Nos. 18A1165, 18A1166

In the

Supreme Court of the United States

LARRY HOUSEHOLDER ET AL.,

and

STEVE CHABOT ET AL.,

Applicants,

v.

OHIO A. PHILIP RANDOLPH INSTITUTE ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

DIRECTED TO THE HONORABLE JUSTICE SONIA SOTOMAYOR ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) Respondent Ohio A. Philip Randolph Institute has no parent company, and no publicly traded company owns 10% or more of its stock.

2) Respondent League of Women Voters of Ohio has no parent company, and no publicly traded company owns 10% or more of its stock.

3) Respondent Ohio State University College Democrats has no parent company, and no publicly traded company owns 10% or more of its stock.

4) Respondent Northeast Ohio Young Black Democrats has no parent company, and no publicly traded company owns 10% or more of its stock.

5) Respondent Hamilton County Young Democrats has no parent company, and no publicly traded company owns 10% or more of its stock.

6) No publicly held company owns ten percent or more of the stock of any Respondent.

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INTRODUCTION

The Ohio A. Philip Randolph Institute *et al.* (the "Plaintiffs") submit this brief in opposition to the emergency applications for a stay pending direct appeal from Speaker Larry Householder *et al.* ("Ohio" or the "State") and Steve Chabot *et al.* (the "Intervenors"), (collectively the "Applicants"). Applicants seek to stay the commencement of remedial proceedings stemming from the three-judge panel's (the "Panel") unanimous judgment. They seek a stay principally on the ground that this Court is expected to issue decisions in two pending partisan gerrymandering cases, *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726, by the end of the Term. But Applicants identify no irreparable injury that they would suffer were the current remedial order left in place. Accordingly, there is no basis for the "extraordinary" relief of a stay. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972).

There is simply no exigency requiring a stay of the Order, which, as a practical matter, will not alter the status quo until long after this Court rules in *Rucho* and *Benisek*. All that is scheduled to occur in this case before the issuance of those decisions are the first steps of remedial proceedings: namely, the parties' joint submission of a list of mutually-acceptable candidates to serve as a special master to potentially assist the Panel in remedial proceedings; briefing on Plaintiffs' Proposed Remedial Plan; and, *should the State so choose*, the State's drawing of its own proposed remedial map. Both parties will have ample opportunity to comment on any new map. And no final map will go into effect until long after this Court's

Term is concluded, allowing any guidance from *Rucho* and *Benisek* to be fully incorporated. Thus, there is no need to issue a stay at this juncture.

By contrast, staying remedial proceedings would risk inflicting irreparable harm on Plaintiffs. The State previously represented to the court below, and again highlights in its motion here, that a new map must be in place by September 20, 2019 for the 2020 election. In fact, there is substantial reason to doubt those representations: Ohio law and past practice provide that a new map need not be implemented until mid-December. But cognizant of the need to settle on a map before the end of the year, the Panel ordered that the remedial process begin in June. The Panel's order ensures that the remedial process can move forward in an orderly manner, and that any remedial map can be in place in a timely fashion. Accordingly, the balance of equities weighs heavily in favor of denying the stay. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

In addition, Applicants have not shown that "five Justices are likely to conclude that the case was erroneously decided below." *Graves*, 405 U.S. at 1203. The Panel's decision was firmly grounded in this Court's prior precedent and is consistent with the decisions of every sister three-judge panel that has addressed partisan gerrymandering in recent years. Nor have Applicants established that any of the Panel's factual determinations were clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (factual determinations are examined under the "clearly erroneous" standard). The Panel found that Ohio's map was drawn with the express intent to entrench a durable partisan advantage – one that

would persist regardless of shifting voting preferences and freeze into place a 12-4 Republican congressional delegation advantage. The map has had precisely that effect. Moreover, the Panel found that natural geography, traditional districting criteria, and other legitimate state interests do not justify the map's highly unusual district lines.

Ohio's congressional districts violate "the core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted); *see also Powell v. McCormack*, 395 U.S. 486, 547 (1969) ("A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'") (citations omitted). Contrary to Applicants' assertion, the Panel's order does not improperly take redistricting out of the hands of the legislature, but ensures that constituents pick their representatives, not vice versa. App.[1] at 154 ("Rather than dictating outcomes in these cases, courts are only fixing *the process* by which voters enact political change. If courts find a constitutional violation and fix it, then *the voters* pick the winners and losers in districts that adhere to the Constitution.") (internal citation omitted).

[1] All citations to the appendix are to the State's appendix in *Householder, et al. v. Ohio A. Philip Randolph Institute, et al.*, No. 18A1165. In *Chabot, et al. v. Ohio A. Philip Randolph Institute, et al.*, No. 18A1166, the Intervenors present a separate appendix, but it includes the same content.

