No. 18A1166

IN THE
SUPREME COURT OF THE UNITED STATES

STEVE CHABOT, et al.,

Applicants,

v.

OHIO A. PHILIP RANDOLPH INSTITUTE, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

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

It is undisputed that Ohio's 2011 congressional districting plan, which the district court struck down as unconstitutionally discriminatory against Democratic Party interests, passed the Ohio legislature with the support of half the Democratic members. It is further undisputed that this plan divided the political cost of Ohio's loss of two congressional seats evenly between the major parties by pairing "two Republican representatives and two Democratic representatives." App-14. The legislature chose to maintain district 11 as a majority-minority district as it had been since the 1960s, App-16, and to create a new minority opportunity seat in Franklin County, which had the largest population growth in the State, so that another African American member might join Ohio's congressional delegation, App-17–18. This was a priority of the Democratic members of the legislature. Stay Mot. 7–8.

Those points of agreement on what the district court called the "major features" of the 2011 plan, App-14 (cleaned up), indicate that, even if political redistricting violated the Constitution, the district court's test has identified a false positive—a case where, the merits of the political choices aside, federal judicial relief is inappropriate. After all, "[t]he use of purely political considerations in drawing district boundaries is not a 'necessary evil' that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, pure politics often helps to secure constitutionally important democratic objectives." *Vieth v. Jubelirer*, 541 U.S. 267, 355 (2004) (Breyer, J., dissenting). As such, "boundaries are not, and should

not be, 'politics free.'" *Id.* at 360. But "politics free" is the rule applied below, and Respondents do not suggest otherwise.

Instead, Respondents ask this Court to deny a stay because the district court was "closer to the facts." Opp. 11 (quotations omitted). This is too clever by half. The federal courts' quest for manageable standards to distinguish constitutional from unconstitutional partisan redistricting cannot be resolved by recharacterizing the question as one of fact. Here, the critical facts are as plain as day, and most are undisputed. The question is whether they rise to the level of a constitutional violation—and what standard applies to that question. Respondents, for example, do not dispute that half of the Democratic legislators voted for the plan, but ask the Court to afford this fact no legal significance. Opp. 8. The Court is unlikely to agree with this and the many other legal premises of the decision below, which upset the "series of compromises" and the "truce"—however "uneasy"—between the "parties seeking political advantage." *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting).

This Court is therefore likely to reverse—if not vacate as a matter of course once it issues its decisions in *Rucho* and *Benisek*—and that matters because irreparable harm is certain without a stay. Respondents ask this Court to ignore its own precedent of staying partisan-gerrymandering actions on markedly similar time frames and to overlook the reality of what the district court's remedial process entails. The district court gave the legislature one, and only one, chance to redistrict, and it must do so by June 14 or lose its opportunity. Asking it to do so now, before this appeal is decided, is asking it to fly blind as to the applicable law; to risk prejudicing

its appeal; to potentially hamstring its ability to return to the 2011 plan if it is victorious; and, if nothing else, to waste its time on a difficult legislative activity likely to prove entirely unnecessary.

And Respondents are likely to experience no counterbalancing harm since they concede no plan will be implemented until after *Rucho* and *Benisek* are issued. Once that occurs, the district court's injunction will likely be vacated as a matter of course, and the court will be required to return to the question of liability. Thus, it is unlikely that Respondents will see any of their desired relief until later this summer at the earliest, so the hurry they advocate is likely to prove futile. The Court should stay the injunction below pending appeal.[1]

ARGUMENT

I. The Court Is Likely To Note Probable Jurisdiction and Reverse or Vacate the Decision and Injunction Below

Respondents' decision to leave the first element, probability of success, for last is no accident. Opp. 20–28. Their task in defending the district court is a tall one. This Court is currently considering the most fundamental aspects of this area of law—including whether a partisan-gerrymandering claim even exists. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Thus, Respondents' assertion (at 20) that the district court

[1] As the Applicants' stay briefing explained (at 4, 19), this Court can treat their stay application as a jurisdictional statement and vacate the injunction below to swiftly resolve this appeal once *Benisek* and *Rucho* are issued. Respondents lodge no objection to that approach, and their demand for urgency suggests agreement in principle.

