No.

IN THE

Supreme Court of the United States

In re Citizens for Fair Representation, City of Colusa, City of Williams, The California Independent Party, The California Libertarian Party, Mark Baird, Cindy Brown, Win Carpenter, Kyle Carpenter, John D'Agostini, David Garcia, Roy Hall Jr., Leslie Lim, Mike Poindexter, Larry Wahl, and Raymond Wong.

On Petition For a Writ of Mandamus to the United States District Court for the Eastern District of California, and The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. In a case challenging the constitutionality of the apportionment of legislative districts, may a district judge, sitting alone, decide a motion to dismiss for lack of standing or, rather, does this Court's unanimous opinion in *Shapiro v. McManus,* 136 S. Ct. 450 (2015), require that that motion be decided by a three-judge district court convened pursuant to 28 U.S.C. §2284(a)?

2. May the Chief Circuit Judge interfere with a district judge's exercise of responsibility pursuant to 28 U.S.C. §2284(b)(1) by instructing the district judge to withdraw the notice issued pursuant to that section and decide the motion to dismiss as a single-judge district court?

PARTIES TO THE PROCEEDING

Petitioners—Citizens For Fair Representation (CFR), City of Colusa, City of Williams, The California Independent Party, The California Libertarian Party, Mark Baird, Cindy Brown, Win Carpenter, Kyle Carpenter, John D'Agostini, David Garcia, Roy Hall, Jr., Leslie Lim, Mike Poindexter, Larry Wahl, and Raymond Wong—are plaintiffs in district court case number 2:17-cv-00973-KJM-CMK, pending in the Eastern District of California.

Respondents are Kimberly J. Mueller, the United States District Judge to whom petitioners' case is assigned, and Sidney R. Thomas, Chief Judge of the Ninth Circuit.

The real party in interest is Alex Padilla, Secretary of State of California, defendant below in his official capacity.

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PRIOR OPINIONS

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JURISDICTION

The All Writs Act, 28 U.S.C. § 1651, authorizes this Court to "issue all writs necessary or appropriate in aid of [its] jurisdictions and agreeable to the usages and principles of law."

STATUTES INVOLVED

28 U.S.C. § 1253 states:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1651 states:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2281 provided:

> that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute on grounds of unconstitutionality should not be granted unless the application has been heard and determined by a three-judge district court.

28 U.S.C. § 2284 states:

> (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. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.
>
> (2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.
>
> (3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this

subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

STATUTORY PROVISION

No constitutional issues are raised by this petition. The only applicable statute is 28 U.S.C. §2284 which provides as follows:

> (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:
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> (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. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.
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> (2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the District judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

JUDICIAL ORDERS BELOW

On August 2, 2017, the district court entered a minute order directing the clerk of court "to formally notify the Chief Judge of the Ninth Circuit of the pendency of this action, as 28 U.S. C. § 2284(b)(1) requires, so that he may appoint a three judge court."

On August 24, 2017, the district court entered a minute order withdrawing its earlier notice to the Chief Judge of the Ninth Circuit.

On June 14, 2018, the district judge made oral rulings in open court denying petitioner's second request for the convening of a three-judge court. That ruling is not yet reflected in a written order or entered on the docket. These two orders and the official transcript of the June 14, 2018 hearing are reproduced in the Appendix.

Petitioners filed an application on June 26, 2018 asking the district court to stay proceedings pending determination of this mandamus petition, but the district court has not yet ruled on it.

STATEMENT OF THE CASE

Petitioners are an organization, two municipalities, two political parties and several individuals who believe that California's scheme for apportioning legislative districts is constitutionally defective because it dilutes the effectiveness of some of the state's voters to the point where their votes are rendered meaningless, and perpetuates invidious discrimination practiced by the state and entrenched by means of state constitutional provisions that cap the number of California legislators at 40 senators and 80 members of the Assembly.

These limits on the size of the state legislature were adopted in the 1879 California Constitution for the purpose of securing and promoting white supremacy. They have not changed in a century and a half, even though the state's population has grown from under a million to 40 million today. Since 1879, the number of constituents represented by each member of the Assembly has grown from approximately 11,000 to approximately 500,000.[1]

This 40/80 apportionment scheme, petitioners con-

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[1] It is impossible to make a similar comparison as to state senate districts because, prior to this Court's ruling in *Reynolds v. Sims,* 377 U.S. 533 (1964), California followed what was known as the "Little Federal Model" which meant that senatorial districts were drawn along county lines, generally meaning that no county would have more than one senator and no senator would represent more than three counties. This changed in 1967 when Senate districts were redrawn to comply with *Reynolds*. As a consequence, each state senator now represents a population roughly equivalent to that of Delaware.

tend, perpetuates the well-documented racism that has animated California's history. As a direct consequence, California's legislature today is sharply out of balance with the state's population, with votes of some races (predominantly whites) favored and voters of other races - Native Americans, Hispanics, Asians and Pacific Islanders, and Blacks sharply disfavored.[2]

Petitioners brought the lawsuit below challenging this apportionment scheme as unconstitutional. Recognizing that resolution of such a claim requires the convening of a three-judge district court, they filed a notice on July 28, 2017, advising the court of the need to convene such a court pursuant to 28 U.S.C. §2284.

On August 2, 2017, the district court issued such an order. However, the court subsequently withdrew that order and, acting alone, eventually granted defendant's motion to dismiss the initial complaint for lack of standing.

On March 19, 2018 Petitioners filed a second amended complaint and renewed request for a

[2] For example, as the complaint points out, Native Americans, who once dominated the population, have never been elected as legislators to either the State Senate or Assembly. Whites, on the other hand, comprise only 38% of the population but make up approximately 78% of the Senate. Hispanics make up only a percent less of California's current population (37%), but only 12% of state senators. The same is also true, albeit to a lesser extent, for Asians and Blacks. This racial disparity is not as severe in the Assembly. Second Amended Complaint, ¶¶ 3.28-3.31. Consistent with plaintiffs' theory of the case, the smaller disparity in the Assembly is a direct result of the fact that each Assembly member represents half the number of constituents than does each senator.

three-judge court. When the district court did not respond to this request, Petitioners filed a motion to convene a three-judge court on April 30, 2018. Petitioners requested that the district court refrain from ruling on defendant's motion to dismiss the second complaint until after a three-judge court has been convened, so that the three-judge court could rule on the motion.[3]

The district court held a hearing on June 14, 2018 and, during the course of that hearing, the district judge stated as follows: (1) she would refuse to issue the notice convening a three-judge court and would decide the motion to dismiss as a single judge; and (2) she was doing so pursuant to instructions she had "received from the chief judge of the Ninth Circuit." Tr. of 6/14/2108 hearing at 6, Appendix at C-7a.

In *Shapiro v. McManus,* 136 S. Ct. 450 (2015), this Court addressed the precise question of whether a district judge sitting alone may decide a motion to dismiss in a case covered by 28 U.S.C. §2284. The Court there held unanimously that the motion must be decided by the three-judge court, subject to only a narrow exception for cases that are "essentially fictitious" or "obviously frivolous." *Id*. at 455 (quoting *Goosby v. Osser*, 409 US 512, 518 (1973)). Defendant below has not argued that plaintiffs' claim is frivolous, and the district court appears to have concluded it is not. Tr. of 6/14/2108 hearing at 29, Appendix at C-28a ("There's no question of frivolity here").

