No. 17-333

IN THE SUPREME COURT OF THE UNITED STATES

O. JOHN BENISEK, *et al.*, Appellants,

v.

LINDA H. LAMONE,
STATE ADMINISTRATOR OF ELECTIONS, *et al.*, Appellees.

On Appeal from the United States District Court
for the District of Maryland

APPELLEES' OPPOSITION TO MOTION FOR EXPEDITED CONSIDERATION OF JURISDICTIONAL STATEMENT AND EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT

For the reasons given below, the appellees, Linda H. Lamone, Maryland's State Administrator of Elections, and David J. McManus, Jr., Chair, State Board of Elections, respectfully oppose the motion of plaintiffs-appellants O. John Benisek, *et al.* ("plaintiffs") for expedited consideration of their jurisdictional statement and for expedited merits briefing and oral argument in the event that the Court notes or postpones probable jurisdiction. In this appeal from a three-judge district court's denial of a motion for preliminary injunction filed 3½ years after the case commenced, the plaintiffs have identified no circumstances that would justify granting their request for an extraordinary departure from this Court's normal procedures. The sense of urgency expressed in the motion to expedite is belied by the unhurried way the plaintiffs have heretofore chosen to litigate this challenge to the Congressional redistricting plan enacted by the Maryland

General Assembly in 2011. The plaintiffs' motion should be denied, and this appeal should proceed in the ordinary course under the provisions of Supreme Court Rule 18 and the other pertinent rules of this Court.

STATEMENT

1. This case is a challenge to the redistricting plan the Maryland legislature enacted in 2011 to satisfy the constitutional requirement that congressional districts be reapportioned to achieve exact population equality in light of the 2010 decennial census. 2011 Md. Laws, Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701 – 8-709 (2014 Supp.). In June 2012, this Court summarily affirmed a three-judge district court's decision upholding the plan and rejecting a challenge that included both racial gerrymandering and partisan gerrymandering claims. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012).

2. The statute was petitioned to statewide referendum, and a sizable majority of voters approved the legislation in the November 2012 election. (J.S. App. 8a.) The plan won voters' support in areas throughout the State, with majorities favoring the plan in 22 of Maryland's 24 counties, including three of the five counties that, prior to the 2011 redistricting, were located wholly or partly within Maryland's Sixth Congressional District.[1] Republican Congressman Roscoe Bartlett had won in those same three counties,

---

[1] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Sept. 8, 2017).

Frederick, Allegany, and Washington, in every congressional general election since 1992.[2] The Sixth District, as reapportioned in the 2011 plan, has become the sole focus of plaintiffs' challenge, after multiple amendments of their complaint.

3. The plaintiffs first brought this action in November 2013, more than a year after the first election under the 2011 plan. The initial complaint, and the amended complaint they subsequently filed, did not include the First Amendment retaliation theory on which they now rely. No preliminary relief was sought in conjunction with the filing of the original complaint or the amended complaint. After this Court issued its decision reversing dismissal of the first amended complaint and remanding, *Shapiro v. McManus*, 136 S. Ct. 450 (Dec. 8, 2015), the plaintiffs waited four months, until March 2016, before filing a second amended complaint, which for the first time set forth their First Amendment retaliation claim. (J.S. App. 7 (acknowledging that plaintiffs' First Amendment retaliation claim was first "clarified" in a second amended complaint filed after remand from *Shapiro v. McManus*, 136 S. Ct. 450 (2015)).) Again, the plaintiffs did not accompany their second amended complaint with a request for preliminary injunction or other preliminary relief. As articulated in their second amended complaint, plaintiffs' revised challenge asserts that the drafters of the 2011 plan "purposefully and successfully flipped [District 6] from Republican to Democratic control" by "moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican

[2] *See* congressional election results available at the State Board of Elections' website, http://www.elections.state.md.us/elections (last visited Sept. 8, 2017).

voters and preventing them from electing their preferred representatives in Congress." (J.S. App. 87a.)

4. The district court denied defendants' motion to dismiss the second amended complaint in August 2016. (J.S. App. 80a–111a.) Still, no request for preliminary relief followed that decision. Instead, the parties embarked upon discovery, a period that included (1) plaintiffs' requests for depositions of sitting legislators to take place during Maryland's 90-day legislative session (ECF No. 112-1 at 15-16); (2) plaintiffs' notice of Rule 30(b)(6) deposition of corporate designee, which was quashed by the district court, there being no defendant that is a corporation (ECF No. 145 at 2); and (3) plaintiffs' motion for sanctions, which was withdrawn by plaintiffs after it was fully briefed (ECF No. 164).

