1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STEPHEN M. SHAPIRO,ET AL., :

4 Petitioners : No. 14-990

5 v. :

6 DAVID J. McMANUS, JR., :

7 CHAIRMAN, MARYLAND STATE :

8 BOARD OF ELECTIONS, ET AL. :

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10 Washington, D.C.

11 Wednesday, November 4, 2015

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13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:03 a.m.

16 APPEARANCES:

17 MICHAEL B. KIMBERLY, ESQ., Washington, D.C.; on behalf

18 of Petitioners.

19 STEVEN M. SULLIVAN, ESQ., Assistant Attorney General,

20 Baltimore, Md.; on behalf of Respondents.

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1 P R O C E E D I N G S
2 (10:03 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-990, Shapiro v. McManus.
5 Mr. Kimberly.
6 ORAL ARGUMENT OF MICHAEL B. KIMBERLY
7 ON BEHALF OF THE PETITIONERS
8 MR. KIMBERLY: Mr. Chief Justice, and may it
9 please the Court:
10 Section 2284(a) states in plain terms that a
11 district court of three judges shall be convened when an
12 action is filed challenging the constitutionality of the
13 apportionment of congressional districts.
14 Section 2284(b) lays out the procedure for calling a
15 three-judge court when the circumstances identified in
16 2284 are satisfied.
17 It -- it reads, quote, "Upon the filing of a
18 request for three judges, the judge to whom the request
19 is presented shall, unless he determines that three
20 judges are not required, immediately notify the chief
21 judge of the circuit, who shall designate two other
22 judges."
23 Now, although that language did not appear
24 in the statute until the 1976 amendments, it was no more
25 than a congressional recognition and codification of

1 what was then by settled -- what was by then settled
2 practice, that a complaint covered by 2284(a) would
3 have, initially, to be referred to a single judge, that
4 the litigants then would have to file a request for a
5 three-judge district court, and in turn that the single
6 judge would have to determine whether three judges were,
7 in fact, required.
8 Now, at the time that Congress enacted that
9 long-standing practice in the 1976 amendments to the
10 Act, this Court's precedents had made clear that one
11 basis upon which three judges are, quote, "not required"
12 is when the claim is constitutionally insubstantial.
13 Congress is presumed to have been aware
14 of -- of this Court's precedents so holding, and in the
15 absence of a contrary indication -- and here there is
16 none -- to have intended that interpretation of the
17 words "not required" to be incorporated into the
18 statute.
19 JUSTICE ALITO: What if it's perfectly clear
20 that the plaintiffs are entitled to judgment? Let's say
21 the State legislature goes back to its pre Reynolds v.
22 Sims method of constituting the State legislature. Does
23 that have to be referred to a three-judge court?
24 MR. KIMBERLY: If it is -- if the claim is
25 obviously foreclosed by this Court's precedents, then

1 no, it doesn't. The -- the upshot of this Court's
2 insubstantiality doctrine is that when a claim is so
3 obviously foreclosed it doesn't present a bona fide
4 controversy within the meaning of Article III and,
5 therefore, isn't the kind of case that has to be
6 referred to a three-judge court.
7 JUSTICE SCALIA: Well, what --
8 JUSTICE ALITO: How do you square that --
9 JUSTICE SCALIA: Go ahead.
10 JUSTICE ALITO: Okay.
11 How do you square that with the statutory
12 language?
13 MR. KIMBERLY: Well, we think that's
14 embodied in the words "not required." In -- in the two
15 and three years before Congress inserted the key
16 language in Section 2284(b), this Court had said in
17 Goosby that three -- that a three-judge district court
18 is, quote, "not required" when the claim is
19 insubstantial.
20 JUSTICE SCALIA: Maybe Goosby was wrong.
21 You don't think Goosby was wrong?
22 MR. KIMBERLY: Well, I -- Goosby represents
23 what had been, by then, nearly 50 years of practice
24 beginning with this Court's decision in Poresky.
25 For what it's worth, I will say I -- I think

1 if Goosby is wrong, we still end up winning because --
2 JUSTICE SCALIA: Oh, I know that. Yes.
3 (Laughter.)
4 CHIEF JUSTICE ROBERTS: Well -- I'm sorry.
5 Well -- I'm sorry, why don't you --
6 MR. KIMBERLY: Well, I -- I -- I would just
7 say, I think the path of least resistance here in
8 reversing the Fourth Circuit is not to overturn that
9 precedent. But we certainly would be happy if the Court
10 were inclined to do that.
11 CHIEF JUSTICE ROBERTS: What do you do if
12 your argument in -- in a case that might go before a
13 three-judge court is that the Court's precedents should
14 be overruled? It's clearly foreclosed by the Court's
15 precedents, but maybe there's a very good argument that
16 the -- those precedents are -- haven't withstood the
17 test of time or whatever.
18 What happens then?
19 JUSTICE KENNEDY: This Court's precedents?
20 CHIEF JUSTICE ROBERTS: Yes, yes.
21 MR. KIMBERLY: This Court's precedents.
22 I think --
23 JUSTICE KENNEDY: I understand the Chief
24 Justice.
25 MR. KIMBERLY: So I think in that

1 circumstance, at least according to the Goosby rule, is
2 that the case would proper -- properly be dismissed
3 for -- for lack of jurisdiction as not stating --
4 JUSTICE KENNEDY: By the -- by the -- by the
5 single-judge court?
6 MR. KIMBERLY: By the single-judge court.
7 And -- and if -- if, then, this Court --
8 JUSTICE KENNEDY: I have -- I have some
9 problems with that. Suppose the -- the case has been on
10 the books from this Court for 15, 20 years, has all
11 sorts of academic commentary; certain circuits have
12 questioned whether the reasoning is still valid.
13 A single-judge court can dismiss in that
14 case?
15 MR. KIMBERLY: Well, I -- I think according
16 to the substantiality rule, yes. Again, if the Court
17 were inclined to --
18 JUSTICE KENNEDY: And I'm surprised -- you
19 think they do need to take that position?
20 MR. KIMBERLY: No. And again, I don't think
21 we do. And if the Court were inclined to narrow the
22 rules that it didn't apply in that circumstance, again I
23 think we'd still win.
24 I don't think this case necessarily presents
25 that question. And, you know, I think all -- all the