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[3] That motion was set for hearing on June 1, 2018. On May 22, 2018 the district court issued a minute order vacating the hearing and ordering the motion submitted on the papers.

Absent a finding that petitioners' claim is frivolous, the district court lacks discretion to refuse issuing a notification calling for the Chief Circuit Judge to convene a three-judge district court pursuant to 28 U.S.C. §2284(b)(1), nor (contrary to the district court's apparent belief, Tr. of 6/14/2108 hearing at 30-31, Appendix at C-29a) does the Chief Circuit Judge have discretion whether to convene such a court or appoint two other judges to sit on it. On this narrow issue, the function of these judicial officers is ministerial, not judicial. The district judge was simply confused on this issue, apparently misled by what she believed was a directive from the Chief Circuit Judge.

Petitioners claim no misconduct on the part of the district judge, the Chief Circuit Judge or any of the "attorneys" (presumably circuit staff attorneys) with whom the district judge had a "discussion" on this topic. Tr. of 6/14/2108 hearing at 29, Appendix at C-28a. Nevertheless, the Chief Circuit Judge did not have the benefit of briefing on this issue, and it is therefore a denial of due process for him to issue authoritative guidance to the district judge about how she must exercise her authority under 28 U.S.C. §2284(b)(1). Nor does the Chief Circuit Judge, acting in his administrative capacity under 28 U.S.C. §2284(b)(1), have authority to speak on this issue. Under the clear terms of the statute, his role is limited to "designat[ing] two other judges, at least one of whom shall be a circuit judge." So whatever guidance or directive the Chief Circuit Judge gave to the district judge was ultra vires and injudicious.

Petitioners do not doubt the good faith of all those involved in this back-doors exchange; nevertheless it is unprecedented and wrong. The parties are entitled to

have the district judge exercise her authority under 28 U.S.C. §2284(b)(1) without interference from the circuit. And the district judge is required to exercise her authority based on her own judgment, as informed by briefing and argument of the parties, unconstrained by guidance from parties outside her chambers, especially where those parties stand on a higher hierarchical footing. Simply put, what district judge would be bold enough to leave a three-judge court notice in place after she had been told that the Chief Circuit Judge disapproves of it? And what district judge would be foolish enough to re-issue such a notice after having first withdrawn it, in compliance with the Chief Circuit Judge's directive? The answer to these rhetorical questions is: few or none. Certainly it is clear from the transcript of the June 14 hearing that this district judge was paying no attention to the briefing of the parties on this issue because she felt herself bound by the directive she had received from the Chief Circuit Judge.

Petitioners seek a writ of mandamus (1) ordering the district judge to disregard the Chief Circuit Judge ukase and issue the notice required under 28 U.S. C. §2284(b)(1), and (2) ordering the Chief Circuit Judge to promptly appoint two other judges, at least one of whom shall be circuit judge , to sit on the three-judge court that will decide petitioners' case.

STANDARD OF REVIEW

This Court may "issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). An applicant for a writ of mandamus must demonstrate (1) that the applicant's right to the writ is "clear and indisputable," *Cheney v. United States Dist. Court,* 542 U.S. 367, 381 (2004); (2) that he has "no other adequate means to attain the relief he desires," *id*. at 380; and (3) that the writ is otherwise appropriate under the circumstances. *See id.* at 381. A writ is appropriate in matters where the applicant can demonstrate a "judicial usurpation of power" or a clear abuse of discretion. *See id*. at 380 (citations and quotations omitted). As this Court noted in *Ex Parte Peru,* 318 U.S. 578, 583 (1943), "[t]he writs [of mandamus and prohibition] afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so."

The writ here, if granted, would do both: It would prevent the single district judge from deciding a motion to dismiss over which she has no authority, and would compel her to exercise her authority to issue a notification triggering the Chief Circuit Judge's duty to convene a three-judge district court. In so doing, this Court would be protecting its own jurisdiction under 28 U.S.C. § 1253 to review the district court's ruling on the motion to dismiss by way of direct appeal, as Congress intended.

REASONS FOR GRANTING THE PETITION

I. Petitioners are Indisputably Entitled to the Relief They Seek

Writing for a unanimous Court in *Shapiro v. McManus*, Justice Scalia made short work of the argument that a district judge may dismiss a case brought under 28 U.S.C. § 2284 without convening a three-judge court. According to *Shapiro*, "all the district judge must 'determin[e]' is whether the 'request for three judges' is made in a case covered by §2284(a)—no more, no less." 136 S. Ct. at 455. "That conclusion is bolstered," the Court noted, "by 2284(b) (3)'s explicit command that '[a] single judge shall not . . . enter judgment on the merits." *Id.*

Shapiro recognized a single circumstance where the district judge may avoid convening a three-judge court: where the judge "determines that three judges are not required." *Id*. at 454 (quoting § 2284(b)(1)). *Shapiro* downplayed this language as "not even framed as a proviso, or an exception from that provision, but rather as an administrative detail that is entirely compatible with § 2284(a)." "Section 2284(b)(1) merely clarifies that a district judge need not unthinkingly initiate the procedures to convene a three-judge court without first examining the allegations in the complaint." *Id*. at 455.

In this case, as in *Shapiro,* even such a cursory examination is unwarranted because "[n]obody disputes that the present suit is 'an action...challenging the constitutionality of the apportionment of congressional districts.' It follows that the district judge [i]s required to refer the case to a three-judge court, for § 2284(a) admits of

no exception, and 'the mandatory "shall". . . normally creates an obligation impervious to judicial discretion.'" *Id*. at 454.

Shapiro addressed the argument that the district judge was not required to convene a three-judge court when the constitutional claim was "insubstantial." *Id*. at 455. "'[C]onstitutional claims will not lightly be found insubstantial for purposes of the three-judge-court statute,' the Court said, 'quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 147-48 (1980). Relying on a series of earlier cases, including *Goosby v. Osser*, 409 US 512 (1973) the court explained, "'[c]onstitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.' And the adverbs were no mere throwaways; '[t]he limiting words "wholly" and "obviously" have cogent legal significance.'" *Shapiro,* 136 S. Ct. at 455 (quoting *Goosby*, 409 U.S. at 518). *Goosby* explains that a claim is "constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281." 409 U.S. at 518.

In their complaint, plaintiffs raise novel claims that are in no way controlled by precedent. While these claims may not ultimately succeed, they "easily clear[] *Goosby's* low bar." *Shapiro*, 136 S. Ct. at 456. Indeed, defendant Padilla has conceded that he did not raise frivolousness in his Motion to Dismiss. Defendant Secretary of State's Opposition to Motion to Convene Three Judge Court at 2 n.2.

