ORAL ARGUMENT HELD ON OCTOBER 22, 2015

No. 14-5249

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENCE INSTITUTE,
Plaintiff-Appellant,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

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

SUPPLEMENTAL BRIEF FOR THE FEDERAL ELECTION COMMISSION

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Pursuant to the Court's December 11, 2015 Order (Document No. 1588062), the Federal Election Commission ("FEC" or "Commission") submits this brief to explain why the Supreme Court's recent decision in *Shapiro v. McManus*, 136 S. Ct. 450 (2015), confirms that the decision below should be affirmed.

Shapiro reaffirms the "familiar proposition" that a "'*substantial* federal question'" is a jurisdictional prerequisite to obtaining a three-judge court under 28 U.S.C. § 2284, and that a single district judge may properly decline to convene a three-judge court (and dismiss the case) where an asserted claim is "'wholly insubstantial and frivolous.'" 136 S. Ct. at 455. Rather than re-defining those terms, *Shapiro* relies on a several earlier Supreme Court decisions that collectively confirm that a claim is jurisdictionally "insubstantial" and "frivolous," and a three-judge court is not warranted, where the legal question presented has already been settled by the Supreme Court. *Id.* at 455-56 (collecting cases); *see infra* pp. 5-9. In particular, *Shapiro* embraces three earlier Supreme Court decisions, each of which explain that a legal question is insubstantial — and a three-judge court is unwarranted — if the "'unsoundness'" of the claim "'so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Ex parte Poresky*, 290

U.S. 30, 32 (1933) (per curiam); *Hannis Distilling Co. v. City of Baltimore*, 216 U.S. 285, 288 (1910); *see Shapiro*, 136 S. Ct. at 455-56 (citing *Goosby*, *Ex parte Poresky*, and *Hannis Distilling Company*).

In *Shapiro*, the Supreme Court concluded that "a plea for relief based on a legal theory put forward by a Justice of this Court *and uncontradicted by the majority in any of* [*of the Court's*] *cases*" is a substantial question to be decided by a three-judge court. *Shapiro*, 136 S. Ct. at 456 (emphasis added). The Court thus reversed a decision by the Fourth Circuit Court of Appeals holding that 28 U.S.C. § 2284(b)(1) permits a single district judge to evaluate a case under Federal Rule of Civil Procedure 12(b)(6) and decline to convene a three-judge court upon finding that a complaint fails to state a claim for relief on the merits. *Id.* at 455-56.

This Court, unlike the Fourth Circuit, determines whether a three-judge court must be convened pursuant to section 2284 by applying the substantiality standard repeatedly articulated by the Supreme Court in *Goosby*, *Ex Parte Poresky*, and *Hannis Distilling Company*, *see Feinberg v. Fed. Deposit Ins. Corp.*, 522 F.2d 1335, 1338-39 (D.C. Cir. 1975) (quoting *Ex parte Poresky*, 290 U.S. at 32), which is the same standard the district court applied in the decision below. (J.A. 42.) And here, unlike in *Shapiro*, Independence Institute seeks to relitigate a

constitutional challenge to the statutory disclosure requirements for "electioneering communications" based on a legal theory that *is* contradicted — indeed, it is "squarely foreclosed" — by an eight-Justice majority of the Supreme Court in two separate cases. (J.A. 42, 57.) For all the reasons set forth in the FEC's brief and at oral argument, the district court correctly concluded that Independence Institute's constitutional claims are "'clearly foreclosed by Supreme Court precedent,'" and properly declined to convene a three-judge court. (J.A. 42.) *Shapiro* confirms that the decision below should be affirmed.