1 Court has to recognize for the purposes of this case is
2 that the insubstantiality rule is not one and the same
3 as the 12(b)(6) standard.
4 JUSTICE KENNEDY: I -- I take it Goosby is
5 not parallel to Rule 11. Rule 11 is a class of cases
6 which are more frivolous even than what Goosby would
7 have --
8 MR. KIMBERLY: No. I think Goosby is even
9 more frivolous than Rule 11. What the Goosby --
10 JUSTICE KENNEDY: Oh, really?
11 MR. KIMBERLY: -- standard provides is that
12 the claim must be obviously frivolous. And what the
13 Court said in Goosby is -- obviously is doing work in --
14 in that formulation. It can't just be that a judge
15 ultimately concludes that the claim is frivolous. It's
16 got to be that there couldn't possibly be any debate
17 about whether it is, in fact, foreclosed by this Court.
18 JUSTICE KAGAN: Am I right that Goosby
19 thought of that as part of the jurisdictional question?
20 MR. KIMBERLY: That's correct.
21 JUSTICE KAGAN: In other words, it's an
22 application of Bell v. Hood --
23 MR. KIMBERLY: That's correct.
24 JUSTICE KAGAN: -- which suggests that if
25 something is so obviously frivolous, then the Court has

1 no jurisdiction on it at all?
2 MR. KIMBERLY: That is not a bona fide case
3 and controversy within the meaning of Article III.
4 That's exactly right.
5 CHIEF JUSTICE ROBERTS: But it's a very
6 difficult line you're drawing, and -- and I understand
7 Bell v. Hood. But you're saying he can't do it. He
8 can't determine that the three-judge court is not
9 required just because the plaintiffs are wrong, but he
10 can make that determination if they are really wrong.
11 And -- and your brief in the analysis and
12 all this, it -- it is always -- it's -- it's like a
13 thesaurus. It's just a collection of adjectives that
14 all mean "frivolous," "insubstantial," you know. And
15 I'm not sure it gives a great deal of guidance to -- to
16 a court.
17 MR. KIMBERLY: Well, I -- I think I'd say
18 two things about that.
19 The first -- I mean, that -- that catalog of
20 adjectives appears in Goosby. This is a rule that has
21 been on the books since Poresky in the 1920s. It -- it
22 isn't, in our view, a rule that has been causing a whole
23 lot of trouble since 1976 amendments. But again, if --
24 if the Court is dissatisfied with the ruling, we're
25 inclined to hold that it is not a basis for finding

1 three judges not required. We still -- I think it still
2 would require a reversal of the Fourth Circuit's rule
3 and of the district court's judgment in this case.
4 CHIEF JUSTICE ROBERTS: Well, you call it --
5 I guess my concern -- you call it a rule, but it's
6 really not much of a rule. It's just kind of a -- I
7 don't know, a sense that something is -- is really bad,
8 as I guess I said earlier, as opposed to just bad. And
9 I think that's an awfully fuzzy line to -- to draw, but
10 fuzzy in -- in when you're talking about jurisdiction
11 where you like to have very precise and clear rules.
12 MR. KIMBERLY: I -- I agree entirely, and
13 I -- and I guess what I -- what I would say on top of
14 that is that if -- if the Court is concerned to avoid
15 fuzzy and difficult rules, that certainly is a reason
16 not to adopt Respondents' position.
17 JUSTICE KENNEDY: Could the Respondents
18 argue that, in the light of Iqbal and Twombly, Goosby
19 should be reconsidered, and the Federal court should
20 have some -- district court, single judge should have
21 some more authority? Or does that work the other way,
22 do you think?
23 MR. KIMBERLY: I -- I think it works the
24 other way. I would be surprised to see Respondents make
25 that argument, because again we're dealing here with a

1 statute, with statutory language that says when a
2 complaint is filed challenging the constitutionality of
3 congressional districts, that a three-judge court shall
4 be convened.
5 And then in (b), using the word "required,"
6 it -- essentially Respondents' view is that the words
7 "shall appearing" in 2284(a), actually means "may," and
8 that the rule "required appearing" in 2284(b) actually
9 means "permitted," and that a single district judge, in
10 their view, can elect whether or not to convene a
11 three-judge court if he or she would, in his or her
12 discretion, prefer to keep the case for him or herself.
13 JUSTICE GINSBURG: Does it depend -- does
14 your argument depend on categorization of what is
15 frivolous in the Goosby language as being
16 jurisdictional?
17 MR. KIMBERLY: I think if the Court were to
18 continue that line of cases here and to hold that that
19 is a basis for declining the convening of a three-judge
20 court, yes. It depends on it being a jurisdictional
21 question.
22 JUSTICE GINSBURG: So what happens under the
23 current statute that calls for a three-judge court on
24 request of a party?
25 Suppose nobody requests the three-judge

1 court. Would -- could the single judge proceed with the
2 case?
3 MR. KIMBERLY: Well, our -- our view, in
4 light of this Court's precedence, is no, that it isn't
5 waivable and it's -- it's a jurisdictional statute
6 that -- that the -- the judge would be without -- that a
7 single judge would be without power to consider the
8 merits in the case covered by the statute.
9 But I should say that that also isn't
10 necessarily a question that's presented here because,
11 even if it's just a claims-processing rule, it's still a
12 mandatory claims-processing rule. And nothing in what
13 the Respondents had said indicates that when a request
14 is filed, the district judge would be empowered
15 nevertheless to disregard the request and -- and
16 nevertheless keep the case for himself.
17 JUSTICE SCALIA: You -- you -- you don't
18 think -- and let's assume that -- that Goosby is
19 jurisdictional.
20 Does that mean that we must let the single
21 judge determine it?
22 MR. KIMBERLY: Well, I --
23 JUSTICE SCALIA: Why is it that the single
24 judge must determine the jurisdictional question? Why
25 can't that be left to the three-judge court just as

1 everything else is?

2 MR. KIMBERLY: To be clear, I don't think a

3 single judge does have to decide the jurisdictional

4 question. I think -- again, the key point is that the

5 merits have to go to a three-judge district court. I

6 don't think the Court has to say anything more about the

7 statute than that in this case because, on the face of

8 it, what the district court here did was enter judgment

9 under Rule 12(b)(6).

10 JUSTICE SCALIA: Perhaps the jurisdiction

11 has to go to that court as well.

12 MR. KIMBERLY: I -- I think that's right,

13 yes. Perhaps, yes.