5. Near the same time that the parties completed seven months of fact and expert discovery, on May 31, 2017, the plaintiffs filed a motion for preliminary injunction and to advance and consolidate the trial on the merits, or in the alternative, for summary judgment. (J.S. App. 1a.) During the pendency of that motion, the district court, on its own initiative, requested briefing on whether a stay should be entered in light of this Court's orders in *Gill v. Whitford*, No. 16-1161. (J.S. App. 1a–2a.) After oral argument on the preliminary injunction motion and the appropriateness of a stay, the district court denied the request for preliminary injunction and entered a "stay pending further guidance" from this Court's disposition of *Gill*. (J.S. App. 2a.) The district court expressly declined to dispose of the parties' fully briefed cross-motions for summary judgment or plaintiffs' request to accelerate the trial on the merits under Rule 65(a)(2). (*Id.* at n. 1.)

6. The majority of the three-judge court held that the plaintiffs "have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief" because they had "not made an adequate preliminary showing that they will *likely* prevail" on the merits of their First Amendment claim. (J.S. App. 2a (parentheses and emphasis in original).) The district court explained that the plaintiffs can succeed on the merits of their claim "*only* if" they prove "Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact . . . ." (J.S. App. 25a (emphasis in original).) To confirm the plaintiffs' own understanding that this is indeed their burden, the district court quoted the following excerpt from their briefing: "[O]ur burden is to show that the purposeful dilution of Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016." (J.S. App. 25a (brackets in original).) The district court stated it was "not yet persuaded" that plaintiffs are likely to succeed in carrying their burden of proving that it was the alleged "gerrymander (versus a host of forces present in every election) that flipped the Sixth District, and, more importantly, that will continue to control the electoral outcomes in that district." (J.S. App, 17a (parentheses in original).) The majority deemed this showing of causation indispensable because, "if an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." (J.S. App. 24a.) That is, "[i]f the loss is instead a consequence of voter choice, that is not an *injury*. It is *democracy*." (J.S. App. 25a (emphasis in original).)

7. In denying the preliminary injunction, the district court made "preliminary" findings (J.S. App. 6a), which included the following: After enactment of the plan, "a plurality (44.8%) of voters in the Sixth District were registered Democrats, while 34.4% of voter were registered Republicans," and "20.8% of voters were registered with neither major party." (J.S. App. 19a-20a.) In the 2012 congressional election, the first held under the 2011 redistricting plan (and the same general election that resulted in approval of the plan), "Democrat John Delaney defeated incumbent congressman Roscoe Bartlett by a 20.9% margin." (J.S. App. 20a.) "However, in the U.S. Senate election conducted that same cycle, Democrat Ben Cardin carried the Sixth District by just 50% of the vote, despite winning 56% of the vote statewide." (*Id.*) The district court also found that Bartlett had "underperformed the other seven members of Maryland's congressional delegation in fundraising leading up to his defeat in the 2012 election." (J.S. App. 21a.) In addition, the district court found facts showing that the 2014 election results further demonstrated the complex and variable views of the Sixth District's electorate. That is, "Republican challenger Dan Bongino nearly unseated Congressman Delaney even though Bongino resided outside the Sixth District" and "operated at a financial disadvantage vis-à-vis Delaney," and in the same election, "Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points." (J.S. App. 21a.)

8. On August 25, 2017, the plaintiffs filed a notice of appeal of the order denying a preliminary injunction. That interlocutory order is the only ruling properly before this Court under 28 U.S.C. § 1253. The plaintiffs' jurisdictional statement and

motion to expedite were docketed September 1, 2017, and the appellees' response is currently due October 2, 2017.