The district judge, too, made it clear the she did not consider plaintiffs' claims frivolous: "And there's no question of frivolity here." Tr. of 6/14/2108 hearing at 29, Appendix at C-28a. When questioned by counsel, the district court confirmed that, in ruling on defendant's motion to dismiss, it was not reviewing the complaint to determine whether it is "essentially fictitious," "wholly insubstantial," "obviously frivolous," or "obviously without merit," as *Shapiro* commands, but rather "I'm treating this as any other case procedurally." *Id*. at 30. It is thus perfectly clear that the district judge's failure to grant plaintiffs' request for a notice pursuant to 28 U.S.C. §2284(b)(1) was not an exercise of the narrow residual authority recognized by this Court in *Shapiro*. Rather, the judge believes that she must decide the standing question as a single judge before issuing the notification calling for a three-judge court. Indeed, that is precisely what the district judge did in response to defendant's first motion to dismiss after she withdrew her notification to the Chief Circuit Judge that the case required the convening of a three-judge district court.

Defendant argued below that the district court, sitting alone, could dismiss a novel constitutional claim for lack of standing, even though it could not do so for failure to state a claim. It relied on language in *Shapiro* to the effect that "'[a] three-judge court is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." 136 S. Ct. at 455 (quoting *Gonzalez v. Automatic Employees Credit Union,* 419 U.S. 90 (1974)). But this overlooks the first part of the sentence on which defendant relied, which is: "Absent a substantial federal question,

even a single-judge district court lacks jurisdiction, and . . . ." Read in context and in its entirety, the point *Shapiro* was making was that a constitutional question may be so insubstantial as to deprive the district court of federal question jurisdiction or a justiciable question. In those circumstances, a single-judge district court may act on its own. But *Shapiro* also held that the bar for what constitutes a substantial federal question for purposes of jurisdiction is very low indeed. If a substantial federal question is presented, the district judge must ask the Chief Circuit Judge to convene a three-judge court, which will then decide all substantive issues.

That this is the correct reading of *Shapiro* is confirmed by the subsequent history of the case. After remand from the Supreme Court, the state brought a 12(b)(6) motion seeking dismissal for lack of justiciability. That issue was decided, not by the district judge sitting alone, but by a three-judge court. *Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016). Indeed, the district judge who issued the notification triggering the convocation of the three-judge court dissented at length. *Id.* at 600 (Bredar, District judge, dissenting). Similarly, in *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959) rev'd, 369 U.S. 186 (1962), the justiciability question was decided by the three-judge district court rather than by the single district judge, despite an "array of decisions by our highest court, charting the unmistakable course which this Court must pursue in the instant case." *Id*. at 826.

This has always been the proper procedure with regard to convening three-judge courts where Congress has determined that certain cases involving substantial federal questions are too important to the structure of the United States to be decided by a single-judge district court. Therefore, in

Baker v. Carr, the three-judge court considered justiciability and ultimately concluded that it was bound by precedent. *Id.* ("From a review of these decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment.")

The three-judge court in *Reynolds v. Sims* concluded that after *Baker v. Carr* "it seems clear to us that: (a) this Court has jurisdiction of the present action; (b) the complaint as amended states a justiciable cause of action; (c) the plaintiffs have standing to challenge the Alabama apportionment statutes." *Sims v. Frink*, 208 F. Supp. 431, 434 (M.D. Ala. 1962), aff'd sub nom. *Reynolds v. Sims*, 377 U.S. 533 (1964).

In *Davis v. Bandemer*, the majority opinion of the three-judge court did not address justiciability, but the dissent specifically referred to the issue. *Bandemer v. Davis*, 603 F. Supp. 1479, 1500 (S.D. Ind. 1984), rev'd, 478 U.S. 109 (1986) ("The Supreme Court of the United States never has addressed directly the justiciability of a political gerrymandering claim. Nonetheless, five Justices have expressed a willingness to analyze such claims under the Equal Protection Clause of the Fourteenth Amendment.") Once again, the decision was made by the three-judge court, not by the district judge sitting alone.

Defendant has not argued below that plaintiffs' claim to have standing is frivolous, nor has the district judge indicated that she considers plaintiffs' standing or justiciability arguments "essentially fictitious," "wholly insubstantial," "obviously frivolous," or "obviously without merit." Based on long-standing precedent and the teaching of *Shapiro,* petitioners are indisputably entitled to the narrow but crucial relief they seek: issuance of a notification pursuant to 28 U.S.C. §2284(b)(1) by the district judge, advising the Chief Circuit Judge that he must appoint two other judges in order to convene a three-judge district court.

II. Petitioners Have no Other Adequate Means to Attain the Relief They Desire

If the district court fails to issue the notice mandated by 28 U.S.C. §2284(b)(1) and *Shapiro*, it will deprive this Court of its direct appellate jurisdiction over the case—jurisdiction Congress expressly vested in this Court rather than the court of appeals. 28 U.S.C. § 1253. If this Court fails to issue a writ of mandamus ordering that the district court issue the notification calling for the Chief Circuit Judge to convene a three-judge court, this Court's "appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). Given that the matter concerns this Court's own mandatory jurisdiction, there can be no doubt that this Court is in the best position to correct the district court's patent error.

Petitioners have no adequate alternative remedy. They have attempted, unsuccessfully, to get the district court to correct its error by reciting *in haec verba* the above arguments, but the district court turned a deaf ear based on a directive from the Chief Circuit Judge. The only remaining alternative is to proceed by way of mandamus or (if the district court grants the motion to dismiss) by direct appeal, to the Ninth Circuit. Normally, this might be an adequate alternative but not in this case, where the district court was steam-rolled into error by the Chief Circuit Judge with the apparent intermediation of the circuit's central staff.

Petitioners are reasonably concerned that the Ninth Circuit will lack the objectivity and neutrality to countermand the Chief Judge's ill-advised directive. Petitioners have no way of knowing what precisely happened behind the scenes, and whether any of the Chief Judge's colleagues may have been consulted. Petitioners are concerned that the judges considering the issue may be motivated to rule in a way that will avoid embarrassment to the Chief Circuit Judge and the circuit. They may feel, with some justification, that they do not have authority to tell their own Chief how to exercise his authority under 28 U.S.C. §2284(b)(1).

Resort to the Ninth Circuit would thus not serve as an *adequate* alternative avenue of relief.

III. The Writ is Otherwise Appropriate Under the Circumstances

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its

prescribed jurisdiction." *Roche* , 319 U. S. at 26 (quoted with approval in *Cheney,* 542 U.S. at 380). As *Cheney* further noted, "only exceptional circumstances amounting to a judicial 'usurpation of power,' ibid., or a 'clear abuse of discretion,' *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 383 (1953), 'will justify the invocation of this extraordinary remedy.'"

In this case we have both. The district court's extraordinary order withdrawing the notification it had issued pursuant to 28 U.S.C. §2284(b)(1) is a clear abuse of discretion under this Court's unanimous ruling in *Shapiro.* Moreover, the district court's decision to rule on the motion to dismiss as a single judge usurps the three-judge district court's authority, and this Court's mandatory appellate authority, as conferred on those courts by 28 U.S.C. §2284 and 28 U.S.C. § 1253 respectively.