14 JUSTICE KENNEDY: Does -- does the waiver

15 argument, the argument that this can be waived by the

16 consent of all parties, does that rest on decisions of

17 this Court?

18 MR. KIMBERLY: Not so far as I'm aware. I

19 mean, nothing in this Court's precedents indicate that

20 the statute is jurisdictional. And in fact -- excuse

21 me, that it's waivable. And in fact, the Court's

22 decision in Idlewild, and before that in Stratton, say

23 precisely the opposite. They say that it's a

24 jurisdictional statute and, moreover, when the -- the

25 conditions for convening a three-judge court are met,

1 that a single judge loses jurisdiction over the merits
2 of the case, either to grant or to deny relief.
3 Idlewild says that very --
4 JUSTICE GINSBURG: In my -- what --
5 JUSTICE KENNEDY: Has the waiver rule been
6 adopted by some of the circuits?
7 MR. KIMBERLY: Not -- in fact, no. It --
8 it's been rejected by every court that's considered it,
9 the Second and D.C. circuits.
10 JUSTICE KAGAN: Well, why do you --
11 JUSTICE GINSBURG: But there was a -- there
12 was a change in '76, and that's when they put in "upon
13 the filing of a request." And that language suggests
14 that it isn't a jurisdictional question, because if a
15 party has to request it, it normally follows if a party
16 doesn't request it, it's waived.
17 MR. KIMBERLY: Well, I -- I -- I wouldn't
18 disagree that that is one possible way to read the
19 statute. I -- I think it's inconsistent with what this
20 Court's precedents said beforehand. And our view again
21 is that really that language is best understood as
22 Congress's codification of what was by then well-settled
23 practice, that when any complaint is filed in a district
24 court, it necessarily first goes to a single-district
25 judge. That single-district judge then has to make a

1 determination whether three judges are required, and
2 that's typically done in response to a request.
3 JUSTICE KAGAN: In reality, on the ground,
4 what percentage of cases is there a request for a
5 three-judge court?
6 MR. KIMBERLY: Oh, all of them. And --
7 and --
8 JUSTICE KAGAN: Litigants want this?
9 MR. KIMBERLY: Ah --
10 JUSTICE KAGAN: Are there any litigants that
11 say to themselves, I'd rather have a one-judge court,
12 thanks?
13 MR. KIMBERLY: Not so far as I'm aware. I
14 think in -- in most cases -- now, I -- I think under the
15 Respondents' reading of the statute is a one-way ratchet
16 permitting only dismissals, but I -- I gather not
17 grants, although it's not clear where, in the statute,
18 the Respondents --
19 JUSTICE GINSBURG: It -- wasn't it a
20 practice in the old days that if you didn't want the
21 three-judge court, you simply didn't ask for injunctive
22 relief? You filed a complaint for declaratory relief
23 and then you didn't -- you could get your one judge?
24 MR. KIMBERLY: That may be so. To be clear,
25 though -- so first of all, that would just mean that

1 the -- the preconditions for invoking the statutory --
2 the jurisdictional nature of the statute weren't
3 satisfied, and that certainly is something that
4 litigants could choose.
5 JUSTICE SCALIA: I don't know why it's
6 contrary to a jurisdictional status that it has to be
7 requested. I mean, can't a request be one of the
8 conditions to confer jurisdiction just as a plaintiff is
9 one of the conditions to satisfy Article III and thereby
10 confer jurisdiction?
11 MR. KIMBERLY: That's exactly right. And
12 our example is, for instance, filing a notice of appeal
13 in the court of appeals. The Court doesn't have
14 jurisdiction without a request for the --
15 CHIEF JUSTICE ROBERTS: Let me get back to
16 the question Justice Kagan asked. It was certainly the
17 case when the law was enacted that the three-judge court
18 was viewed as an anti-plaintiff provision.
19 The idea was that single judges were too
20 quickly issuing injunctions, you know, blocking the
21 State enactments, and they thought that would be less
22 likely if you had three judges. I'm not sure if that's
23 still true today, but it certainly was when the law was
24 passed.
25 MR. KIMBERLY: It was true in 1910 when the

1 first version of this statute was enacted. It was not
2 true by 1976 when the -- when the amendments at issue
3 here were enacted.
4 That much is made clear by the legislative
5 history of the Voting Rights Act, which is one of those
6 other statutes that provides -- statutes that provides
7 for three-judge-court review beyond 2284.
8 The legislative history in that -- in that,
9 with respect to that statute, was clear, that indeed,
10 three-judge district courts were more likely to grant
11 relief to plaintiffs than were single judges, which is
12 in part what explained why Congress, in that Act,
13 provided for three-judge-court review.
14 JUSTICE GINSBURG: And plaintiffs liked it
15 because you could skip over the court of appeals and go
16 right to this Court, and on appeal rather than
17 certiorari.
18 MR. KIMBERLY: That's right. And so I think
19 in that respect, Respondents reading the statute is also
20 quite inconsistent with the well-understood purposes of
21 the statute. Among them, key among them, to ensure that
22 merits judgments and cases covered by the Act, which
23 after the 1976 amendments are quite narrow and cover
24 only particularly politically sensitive and important
25 cases, receive as quick a final decision before this

1 Court as possible.
2 On Respondent's reading of the statute, a
3 single judge can keep the merits for him or herself and
4 interpose the court of appeals in the process.
5 What's more, their reading of the statute
6 also creates really difficult jurisdictional problems on
7 appellate review.
8 If -- if a single-judge district court can
9 grant a motion to dismiss under 12(b)(6) and it goes
10 before the court of appeals and the court of appeals
11 reverses, the upshot is that, well, three judges were in
12 fact required after all.
13 The case then has to get referred to a
14 three-judge district court. But it's not clear, then,
15 whether the three-judge district court would be bound by
16 law of the case on the 12(b)(6) question by the decision
17 of the court of appeals.
18 If -- if it is bound, that's --
19 JUSTICE SCALIA: Sure it is. Come on.
20 MR. KIMBERLY: Well --
21 JUSTICE SCALIA: Really think that's
22 questionable?
23 MR. KIMBERLY: I actually don't think it's
24 questionable. I think it's quite inconsistent with what
25 the statute says in (b)(3), though, and it's an

1 indication why Respondent's reading of the statute can't
2 be the right one, because what it means is the 12(b)(6)
3 question then goes to the court of appeals precisely in
4 the circumstances when Congress has meant -- Congress
5 meant only the single-judge district courts decide that.
6 JUSTICE ALITO: How do you think the -- the
7 Goosby Rule applies to political gerrymandering claims
8 in general? This Court has never seen one that it
9 thought was justiciable.
10 Do you think there are any that -- but
11 assuming that the possibility that there might be one is
12 enough to take the case to the three-judge court? And
13 if that's so, are there any that would not go to a
14 three-judge court?
15 MR. KIMBERLY: I -- I think there are some
16 that wouldn't go. A political gerrymandering claim that
17 was predicated exclusively on a purported rights
18 proportional representation in Congress would be wholly
19 foreclosed by Bandemer itself.
20 But the fact --
21 JUSTICE ALITO: But so long as it favors
22 who -- the party that controlled the legislature when
23 the plan was drawn up, which is almost always the case,
24 couldn't a political gerrymandering claim be made that
25 that's why it was done?