STATEMENT OF THE CASE

Ohio's congressional map is one of the most egregious gerrymanders in recent history. The map intentionally dilutes the votes of individual voters by packing and cracking them into districts designed to minimize Democratic influence and maximize Republican advantage, regardless of the electorate's preferences. After extensive discovery and trial, including over 60 witnesses and thousands of pages of evidence, the Panel found that Ohio's map was engineered to lock in a 12-4 Republican advantage for a decade. The map has performed exactly as its architects planned. Despite fluctuating statewide vote share, it has consistently delivered Republicans 75% of the seats. This advantage has persisted even in years when Democratic candidates won close to 50% of the vote.

1. Procedural History.

Plaintiffs filed their complaint in May 2018. R.1. From the outset, the parties and the Panel recognized that expedition was necessary to ensure that, if a constitutional violation was found, there would be sufficient time to remedy it before the 2020 election. *See, e.g.*, R.35, R.39. Expedited motions to dismiss and for intervention were decided during the summer of 2018, and the parties engaged in expedited discovery throughout the rest of the year.

Applicants moved for summary judgment on January 8, 2019. R.136–40. On February 15, 2019, the Panel denied the motions for summary judgment, setting forth the legal standards applicable in the case. R.222. Applicants also sought to stay the trial. R.185. The Panel unanimously denied the stay. R.213. Applicants did not appeal this denial.

The Panel held an eight-day trial, commencing on March 4, 2019. At trial, 23 witnesses gave live testimony, including eight expert witnesses, a principal map drawer, the then-Speaker of the Ohio House of Representatives, a former state senator (who was a member of Ohio Senate at the time of the map's passage), and nine individuals who are Plaintiffs and members of Plaintiff organizations.

2. Findings of Fact and Conclusions of Law.

On May 3, 2019, the Panel issued its opinion, which constituted its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1). R.262; App. at 1. The Panel found that Ohio's congressional map was an unconstitutional gerrymander, violating the First and Fourteenth Amendments to the U.S. Constitution and exceeding the State's powers under Article I.

In holding that Ohio's congressional districts constituted a partisan gerrymander, the Panel credited expert evidence illustrating that the map is an extreme outlier. The expert evidence included metrics measuring partisan bias, which measures partisan unfairness—as distinct from proportionality.[2] App. at 56; *cf. id.* at 152. Ohio's congressional map was compared to over 500 other congressional maps enacted by other states, dating back to 1972, on four different partisan bias measures. *Cf. id.* at 61–62. The partisan bias metrics, along with

[2] Partisan bias is a proportionality-agnostic measure. Proportionality asks whether a party's seat share mirrors its vote share—e.g. 25% of the votes electing 25% of the seats. Partisan bias, by contrast, measures fairness vis-à-vis the parties in the translation of votes to seats. Ohio's asymmetry measure gives an example of this principle in action: It illustrates that when Democrats win 55% of the vote in Ohio, they are projected to win just 37.5% of the seats; by contrast, when Republicans win 55% of the vote, they capture 75% of the seats. App. at 56; *cf. id.* at 152. Partisan bias is illustrated by the fact that when Democrats receive the same vote share as Republicans, they do not receive the same seat share. It is this partisan bias principle that the metrics capture.

other expert evidence such as map simulations that compared Ohio's map to the universe of possible maps in Ohio, demonstrated that Ohio's map has systematically advantaged the favored party more than almost any comparable map in recent American history. *Id.* at 57–60.

Ohio's mapmakers achieved this result by rejecting traditional redistricting criteria and privileging partisan advantage over *all* other ends. Democratic voters were cracked and packed across district lines. For example, the City of Cincinnati is a heavily Democratic city in Hamilton County. App. at 194–202. Instead of drawing a district that respects the city limits, which would give Democrats the opportunity to elect their candidate of choice to Congress, Democratic voters in Cincinnati were split between Districts 1 and 2, to ensure that they would never have that opportunity. *Id.* Likewise, a new district was created in Franklin County in order to pack Democratic voters. *Id.* at 202–08. This district was referred to by the map drawers as the "Franklin County Sinkhole." *Id.* at 203. The creation of this district transformed surrounding districts from being competitive to safe Republican districts. *Id.* at 204. The map drawers also drew what has been called "the snake on the lake"—a skinny district along Lake Erie, which forced the Democrat incumbent (the most senior member of Ohio's congressional delegation) in Toledo to run against the Democratic incumbent in Cleveland. *Id.* at 216–20. This new district effectively eliminated a Democratic-leaning district. *Id.* Another highly Democratic county, Summit County, was split four ways to crack its voters, even though the county could have fit into a single district. *Id.* at 221–27. The split

of Summit County effectively eliminated another Democratic-leaning district. *Id.* Reviewing all the evidence presented at trial, the Panel determined that the sole reason for the construction of the specific district lines was to entrench partisan advantage.