This alone would be sufficient to justify the exercise of this Court's mandamus jurisdiction, but there is more here. As outlined above, these missteps on the part of the district judge were not simply the kind of errors to which all judges, at one time or another, fall prey. Rather, the error was precipitated by an intervention from the Chief Circuit Judge and discussion with the circuit staff attorneys. Indeed, the decision appears to have been foisted on the district judge against her preference: "*I would love to have other judges to share the responsibility of resolving this motion*, but I think, as I've made clear previously, and actually has been clarified in a response I received from the chief judge of the Ninth Circuit, I have an independent obligation initially to

determine whether or not there's any case that is going to proceed." Tr. of 6/14/2108 hearing at 6, Appendix at C-7a.[4]

What was said to the district judge in those communications, and by whom, is a mystery, but it must certainly have been very strong if it persuaded her to ignore the clear holding of *Shapiro* and her own strong preference for having the matter decided with the help of two colleagues "to share the responsibility " (as Congress contemplated). If the matter is left for resolution by the circuit petit-

[4] When questioned by counsel about this statement, the district judge equivocated, claiming that what she received was not really an instruction:

> MR. STAFNE: Okay. And my understanding is you are doing that upon the instruction of the chief judge of the Ninth Circuit.
>
> THE COURT: Well, it's not the instruction. It's having been pointed to the proper procedure and the law that's applicable. I made my own decision in terms of reversing myself on the three-judge court. I think it was in error procedurally. It was at least premature. And it is my duty, I became persuaded by checking the authorities that were brought to my attention that it's my job to first decide the motion to dismiss. As I told you, I would love to have two other judges to help decide this, but I don't think that's what the law provides.

Whether the communication is termed as an instruction or merely guidance, the point remains that it came from a higher authority and therefore carried sufficient force to overcome the district judge's preference for having "two other judges to help decide this." Moreover, the Chief Circuit Judge, who apparently gave this guidance, did so without the benefit of briefing or argument from the parties on this point. This is clearly inappropriate.

ioners will be faced with the distasteful prospect of seeking further information from the district judge and the Chief Circuit Judge as to what, exactly, transpired to so drastically alter the district judge's initial inclination and personal preference. No parties should be put in such an adversarial relationship with the court that will eventually rule on the merits of their case. This Court can pretermit that disagreeable prospect by granting the petition and issuing a writ directing the district court to perform its ministerial duty of issuing the notice to the Chief Circuit Judge pursuant to 28 U.S.C. §2284(b)(1).

CONCLUSION

This Court should summarily grant the petition and order the District Court for the Eastern District of California to issue a notice pursuant to 28 U.S.C. §2284(b)(1) in case number 2:17-cv-00973-KJM-CMK.

In the alternative, if this Court is not inclined to issue a writ of mandamus, petitioners respectfully request that the petition be transferred to the Court of Appeals for the Ninth Circuit for its action thereon. This will save petitioners the expense of filing a separate mandamus petition in that court.

Respectfully submitted,

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APPENDIX

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APPENDIX A

FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

CIVIL ACTION CASE # 2:17-CV-00973

Citizens for Fair Representation, et al., plaintiffs

v

Secretary of State Alex Padilla, defendant

Filed August 2, 2017

MINUTE ORDER

MINUTE ORDER issued by Courtroom Deputy A. Waldrop for District Judge Kimberly J. Mueller on 8/2/2017: In light of plaintiffs complaint and notice of requirement of three judge court, (ECF Nos. 1, 12), the court has determined this case implicates 28 U.S. C. § 2284(a), providing for the convening of a three judge court. The court thereby DIRECTS the Clerk of Court to formally notify the Chief Judge of the Ninth Circuit of the pendency of this action, as 20 U.S.C. § 2284(b)(1) requires, so that he may appoint a three judge court. SO ORDERED. (Text Only Entry)

APPENDIX B

FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

CIVIL ACTION CASE # 2:17-CV-00973

Citizens for Fair Representation, et al., plaintiffs

v

Secretary of State Alex Padilla, defendant

Filed August 24, 2017

MINUTE ORDER

MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: Upon consideration of the parties' filings relating to the question of whether a three judge court need be convened to resolve defendant's pending motion to dismiss and plaintiffs' pending motion to amend, the court has determined that it is premature to request the convening of such a court prior to this court's threshold determination of jurisdiction and justiciability. See Shapiro V. McManus, 136 S. Ct. 450, 455 (2015). Defendant's ex parte application for reconsideration (ECF [15]) is granted to the extent the direction to the clerk of the Court at ECF 14 is WITHDRAWN until the court has resolved the pending motions. The August 25, 2017 hearing on the application for reconsideration is VACATED. (Schultz, C)

APPENDIX C

FOR THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CIVIL ACTION CASE # 2:17-CV-00973

Citizens for Fair Representation, et al., plaintiffs

v

Secretary of State Alex Padilla, defendant

SACRAMENTO, CA
3:01 P.M.
REPORTER'S TRANSCRIPT
MOTION TO DISMISS
THURSDAY, JUNE 14, 2018

For the Plaintiff:	STAFNE LAW FIRM
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

APPEARANCES, CONT'D

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
P.O. Box 944255
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BY: George Waters

SACRAMENTO, CALIFORNIA
THURSDAY, JUNE 14, 2018, 3:01 P.M.
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THE CLERK: Calling civil case 17-973; Citizens for Fair Representation, et al. versus Padilla. This is on for defendant's motion to dismiss.

THE COURT: All right. The plaintiffs are being allowed to sit behind their counsel.

Counsel, can you go ahead and identify yourself for the record, yourselves.

MR. STAFNE: Your Honor, my name is Scott Stafne. I am one of the counsel for the CFR plaintiffs.

MR. ZERMAN: Good afternoon, your Honor. Gary L. Zerman, counsel with Mr. Stafne.

THE COURT: All right. Good afternoon to each of you.

MR. WATERS: And, your Honor, George Waters for defendant, Secretary of State. And, your Honor, I would like to ask a question here at the beginning. I have a bad back, and I don't know whether you prefer argument standing up or sitting down, but I'd like you to note it would be much easier for me sitting down.

THE COURT: At a session like this without a jury present, I really let the parties decide. And in this instance, if you need to stand for ergonomic purposes, for any purpose, it's fine with me. And if you'd like to do that from the podium, you may.

MR. WATERS: I'd prefer to sit is what I would like to do.

THE COURT: All right. These days I prefer to stand if I've been sitting too much. So it's fine if you all sit at counsel table. I think you did that last time.

MR. STAFNE: Yes. And I may prefer to come up there when we get to actual argument.

THE COURT: Well, I'd like to proceed as I always do. I have questions, having read the briefing, so I'd like to go through those, and then I'd allow

brief wrap-up argument to the extent you think there's something not covered by the briefing that I haven't asked.

MR. STAFNE: That would be fine. I would like to introduce the plaintiffs or have them introduce themselves to you, your Honor, since last time we were unable to do that.

THE COURT: All right. Whatever works most efficiently.

MR. STAFNE: Probably the easiest thing to do would be to ask each plaintiff to stand.