1 MR. KIMBERLY: I -- I think that's right,
2 and I think that's why we see most of these claims
3 rightly being sent to three-judge district courts, just
4 as Congress intended.
5 JUSTICE BREYER: We might get to this
6 question, but at some point somebody is going to have to
7 say whether you do have a substantial claim.
8 MR. KIMBERLY: That's right. And our view,
9 against the backdrop of this Court's precedence, is
10 that's a sufficiently easy question that --
11 JUSTICE BREYER: Is it?
12 MR. KIMBERLY: Well, I think so --
13 JUSTICE BREYER: Because?
14 MR. KIMBERLY: There is no -- no decision of
15 this Court -- binding decision of this Court holding
16 that our claim is wholly foreclosed.
17 JUSTICE KENNEDY: Vieth?
18 MR. KIMBERLY: No. I think Vieth --
19 JUSTICE BREYER: Because?
20 (Laughter.)
21 MR. KIMBERLY: Well, Vieth -- Vieth has -- I
22 think the threshold question is what is the controlling
23 opinion in Vieth. There's a plurality opinion. The
24 courts -- the lower courts have all generally agreed
25 that it's Justice Kennedy's concurrence in Vieth that

1 controls. And it's Justice Kennedy's concurrence in
2 Vieth that provides the basis for the complaint in this
3 case.
4 It would be quite strange to say that a
5 claim that is embodied in the controlling opinion of
6 this Court from less than a decade ago is wholly
7 foreclosed by this Court's precedence. That's why we
8 think it's a sufficiently easy question for this Court
9 to remand with instruction simply to convene a
10 three-judge court, but if the Court were not inclined to
11 go that far, we're perfectly comfortable briefing that
12 question before the single judge.
13 If there are no further questions, I'll
14 reserve --
15 JUSTICE KENNEDY: I didn't understand. If
16 you're not going to go that far, you want to brief what
17 question before the district?
18 MR. KIMBERLY: Well, I think -- I think the
19 single judge below Judge Breyer would have to address
20 the question whether three judges are required under
21 proper standards. In this case he said three judges are
22 not required because I dismiss under Rule (12)(6). I --
23 I don't think it necessarily follows --
24 JUSTICE KENNEDY: So you'd want to brief it
25 under Goosby or something?

1 MR. KIMBERLY: Yeah, that's right, under the
2 proper insubstantiality standard.
3 Now, as I say, I think that issue has been
4 briefed before this Court, and it's a sufficiently easy
5 question to answer --
6 JUSTICE KENNEDY: Oh, I see.
7 MR. KIMBERLY: -- that it's something this
8 Court can reach. But if it's not so inclined, then --
9 then we'll do so before the single judge.
10 Thank you.
11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Sullivan.
13 ORAL ARGUMENT OF STEVEN M. SULLIVAN
14 ON BEHALF OF THE RESPONDENTS
15 MR. SULLIVAN: Mr. Chief Justice, and may it
16 please the Court:
17 In 1976, Congress considerably narrowed the
18 circumstances that would call for the procedural device
19 of a three-judge court. And as part of that pairing
20 down of the three-judge statute, Congress, for the first
21 time, authorized a single-district judge to, quote,
22 "determine that three judges are not required."
23 For three reasons, this Court should affirm
24 that that authorization permits the single district
25 judge to dismiss a complaint that, on its face, fails to

1 satisfy Rule 8 and Rule 12(b)(6) as required in all
2 civil actions.
3 JUSTICE GINSBURG: May I go back to
4 something you just said? Because I thought that the
5 word "required" was in the statute. It wasn't
6 introduced in '76; it was there before.
7 MR. SULLIVAN: Well --
8 JUSTICE GINSBURG: Required to be heard by a
9 three-judge court.
10 MR. SULLIVAN: But it wasn't for an
11 authorization for a single judge. In the prior statute,
12 upon the filing of the request for injunctive relief,
13 the three-judge court was required to be convened, and
14 so the express language of the statute did not have a
15 provision for the single judge to make that call.
16 JUSTICE SOTOMAYOR: On what basis are -- it
17 sounds to me that you're giving a meaning to not
18 required that was different to the meaning we gave to it
19 pre-1976. Am I correct?
20 MR. SULLIVAN: I -- I don't think that's
21 necessarily the case. I think not required meant that
22 it didn't have a set meaning as plaintiffs --
23 JUSTICE SOTOMAYOR: I -- he took out the
24 adjectives, descriptors from our case law:
25 "Insubstantial," "wholly insubstantial," "frivolous,"

1 "obviously or essentially frivolous." I mean --
2 MR. SULLIVAN: But that --
3 JUSTICE SOTOMAYOR: -- that's very different
4 than a 12(b)(3) motion.
5 MR. SULLIVAN: Yes, Justice Sotomayor,
6 that -- those words appear, but in the prior case law
7 before 1976, this Court had, in two important cases,
8 permitted a district judge to adjudicate the entire case
9 notwithstanding the presence of a substantial claim
10 raised by the plaintiff. And those cases are Bailey and
11 the Hagans v Lavine case cited by Petitioners.
12 There, Hagans v. Lavine, there was no
13 question there was a substantial equal protection claim.
14 The district judge perceived that there's this
15 preemption claim, and I think I can get rid of the case
16 by ruling on the preemption claim, which is exactly what
17 the district judge did.
18 And this Court affirmed that that was the
19 correct procedure; that there was no reason to trouble
20 the three-judge court if there was a statutory claim
21 that could be resolved and rendered unnecessary to
22 address the equal protection clause.
23 So the idea that there was this set
24 understanding that any time there's a substantial claim
25 it's off limits to a single district judge is simply not