The cracking and packing of Democrats in Ohio was not driven by the state legislative process, but by Republican operatives, including U.S. congressional staff in Washington, who worked outside of the state legislative process. App. at 3, 11–14. A hotel room, nicknamed the "bunker," was rented to draw the map away from the public eye. *Cf. id.* at 8. The map drawers amassed a large collection of partisan data on Ohio's voters. *Id.* at 9. They supplemented data provided by a state-retained expert with data that was directly supplied by the national Republican Party. *Cf. id.* The map drawers then created a set of partisan indices to score their maps and ensure that they would produce their desired outcome: an entrenched 12-4 Republican majority resistant to electoral swings. *Id.* at 10–11. As the Panel noted, in the last days of the drafting, as final small changes were made to the district lines, both state and national Republicans were mindful of the partisan consequences of even very minor tweaks. *Id.* at 11–14. Even in cases where revisions were drafted by others, national Republican operatives had to "sign off" on changes before they were implemented. *Id.* (internal citations omitted); *see also id.* at 182–83.

The intent of the map drawers was made manifest by their internal communications and statements on the floor of Ohio's General Assembly. The

mapmakers characterized the "downtown" Democratic area in Columbus, in Franklin County, as "dog meat" voting territory. App. at 18, 183, 203. They stated that their map was crafted to guarantee that 12 Republican seats remained within the "safety zone." *Id.* at 130. They declined to seek an additional Republican seat only because the resulting map might have spread the Republican advantage too thinly, risking the possibility that changes in voter preference would alter their desired 12-4 advantage. *Id.* at 130, 157, 206, 273, 279.

The Panel directly considered the question of whether Ohio's map was the result of a bipartisan compromise and, after reviewing voluminous evidence, found that it was not. In particular, the Panel noted that the Speaker of the Ohio House "testified that while some negotiations occurred, there was never a chance that the Republicans in the majority would permit a map that altered the [12-4] partisan balance." App. at 248. After the12-4 partisan advantage had been secured by the Republican map-drawers, all other changes to the map were de minimis. *Id.* at 246–47. That some Democratic legislators voted for the map in exchange for small, parochial concessions to their individual district lines did not negate the fact that the process was dictated by the Republican Party, which controlled both houses of Ohio's legislature and the governorship. *Id.* at 248.

Further, after careful assessment of the evidence at trial, the Panel determined that no legitimate redistricting criteria or state interest justified the map's congressional district lines. App. at 186–87; 194–237; *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016) (outlining legitimate

redistricting criteria). Examining each district in turn, the Panel concluded that many more rational districts that respected traditional districting principles could have been drawn. App. at 194–237. The Panel considered and rejected the assertion that the goal of protecting incumbents explained the district lines. *Id.* at 238–46. The map drawers paired more sets of incumbents than were necessary to account for the loss of two seats. *Id.* Further, the most senior member of the delegation was paired with another Democratic incumbent in a new district, putting her seat at risk. *Id.* at 280. And the bill's legislative sponsor unequivocally disclaimed that incumbency had influenced the way the lines were drawn. *Id.*

The Panel also concluded that Voting Rights Act (VRA) compliance did not explain or justify the district lines. App. at 249–58. The Panel questioned the "sincerity and veracity" of this proffered justification, and concluded that such an interest did not drive the construction of the congressional districts. *See id.* at 206.

The Panel further concluded that "Ohio's natural political geography in no way accounts for the extreme Republican advantage observed in the 2012 map." *Id.* at 259. The Panel determined that it could not "take seriously the argument that Democratic voters' tendency to cluster in cities supports a finding of natural packing when under this map those cities were often cracked rather than packed." *Id.*

In sum, the Panel found that the State had drawn the congressional map with the intent of entrenching a durable partisan advantage, had achieved that effect, and had failed to justify the district lines with reference to any legitimate

districting criteria or state interests. It therefore concluded that the map violated the First and Fourteenth Amendments, and Article I.

3. Remedial Schedule

Recognizing the need to begin the remedial process promptly to ensure that a constitutional map could be in place by late 2019, the Panel ordered the first deadline in the remedial process six weeks after its opinion. App. at 293–97. As the first step, the parties were directed by June 3 to identify three mutually-acceptable candidates to serve as a special master to assist the Panel in remedial proceedings, and to brief the propriety of Plaintiffs' Proposed Remedial Plan. In addition, the Panel gave the State the *choice* to draw a new constitutional map by June 14, which the parties would then brief, and the Panel would review. *Id.* The State is not required to take this step, but has simply been given the opportunity to do so. The Panel explained that, if the State chooses not to enact its own map, the Panel will meet its "own duty to cure illegally gerrymandered districts through an orderly process in advance of elections." *Id.* at 296 (quoting *North Carolina v. Covington*, 138 S. Ct. 2548, 2553–54 (2018)). The Panel could either appoint a special master from the parties' joint list of mutually-acceptable candidates, or order the entry of the Plaintiffs' Proposed Remedial Plan. *Id.* at 296–97.