9. The plaintiffs' motion to expedite requests that "defendants be directed to file a motion to dismiss or affirm on or before September 15, 2017," with plaintiffs' opposition due September 19, 2017, and "that the briefs be considered at the Court's September 25, 2017 conference." Motion at 1. The plaintiffs further request "an expedited schedule for resolving the merits" if "the Court notes or postpones probable jurisdiction. . . ." *Id.* at 2. Their proposed expedited merits briefing would make plaintiffs' brief due October 9, 2017; defendants' brief due October 23, 2017; and plaintiffs' reply brief due October 30, 2017, with oral argument to "be heard on November 6, 2017." *Id.* The plaintiffs also suggest that the Court "set this case and *Gill v. Whitford*, No. 16-1161, for argument on the same date." *Id.*

ARGUMENT

This case does not present any compelling need for the Court to grant the plaintiffs' request to disrupt the Court's normal operations by creating a special truncated schedule, which would disturb this Court's established distribution and conferencing schedule, as well as its schedule for oral arguments. By refraining from any request for a preliminary injunction during the first 3½ years of this litigation, the plaintiffs effectively conveyed to the district court plaintiffs' own determination that their need for relief was not urgent. Their motion to expedite does not offer any suggestion of special circumstances that might justify treating the denial of their belated motion for preliminary relief as an emergency. Even if their claim for relief were ultimately determined to be valid, any inability to obtain

injunctive relief prior to the 2018 election, as they would prefer, Motion at 7, is the direct and cumulative result of the plaintiffs' own litigation choices. As was recently reaffirmed in another context, on questions of timing the Court's solicitude tends to be reserved for circumstances "beyond [the litigant's] control," and the Court is less concerned "when a litigant was responsible for its *own* delay." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 (2016) (holding equitable tolling unavailable unless "the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control" (emphasis in original)).

Even in the more momentous appeals this Court has entertained, including matters of the utmost public importance, orders to expedite proceedings have been rare, and rarer still have been discussions of them in reported decisions. In one such instance, Justice Stevens opined that "[i]t is both unnecessary and profoundly unwise for the Court to order expedited briefing of the important questions raised" in an appeal, for even if the case "presents substantial constitutional questions," this Court's "consideration of them surely should be undertaken with the utmost deliberation, rather than unseemly haste." *Felker v. Turpin*, 517 U.S. 1182, 1182 (1996) (Stevens, J., with Souter, Ginsberg, and Breyer, J.J., dissenting from order directing expedited briefing).

Absent an express statutory requirement or a provision in this Court's rules, Congress' "grant of appellate jurisdiction" to review directly a district court's decision "does not give the Court license to depart from established standards of appellate review." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 336 (1985) (O'Connor, J., concurring). Nor does the statutory authorization of direct appeal to this Court, in itself,

demand accelerating the procedures that normally govern the Court's consideration of an appeal. The Court's Rule 18 sets forth the procedures it deems appropriate when a direct appeal from a district court decision is authorized by statute, and these procedures do not call for the extreme haste urged by plaintiffs. Contrary to the plaintiffs' suggestion that the need for "expedited treatment" automatically exists in an appeal from a three-judge district court under 28 U.S.C. §§ 2284 and 1253, the text of these statutes does not so provide. By contrast, in the two cases cited in the plaintiffs' motion, neither of which involved redistricting or § 2284, the requirement for expedition in those appeals from three-judge district courts arose not from the general grant of appellate jurisdiction under 28 U.S.C. § 1253, but from express language within the statutes challenged in those actions. *See Raines v. Byrd*, 521 U.S. 811, 817 (1997) (challenge to the Line Item Veto Act, which imposed on this Court a "duty" to "advance on the docket and to expedite to the greatest possible extent the disposition of any [suit challenging the Act's constitutionality] brought under [§ 3(a) of the Act]" (alterations in original)); *United States v. Eichman*, 496 U.S. 310, 313 n.2 (1990) (challenge to a criminal conviction under the Flag Protection Act of 1989, which contained a provision directing this Court to "advance on the docket and expedite to the greatest extent possible" any constitutional challenge to the Act).

Tellingly, the plaintiffs have not cited to a single redistricting case as an example of the type of expedited schedule they seek. All such cases involve, to one extent or another, the rights at stake in elections, although none involves the type of access-to-the-ballot-box voting rights claims at issue in another case cited by plaintiffs, *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014). Requests for

preliminary injunctions are not uncommon in redistricting cases, but the only preliminary injunction case cited by the plaintiffs, *FTC v. Dean Foods Co.*, 383 U.S. 901 (1966), involved enjoining a merger between two private companies to preserve the status quo pending a more thorough review. Here, the plaintiffs are seeking instead to enjoin operation of an enactment approved overwhelmingly by the voters and to disrupt the status quo that has persisted through the past three election cycles. As reflected in this Court's recent order staying the injunction entered by the three-judge court in *Gill*, when an appeal involves novel legal claims regarding a state's enacted redistricting map, the status quo should be preserved pending a thorough consideration of the merits.