THE COURT: All right.

MR. STAFNE: And I would point out that there were different plaintiffs in the first, in the original complaint than there are in the second amended complaint. There's some here from both. Many people couldn't get here because of the change in the time. But those that are here, I would ask each stand and identify themselves.

MR. RAPOSA: Terry Raposa,

MR. BAIRD : Mark Baird from Siskiyou County,

MR. HALL: Roy Hall, Chief Shasta Nation,

THE COURT: All right. We need to use the microphone. So to the extent you're representing an organization, can you clarify that?

MR. HALL: Yes. I'm the chief of the Shasta Nation Native Americans.

THE COURT: Were the prior two gentlemen individual plaintiffs or representative plaintiffs?

MR. STAFNE: They're individual. I think both are officers in CFR as well.

THE COURT: All right. Next.

MR. WIN CARPENTER: Win Carpenter, president of the 501(c)(4) for Citizens for Fair Representation.

THE COURT: All right:

MR. KYLE CARPENTER: Kyle Carpenter.

THE COURT: All right.

MR. BAIRD: And Steven Baird.

MR. WONG: And Raymond Wong.

MR. STAFNE: As I say, the rest of the plaintiffs were unable to get here because of the change.

THE COURT: All right. It's actually quite rare for parties to be present at motions practice. Anyone is welcome. The public is welcome at any hearing at any time. But certainly it's not held against any part if they aren't appearing personally at the motion hearing. It's a different matter if the case gets to trial.

First, I just want to acknowledge that there's a continuing request that this matter be heard by a three-judge court. I would love to have other judges to share the responsibility of resolving this motion, but I think, as I've made clear previously, and actually has been clarified in a response I received from the chief judge of the Ninth Circuit, I have an independent obligation initially to determine whether or not there's any case that is going to proceed. And there are threshold questions of jurisdiction and justiciability. And so my understanding of my job at

this time is to hear this as a single judge, and it's only once jurisdiction is established that a three-judge court would be considered by the chief of the Ninth Circuit. And so that's why this judge is hearing this as a single judge.

I just want to start with the last filing and just give Mr. Stafne and Mr. Zerman a brief opportunity just to, without going into a lot of discussion -- I have to decide whether or not I'm going to allow any supplemental briefing, but just in a nutshell explain why you think Masterpiece affects the Court's decision on the motion to dismiss here.

MR. STAFNE: Masterpiece is the conclusion thus far of the gay rights marriage series of cases. And that series of cases began pretty much with the Prop 8 case which occurred here in California.

THE COURT: I know the history of the case, and I'm generally familiar with the case. My question is why your filed it as supplemental authority with respect to this motion.

MR STAFNE: Right.

THE COURT: So then help me in a nutshell understand why you think it's supplemental authority that's relevant here.

MR. STAFNE: Sure. It relates to the First Amendment causes of action, which is Shapiro the court held that Justice Kenney's concurrence or dissent in Vieth, the Vieth case, was sufficient in raising the First Amendment retaliation claim to prevent a single judge from ruling on a chase. It also is significant --

THE COURT: All electronic devices need to be off. No recording, no phones ringing. Any device that makes a sound is subject to seizure by the security officer without further order of the court.

All right. you may proceed.

MR. STANFE: It also is significant because those series of cases involved a situation in which the Supreme Court iterated that the general grievance standard is one of prudential standing as opposed to Article III standing. And that was confirmed in the Lexmark opinion which is cited in our response brief. And I can address that further if the court likes.

THE COURT: So it is primarily relevant in your view to the three-judge court question?

MR. STAFNE: The first part is. The second part is not. We believe that the general grievance standard is not a constitutional standard. It relates to prudential standing.

Further, we believe that all of the causes of actions are premised on claims of invidious discrimination that we have alleged plenty of facts in our complaint and that this long-term invidious discrimination which has existed since California's founding and, we point in our complaint, can be traced well bey9ond the '50s, is present today. And that where you have invidious discrimination as the basis, you can't have a general grievance, because when you are discriminating against people, that means there are people that are being subject to harm and that others aren't.

So the point I'm making by changing all of our causes of action to being based on invidious discrimi

nation within the meaning of the Fourteenth Amendment and not including such statutory causes of action such as the Voting Rights Act, we have created a situation which by the very framing of the issue says that these people have been harmed concretely and particularly by discrimination aimed at them.

THE COURT: All right. So with that, without going any further, given the supplemental filing, Mr. Waters, would you be requesting the change for any supplemental briefing based on Masterpiece and the argument you've just heard?

MR. WATERS: No, your Honor.

THE COURT: All right. Let me think about that.

MR. STANFE: Sure.

THE COURT: In terms of the motion, I think the defense noted it hadn't been served with the new complaint.

Is that an issue I need to address at this point?

MR. WATERS: No. Let me just tell you what the issue is. The Secretary of State, the original defendant, has been served. The Secretary of State's in. The State of California has not been served, and the Redistricting Commission have not been served. But the Secretary of State is a party, has been served with everything, your Honor. And I'm representing the Secretary of State today.

THE COURT: All right. And that's all?

MR. WATERS: That's all.

THE COURT: All right. So that's understood.

MR. STAFNE: Yes. And, your Honor, the reason they weren't served is because it's a proposed complaint. And until we can file it, it was not appropriate to serve them. Mr. Waters and I had talked about it with regard to our very first discussion on this issue. He'd asked me why I hadn't served them, and I said it's a proposed complaint until we receive the Court's permission. And then I presume that they will file additional motions similar to this one if we get beyond this one.

THE COURT: Well, is there some procedural fine point I'm missing here? It's styled as a second amended complaint.

MR. STAFNE: Right.

THE COURT: There's not a motion seeking leave to file.

MR. STAFNE: Well, it is a motion to amend the complaint.

THE COURT: Again, is that invoking the three-judge court question?

MR. STAFNE: Yes, as the whole procedure has evolved.

THE COURT: All right. So help me understand in terms of the complaint, the allegations are different, but now here's my question. There's still a broadly defined group. Right? The injury is felt primarily by members of minority groups defined to include racial, ethnic, political party, wealth, geography. How is that not virtually everyone in California except wealthy Bay Area and Silicon Valley folks?

MR. STAFNE: Well, it's not wealthy. So let's go to the causes of action.

The first cause of action relates to the constitutional enactment of provisions that were discriminatory.

The second cause of action, which relates to only those minority groups which are the Native Americans, the Mexican Americans, the Asian Americans, and the black Americans, alleges that they were subjected to the discrimination then and that it continues today.

And the complaint alleged factually that 38 percent of California's population is white, yet 78 percent of its Senate is white. So they are doubled in proportion.

If you look at the Hispanics, they comprise 36 percent of the population, but they only have 12 percent of the Senate.

And the same is true for the black plaintiffs as well as the Asian plaintiffs.

And so what they are saying is in the second cause of action that the maintaining of this discrimination impacts them. I can give each of their names if you want, but...

THE COURT: No, I have the complaint in front of me.

MR. STAFNE: Okay. And so then --

THE COURT: So are you saying it's a different group for each claim, and so that's an important clarification on my question about broadly defined group? The group isn't so broadly defined depending on the claim?