Applicants filed motions to stay the Order with the Panel on May 6, 2019. R.266, R.268. The Panel denied Applicants' request on May 9, 2019. R.270. Applicants then filed the instant motions with this Court on May 10, 2019.

ARGUMENT

Under this Court's precedent, "[s]tays pending appeal to this Court are granted only in extraordinary circumstances." *Graves*, 405 U.S. at 1203; *see also Conkright v. Frommert*, 129 S. Ct. 1861 (2009) (Ginsburg, J., in chambers) ("Denial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'").[3] A stay is considered an extraordinary remedy because lower courts are "closer to the facts" and their decisions are therefore "entitled to a presumption of validity." *Graves*, 405 U.S. at 1203. Thus, Applicants carry a heavy burden to show that a stay is warranted. *Id.*; *Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers). They must establish both that it is likely that this Court will find the decision below "erroneous" and that they would be irreparably harmed. *Graves*, 405 U.S. at 1203; *see also Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009). Further, the Court must "balance the equities" between the applicant, the respondent, and the public at large. *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087.

Given the heavy burden that Applicants must overcome, the Court has a long history of refusing to grant stays in redistricting cases. *See, e.g.*, *McCrory v. Harris*, 136 S. Ct. 1001 (2016) (racial gerrymandering); *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (racial gerrymandering); *Cox v. Larios*, 540 U.S. 1216 (2004) (reapportionment); *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist,

[3] Applicants erroneously cite the standard for a stay in a discretionary, rather than direct, appeal. State Br. at 3; Int. Br. at 17.

C.J., in chambers) (Voting Rights Act); *Graves*, 405 U.S. at 1204 (reapportionment); *Mahan v. Howell*, 404 U.S. 1201, 1203 (1971) (Black, J., in chambers) (reapportionment); *Travia v. Lomenzo*, 381 U.S. 431 (1965) (per curiam) (reapportionment).

As the Court has done in the past, it should deny a stay that, here, would halt nothing more than the initial phase of remedial proceedings. Applicants have identified no irreparable harm, and under this Court's precedent, that is sufficient to deny the stay, without even considering the likelihood of success on the merits. *Ruckelshaus v. Monsanto*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). There is no need for a stay, where all that is contemplated in the Panel's order is the beginning of a remedial process. The balance of equities weighs decidedly in Plaintiffs' favor, because delaying remedial proceedings risks making a timely remedy impracticable. And Applicants have failed to show that the Panel's decision was erroneous. The Panel found overwhelming evidence that Ohio's mapmakers subverted all other district considerations in order to entrench a Republican advantage against future changes in voter preferences, and such conduct plainly violates the Constitution.

I. IRREPARABLE HARM WILL NOT RESULT ABSENT THIS COURT'S INTERVENTION, AND THE BALANCE OF EQUITIES FAVORS A DENIAL OF THE STAY.

A. Applicants Will Not Suffer Irreparable Harm if a Stay Is Denied.

This Court's consideration of Applicants' stay motions should begin and end with their failure to demonstrate irreparable injury. "An applicant's likelihood of

success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus*, 463 U.S. at 1317; *see also Nken v. Holder*, 556 U.S. 418, 438–39 (2009) (citing *Ruckelshaus*, 463 U.S. at 1317). Neither the injunction barring any future elections under the challenged plan, nor the opportunity the Panel offered the State to propose a remedial map, causes the State any irreparable injury. Since Applicants cannot demonstrate irreparable injury, a stay should be denied.

As an initial matter, enjoining the challenged map for use in future elections—which will not occur until 2020—does not present any imminent injury. Staying the injunction imposed by the Panel at this time "would amount to nothing more than 'a mere declaration in the air.'" *Barthuli v. Board of Trs.*, 434 U.S. 1337, 1339 (1977) (Rehnquist, J.) (quoting *Giles v. Harris*, 189 U.S. 475, 486 (1903)).

Applicants will also suffer no irreparable injury from proceeding with the remedial schedule as set out by the Panel. A remedial congressional map has not been implemented for Ohio and will not be ordered until later this year, at the conclusion of the remedial process. The fact that *Rucho* and *Benisek* may soon be decided does not change that fact, as their implications for this case can be fully incorporated under the Panel's existing timeline. The State has identified September 20, 2019 as the date by which it needs to have a settled map for the November 2020 congressional election. App. at 294. Ohio law and experience places that date in December 2019. *See* Ohio Rev. Code §§ 3501.01(E)(2); 3513.05 (deadline for declaring as a candidate in the primary election, to be held in the first

full week of March 2020, is in mid-December 2019); App. at 294 (noting that former Governor Kasich signed into law the challenged plan, for use in the 2012 election, on December 15, 2011). Regardless, the Panel's schedule reflects its "commit[ment] to working with [the State's asserted September 20th] timeline for establishing a remedial plan." *Id.* Well before that time, this Court's decisions in *Rucho* and *Benisek* will have issued, and nothing precludes the parties or the Panel from then taking into account any further guidance those decisions provide. In the meantime, neither meeting with opposing counsel to agree on special master candidates nor drafting a brief regarding Plaintiffs' Proposed Remedial Plan, both due June 3rd, constitutes irreparable injury.