"followed this Court's precedent" carries no substance. It could not have done so because there is precious little precedent to follow. And what *does* exist—e.g., *Vieth*'s rejection of a predominance test—the district court either ignored or declined to honor. *See, e.g.*, App-167–73. Similarly, Respondents' assertion (at 20) that the district court's opinion enjoys the support of "sister three-judge panels" means even less when those opinions are currently stayed; two are under review in this Court; and none, of course, are binding here. This element is satisfied.

A. Respondents Ignore the High Likelihood of Summary Vacatur and Remand as a Matter of Course

Respondents have nothing to say of the clearest reason the Applicants are likely to succeed, which is that this Court will likely, as a matter of course, vacate and remand the district court's injunction after its *Rucho* and *Benisek* decisions are issued. That will require the district court to return to the drawing board on the question of liability, make new findings as necessary, and apply what this Court declares to be the law to this case in the first instance. That would be success on the merits, and the first element is met on this basis alone. Respondents' failure to respond to this point is telling.

B. Respondents Fail To Defend the District Court's Many Legal Errors

Respondents defend the district court's decision simply by reciting (at 22–27) the legal tests it adopted and calling (at 27) everything else a challenge to "factual conclusions," which they say command this Court's deference. But whether a standard is the right standard, whether it is manageable, and *how* it applies are all

quintessential legal questions. It cannot be that whether or not the district court acted "in the manner traditional for English and American courts," *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion), is beyond this Court's ability to review. But that is the implication of Respondents' approach.

1. As to standing, Respondents assert vaguely (at 26–27) that they established standing because of a showing of "packing and cracking." But Respondents do not explain how "packed" Respondents have suffered a redressable injury from having too easy a time electing their preferred representatives. Stay Mot. 19–20. Nor do they dispute that *their own remedial map* places many Respondents in safe Republican districts where they are unlikely to be able to elect their preferred candidates of choice (i.e., Democratic candidates). Stay Mot. 19–22. That is no different from the scenario this Court addressed in *Gill*, where one plaintiff's "own demonstration map resulted in a virtually identical district for him," since it "has not affected [his] individual vote for his Assembly representative." 138 S. Ct. at 1933.

The district court made no contrary factual findings, and Respondents sidestep this by asserting (at 27) that "the Panel determined that the packing and cracking demonstrated by Plaintiffs was not caused by the natural political geography of the state." This is misleading. The pages Respondents cite, App-258–61, are pages where the district court had *shifted the burden to the defense*. That is, it did not find that "packing and cracking…was not caused by the natural political geography of the state." Rather, it found that the State and the Applicants had not shouldered the burden of disproving this presumption of causation. But it was *Respondents'* burden

to establish standing, not the Applicants' burden to disprove standing. Moreover, the other pages Respondents cite, App-190–92, involve *statewide* showings of harm, which are precisely the types of evidence found insufficient in *Gill*. This analysis is unlikely to survive this Court's scrutiny.

2. As to justiciability, Respondents simply parrot (at 20–21) the standards discussed in *Baker v. Carr*, 369 U.S. 186, 217 (1962), and call them met. But, as the Applicants' stay application explains (at 24), a test of "intent," "effect," and "lack of justification" answers none of the questions raised in *Vieth*—in particular, the question of when partisan intent goes too far. And, indeed, the test looks suspiciously like at least one test *Vieth* expressly rejected. *See, e.g.*, *Vieth*, 541 U.S. at 295–98 (plurality opinion) (rejecting intent-effect-justification standard); *id.* at 308 (Kennedy, J., concurring) ("The plurality demonstrates the shortcomings of the other standards that have been considered to date."). Respondents have no response.

What's worse, they fail to indicate what plan will ever survive the district court's test. As the Applicants' stay motion observes (at 24), no plan to date has been upheld under the district court's test. The apparent result in application is that no consideration of politics is permissible. That view has gained little traction in this Court. *See, e.g.*, *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting). Moreover, Respondents ignore the necessary implication of their legal theory as applied to this case—that the Ohio legislature, which sought to split the apportionment burden evenly among the parties, was constitutionally required to burden only Republican political interests, pairing or otherwise harming only Republican incumbents—since its choice of an

even split of incumbents was deemed unconstitutional. That proposed rule is patently untenable. Stay Mot. 26. All of this gives cold comfort to anyone concerned that partisan-gerrymandering claims, if recognized, "would commit federal and state courts to unprecedented intervention in the American political process" and "risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U.S. at 306–07 (Kennedy, J., concurring). Thus, Respondents' assertion (at 21) that this is no different from other federal-court review of state election laws rings hollow. *See Vieth*, 541 U.S. at 290 (plurality opinion) ("Our one-person, one-vote cases have no bearing upon this question, neither in principle nor in practicality.").