MR. STAFNE: Well, depending on the cause of action. So the premise here, and it's pretty well stated, and I think pretty well can't be disputed, there is invidious discrimination going on since this state's founding. And that discrimination has had an impact on the State Legislature.

THE COURT: I understand the factual allegations and the general policy argument. It's a really interesting policy argument. The question is is it making a claim that this Court can reach? So you may tell me this is an improper question given what you're saying, but is it proper to say who is not part of the group of aggrieved persons?

MR. STAFNE: Sure. Those people are benefited by the discrimination.

THE COURT: So who are those, besides Mark Zuckerberg and Nancy Pelosi?

MR. STAFNE: So when you are aggrieved, you are aggrieved because you received injury. And it has to be concrete and particularized, which is what I understand Mr. Watters' point to be. The people who are aggrieved are those who are discriminated against and experience the effect of that discrimination in a concrete and particular way.

THE COURT: So who is not aggrieved based on your allegations? Who is not part of the aggrieved group?

MR. STAFNE: Anybody who believes they're not aggrieved. So it's just like in the gay rights case. I mean, in the gay rights case, they came u with a -- they said that the constitution, which has no provisions in it about gay people, which had been discrim

inated for a long period of time, claim that their due process was being violated. Here we've got a different situation. We've got written in the Constitution itself bars to invidious discrimination.

So in the gay rights cases, they were able to identify the discrimination by saying we have been discriminated against because of our sex. Now, the only way they were able to get to that is by changing the Constitution.

We come to you saying we have been discriminated against because our right and ability to participate in self-representation has been diminished, and we want to exercise that. A person who doesn't want to exercise it and doesn't even believe they are discriminated would not be discriminated against.

THE COURT: So let me ask the question this way. You are saying the alleged underrepresentation and inaccessibility is common throughout California; right?

MR. STANFE: Yes.

THE COURT: you're not saying the cap -- the cap doesn't apply differently in some districts.

MR. STAFNE: No.

THE COURT: or some districts aren't affected in one way and others in another way. It's just the sap applies equally across districts.

MR. STAFNE: No, it doesn't. So what we are saying is that even if you consider the cap as neutral, it has a disparate discriminatory impact. As the court said in Bandemer, "Unconstitutional discrimination occurs when the electoral system is arranged in a manner that will consistently degrade a voter's

or group of voters' influence on the political process as a whole."

So if you're in a geographical district that's very small, we know that some don't -- like LA has 11 counties. I mean, that has consequences for both the voters and candidates in those very small districts. Now, if you're in a district like District 1, you've got 11 counties, and you have to put a huge amount of people with a huge amount of divergent interests together, and they don't get a fair shot at representation within the legislative body.

THE COURT: But are you saying as a result that some voters have less power compared to others on a vote-by-vote basis? Aren't you saying every Californian's vote is steadily losing power because of population growth? Isn't that what you're saying?

MR. STAFNE: We are arguing under the Fourteenth Amendment that vote dilution is a problem. But we're arguing much more than that, because we are tying it to the notion of self-representation. That voters have the right to organize together. For example, let's take the First Amendment claim when you tie it to the invidious discrimination. Our clearest plaintiff in that, of course, is Mark Baird who's lost his job. But the third parties and the various groups, rural groups, have no ability to actually affect their representatives.

And the complaint makes clear that that is a part of the problem, and especially for those people who want to. Now, whether people who don't vote, whether, you know, they are included in this Evenwel leaves open. It says that the true nature of

representation involves the constituency. And if you create a constituency that cannot be represented, that is not a policy problem. It is a constitutional legal problem.

THE COURT: All right. Let me ask Mr. Waters if you have a response so far other than what's in your briefing.

MR. WATERS: Well, briefly, your Honor. Let me make one general comment to start out. And it has been our position since the beginning -- this is the second dismiss hearing. The Secretary of State's position throughout has been that this is an extremely important question of public policy, but it is not a policy. It's not a question for a federal district court. That it's not justiciable, and there's not standing. So I just want to say publically that it's not our position that the issues being discussed here are not important. They're very important. It's just we're in the wrong theater.

Having said that, I will say to summarize what our brief, the point we're trying to make here is that it's very difficult to think of anybody who is not, as plaintiffs would have it, anyone who is not adversely affected by the size of the districts. That's because all the districts are the same size, and they have to be the same size. That's a decision by United States Supreme Court have required that all legislative districts in California and everywhere else in the country have to be very narrowly the same size. Until sometime in the 1950s, California had a different system known as the federal plan where there was a certain amount of senators, in particular, allotted to counties. And at that time I presume that

if the California plan were still in effect, we would not be here because at that point there were huge differences in the population between districts. Now, due to federal Supreme Court decisions, all districts have to be pretty much within, I think, 90 percent the same size. And once you follow that train of thought, plaintiffs have not articulated here how any of the various groups they represent or who among them are differently situated than anyone else.

And I think you pointed out that what we pointed out in the brief is there is Nancy Pelosi and Mark Zuckerberg are the two names that have come up so far, but I think given the definitions we're working with, even they could be considered part of who would be harmed here.

THE COURT: What if the overlay is rural? If it's rural voters being unavailable to effect their choice in electing leaders, let's assume statewide leaders.

MR. WATERS: Well, I think statewide leaders by definition -- I assume we're using rural as not densely populated. I assume that's what that means. For statewide, just to be -- I apologize if I'm being too literal here, but know, the Governor, the Secretary of the State, everyone else is elected by everyone in the state, so the districts obviously, you know, wouldn't affect them.

THE COURT: So then districted, district by district.

MR. WATERS: So then we go to the senate, the Assembly, and the body not mentioned in this case, the House of Representatives, which, by the way, has districts that are larger than California

Assembly districts. For those, I think if you think this through -- let me just give you a hypothetical. I think a very crude estimate of the number of voters in California, the number of people at least eligible to vote in California right now is 20 million people. I agree, I don't think anyone would disagree, that if all 20 million of them were made legislators, then all the complaints that plaintiffs have here would, I think in their terms, go away because, by definition, Hispanics, rural, everybody would be the same amount.

The issue we get into here is that I believe common sense would tell everyone that a legislative body of 20 million people would not be a legislative body at all. It would be mayhem. And so some number has to be come up with, and California has done it. And now we're in a position where a group of plaintiffs are making assertions that could apply I think to virtually all 20 million electors, but how anyone would ever measure what size district anything less than 20 million, a legislative body of less than 20 million, how one would balance against another is an issue which I think is just not addressable by a federal court.

And even with Nancy Pelosi -- I'll make this short -- even with Nancy Pelosi and Mark Zuckerberg. I don't want to trivialize this, but the fact of the matter is whatever size legislature you come up with, they're going to have more influence than me or you or anybody else in this court because they are who they are. You have the majority leader in -- the minority leader in Congress and one of the wealthiest people in the world. I mean, the effect o them would be on a different slice of the spectrum,

but the effect would be the same. That's my response.