The Panel imposed no requirement that the State take any further action. On June 14—the date on which Applicants fixate, *see, e.g.*, State Br. at 19, 21–23—no remedial plan will in fact be "foisted upon" the State, Int. Br. at 36. Rather, at that time, the State may exercise an *entirely voluntary option* to develop and submit a remedial map to the Panel, which the parties and the Panel will then begin to assess as to whether it is an adequate remedy. Being given an option to act is no injury at all, much less an irreparable one. If the State chooses not to exercise that option, then the Court has set in place procedures for a remedial map. At that time a special master, for example, may be appointed to draw a remedial map.[4] The mere exploration of remedial possibilities inflicts no irreparable injury, and does not

[4] In redistricting cases, courts routinely appoint special masters to draw remedial plans. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2550–51 (2018).

remotely present the "extraordinary circumstances" that warrant a stay. *Ruckelshaus*, 463 U.S. at 1316 (citing *Graves*, 405 U.S. at 1203).

Carefully devising a remedial schedule to afford the State the option to propose a remedial plan of its own in the first instance in no way constitutes a "command" to the State to implement a new map, State Br. at 19. Rather, it manifests respect for federalism principles articulated by this Court in *Wise v. Lipscomb*, 437 U.S. 535 (1978), namely, that "it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." App. at 294 (citing *Wise*, 437 U.S. at 540). The Panel "conscientious[ly] appli[ed]" this principle, *Graves*, 405 U.S. at 1204, and provided the State with an opportunity at the outset of remedial proceedings to produce its preferred plan, which could then be implemented as a remedy if it cured the constitutional violations. An opportunity to set the agenda for the remedial process is not an irreparable injury.

To the extent that Applicants elect to expend "time and legislative resources negotiating a map," State Br. at 21, that is their choice. They have not established that voluntarily choosing to do so constitutes irreparable harm. Such an "inconvenience" is "not so great as to warrant a stay." *Bellotti v. Latino Political Action Comm.*, 463 U.S. 1319, 1320 (1983) (Brennan, J., in chambers). In any event, a remedial proposal can be produced in the ordinary course of legislative activity in Ohio. No emergency sessions will be required to pass a remedial map. Ohio's

General Assembly is in session year-round and has numerous sessions in its calendar from now until June 14, including dates held in reserve. *See* The Ohio Legislature: 133rd Assembly: Session Schedule, https://www.legislature.ohio.gov /schedules/session-schedule (last visited on May 19, 2019).

Moreover, the State's remedial proposal need not be drawn from scratch. Pursuant to Applicants' own request, Plaintiffs have already submitted a Proposed Remedial Plan, disclosed in discovery and tested at trial, that could be used as a starting point. App. at 89–93. As the Panel found, the Proposed Remedial Plan follows traditional redistricting criteria and satisfies the two particular interests that Applicants asserted at trial: avoiding incumbency pairing and protecting prior district cores. *Id*. The State possesses a copy of the digital map file of the Plan from discovery, and can of course modify it as it chooses.

Contrary to the State's representation, it is not "virtually impossible" for the State to know how to draw a constitutional map. State Br. at 22. Not drawing a partisan gerrymander is straightforward. The challenged map was drawn with the overwhelming intent to cement an enduring advantage in favor of Republicans, jettisoning traditional redistricting criteria in the process. App. at 5–27. So long as the State's proposed remedial map is drawn without that improper intent, it would pass muster. Moreover, this Court's precedents provide the State with examples of permissible goals in districting, including "avoid[ing the] pairing of incumbents," "achiev[ing] a rough approximation of the statewide political strengths of the

Democratic and Republican parties," and "keep[ing] intact political subdivisions." App. at 168 (citing decisions).

The absence of irreparable injury is underscored by the fact that the State's map-drawing exercise is wholly optional. In short, the only things that will happen between now and the end of the Court's term is the selection of three mutually agreed-upon candidates for special master; briefing on Plaintiff's proposed plan; and, should the State choose, the proposal of a new plan by the State. None of this amounts to the irreparable injury that is a necessary predicate for a stay, and therefore, the Court should deny a stay on this ground alone.