1 borne out by this Court's pre-1976 precedent. So
2 there's more at work in that precedent.
3 Indeed, for those who will consult
4 legislative history, the Senate Report 94204 has a
5 heading under uncertainties in the prior law, and the
6 first item is A, whether or not a three-judge court
7 should be convened was the first of the several
8 uncertainties that the Senate noted in its report.
9 So the idea that Petitioners want to say
10 that by saying "not required" in the statute, Congress
11 intended to adopt a certain subset of this Court's prior
12 jurisprudence is not borne out by --
13 JUSTICE BREYER: Well, they -- they want to
14 raise about as important a question as you can imagine.
15 They want to say, reading Vieth, that the State
16 legislators are forbidden to draw district boundaries
17 the way that has been done here. I take it that's their
18 basic claim. And if they are right, that would affect
19 congressional districts and legislative districts
20 throughout the nation.
21 So what reason could Congress have had for
22 saying, although we want three-judge courts to decide
23 these kind of cases generally, where the single-most
24 important issue that could possibly be raised -- I
25 exaggerate only slightly -- is raised, that kind of

1 issue is for a single judge?
2 MR. SULLIVAN: Well, Congress, if it had
3 looked back at this Court's case law, would have seen
4 that this Court regularly denied three-judge courts even
5 where there was an important issue such as when the
6 preemption was the issue. Preemption cases --
7 JUSTICE SOTOMAYOR: Do you want to give me a
8 list of those cases with -- I'm going to continue it.
9 MR. SULLIVAN: Yes. Swift -- Swift and
10 Company --
11 JUSTICE SOTOMAYOR: Answer Justice Breyer.
12 MR. SULLIVAN: So the -- the Court's
13 concern, it was always a narrow interpretation of the
14 statute for very important reasons. And that is to
15 minimize the dislocation of the lower Federal courts'
16 functioning and structure, which always happens when you
17 have to bring in two extra judges. And secondly, to
18 control this Court's mandatory appellate docket.
19 So those are always at work when the Court
20 was reading the statute. And Congress knew this. And
21 on page 5, the Senate report acknowledges this narrow
22 reading without disavowing it or instructing this Court
23 to do otherwise.
24 So the statute always was read not in the
25 most embracing terms, as it said in Swift & Company v.

1 Wickham at page 126, not in the most embracing terms,
2 but in restrictive -- in a restrictive way because of
3 the important concerns of judicial administration that
4 were at stake, but also to best serve the historical
5 purpose, which is to protect States from the improvident
6 injunction by a single judge.
7 JUSTICE GINSBURG: Well, haven't they
8 strayed from that -- or Congress has, because Congress
9 said you also get a three-judge court if you're
10 attacking a Federal statute, right? It started out with
11 the concern about enjoining State statutes. But if you
12 were trying to enjoin a Federal statute, you could also
13 get a three-judge court, right? And there was no
14 State-protective interest involved in that.
15 MR. SULLIVAN: That was probably to protect
16 an analogous Federal interest in having its -- its laws
17 not improvidently enjoined. That statute is no longer
18 there, as you know. But that obviously wouldn't have
19 had the same State sovereignty concerns, but the --
20 there was impetus for that adoption from the Federal
21 Government because they saw the benefits that the States
22 reached from having the procedure adopted.
23 JUSTICE KAGAN: Can I make sure I understand
24 what you're saying, because what you're saying now is
25 different from what I had thought that your briefs were

1 saying? I had thought in your briefs that you were
2 relying on changes in the law that -- that Congress made
3 in -- I think it's 1976; is that right?
4 MR. SULLIVAN: Yes.
5 JUSTICE KAGAN: But now you're suggesting
6 that you're not relying on that, that you're saying that
7 before that, we -- we viewed as acceptable a -- a
8 one-judge court dismissing a case. Is that now what
9 you're saying, historic practice favors you as opposed
10 to the -- the 1976 amendments favor you?
11 MR. SULLIVAN: I think the important thing
12 is the amendments that we pointed out in our brief
13 are -- were significant changes in -- in the structure
14 and meaning of the statute. But I was responding to
15 Petitioners' argument that this Court can simply look at
16 the words "not required" and know immediately what they
17 mean from reading the prior case law. And I don't think
18 that will be an effective process for this Court if it
19 gives full --
20 JUSTICE SCALIA: It's a winner for you --
21 it's a winner for you if those prior cases say what you
22 say they say.
23 MR. SULLIVAN: I hope so, Your Honor. And I
24 hope you'll remember that.
25 JUSTICE SCALIA: Well, it should have been

1 in your brief. I mean, you should have made that point
2 in your brief.
3 MR. SULLIVAN: Well, you know, I'm trying to
4 provide value now in addition to what we had in the
5 brief.
6 (Laughter.)
7 JUSTICE SOTOMAYOR: For my edification, what
8 are the cases -- I know Bailey is one. What are the
9 other ones you're relying on?
10 MR. SULLIVAN: Well, in Swift v. Wickham is
11 the best exposition of what this narrow construction or
12 restrictive construction is about. The words clearly
13 said in the prior statute, "On grounds of
14 unconstitutionality."
15 And this Court read that phrase not to
16 include a very important clause of the Constitution, the
17 supremacy clause, because it was important to keep it
18 narrow and not to open the floodgates to every
19 preemption challenge that would come down, even though
20 those challenges are very important and often much more
21 devastating to the State than a constitutional claim
22 could be. That's an example.
23 In Gonzalez, this Court read the phrase in
24 28 U.S. 1253, which is the direct appeal provision --
25 "orders granting or denying an injunction," this Court

1 read to not include any denial of an injunction that
2 would have been a sound basis for not convening a
3 three-judge court in the first place.
4 And the Court phrased it that broadly to
5 include whatever basis there might be to not convene a
6 three-judge court. That means you don't get the direct
7 appeal, which is a very important part of this whole
8 statutory scheme.
9 It became more important with the rise of
10 the reapportionment cases, which, by the way, the reason
11 you don't see any old reapportionment cases in the case
12 law is they would have been foreclosed by this Court's
13 precedent until Baker v. Carr.
14 But with the rise of those, the part of the
15 structure -- not the three-judge so much, but it was the
16 direct appeal that became more important to the States
17 to protect them, as -- as was spoken to by the assistant
18 U.S. attorney general Robert Dickson who testified. And
19 we quote his testimony at page 30, talking about, but
20 for that direct appeal and the ability to get an
21 immediate stay from this Court, entire elections would
22 have had to be conducted under plans that were adopted
23 by district courts, contrary to what the legislature had
24 provided, and it was very important to have access to
25 this Court to get that stay and not to have the entire

1 election disrupted by that order.