3. On the merits, Respondents have no answer to the Applicants' observation that the district court's predominance test has been rejected. Stay Mot. 29–30. Respondents concede (at 23) that the district court applied a predominance test but fail to explain how that was an option when five Justices in *Vieth* rejected it. Respondents simply recite the test and call it justified because the district court "looked to this Court's equal protection jurisprudence." Opp. 23. It may have, but it misinterpreted that jurisprudence. For strict scrutiny to apply as it does in racial-discrimination cases, a suspect classification must be identified, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), and at least six Justices held in *Vieth* that political considerations are not inherently suspect, *Vieth*, 541 U.S. at 285 (plurality opinion); *id.* at 313–14 (Kennedy, J., concurring); *id.* at 360 (Breyer, J., dissenting). Applying what amounted to strict scrutiny here was legal error.

Equally unavailing is Respondents' reliance on free-speech, free-association, and Article I principles. For one thing, these provisions were before the Court in *Vieth*, *see* 541 U.S. at 305–06 (plurality opinion), *id.* at 314 (Kennedy, J., concurring), so the tests *Vieth* definitively rejected are no more available under these provisions than under the Equal Protection Clause. *See also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 409 (2006). That all these arguments rise or (more likely) fall together is implicit in the district court's application of materially identical standards to all claims. App-262, App-270.

Besides, Respondents identify no burden on the right to speak or associate, and the district court found that "[t]here is no serious dispute that nothing about the current map categorically prohibits Plaintiffs from engaging in these activities." App-135. The right to succeed in elections is not like the right of a voter to access a ballot or of a party to control its internal affairs, so there is no burden requiring justification under the *Anderson/Burdick* framework. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203–04 (2008) (holding partisan motive does not amount to a burden the right to vote). Every eligible voter in Ohio can cast a ballot, every vote is counted, and parties are free to advocate and organize as they please. Neither Respondents nor the district court has cited any case even hinting that the right to elect one's preferred candidates is incorporated in these provisions.

4. Respondents' characterization (at 26–27) of all other aspects of this appeal as factual is unpersuasive. They ignore the fact that the district court made most of the critical factual determinations *after* it shifted the burden to the defense

to justify the supposed burden on constitutional rights. But this Court's precedent has required redistricting challengers to establish that an impermissible motive or effect explains the district lines as part of their *prima facie* case. *See Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 243 (2001). The district court here erred in demanding justification with the burden on the defense—requiring in effect that the defense prove that the district lines resulted from only permissible motives and imposed only permissible effects. That error was a legal error unlikely to withstand scrutiny on appeal.

In particular, the district court's order erroneously required the defense to justify the State's Voting Rights Act and minority-opportunity goals under a racial-gerrymandering strict-scrutiny standard and to establish that its incumbency-protection goals were "protected." Stay Mot. 32–34. But this Court's precedent supports both goals, holding that drawing a majority-minority district is a legitimate policy objective requiring no justification, *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993), as is the goal of incumbency protection, *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *White v. Wiser*, 412 U.S. 783, 791 (1973); *Vieth*, 541 U.S. at 358–61 (Breyer, J., dissenting) (conceding incumbency protection as legitimate purpose distinct from partisan entrenchment); *id.* at 351 n.6 (Souter, J., dissenting) (similar conclusion); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The factual findings on these points were rendered after an improper burden shift, which is a legal error. Moreover, the district court's holdings that these goals were illegitimate was nothing more than disagreement with the legislature's political and policy judgments.

Indeed, Respondents mischaracterize the district court's factual findings and overstate the degree to which facts are in dispute. It is not in dispute that a majority of Democratic legislators voted for the plan, that a 13–3 map was possible and rejected, that Democratic members had input, that the legislature intended to preserve a majority-minority district in northeast Ohio, and so on. For the most part, the question here is not whether some specific fact is true or not but whether the facts have any constitutional significance.