B. The Balance of Equities Weighs Heavily Against Applicants' Requests for a Stay.

"Before issuing a stay, '[i]t is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087. Here, denial of a stay would simply mean that remedial proceedings may commence, to ensure that a remedy can be installed before the State's asserted deadline of September 20, 2019. While allowing remedial proceedings to continue causes the State no irreparable injury, delaying the remedial process has the real potential to cause irreparable harm to Plaintiffs, by creating a situation in which, once remedial proceedings re-commence, the State will insist that there is insufficient time to implement a remedial map. A stay could thus prevent a remedial map from being implemented in time for the 2020 elections, and therefore

cause Plaintiffs and Ohio voters once again to suffer the same constitutional violations that brought them to court in the first place.

The Panel's remedial schedule protects the interests of all parties and the public by ensuring that a constitutional remedial map could be implemented in time for the State "to fulfill the administrative duties and obligations associated with preparing for the 2020 congressional election." App. at 294 (citing R.185-1 (Wolfe Decl. at 2)); *see also* State Br. at 23. The Panel's schedule aims for a final resolution by late 2019 precisely to avoid what this Court noted in *Purcell v. Gonzalez*; namely, that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. 1, 4–5 (2006).[5] The Panel's respect for the time that election administrators, candidates, and voters need to adapt to new district lines reflects a sound exercise of equitable discretion that should not be disturbed.

A stay would jeopardize the parties' rights to a full and fair opportunity to be heard on the various issues that may arise in the course of remedial proceedings. The remedial schedule reflects a balance between affording the State a full-throated

[5] The State claims that if a remedial map is ordered, "voters of Ohio would have to vote under at least three different congressional district maps in three elections." State Br. at 22–23; *see also* Int. Br. at 37–38. But this would be true with any redistricting challenge brought before decennial redistricting. Given decennial redistricting, voters already have to vote under two different district maps in two elections. Surely, voters should not be forced to vote under an unconstitutional map simply because of conjecture that voters would be confused by a remedial map, State Br. at 22–23, or an unsupported assertion that voters are "acclimated" to an unconstitutional one, Int. Br. at 37. Whatever confusion the State speculates has been caused by this litigation pales in comparison to record evidence of the widespread confusion among voters as a result of the senseless district boundaries of the challenged map that slice and dice neighborhoods and communities in ways that bear no relation to traditional districting principles. *See* App. at 31–38, 84.

opportunity to proffer its preferred remedial map, *see supra*, while also ensuring that a final constitutional map can be put in place in time for the 2020 elections.

The remedial process affords all parties a full and fair opportunity to be heard on the propriety of any remedy. The schedule provides for the parties to confer on which special master candidates to propose, App. at 296, and to brief the virtues and vices of any and all maps drawn by the special master, *id*. at 297. The parties are also given a full opportunity to brief whether Plaintiffs' Proposed Remedial Plan could be adopted. *Id.*

In short, the Panel's remedial order is "narrowly drawn to effectuate its decision with a minimum of interference with the State's legislative processes, and with a minimum of administrative confusion in the short run." *Graves*, 405 U.S. at 1204. As such, it "is entitled to a presumption of validity." *Id*. at 1203. A stay of the Panel's order would risk depriving Plaintiffs and Ohio voters of a remedial map that addresses the constitutional violations.

Finally, contrary to Applicants' assertions, State Br. at 5–6; Int. Br. at 10, the passage of a redistricting ballot measure in Ohio ("Issue 1") does nothing to alter the equitable calculus. Issue 1 has no bearing on the 2020 election, the election for which the remedy is currently sought. Issue 1 allows partisanship to be used in the districting process without defining a limit. Ohio Const. Art. XIX §§ 1(C)(3)(a); 1(F)(3)(a). Moreover, it leaves ultimate responsibility for the redistricting process with the majority party, which can enact its own map without any minority party buy-in if the other processes break down. *Id.* at § 1(F)(3). Without constitutional

constraints, there is a substantial risk that partisan gerrymandering will continue unabated, and likely worsen. App. at 154–55 ("Experience has shown that legislators are unlikely to act as neutral umpires in this context. Judges, however, play precisely that role. Rather than decide who wins an election in these cases, the courts' role is to ensure that an even playing filed, just as courts have done with other forms of gerrymandering.").

II. THE PANEL'S DECISION WAS NOT ERRONEOUS.

Applicants have also failed to establish that it is likely that "a majority of the Court will conclude that the decision below was erroneous." *Ind. State Police Pension*, 556 U.S. at 960. The Panel followed the Court's precedent and the reasoning of its sister three-judge panels; Applicants barely attempt to dispute the legal reasoning of the Panel. Rather, they attempt to substitute their own credibility assessments and versions of the facts for those found by the Panel. But they have not shown a single finding to be clearly erroneous. They certainly have not satisfied their heavy burden of establishing that they are entitled to the extraordinary remedy of a stay pending appeal.