I. THE SUBSTANTIALITY STANDARD ADOPTED IN THIS CIRCUIT AND APPLIED IN THE DECISION BELOW IS CONSISTENT WITH *SHAPIRO*

In *Shapiro*, voters sought to challenge the constitutionality of Maryland's apportionment of congressional districts and, pursuant to 28 U.S.C. § 2284, they requested a three-judge court to decide their case. 136 S. Ct. at 453. The district judge, however, found that the claim was "'not one for which relief can be granted,'" and dismissed the case without convening a three-judge court. *Id.* (quoting *Benisek v. Mack*, 11 F. Supp. 3d 516, 526 (D. Md. 2014)). Consistent with Fourth Circuit precedent permitting a district judge to deny a request for a three-judge court if the district judge finds that the case fails to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court of Appeals summarily

affirmed. 136 S. Ct. at 454, 455. The Supreme Court granted certiorari to clarify "under what circumstances, if any, a district judge is free to 'determin[e] that three judges are not required' for an action 'challenging the constitutionality of the apportionment of congressional districts.'" *Id.* at 452 (quoting 28 U.S.C. § 2284(a), (b)(1)).

Section 2284 provides: "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." 28 U.S.C. § 2284(b)(1) (emphasis added).

The Court in *Shapiro* first clarified that the italicized language "should not be read as a grant of discretion to the district judge" to ignore the statutory mandate to convene a three-judge court upon a proper request. 136 S. Ct. at 454.

Second, and most relevant here, the Court in *Shapiro* reaffirmed the "familiar proposition" that "the filing of a 'constitutionally insubstantial' claim d[oes] not trigger the three-judge court requirement. . . ." *Id.* at 455 (quoting *Goosby*, 409 U.S. at 518). The Court emphasized that a "*substantial* federal question" is a threshold jurisdictional requirement; "[a]bsent a substantial federal question, even a single-judge district court lacks jurisdiction." *Id*. (emphasis added). *Shapiro* reiterates the Court's explanation, in earlier decisions, that a claim

is deficient for jurisdictional purposes if it is "'wholly insubstantial and frivolous.'" *Id.* at 455. And rather than further defining "wholly insubstantial and frivolous," *Shapiro* invokes the Court's "long" history of "distinguish[ing] between failing to raise a substantial federal question for jurisdictional purposes . . . and failing to state a claim for relief on the merits," and cites several earlier decisions, discussed below, that collectively confirm that a claim is jurisdictionally "insubstantial," and a three-judge court is not warranted, where the legal question presented has already been settled by the Supreme Court. *Id.* at 455-56 (collecting cases).

Shapiro cites *Bailey v. Patterson*, in which the Supreme Court held that a three-judge court was *not* required to decide whether a state could require racially segregated transportation facilities. 369 U.S. 31, 33 (1962) (per curiam); *see Shapiro*, 136 S. Ct. at 456 (citing *Bailey*). The Court in *Bailey* explained that the segregation question was a legal issue that the Supreme Court had "settled beyond question" and is thus "no longer open; it is foreclosed as a litigable issue" and a three-judge court need not be convened to decide such an issue because the claim is "wholly insubstantial, legally speaking nonexistent." 369 U.S. at 33. *Bailey* further held that "three judges are similarly not required when . . . prior decisions make frivolous any claim that a state statute on its face is not constitutional." *Id.*

Shapiro also cites *Bell v. Hood*, in which the Court held that the case was not "insubstantial or frivolous" because it concerned an "issue of law" — whether monetary damages are available for federal officers' violations of the Fourth and Fifth Amendments — that "ha[d] *never* been specifically decided by th[e Supreme] Court." 327 U.S. 678, 683-84 (1946) (emphasis added); *see Shapiro*, 136 S. Ct. at 455 (citing *Bell*).

As indicated *supra* pp.1-2, *Shapiro* cites three earlier decisions in which the Supreme Court explained that a federal legal question is "obviously frivolous or plainly unsubstantial" where it is "either . . . manifestly devoid of merit, or . . . its unsoundness so clearly results from the previous decisions of th[e Supreme C]ourt as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hannis Distilling Co.*, 216 U.S. at 288; *see Goosby*, 409 U.S. at 518 (same); *Ex parte Poresky*, 290 U.S. at 32 (same); *see Shapiro*, 136 S. Ct. at 455 (citing *Goosby*, *Ex parte Poresky*, and *Hannis Distilling Company*).