THE COURT: All right. I think Catherine the Great tried a quite democratic approach to a people's legislature at one point and give it many years and finally gave up. But that's just a historical footnote.

So on the -- I previously observed aren't you asking a court to do, I mean, it's not just Mr. Waters saying this, I said it in my prior order. Really courts are not just another political branch regardless of what people may think. We are courts of limited jurisdiction. We are the weakest branch. We can exercise great power when we have the ability to do that. But you're asking me to stand in for the legislature, hold the kind of hearings a legislature could and arguably should, and that's asking me to answer political questions that courts just don't ask. Why is that not the case if there's standing?

MR. STAFNE: Okay. And the reason that is not the case is because the same arguments were made by the dissents in Baker v. Carr, also in Brown v. Board of Education. Those were equitable cases. And here the only argument that they make under the justiciability standards is that there is a lack of judicially discoverable and manageable standards. But we have changed our relief that we are requesting from this Court. The relief we request is equitable. We request declaratory relief holding the cap as unconstitutional and ask this Court grant the defendants a reasonable period of time, not to exceed two years, to cure the constitutional violations, B, require defendants to report periodically to the Court as to what measures it has made to remedy the

violations, and, C, to retain jurisdiction over this case until the constitutional violations have been cured.

We also ask for injunctive relief requiring the number of elected members of the Assembly be increased to a number as determined at trial which will assure, A, that the voters who have been discriminated against on the basis of race as identified in the complaint have an opportunity to elect their preferred candidates and, B, that voters in sparsely populated rural areas have a meaningful opportunity to elect their preferred representatives.

Now numerous relief hold this is -- or excuse me, numerous cases hold this type of equitable relief is appropriate. And two examples again are Brown v. Board of Education and Baker v. Carr. In Swann v. Charlotte-Mecklenburg Board of Education, Chief Justice Burger, writing for a unanimous Supreme Court after Brown had come down and the courts had had problems, held "The absence of fixed or even substantially fixed guidelines does not preclude a court of equity from acting to redress a proven constitutional violation."

In Hecht v. Bowles, the court held "The essence of equity jurisdiction has been the power of the chancellor to do equity and to mould each decree to the necessities of the particular case."

Because the plaintiffs in this case have claimed that they are harmed by invidious discrimination, upon proof thereof, the burden will shift to Padilla and the State of California to show how the constitutional violation has been rectified.

So what we are asking you to do is take a case of clear discrimination and simply to hold whether there is discrimination and whether that has violated the Constitution.

THE COURT: I understand the relief sought.

MR. STAFNE: All right.

THE COURT: The Court has cases in which it has the kind of structure you're talking about, but it assumes that there's a claim there that allows the case to proceed.

MR. STAFNE: Sure.

THE COURT: So I think I understand your arguments. Isn't there something that's going to be on the ballot now in the fall, and would that moot your case?

MR. STAFNE: No it wouldn't, your Honor.

THE COURT: Only the attorneys are speaking. Again, this is not is a legislative hearing. The public is willing to be present. They're welcome to be present. but it's the counsel who speaks to the Court.

MR. STAFNE: And I'm sorry, your Honor. I don't have control of folks who are behind me, and I didn't hear them.

No. And we address that in our response. The Court may in some circumstances, according to the Supreme Court, hold off temporarily, but the decision ultimately comes to the Court under Federalist Paper Number 78. They talk about how the United States judicial system was going to be formed. And at one point in that rather brief article, they talk about, well, isn't the Court more powerful than the

Legislature? And you noted that the court's supposed to be the weakest branch.

And the answer is the exercise of judicial power does not presuppose that the Court has power. It presupposes that the people have power, and the Court is acting as an agent of the people in following the fundamental law as opposed to like a constitutional provision of the State of California.

THE COURT: At least as a check on the government as and when needed at times. you're arguing for broad equitable powers.

MR. STAFNE: Under the Fourteenth Amendment as well. I think probably the best thing I have read in talking about the general grievance is Scalia's dissent in Akins v. SEC, or FEC, Federal Elections Commission. And in that case, they found that there was not a general questions, or not a general grievance. And Scalia explains that the reason for the general grievance is so that political questions can be properly decided by the political branches. But that reasoning makes no sense when it is the political branches that are violating the Constitution.

THE COURT: I understand that argument. Akins' standing fundamentally related to a right provided by statute.

MR. STAFNE: It did indeed. But the part that I fond very interesting was Scalia's dissent, because he goes all out in explaining -- the whole case is very interesting. But Scalia's dissent that the reason we use general grievance as a part of -- he doesn't say prudential standing, but that's what Lexmark holds -- is because we want to give the

political branches the power they were intended to have.

But here, the judicial question is we don't want to give them the power to discriminate against the people. And because it is targeted against specific classes of people. And the thing about discrimination is when it is practiced, it destroys the moral fiber of government in a way which can over time concretely and particularly injure those who are not initially targeted for the discrimination. And that's what we're claiming has happened.

THE COURT: I understand. You're very eloquent, and they're very interesting arguments. I think you are pushing the envelope when it comes to what a court of law can do, but I will think hard about the arguments you're making.

My question for Mr. Waters -- and I'd allow any brief wrap-up argument, again, to the extent you think something is not covered by the briefing or the discussion we've just had. but is there at least a point here upon which reasonable judges could disagree such that there's something I should make certain an appellate court is paying attention to if I grant the motion?

MR. WATERS: I think not, your Honor. And I would focus specifically on one statement from my opposing counsel in the most recent comments he made. There was a reference to a lack of judicially discoverable standards to determine the size of legislative districts. That's not my language. it was in my brief, but I didn't make it up. It comes from the United States Supreme Court in Holder v. Hall when the court decided that the Section 2 of the

Voting Rights Act did not accord to minority plaintiffs the right to challenge the size of municipal districts, the size of municipal districts. And ultimately the reason for that was that there is not judicially discoverable standard.

I could go down to different cases about how that statement might not be true in other factual cases, but I think that the closest thing we have here is Holder v. Hall, and I think the result is clear. And I think honestly that reasonable judges are all bound by the Supreme court, and I think that that directive is clear. So no, I don't think there is any room for debate, your Honor.

THE COURT: All right. Do you think I've missed anything? I'd allow Mr. Stafne, Mr. Zerman a few more minutes if you think there's something, again, not covered, and then Mr. Waters because it's his motion.

MR. STANFE: I would just like to respond. We removed the Voting rights Act as an element. Our complaint is based pretty much totally on invidious discrimination.

THE COURT: I understand that.

MR. STAFNE: Also, I would like to stress that because of the importance of the issues in this case now and in the future, in 2060 California will have 50 million people. Plaintiffs urge this Court publish its decision in F. Supp. so that it can get the attention it deserves. It's not going to go away. And it threatens the foundation of our democratic republic and puts us in a situation where we have more people in our districts than virtually any other country. We're worse than China.

So to the extent we want to continue to take the moral high ground and to talk about democratic republics, we need to really make sure we have one, and we need to have a way of doing that.