The 2011 plan does not violate any fair and manageable standard that might apply to partisan-gerrymandering claims. Democratic members were in the best position to know whether a redistricting plan discriminated against their perceived supporters or, instead, represented "an uneasy truce, sanctioned by tradition, among different parties seeking political advantage." *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting). Because it is highly unlikely that Democratic members would vote at high levels for a discriminatory plan, a challenger in a case like this should be required (at a minimum) to prove with particularity how this fact is consistent with a claim of partisan discrimination. The district court, however, gave this fact *no* weight at all. Similarly, the protection of incumbents of *both* parties cannot be deemed "too much partisanship" by anyone's standard, *Vieth*, 541 U.S. at 344 (Souter, J., dissenting), so a plan called biased in favor of Republicans that forced three Republican incumbents to run against other incumbents is also highly unlikely to be unconstitutional for partisan reasons. The 2011 plan resulted from the legislature's express *rejection* of more one-sided partisan plans proposed. Even if that choice

contained elements of self interest, it proves that gerrymandering is self-limiting. Stay Mot. 26. Altruism and self-sacrifice are not constitutional commands.

The district court was not entitled to delve further into the legislative process and second-guess each and every political decision as it did. Its very approach in doing so is the error, and it cannot be fairly characterized as an error of fact. All of the district court's legal principles were wrong, and a fair prospect of reversal on even one would justify a stay.

II. Irreparable Harm Will Result Absent This Court's Intervention, and the Balance of Equities Favors a Stay

A. Respondents fail to meaningfully address the irreparable harm asserted in this case. Their contention (at 13) that "enjoining the challenged map for use in future elections" presents no injury ignores this Court's express holding that "the [State's] inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)). For their contrary argument, Respondents rely on *Barthuli v. Bd. of Trustees of Jefferson Elementary Sch. Dist.*, 434 U.S. 1337 (1977) (Rehnquist, J., in chambers), a case about a school employment contract with no apparent factual relevance to this one—no reference to redistricting, elections, or even an enjoined state law. Respondents, meanwhile, ignore *Abbott*, a redistricting case where this Court, just two Terms ago, issued a stay of an injunction over a year before the next scheduled general election. *Abbott v. Perez*, 138 S. Ct. 49 (Sept. 12, 2017). Nor do they address this Court's issuance of a

stay in *Gill* on June 19, 2017. *Gill v. Whitford*, 137 S. Ct. 2289 (2017). These cases demonstrate in practice what this Court has expressly held: an injunction against a state statute is irreparable harm, justifying a stay.

The reliance interests of the entire general public on *this* type of state law render that harm particularly acute. The district court has not shown "respect for the time that election administrators, candidates, and voters need to adapt to new district lines," Opp. 18, when it has chosen to demand a new redistricting (either by the legislature or under its own powers) before learning whether its injunction will be upheld on appeal. Respondents' argument for immediate action is self-defeating, since the irreparable-harm inquiry assumes the Applicants will *succeed* on appeal, not that they will fail (as Respondents assume). By implementing a plan before the case is concluded, the district court has chosen to place the voters in a position where they will likely see one plan (the 2011 plan) then another (the 2019 plan) then another (the 2011 plan) and yet another (the 2021 plan) within a two-year period. This makes no practical sense and undermines the orderly elections process.

B. Respondents also ignore the independent harm resulting from the state legislature's choice "either [to] adopt an alternative redistricting plan…or face the prospect that the District Court will implement its own redistricting plan." *Karcher v. Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers). That, too, is irreparable harm. And it is imminent because the district court set a June 14, 2019, deadline for the state legislature to choose its poison. Immediate relief is essential to allow the legislature to defer legislative action (or inaction, as the case may be) until

after this Court has addressed the merits of the district court's decision—or at least until its forthcoming *Rucho* and *Benisek* opinions are issued.

Respondents cite nothing for their position (at 13–14) that no irreparable harm will result from this legislative dilemma, and they mischaracterize the choice the legislature faces. It is simply not true that "[b]eing given an option to act is no injury at all," Opp. 14, when the options presented are (1) undertaking the sovereign and entirely discretionary act of passing a law, *see New York v. United States*, 505 U.S. 144, 178 (1992), or (2) stepping aside to watch the court seize the sovereign power over that act for itself.