Steel Company v. Citizens for a Better Environment, which *Shapiro* also cites, similarly explains that dismissal for lack of a federal claim is appropriate where a claim is "'foreclosed by prior decisions of this Court.'" 523 U.S. 83, 89 (1998); *see Shapiro*, 136 S. Ct. at 456 (citing *Steel Company*). And in *Washington*

v. Confederated Tribes of Colville Indian Reservation ("*Confederated Tribes*"), also cited in *Shapiro*, the Court similarly held that under *Goosby*, prior Supreme Court decisions support a conclusion that certain claims are insubstantial where those decisions "inescapably render the claims frivolous." 447 U.S. 134, 148 (1980) (citation omitted); *see Shapiro*, 136 S. Ct. at 455 (citing *Confederated Tribes*).

These earlier decisions, each cited in *Shapiro*, collectively confirm that the substantiality standard adopted by this Circuit and applied in the decision below is consistent with *Shapiro*. Indeed, there is no dispute that this Court, unlike the Fourth Circuit, determines whether a three-judge court must be convened pursuant to section 2284 by applying the same substantiality standard articulated by the Supreme Court in *Goosby*, *Ex Parte Poresky*, and *Hannis Distilling Company*. *See Feinberg*, 522 F.2d at 1338-39 ("Constitutional claims may be regarded as insubstantial if they are 'obviously without merit,' or if their 'unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'") (quoting *Ex parte Poresky*); Appellant's Br. 13-14, 15, 19-20, 25 (quoting *Feinberg* standard); FEC Br. 53 (same). Both parties similarly agree that the district court properly recognized that

the substantiality standard in *Feinberg* is controlling here. (Appellant's Br. 13-14 (acknowledging that "the district court correctly stated" the applicable standard here and thus evaluated whether the "'unsoundness'" of appellant's constitutional claims "so clearly results from the previous decisions (of the Supreme Court) as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'") (quoting Mem. Op. (J.A. 42 (quoting *Feinberg*, 522 F.2d at 1338-39))); FEC Br. 53 (citing parties' agreement with district court on *Feinberg* standard); *see* J.A. 42 (decision below applying *Feinberg*).) *Feinberg*, moreover, is also consistent with the other Supreme Court decisions cited in *Shapiro* that describe the section 2284 substantiality standard. *Compare, e.g.*, *Bailey*, 369 U.S. at 33 (legal issue that Court has "settled beyond question . . . is foreclosed as a litigable issue" and thus "wholly insubstantial"); *Steel Co.*, 523 U.S. at 89 (claim that is "'foreclosed by prior [Supreme Court] decisions" is insubstantial).

In *Shapiro*, the Supreme Court concluded that "a plea for relief based on a legal theory put forward by a Justice of th[e] Court *and uncontradicted by the majority in any of* [the Court's] *cases*" is a substantial question to be decided by a three-judge court. *Shapiro*, 136 S. Ct. at 456 (emphasis added). Nothing about that conclusion calls into question this Court's *Feinberg* standard, which the

district court properly applied in the decision below, *see infra* pp. 9-11. Indeed, here, unlike in *Shapiro*, the legal theory in question has been litigated in the Supreme Court on two separate occasions and, in both instances, was flatly rejected by eight Justices of the Court.

II. THE DISTRICT COURT PROPERLY DECLINED TO CONVENE A THREE-JUDGE COURT TO DECIDE INDEPENDENCE INSTITUTE'S INSUBSTANTIAL CONSTITUTIONAL CHALLENGE

As the FEC previously explained (FEC Br. 17, 20-40, 51-56), the district court properly applied *Feinberg*'s insubstantiality standard and correctly concluded that Independence Institute's constitutional challenge is "clearly" and "squarely" foreclosed by Supreme Court precedent, namely, *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McConnell v. FEC*, 540 U.S. 93 (2003). (J.A. 42, 57.) The court observed that this case "can be distilled to the application of the Supreme Court's clear instructions in *Citizens United*," in which "in no uncertain terms, the Supreme Court rejected the [same] attempt to limit [the Bipartisan Campaign Reform Act's ("BCRA")] disclosure requirements to express advocacy and its functional equivalent." (J.A. 42 (citing *Citizens United*, 558 U.S. at 369).) The court below properly declined to convene a three-judge court and dismissed Independence Institute's claims because appellant "seeks the same relief that has already been foreclosed by *Citizens United*" and Independence Institute's "efforts