THE COURT: All right. Well, certainly any order the Court issues will be on the public docket. Usually it's picked up by publication services. Whether or not it's formally published or not, that's a separate question. But I'll take that under advisement. And ultimately I think the question is is this the forum in which -- is an Article III court the forum in which the questions will ultimately be decided.

MR. STAFNE: Sure. And I think that your Honor has the ability to determine whether it's published by F. Supp.

THE COURT: I can request it.

MR. STAFNE: Mr. Zerman had something to say.

MR. ZERMAN: I'll be brief, your Honor. We believe this case requires the Court appoint a three-judge court per the high instructions from the Supreme Court in Shapiro v. McManus. There's a very, very low bar per the Goosby case. And the Court did the correct thing here initially. you granted the three-judge court, but then you reversed yourself. We have not filed another request. And as Mr. Stafne pointed out, we have made all these further allegations that we think lowered the bar even further.

Now, there's no provision that once you grant a three-judge court that you can withdraw it. And we have found no case that that's ever happened.

We believe we're prejudiced by not having the three-judge court because we're getting into the merits, and we are not waiving that. And again, we would request that you publish the decision.

THE COURT: We're not getting into the merits, just so it's clear. We're talking about whether or not there's a claim.

So here's the way this will play out. If I deny the motion to dismiss, the we can turn to the question of the three-judge court. And ultimately this court does not convene the three-judge court. It's the chief judge of the Ninth Circuit that ul6timately would be tasked with convening a three-judge court. So that is clear. And it's clear to this Court that I will make the first decision about whether or not the motion to dismiss is granted or denied. If I grant the motion, then both questions can be appealed and a panel of the Ninth Circuit will consider the questions, and the three-judge court request can be presented to that court.

This Court does not have the power to -- and in the course of going through the initial steps here, I got more clear about that. So we're going through the motions here. You have the right to appeal anything I decide and ultimately to present that request again and to argue that I've erred at any point along the away with respect to the handling of the three-judge court request or the handling of the motion to dismiss.

MR. STAFNE: Your Honor, just so I'm clear, it doesn't seem like the request for a three-judge panel has been decided, at least in writing, because being here, it appears sub silentio it's been granted.

THE COURT: Not the renewed request, because that request cannot be granted unless there's a case, unless there's jurisdiction, unless there's something that's justiciable.

MR. STAFNE: And as I understand --

THE COURT: So that's the threshold. It may feel circular to you. I know you want a three-judge court to decide this motion, but the first question is is a case going to proceed. There's no case proceeding.

MR. STAFNE: Right.

THE COURT: And so if I deny the motion -- at this point I have to deny without prejudice the request for a three-judge court because of the pending motion to dismiss.

MR. STAFNE: Okay. And my understanding is you are doing that upon the instruction of the chief judge of the Ninth Circuit.

THE COURT: Well, it's not the instruction. It's having been pointed to the proper procedure and the law that's applicable. I made my own decision in terms of reversing myself on the three-judge court. I think it was in error procedurally. It was at least premature. And it is my duty, I became persuaded by checking the authorities that were brought to my attention that it's my job to first decide the motion to dismiss. As I told you, I would love to have two other judges to help decide this, but I don't think that's what the law provides. But you've got a full record now, and if I'm wrong, then you can appeal me.

MR. STAFNE: And as I understand it, what you're saying is you're applying the same standard

you would in any case to determine whether or not there's jurisdiction.

THE COURT: Yes.

MR. STAFNE: And that you are not applying the standard of whether it's frivolous. You're going about doing this as you would any case. And you have had discussion with the circuit court.

THE COURT: Well, I initially contacted the circuit because I thought on its face that this is where -- you know, we're generalist judges. We certainly have had requests for three-judge courts before. I sit on a three-judge court in a separate case. So I have familiarity with the composition and the establishment of three-judge courts. But here, I hadn't thought through the procedural steps that lead up to the establishment of a three-judge court. so I'm not trying to hide the ball.

MR. STAFNE: No, you've been --

THE COURT: And there's no question of frivolity here. There's a question of is there standing? Is there something any Article III court can get its arms around and decide the case before you, motion to dismiss in a newly filed civil rights case? So I had that discussion with the attorneys, and I'm going to issue an order applying the standards that apply in that kind of case. Does that case get to move forward as pled? Does it need to be amended? Does it go away entirely? So yeah, the Court hears motions to dismiss. I have this kind of calendar about every two weeks. And almost every case starts with at least one round of motions to dismiss, if not two. And in this circuit, the court usually grants at least one round of leave to amend, as I've done here.

So yeah, I'm treating this as any other case procedurally. I've taken account of the three-judge court request now. I'm not a policy maker like a legislator. I really am not. I know people think that is what courts do. What courts do, we look at what parties bring to us, we are reactive, we look at the law that applies, we read the rules, and we do our best to apply that law. And so that's what I'm doing. And I'm trying to create a record. I'm not doing things in secret. I'm trying to create a record explaining myself so that you can understand and then you can appeal me. Am I'm trying to create a record so the appellate court, if it's reviewing what I've done, ahs at least a decent sense. And if they tell me I got it wrong, they'll send it back. But again, ultimately I'm not the one that can create the three-judge court. If there's a case that proceeds, if I deny the motion to dismiss and direct the defendant to answer, then I would reach out once again to the chief of the Ninth Circuit. And if I've denied the motion to dismiss, then that judge may decide it's time to establish a three-judge court. I certainly can't tell him what to do. I can draw his attention to the status of the case.

Does that make sense?

MR. STAFNE: It does. And I thank you for explaining that.

THE COURT: All right:

MR. ZERMAN: Thank you, your Honor. I just remind you, though, that we have the right to maintain the value of our vote. And so when you consider your decision, again, consider Department of Commerce v. U.S. House of Representatives, 1999 case, Supreme Court Case, that involved sapling, but it's

still -- this is a constitutional case regarding the value of our vote.

THE COURT: And one of the best things about this job is thinking deeply about constitutional questions which are very important. And the question here is are you presenting a question that an Article III court of limited jurisdiction can decide? And this lowly trial judge gets to take the first crack at that question, and then you can appeal me, and you can try to get the Supreme Court to take the case if the Ninth Circuit goes the other way.

MR. STAFNE: We're certainly hoping we don't have to appeal you because we understand your dilemma, but here what you have is the political branch is the problem.

THE COURT: I understand that. I understand that that's your argument.

MR. STAFNE: All right.

THE COURT: And I'm not --

MR. STANFE: Prejudging.

THE COURT: I'm not making a policy decision to agree or disagree with you. the question is given that argument, is it framed in a way that a court can allow a claim or claims to proceed?

All right. Anything else you want to say, Mr. Waters?

MR. WATERS: Nothing to add, your Honor.

THE COURT: all right. The matter is submitted. I will issue an order as quickly as I can. I am wrapping up a criminal trial, but this is an important case, and I'll get to it as soon as I can.

MR. STAFNE: Thank you, your Honor.

THE COURT: All right. Thank you.

MR. WATERS: Thank you , your Honor.

MR. ZERMAN: Thank you, your Honor.

(Proceedings concluded at 3:55 p.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kelly O'Halloran

KELLY O'HALLORAN, CSR #6660