A. The Panel Ruling on Justiciability Is Consistent with this Court's Precedent.

In determining that Plaintiffs' claims are justiciable, the Panel followed this Court's decision in *Davis v. Bandemer*, 478 U.S. 109, 113 (1986) and applied the "political question" factors identified in *Baker v. Carr*, 369 U.S. 186, 217 (1962). App. at 141–49; *see also generally* App. at 139–165. The Panel focused in particular on the two primary factors under the *Baker v. Carr* test: (1) textual commitment of

an issue to one of the political branches; and (2) an absence of judicially manageable standards. *Id*. at 141. The Panel found that the *Baker* factors did not bar judicial review. *Id*. at 141–49.

First, with respect to whether partisan gerrymandering claims are textually committed to another branch, the Panel followed this Court's guidance that redistricting implicates important constitutional rights, and observed that "[t]he right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article 1." App. at 142 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964)); *see also* App. at 143 ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote, or . . . the freedom of political association." (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986))); App. at 165 ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." (citing *Reynolds v. Sims*, 377 U.S. 533, 566 (1964))).

Second, the Panel found that standards to address partisan gerrymandering claims are judicially manageable, as illustrated by the unanimous judgment of four three-judge panels in recent cases. App. at 148 (citing recent federal partisan gerrymandering cases). The Panel found that these "federal courts . . . have converged considerably on common ground both in establishing standards for assessing a redistricting plan's constitutionality and for evaluating partisan effect."

Id. Within the legal framework used by the Panel and sister panels, statistical metrics serve as *evidence* of the elements of the underlying claims, just as in other voting rights cases. *Id.* at 152–53 (citing measures for population deviation used in malapportionment cases, and multiple measures for racially polarized voting and compactness used in Voting Rights Act cases); *see also id.* at 149 (citing Voting Rights Act cases).

The Panel thus joined four other federal three-judge panels in finding judicially manageable standards for partisan gerrymandering. *See League of Women Voters of Mich. v. Benson*, No. 2:17-cv-14148, 2019 WL 1856625, at *27 (E.D. Mich. Apr. 25, 2019); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 513 (D. Md. 2018); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 929 (M.D.N.C. 2018); *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016).

B. The Panel Properly Found that the State Violated the Equal Protection Clause.

The Panel properly found that the challenged districts dilute the votes of Democratic voters because of their political affiliation in violation of the Equal Protection Clause. App. at 167 ("Partisan gerrymanders violate equal protection by electorally disadvantaging the supporters of the party that lacked control of the districting process because of their support of that party."). The Court has long recognized that the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555; *cf. Karcher v. Daggett*, 462 U.S. 725, 748 (1983) ("If [district lines] serve no purpose other than to favor one segment—

whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.").

The Panel adopted a three-part test to assess whether a redistricting process diluted the disadvantaged party's vote in violation of the Fourteenth Amendment: "(1) a discriminatory partisan intent in the drawing of each challenged district and (2) a discriminatory partisan effect on those allegedly gerrymandered districts' voters." App. at 167. "Then, (3) the State has an opportunity to justify each district on other, legitimate legislative grounds." *Id.* The Panel's standard is consistent with tests adopted by this Court in other contexts. For the intent prong, the Panel adopted the more restrictive "predominant-purpose standard" from this Court's racial gerrymandering case law. App. at 169–70 (citing *Miller v. Johnson*, 515 U.S. 900, 911 (1995), for the predominant factor standard); *see also* App. at 170–71 (discussing apportionment cases as examples of "when partisanship predominates, partisanship is not a legitimate districting criterion"). The Panel also looked to this Court's equal protection jurisprudence to identify what types of "direct and indirect evidence" are relevant to this inquiry. *Id.* at 172–73 (citing this Court's racial discrimination and racial gerrymandering case law). As to the effect prong, *see id.* at 173–75, the Panel noted that a plaintiff must show a "consistency of results" across various metrics, which here was "bolstered by evidence showing that the

partisan bias that the plan engendered was durable" over time, *i.e.*, "the plan entrenched the favored party in power." *Id.* at 174.

C. The Panel Properly Found that the State Violated Plaintiffs' Rights Under the First Amendment.

Applying this Court's long settled First Amendment precedents, the Panel identified two distinct First Amendment injuries from the challenged map: (1) vote dilution and (2) associational harm. It held that the First Amendment vote dilution claim mirrors the Equal Protection claim, as the dilution was undertaken "because . . . of the[] political views" of the supporters of the disfavored party. *Vieth v. Jubelirer*, 541 U.S. 267, 314–15 (2004) (Kennedy, J., concurring in the judgment).