to distinguish this challenge from that in *Citizens United* are futile." J.A. 42-43; *Feinberg*, 522 F.2d at 1338-39 (three-judge court not required where previous Supreme Court decisions "foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy"); *see also, e.g.*, *Steel Co.*, 523 U.S. at 89 (dismissal is appropriate where claim is foreclosed by prior Supreme Court decisions); *Bailey*, 369 U.S. at 33 (three-judge court need not be convened to resolve an issue that is "settled beyond question").

That the district court considered Independence Institute's various arguments for why "*Citizens United* does not determine the outcome of this case" does not transform the decision below into an improper, first-hand evaluation of the merits of appellant's constitutional challenge. (J.A. 43; *see* J.A. 44-75.) The district court addressed such arguments in order to support its conclusion that "[n]one of the[] distinctions" Independence Institute attempted to draw between its challenge and *Citizens United* "have the effect [Independence Institute] desires, and *Citizens United* still governs this matter." (J.A. 44.)[1]

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[1] Among other things, the district court correctly explained that the breadth of the Supreme Court's holdings in *McConnell* and *Citizens United* foreclose Independence Institute's attempts to distinguish its legal claims from those rejected by the Supreme Court based on the content of its proposed advertisement. (*See* J.A. 53 (explaining that the Court in *McConnell* upheld BCRA's disclosure requirements for "the *entire range* of 'electioneering communications'") (quoting

The circumstances of this case bear no similarity to *Shapiro*, where "a plea for relief based on a legal theory put forward by a Justice of th[e] [Supreme] Court and uncontradicted by the majority in any of [the Court's] cases" was found to be a substantial question to be decided by a three-judge court. *Shapiro*, 136 S. Ct. at 456. Here, Independence Institute seeks to relitigate a legal question that is squarely foreclosed by two eight-Justice opinions of the Supreme Court. (J.A. 48-53.) This case epitomizes a claim that is "wholly insubstantial."

III. THE DISTRICT COURT AWARDED JUDGMENT TO THE FEC AS A MEANS OF TERMINATING THIS INSUBSTANTIAL CASE

Ultimately, having explained its reasons for concluding that Independence Institute's challenge "is squarely foreclosed by *Citizens United*," the district court concluded that such reasons were the basis for the Court's denial of the application for a three-judge court. (J.A. 57-58.) Then, as a means of fully resolving the still-pending action, including Independence Institute's pending preliminary injunction motion, and "[p]ursuant to the parties' agreement to consolidate briefing on the

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McConnell, 540 U.S. at 196; emphasis added by district court); J.A. 48-52 (rejecting Independence Institute's attempts to distinguish its case from *Citizens United* based on the content of its proposed advertisement and explaining that *Citizens United* upheld BCRA's disclosure requirements for electioneering communications "[e]ven if the ads only pertain to a commercial transaction" and expressly refused to limit such disclosure requirements to express advocacy and its functional equivalent) (quoting *Citizens United*, 558 U.S. at 369).)

merits with the preliminary injunction briefing," the Court entered judgment in favor of the FEC and dismissed the case. J.A. 58; *see infra* pp. 13-15. Importantly, the district court did not undertake any separate analysis of the merits to support its dismissal decision; it dismissed the insubstantial case because it is "squarely foreclosed" by Supreme Court precedent. (J.A. 42, 57-58.) That course of action was a permissible means of disposing of Independence Institute's insubstantial constitutional challenge.