2 The idea that Petitioner insists on that the

3 insubstantiality rule is not a merits-based test is just

4 obviously can't be true, because you have got to know

5 what the merits are before you know it's insubstantial.

6 I know this Court's precedent has treated it as a

7 jurisdictional matter. But I would submit that it -- it

8 really doesn't meet the set of tests that Justice

9 Ginsburg laid out for the Court in Arbaugh of what's

10 jurisdictional and what is not.

11 And the idea that there's a clear division

12 between insubstantially and failure to state a claim is

13 not borne out. And in one of the cases cited by the

14 Petitioner in their brief at page 23, Kalson v.

15 Paterson, the 2008 Second Circuit case illustrates that,

16 because there a single-district judge is deemed able to

17 decide it because it's insubstantial, even though the

18 court acknowledges that the theory is not foreclosed by

19 precedent.

20 It just comes around to saying, yes, it is

21 insubstantial. And it rules, it affirms the grant of a

22 motion on the pleadings under Rule 12(c), which in the

23 Second Circuit, as in most other circuits, is analyzed

24 exactly like a Rule 12(b)(6) failure to state a claim

25 motion.

1 The claim there was that the State should
2 have used voting age population, which, interesting
3 enough, is the issue that this Court has noted probable
4 jurisdiction on in Evenwell. And there a three-judge
5 court in Evenwell dismissed under 12(b)(6).
6 So you have a court in the Second Circuit
7 saying that's insubstantial. Whether or not they were
8 right or they analyzed it right under Goosby, they
9 reached that conclusion. And they -- they did it on an
10 analysis that it's hard for me to distinguish from a
11 12(b)(6) analysis. And then the three-judge court in
12 Evenwell, which this Court will be visiting, did the
13 whole matter under a 12(b)(6) analysis, which is maybe a
14 little more detailed than the Second Circuit in
15 insubstantially analysis, but really hard to tell the
16 difference. How did you reach that conclusion?
17 JUSTICE KAGAN: Mr. Sullivan, I -- I -- I
18 guess I'm -- I'm not so inclined to think that. We
19 always have had this very narrow category of cases which
20 we say we're dismissing on jurisdictional grounds that
21 sound kind of merits-y. But -- but we've cabined that.
22 You know, we've basically said that's only when it's
23 completely ridiculous. And so there's no case at all.
24 It's just a laughing stock of a case, given our
25 precedents. And that's a very different kind of inquiry

1 than the typical 12(b)(6) inquiry.
2 MR. SULLIVAN: Well, it's easy when it's the
3 little green men and the extraterrestrials, but that's
4 not the cases that have arisen and been addressed by
5 this Court. Goosby v. Osser, the court of appeals in
6 that case ruled that it was insubstantial, the claim
7 there that prisoners had to have access to absentee
8 ballots, because this Court had a prior case, McDonald,
9 which had said the prison system there and the election
10 system was -- it was fine not to allow the prisoners to
11 have absentee ballots.
12 And when it came to this Court, Justice
13 Brennan for the Court said, you've misread our
14 president; McDonald doesn't foreclose this case. So it
15 involved extraterrestrials and no little green men. But
16 a panel --
17 JUSTICE SCALIA: I don't know what you mean
18 by "extraterrestrials." What are these --
19 MR. SULLIVAN: Some of the case law refers
20 to --
21 JUSTICE SCALIA: Aliens? No?
22 MR. SULLIVAN: Aliens -- aliens. Some of
23 the case law seems to -- to categorize only the -- the
24 only cases that would come under Bell v. Hood, some
25 judges will say are the ones so outlandish that involves

1 something that on its face you could say that could
2 never be true.
3 JUSTICE SCALIA: Okay. And that -- that's
4 what you mean by "extraterrestrial"?
5 MR. SULLIVAN: Yes.
6 JUSTICE SCALIA: Outlandish. Okay.
7 MR. SULLIVAN: Outlandish.
8 JUSTICE SCALIA: Okay.
9 JUSTICE BREYER: Bailey is -- I mean, Bailey
10 was the mirror-image case. I mean, it was a case where
11 some African-American plaintiffs were saying they have a
12 constitutional right to travel without discrimination in
13 interstate commerce, as I read it. And they convened a
14 three-judge court because they wanted to set aside
15 Mississippi law to the contrary, in 1961. And the court
16 said, but it's absolutely clear that a statute that
17 requires segregation is unconstitutional. So this
18 shouldn't have even been heard by a three-judge court
19 because there has to be some kind of an issue. And the
20 words it uses are it doesn't require a three-judge court
21 when the claim that a statute is unconstitutional is
22 wholly insubstantial.
23 MR. SULLIVAN: But there's --
24 JUSTICE BREYER: He's speaking nonexistent.
25 And they said it's nonexistent because it's clear what

1 the Federal law was. I mean, that was the nature.
2 So -- so I don't see how that helps you.
3 MR. SULLIVAN: Well, I don't know if it
4 helps, but I think it doesn't help Petitioners the idea
5 that that's a significant expansion, if not a complete
6 departure from Bell v. Hood, which addressed when a
7 complaint could be dismissed for lack of subject matter
8 jurisdiction because it's insubstantial. There the
9 claim is granted, relief is granted in --
10 JUSTICE BREYER: That's true, but I mean,
11 they put down a standard as to whether or not a
12 three-judge court is necessary. And they say a
13 three-judge court is not necessary when the reason for
14 giving the three-judge court -- you know, if it's -- if
15 it's insubstantial. In that case you have to have a
16 three-judge court, I guess, when there's some
17 constitutional issue. They said there is no
18 constitutional issue, not because it was frivolous or
19 from Mars, but for the opposite reason: The law was
20 clear.
21 MR. SULLIVAN: The law was clear, and --
22 JUSTICE BREYER: Yes.
23 MR. SULLIVAN: -- the single-district judge
24 should have been allowed to address that in argument --
25 JUSTICE BREYER: All right. So here his --