The "associational harm of a partisan gerrymander is distinct from vote dilution." *See Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring). In assessing this associational claim, the Panel again relied on well-settled First Amendment precedent. This Court has consistently recognized that "the First Amendment protects 'the freedom to join together in furtherance of common political beliefs.'" *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (quoting *Tashjian*, 479 U.S. at 214). And this associational right is linked to the right to vote. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

The Panel recognized that not all election laws "impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." App. at 264–65 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983)). It applied the test articulated in *Burdick v. Takushi*, and weighed "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

Amendments" against the State's interests. App. at 265 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

This Court has a long history of applying the *Anderson-Burdick* test when considering laws that regulate the right to vote. App. at 265. The Panel determined that the substantial burden on Plaintiffs' First Amendment associational rights outweighed the State's asserted interests. App. at 270–84. Applicants have not shown that the Panel's application of that precedent here was erroneous.

D. The Panel Properly Found that the State Exceeded Its Powers Under Article I.

The Panel also correctly concluded that Ohio's partisan gerrymandering violated Article I of the Constitution. As this Court has stated, "the power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote, or . . . the freedom of political association." *See, e.g.*, *Tashjian*, 479 U.S. at 217 (citing *Wesberry*, 376 U.S. at 6–7). "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995)). The Panel correctly concluded that a State "exceeds its authority under the Elections Clause if the State violates the First and/or Fourteenth Amendment." App. at 287 (citing *Tashjian*,

479 U.S. at 217). Applicants have not demonstrated that the Panel's conclusion was erroneous.

E. The Panel Followed Well Established Precedent in Rejecting Laches.

The Panel's rejection of Ohio's laches defense also follows this Court's well-established precedent. Laches does not apply where there is a continuing constitutional violation. "Where the challenged violation is a continuing one, the staleness concern disappears." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). Thus, in *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*, this Court permitted an Equal Protection challenge to a local district to proceed nine years after the district's creation, 429 U.S. 651, 653 (1977), over the dissent's objection that the case should be barred by laches, *id.* at 656 (Rehnquist, J., dissenting).

F. The Panel Properly Found that Plaintiffs Have Standing.

While the State does not dispute the Panel's finding that Plaintiffs have standing, Intervenors claim error but are flatly wrong. Int. Br. at 19–22. The Panel followed this Court's clear directive in *Gill* to determine that the Plaintiffs had standing. Unlike the trial presentation in *Gill*, 138 S. Ct. at 1931–32, here Plaintiffs "meaningfully pursue[d] their allegations of individual harm," *id.* at 1932. As required by *Gill*, standing for Plaintiffs' vote dilution claim was established on a district-by-district basis with evidence demonstrating that Plaintiffs' districts had been cracked or packed, causing Plaintiffs' votes "to carry less weight than it would carry in another, hypothetical district." *Id.* at 1931; *see* App. at 115–34. And for

their First Amendment associational injuries, Plaintiffs established standing by proving that they were "deprived of their natural political strength by a partisan gerrymander." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see* App. at 134–39. These same dilution and associational injuries give rise to standing for Plaintiffs' Article I claim. App. at 139.

Contrary to Intervenors' assertion, Int. Br. at 19, the Panel determined that the packing and cracking demonstrated by Plaintiffs was not caused by the natural political geography of the state. App. at 190–92, 258–61. Furthermore, Intervenors ignore *Gill* in attempting to dismiss Plaintiffs' injuries as generalized grievances. Int. Br. at 20. Although Intervenors selectively quote isolated portions of Plaintiffs' testimony below, *id.*, they fail to confront the fact that Plaintiffs established precisely what *Gill* requires: that "the particular composition of the voter's own district . . . caus[ed] his [or her] vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931.

G. The Panel's Factual Determinations Were Not Clearly Erroneous.

The State wisely does not challenge the Panel's factual findings as clearly erroneous. Intervenors, by contrast, appear to dispute some of the Panel's factual conclusions, although they fail to identify any particular finding as "clearly erroneous." This Court affords great deference to lower courts when reviewing factual findings, especially in cases involving intentional discrimination. The Panel's factual determinations can be reversed only if they are "clearly erroneous."

City of Bessemer City, 470 U.S. at 573 ("Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): 'Findings of fact shall not be set aside unless clearly erroneous . . . ."); *see also Hernandez v. New York*, 500 U.S. 352, 364 (1991) (collecting cases and finding that "intent to discriminate as a pure issue of fact, subject to review under a deferential standard"); *Rogers v. Lodge*, 458 U.S. 613, 622–23 (1982) (clearly-erroneous standard applies to review of finding that at-large voting system was maintained for discriminatory purposes). Under this standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *City of Bessemer City*, 470 U.S. at 573–74. Intervenors have failed to demonstrate that any of the Panel's findings were clearly erroneous.

CONCLUSION

There is no exigency requiring a stay. Allowing remedial proceedings to begin will not cause irreparable harm to Applicants, while staying those proceedings risks inflicting irreparable harm on Plaintiffs and Ohio voters. No stay is necessary for the Panel to incorporate into its proceedings any further guidance from this Court's decisions in *Rucho* and *Benisek*.

The Court should deny Applicants' motions to stay.

Respectfully submitted,

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