Even if, under *Shapiro*, the district court should have more explicitly *characterized* its dismissal as being for lack of jurisdiction, it correctly determined that Independence Institute's claims are "squarely foreclosed" by Supreme Court precedent and did not apply an alternative standard as the district court in *Shapiro* had. (J.A. 57.) Determining whether a claim is wholly insubstantial involves a heightened standard but is otherwise very similar to making a merits determination as a matter of law. Because the district court applied the correct standard, its characterization of its dismissal is of little significance. Indeed, this Court may affirm the decision below even on different grounds than those relied on by the district court. *See, e.g.*, *Bowyer v. D.C.*, 793 F.3d 49, 53 (D.C. Cir. 2015) ("On de novo review, we may affirm the district court's judgment on a different theory than used by the district court."); *Jenkins v. Washington Convention Ctr.*, 236 F.3d 6, 8

n. 3 (D.C. Cir.2001) ("The court may affirm the district court on grounds different from those relied upon by the district court").

IV. INDEPENDENCE INSTITUTE EXPRESSLY CONSENTED TO HAVE THE MERITS RESOLVED BY THE DISTRICT COURT AND BCRA, UNLIKE SECTION 2284, PERMITTED IT TO DO SO

As the FEC explained in its principal brief (FEC Br. 52), section 403 of BCRA sets forth special procedures for constitutional challenges to "any provision" of BCRA and, *inter alia*, required all constitutional challenges to the statute initiated before December 31, 2006, to be heard by a three-judge district court convened pursuant to 28 U.S.C. § 2284. Such special procedures do not apply to challenges like this case filed after December 31, 2006, however, "unless the person filing such action elects such provisions to apply to the action." BCRA § 403(d)(2), 116 Stat. 114; *see* FEC Br. 52. *Shapiro*, by contrast, concerned the constitutionality of the apportionment of congressional districts, for which three-judge courts remain mandatory where the challenge presents a substantial federal question. *Shapiro*, 136 S. Ct. at 452-455.

As the record in this case makes clear, although Independence Institute invoked BCRA's special judicial review provision and requested a three-judge court (J.A. 8), it also expressly consented — before the three-judge court request had been ruled on — to consideration of its preliminary-injunction motion as a

motion for summary judgment and to consolidation of its preliminary injunction motion with a decision on the merits. (*See* J.A. 4 (Minute Order, Sept. 9, 2014) ("With the parties' consent, the court will consider Plaintiff's Motion for Preliminary Injunction as a Motion for Summary Judgment. Plaintiff has agreed to file no additional substantive briefing on the merits."); J.A. 34-35 (reciting the parties' joint stipulation and the district court's order "in light of Plaintiff Independence Institute's agreement not to supplement its motion for Preliminary Injunction (Docket No. 5) with supplemental substantive briefing or evidence, *for the Court to consider Plaintiff's Motion for Preliminary Injunction as a Motion for Summary Judgment*") (emphasis added).) Independence Institute made no objection to a single-judge court ruling on its motion for preliminary injunction and never specified that the ruling on that motion after consolidation with the merits should occur only after a ruling on its three-judge court request.

The decision below both denied Independence Institute's application for a three-judge court and entered judgment for the Commission, and it expressly did the latter "[*p*]*ursuant to* the parties' agreement to consolidate briefing on the merits with the preliminary injunction briefing." (J.A. 58 (emphasis added); *see id.* n.18 ("The parties agreed that the Court would adjudicate this case on the merits without the submission of additional evidence. . . ." (citing the Joint Stipulation

(J.A. 34-35)).) Independence Institute effectively waived any objection to the single-judge district court ruling on the merits when it entered into that stipulation.

Where, as here, the parties expressly agreed, in a joint stipulation, for the district court "to consider [Independence Institute's] Motion for Preliminary Injunction as a Motion for Summary Judgment," (J.A. 35), section 403(d)(2) of BCRA permitted them to do so, and the district court simply followed that agreed-upon consolidation procedure, the court's award of judgment to the FEC was plainly not improper and *Shapiro*, which does not concern section 403 of BCRA, does not suggest otherwise.

CONCLUSION

For all the foregoing reasons and those set forth in the FEC's principal brief and at oral argument, the Court should affirm the decision below.

Respectfully submitted,

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January 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January 2016, I electronically filed the Supplemental Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system and hand delivered paper copies to the Court. Service was made on the following through CM/ECF:

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