1 I guess you're going to think certainly, he's not
2 clearly right, and the question is, is he clearly wrong.
3 MR. SULLIVAN: But I would submit that,
4 under this -- the Court's prevailing rule, the Court --
5 the Court adopts the Federal rules, and all -- all
6 district judges are bound for them.
7 If a district judge is entitled to grant
8 relief, as under the Bailey case, it seems reasonable to
9 allow that judge to determine that a complaint on its
10 face is legally sufficient, as the court would in any
11 other case.
12 These -- these rules are binding, unless you
13 can find in the statute a reason that compels the
14 district judge not to comply with the civil -- the rules
15 of civil procedure, then the district judge is in his or
16 her rights?
17 JUSTICE SCALIA: So you say "required in the
18 statute" means "states a claim"?
19 MR. SULLIVAN: Well, I think that it
20 could -- it incorporates that understanding as much as
21 it would incorporate the insubstantiality, because both
22 are presumptions that courts rely on. A case is not
23 going to proceed, pass a motion to dismiss, certainly
24 not under Iqbal and Twombly, unless it satisfies Rule 8.
25 That's just a basic understanding of every district

1 court in the land. And it seems strange that, if -- if
2 the cases are that important and they're going to
3 require two extra judges and a direct appeal to this
4 Court, that a legally insufficient complaint that
5 otherwise could not get past the threshold of the
6 courthouse is going to get an automatic direct appeal to
7 this Court.
8 JUSTICE SCALIA: So let -- let's assume you
9 have a district judge who says it fails to state a
10 claim. And -- what does the plaintiff do? Where does
11 the appeal go?
12 MR. SULLIVAN: To the court of appeals, as
13 in every other case.
14 JUSTICE SCALIA: So it goes all the way up,
15 and if -- if he loses in the court of appeals, he tries
16 to come up here, right? And we finally decide it did
17 state a claim. Then what happens? It goes back down
18 and you begin all over again with a three-judge court,
19 right?
20 MR. SULLIVAN: Yes, Your Honor.
21 JUSTICE SCALIA: Wow. Wow, that's -- I
22 mean, that's my comment.
23 (Laughter.)
24 JUSTICE SCALIA: It's extraterrestrial, as
25 he said.

1 (Laughter.)
2 MR. SULLIVAN: But -- but I -- I understand
3 your reaction, but I think that comes -- when you have a
4 departure from the norm, as the three-judge statute
5 creates, you're going to have some situations that may
6 be a little bit stickier than otherwise that you have
7 had in a normal functioning of the content. But that's
8 happened.
9 CHIEF JUSTICE ROBERTS: I mean, the other
10 alternative is it's a three-judge district court, and
11 then we have to take it on the merits. I mean, that's a
12 serious problem because there are a lot of cases that
13 come up in three-judge district courts that would be the
14 kind of case -- I speak for myself, anyway -- that we
15 might deny cert in, to let the issue percolate. And now
16 with the three-judge district court, no, we have to
17 decide it on the merits.
18 MR. SULLIVAN: Well, you had seven more
19 direct appeals from Maryland, as we cite in our -- in
20 our brief, that -- the cases we've had in recent years
21 that were dismissed by a single judge, they would have
22 all come here. And we're one State times 50 -- 400 more
23 direct appeals, perhaps? I don't know how frequently
24 these cases are filed in other States.
25 But that was a concern that -- that was

1 always lurking in all the cases prior that this Court
2 decided before 1976 and was acknowledged in the report
3 that there is this concern to control this Court's
4 mandatory docket, which Congress cares deeply about,
5 because they took away the direct appeal of
6 constitutional claims that would come up from the
7 courts.
8 JUSTICE SCALIA: We care even more than
9 Congress. Trust me.
10 MR. SULLIVAN: I hope you care deeply and --
11 and deeply enough to -- to affirm this reasonable
12 interpretation. And I think it will serve the interest
13 of -- of this Court and also all the other litigants as
14 well.
15 And if -- unless there are further
16 questions, we submit.
17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Kimberly, you have 11 minutes left.
19 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY
20 ON BEHALF OF THE PETITIONERS
21 MR. KIMBERLY: Just a few quick points.
22 First, a comment about Swift v. Wickham.
23 This is a case that we addressed on page 5 in footnote 1
24 in our reply brief.
25 The holding in that case was simply that a

1 preemption claim is not a constitutional claim within
2 the meaning of the statute. There's nothing
3 inconsistent about that holding with our position before
4 this Court.
5 Second, with respect to the --
6 JUSTICE SCALIA: Explain why that's so. Why
7 is -- why is that so clear that -- that it's frivolous,
8 you know?
9 MR. KIMBERLY: Well, I -- I don't -- that's
10 not the holding in the case. I'm sorry. I just --
11 the -- the -- in order to have a three-judge court, you
12 have to bring a constitutional claim, and the Court's
13 holding in that case was that a preemption claim,
14 although it involves a question under the supremacy
15 clause, is ultimately really a statutory claim. And so
16 it just isn't of the sort that Congress meant to -- to
17 go before a three-judge court, as a matter of
18 interpretation of the statute.
19 JUSTICE SCALIA: And it doesn't matter
20 whether that's frivolous or not?
21 MR. KIMBERLY: That's right. Yes. It --
22 it's a completely different holding. It has nothing
23 whatever to do with the question whether a substantial
24 claim has to go before the three-judge court.
25 JUSTICE KENNEDY: Does it happen often that

1 a single judge will say there are three issues here; one
2 would definitely involve a three-judge court, but the
3 previous are ones that I can reach, and so I will reach
4 those first.
5 Does that happen very often?
6 MR. KIMBERLY: Not so far we're aware of.
7 We -- we are aware that it has happened. It doesn't
8 seem to be a frequent occurrence.
9 The Third Circuit in Page indicated that
10 when that happens, because the statute applies to the
11 action, that the entire action must go.
12 Now, if I could say something briefly about
13 purpose. My friend on the other side of the podium
14 suggested that the sole purpose here for the statute was
15 to protect States from improvident grants of
16 injunctions. If that were the case, you would expect,
17 in Section 2253, to see -- which is the -- the provision
18 that provides for appellate review over judgments of
19 three-judge district courts -- you'd expect to see
20 mandatory and direct review before this Court only from
21 final judgments of courts granting injunctions. But in
22 fact, what 2253 says in express terms is that there's a
23 right of immediate appeal before this Court from both
24 grants and denials of relief in cases heard by the two
25 district courts.