That is not an "option" in the ordinary sense of that term; it is fundamentally coercive, like the proverbial gun to the head. Redistricting is "primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). The district court was *required* to afford the Ohio legislature the first opportunity to craft a remedy because federal district courts must *always* "refrain[] from acting further until the…Legislature ha[s] been given an opportunity to remedy the" violation. *Id.* The legislature, then, is not merely faced with "[t]he mere exploration of remedial possibilities," Opp. 14, but with the task of enacting a plan to comply with an order whose validity it vehemently contests or to hand over its authority to a federal court to seize that task for itself. An "opportunity to set the agenda for the remedial process," Opp. 15, is indeed irreparable harm if failure to act results in federal-court seizure over that agenda.

Moreover, the legislature's choice is necessarily constrained and impacted by the outcome of the appeal, but the June 14 deadline does not allow the legislature to wait until the appeal has concluded to assess whether and how to exercise its redistricting "option." Accordingly, the legislature faces a strong incentive *not* to exercise its "option" at all, since doing so would create new legislation to govern future elections. *See Abbott*, 138 S. Ct. at 2324–30 (applying the ordinary good-faith standard applicable to all legislation to redistricting plan enacted to remedy violation of law). Respondents seem to believe that new legislation does not become law until the district court approves it. Not true. Although the district court maintains the power to review any new plan the legislature adopts, the new legislation will be the law setting new congressional districts for Ohio unless and until the district court finds that plan unconstitutional as well (and likely without any new trial over the new districts).

New legislation might risk mooting the appeal. And, even if it does not have that effect, the legislature, if successful on appeal, may still be required to enact yet further legislation to rescind the new map and revert to the 2011 plan. Furthermore, the legislature risks enacting a plan that satisfies one set of principles, based on its good-faith reading of the district court's order, only to find after appellate review that an entirely different set of principles governs. Thus, the "option" to redistrict *before*,

rather than *after*, the legislature learns of the ultimate resolution of fundamental yet-to-be-decided matters is not a meaningful one.[2]

This harm is irreparable. The legislature has one, and only one, shot at meeting the district court's standard. The district court did not signal that it would allow the legislature a second chance to redistrict *after* its appeal concludes; to the contrary, it expressly stated "[n]o continuances will be granted." App-295. The legislature, then, is forced to make its choices once and with limited information.

C. The balance of harms is entirely one-sided for the simple reason that vacatur and remand is almost certain once the *Rucho* and *Benisek* decisions are issued. Respondents offer their balance-of-harms analyses under the misimpression that, once *Rucho* and *Benisek* are issued, the remedial proceeding will press forward under their "guidance." Opp. 2. That is highly unlikely. Rather, once *Rucho* and *Benisek* are issued, this Court's prior practice indicates that it will likely *vacate* the district court's injunction and remand to allow the district court to assess in the first instance what parts of its 300-page liability opinion are impacted. Thus, the district

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[2] Respondents' blithe assertion that "[n]ot drawing a partisan gerrymander is straightforward," Opp. 16, is empty rhetoric. "[B]oundaries are not, and should not be, 'politics free.'" *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting). The legislature must make innumerable discretionary decisions to divide Ohio's millions of residents into sixteen equally populated districts. And it must do so in the wake of being told that its 2011 policy choices—such as compliance with the Voting Rights Act, creating a majority-opportunity district in Franklin County, and protecting incumbents of both parties—are unconstitutional because they ostensibly burdened Democratic Party political interests. How can the legislature know what policy choices are next on the chopping block until this Court rules?

court will be required to return to the *liability* question. In the meantime, the injunction will lose all force and effect, and the remedial proceedings will terminate, having no legal basis to proceed.

Thus, it is almost inevitable that, for any remedy to be implemented, the district court must address the merits of the case again and (if appropriate) reach another determination of liability and (if necessary) issue another injunction. All of those steps must occur *before* Respondents' asserted interest in a new map can be vindicated. Their description of harm to their interests is a description of what will occur in any event. What is causing the bottleneck here is not the remedial proceeding; it is the forthcoming *Rucho* and *Benisek* decisions, which must be consulted before this matter can reach a final judgment.

Accordingly, on the one side of the balance lie a set of harms Respondents will incur in any event, and on the other lie a set of harms that can easily be avoided by a stay. That is not a difficult choice.

CONCLUSION

The Court should stay the injunction below and remedial proceedings pending appeal. Alternatively, the Court should stay the injunction and remedial proceedings pending its forthcoming *Rucho* and *Benisek* decisions, treat this stay application as a jurisdictional statement, and vacate and remand the opinion and injunction below once those decisions are issued for further consideration.

Respectfully submitted,

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