Moreover, in this case it is highly doubtful that any efforts to contort the normal schedule of this Court's operations, no matter how extreme, could deliver to plaintiffs their requested relief within the time they have targeted. The plaintiffs watched as three successive congressional elections occurred under the 2011 redistricting plan, without any effort from them to seek a preliminary injunction. The plaintiffs ultimately waited to file a motion for preliminary injunction on May 31, 2017, *after* candidate filing for the 2018 election had begun and less than eight months before the candidate filing deadline.[3] From the date they chose to file that motion, any path to their desired relief required, in less than eight months, completion of the following events: (1) a hearing to be scheduled and held by the three-judge court; (2) issuance of an opinion and order of the three-judge court; (3) completion of this Court's appellate process; (4) any proceedings that might be

[3] *See* http://www.elections.state.md.us/elections/2018/2018_Election_Calendar.pdf (last visited Sept. 8, 2017).

necessary on remand from this Court; (5) the Governor and the General Assembly's consideration and enactment of a new plan; (6) the three-judge court's review and approval of the plan; and (7) implementation by the State Board of Elections of all measures necessary to fulfill its obligations under federal law with respect to absentee ballots and to complete other required administrative tasks to ensure that elections proceed on time. Indeed, in arguing their preliminary injunction motion, the plaintiffs "indicated that a revised districting plan must be enacted no later than December 19, 2017, to allow orderly implementation in advance of the 2018 midterms." (J.S. App. 31a.)

The practical impossibility of achieving that goal was recognized by the district court. Explaining its decision to stay proceedings, the district court determined that it "is in no position to award Plaintiffs the remedy they have requested on the timetable they have demanded." (J.S. App. 31a.) The court further explained that the plaintiffs had advised the court "that an injunction should issue no later than August 18, 2017, to accommodate legislative mapmaking or, if necessary, a judicially imposed map," but by the time the district court was able to issue its decision on the motion for preliminary injunction, "that August date ha[d] already come and gone." (*Id.*) The court went on to state that, "as a practical matter, the Court would have been unable to cure any constitutional ill in advance of the 2018 midterms even if it scheduled a trial at the earliest opportunity." (J.S. App. 32a; *see id.* n.7.)

This Court is now in no better position to afford the plaintiffs their requested relief than the district court was in August. While the plaintiffs' motion to expedite provides a few examples of cases in which candidate filing periods were extended (Motion at 7), they

fail to acknowledge other significant constraints of the election calendar. Most notably, the Military Overseas Voter Empowerment Act of 2009 requires states to transmit timely requested absentee ballots 45 days before a scheduled federal election. Pub. L. 111-84, § 579 (2009), codified at 52 U.S.C. § 20302. Although the requirement can be waived, that waiver must be requested, for the next election cycle, by March 28, 2018.[4] The ballot is currently scheduled to be certified May 2, 2018, and early voting will commence June 14, 2018. Even if plaintiffs' requested expedited briefing and argument schedule were granted, there is little chance their requested relief could be granted without extreme disruption to the conduct of Maryland's 2018 elections.

The plaintiffs have requested not only that the briefing schedule in this case be severely compressed and that this case be added to this Court's November calendar, but also that the already scheduled oral argument in *Gill v. Whitford* be postponed so that the two cases can be considered together. Such disruption is unnecessary. The *Benisek* plaintiffs already have filed in *Gill* an amicus curiae brief setting forth their position on whether and how the two cases are related. Brief of Plaintiffs in the Maryland Redistricting Litigation in Support of Neither Party, No. 16-1161 (August 4, 2017). Moreover, plaintiffs' motion to expedite emphasizes the multiple ways that the two cases substantially differ (Motion at 8–10), a divergence that undermines the rationale for considering the two cases in tandem.

---

[4] *See* http://elections.state.md.us/elections/2018/2018_Election_Calendar.pdf (last visited Sept. 8, 2017).

CONCLUSION

The motion to expedite should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
Solicitor General

SARAH W. RICE
JENNIFER L. KATZ
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6325

September 9, 2017

CERTIFICATE OF SERVICE

I CERTIFY that on this 9th day of September 2017, a copy of the foregoing Opposition to Motion for Expedited Consideration of Jurisdictional Statement and Expedited Merits Briefing and Oral Argument was sent electronically and by first class mail, postage prepaid, to

Michael B. Kimberly, Esquire
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006
mkimberly@mayerbrown.com

Counsel for Plaintiffs-Appellants

Steven M. Sullivan