1 JUSTICE SCALIA: To -- to -- to say
2 otherwise, we -- we would have to say that you get --
3 you get no appeal in one category of case. I -- I --
4 I -- you know, I'm -- I'm not sure it -- it would comply
5 with due process to -- to have a judgment from which
6 there is no appeal.
7 MR. SULLIVAN: Well, I think --
8 JUSTICE SCALIA: And that's what you're
9 saying, that -- that Congress would have provided for no
10 appeal whatever if you -- if you -- if -- if -- if the
11 State wins. No appeal for the plaintiffs.
12 MR. KIMBERLY: Well, I -- I -- I think
13 Respondents' position is if relief can be denied, it may
14 be granted. That -- an order of that sort may be
15 entered by a single district judge and you'd get 1291
16 review before a court of appeals.
17 Our -- our -- our point is only that, if the
18 statutory purpose were only to protect States from
19 grants of injunctions, you would see -- and that single
20 judges in turn could decide everything else, you would
21 not see in 1253, which provides for immediate appeal to
22 this Court from judgments of three-district court --
23 three-judge district courts, the right of appeal from a
24 denial of relief.
25 JUSTICE BREYER: I -- as far -- as far as I

1 understand it, his strongest argument on the other side
2 would roughly go -- he didn't put it this way -- like
3 this:
4 On your side is the fact, well, why wouldn't
5 a three-judge court decide a very important question of
6 law in this area?
7 On the other side of it is that, well, you
8 just have left, in three-judge courts primarily, almost
9 exclusively, reapportionment issues, which are specially
10 political.
11 And to put these all, you know, they are
12 very -- because of the opinions you point out in Vieth,
13 there's a huge variation of all kinds of different legal
14 claims that might be made. And if there is a set of
15 cases where this Court should be careful as to when and
16 how and which it enters in which order, i.e.,
17 discretion, if we accept your view, that set of cases
18 where we should be particularly careful as to how we
19 proceed will be the set of cases where we have no choice
20 and we have to take immediately whatever variations on
21 the theme of disproportionate gerrymandering, da da da,
22 whatever order they happen to arise and whenever they
23 happen to arise, because we have no choice.
24 MR. KIMBERLY: So I have two responses to
25 that. The first is it's reflected in the congressional

1 record and the testimony before Congress that, indeed,
2 Congress was quite concerned with the political
3 sensitivity of these cases.
4 The way that Congress decided to deal with
5 that political sensitivity was to ensure that, in the
6 first instance, these cases are decided by a panel of
7 three judges, as -- as Judge Henry Friendly, in his
8 testimony before the 92nd Congress, indicated there.
9 The concern was to ensure that adherents of
10 more than one political party were deciding these cases
11 because, not only to ensure greater deliberation and
12 accuracy and decision making, but also because it might
13 be unseemly to allow a single judge to decide such a
14 politically-sensitive case where it might appear --
15 whether or not it actually is true -- where it might
16 appear to the public that his or her own political
17 ideologies and predilections --
18 CHIEF JUSTICE ROBERTS: So now you have --
19 now you have cases quite often, particularly in the most
20 sensitive ones, decided by a vote of two to one. So I
21 don't know how that -- how that particular answer is
22 very responsive to the concern that Justice Breyer has
23 pointed out, which -- which is one I share.
24 MR. KIMBERLY: Well, so that leads to me to
25 the second half of my response, and that is that in the

1 majority of these cases that make it before this Court
2 on mandatory review, the Court generally enters a
3 summary affirmance and doesn't note probable
4 jurisdiction and take full briefing.
5 When the Court affirms on the basis --
6 affirms on the -- without taking full argument and
7 briefing, there's a limited presidential effect to those
8 decisions. It is not binding the same way that a full
9 decision -- that they're binding in the same way as a
10 decision following full briefing --
11 JUSTICE ALITO: Well, to go back to your --
12 CHIEF JUSTICE ROBERTS: Just to follow up:
13 In -- in recent years, is it true that in
14 reapportionment cases, the majority of the way we've
15 handled direct appeals has been summarily?
16 MR. KIMBERLY: With all due respect, I think
17 you'd probably be in a better position to answer that.
18 CHIEF JUSTICE ROBERTS: No, no. I'm just
19 talking statistically.
20 MR. KIMBERLY: I mean, certainly the Court
21 has been taking a large number of these cases recently.
22 It's been two or three each term. I --
23 CHIEF JUSTICE ROBERTS: When you say
24 "taking" them, I mean, they're being presented to us.
25 We have no choice, but taking --

1 (Laughter.)

2 MR. KIMBERLY: Right. And I'm sorry. What
3 I mean is noting probable jurisdiction and taking full
4 briefing and arguments in two or three such cases each
5 term.

6 But that, at least as I understand how the
7 Court operates, is -- is a question of -- of discretion,
8 whether it notes probable jurisdiction and takes that
9 additional step.

10 JUSTICE ALITO: On the issue of political
11 sensitivity, if it goes to a single judge, you will have
12 a decision by a judge who has presumably been selected
13 by the spin of the wheel, or by -- at random, and then
14 you'll have an appeal to a court of appeals panel that
15 is presumably chosen at random. Whereas if it goes to a
16 three-judge court, there will be a decision, and it may
17 involve some very sensitive findings of fact by a panel
18 that is hand-picked by the chief judge, who is in a
19 position to appoint himself or herself to the
20 three-judge court and select a third district judge who
21 the chief judge believes is likely to agree with or
22 defer to the chief judge.

23 So I don't see how that -- how that creates
24 an insulation against the appearance of political
25 favoritism.

1 MR. KIMBERLY: Well, I -- it may be so that
2 in those cases, if -- if a litigant or a member of the
3 public dug down behind how the panel is appointed, that
4 there might be a basis for raising a concern. But it's
5 certainly reflected in the congressional record that it
6 was Congress's judgment that the best protection against
7 that concern -- and -- and indeed, this goes back to the
8 original version of the Act back in 1910, that
9 Congress's concern was that the public could rest more
10 easy when decisions of such political importance and
11 sensitivity are decided by three judges rather than one.
12 If there are no further questions.
13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.
15 (Whereupon, at 10:50 a.m., the case in the
16 above-entitled matter was submitted.)
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