No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEVE CHABOT, et al.,

Applicants,

v.

OHIO A. PHILIP RANDOLPH INSTITUTE, et al.,

Respondents.

EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

PATRICK T. LEWIS
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114

ROBERT T. TUCKER
ERIKA DACKIN PROUTY
BAKER & HOSTETLER LLP
200 Civic Center Drive,
Suite 1200
Columbus, OH 43215

EFREM M. BRADEN
Counsel of Record
KATHERINE L. MCKNIGHT
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
(202) 861-1504
mbraden@bakerlaw.com

Counsel for Applicants

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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:

This Court is considering two cases, *Rucho v. Common Cause*, jurisdiction postponed No. 18-422 (Jan. 4, 2019), and *Lamone v. Benisek*, jurisdiction postponed No. 18-726 (Jan. 4, 2019), that present the questions whether so-called "partisan gerrymandering" claims are justiciable and, if so, what standard applies. On May 3, 2019, the three-judge district court below—relying on the district-court *Rucho* and *Benisek* rulings—issued an opinion and injunction proving why these claims are not justiciable: the court invalidated Ohio's congressional redistricting plan as unconstitutionally "gerrymandered" against the Democratic Party even though *half of the Democratic members of the Ohio legislature voted for it*. In other words, the district court recognized a constitutional claim to vindicate partisan buyer's remorse.

The enjoined redistricting plan was a bi-partisan compromise designed to split Ohio's loss of two congressional seats evenly between the two major parties. Legislators agreed that one set each of Democratic and Republican incumbents would be paired and that, otherwise, the parties would maintain the same number of favorable seats as existed under the prior plan. Although the Republican-controlled legislature had the political power to eliminate two seats favorable to Democratic candidates and maintain the same number of Republican-friendly seats, it chose not to do so. Instead, the legislature protected incumbents of both parties and implemented redistricting goals, including preserving and increasing minority

electoral opportunity, that received widespread (and well documented) support on both sides of the aisle.

Ohio's plan, then, is an improbable candidate to be the first plan successfully and conclusively invalidated as a "partisan gerrymander" in the federal courts. That presumably is why the plaintiffs below ("Respondents" here) waited seven years to file this case, after they destroyed perhaps more than a dozen boxes of relevant documents in their possession and after multiple key fact witnesses had passed away. Only by turning a blind eye to facts obviously incompatible with its holding—including the extensive testimony of the assistant Democratic minority leader supporting the testimony of Republican witnesses—could the district court reach the baffling conclusion that Ohio's plan is unconstitutional. And the legal proposition it established, that the Ohio legislature was constitutionally obligated to place the entire burden of the reapportionment on Republican incumbents, is nothing short of mystifying.

The court inexplicably placed dispositive weight on quotidian political considerations and discussions, deeply flawed expert analyses, and the incidental partisan impact of non-partisan goals, such as Voting Rights Act compliance, that the district court simply disagreed with as a matter of policy. It ignored testimony of officials from both parties establishing Democratic input and support for key policy choices. The court addressed only some of the defense-side evidence and only *after* it shifted the burden to the defense to prove that the plan was not an unconstitutional partisan gerrymander. Indeed, it rejected non-partisan explanations for the map

simply because there was a "competing [partisan] narrative." App-256. That the lower courts have proven incapable of distinguishing partisan lust from bi-partisan compromise establishes beyond cavil that they are incapable of resolving these inherently political disputes. Accordingly, all the justiciability concerns expressed by multiple Justices of this Court for decades have now been realized in a lurid fashion.

And that is just one reason why this Court is likely to note probable jurisdiction and reverse. Another is simply that this Court's forthcoming decisions in *Rucho* and *Benisek* will necessitate prompt reconsideration of this case no matter what those decisions hold. The district court adopted and applied the test under review in *Rucho*, and no issue presented in this case could conceivably escape the impact of the Court's forthcoming decisions. It is improper for the district court to charge headlong into the remedial phase based on an analysis that is sure to require reconsideration in just a few weeks. Further, this Court's setting *Rucho* and *Benisek* for argument and its staying every federal-court partisan-gerrymandering injunction presented to it to date establishes a high likelihood of consideration on the merits and reversal. In short, no plan has conclusively been invalidated by the federal courts as a partisan gerrymander, and Ohio's is highly unlikely to be the first.

Meanwhile, the irreparable-harm element is established virtually as a matter of law, since the district court ordered the legislature to prepare a new redistricting map more favorable to the Democratic Party's perceived interests by June 14, 2019, and it has now subjected Ohio's elections apparatus to federal-court oversight. That irreparable harm weighs overwhelmingly in favor of a stay. By contrast, the harm to

Respondents from a stay will be *de minimis* because the decision below will almost assuredly be vacated as a matter of course once *Rucho* and *Benisek* are issued, and, in all events, further liability proceedings will be necessary before any remedial issues are ripe for consideration. There is time for a remedial map to be issued, if necessary, before the 2020 elections, and it would be pointless to proceed towards a remedy while this Court is still considering such elementary matters as standing and justiciability.

The Court therefore should stay the district court's injunction pending appeal. Alternatively, it should stay the injunction pending this Court's consideration of *Rucho* and *Benisek*, treat this application as a jurisdictional statement, and vacate and remand the decision below for further consideration once *Benisek* and *Rucho* are issued. *See, e.g.*, *Perry v. Davis*, 565 U.S. 1090 (2011) (treating stay applications as jurisdictional statements and noting probable jurisdiction).

DECISION UNDER REVIEW

The Applicants are intervenors below. Applicants Steve Chabot, Brad Wenstrup, Jim Jordan, Bob Latta, Bill Johnson, Bob Gibbs, Warren Davidson, Michael Turner, Dave Joyce, and Steve Stivers are Republican members of Ohio's congressional delegation. Applicants the Republican Party of Cuyahoga County, the Franklin County Republican Party, Robert F. Bodi, Charles Drake, Roy Palmer III, and Nathan Aichele are private persons who support Republican candidates for

Congress.[1] The Applicants seek a stay or injunction pending appeal of the three-judge district court's May 3, 2019 order, *Ohio A. Philip Randolph Institute v. Householder*, 1:18-cv-00357-TSB-KNM-MHW, ECF No. 262 (S.D. Ohio May 3, 2019). The order is reproduced at Appendix A. The district court's final judgment is reproduced at Appendix B. The Applicants first sought a stay in the district court, which denied the motion. The denial order is reproduced at Appendix C.

BACKGROUND

A. In 2011, the Ohio legislature enacted a congressional redistricting plan after the release of decennial census information. The census revealed that Ohio's population growth had stagnated relative to that of other states, and Ohio therefore lost two congressional seats in the decade's reapportionment. At the time of the redistricting, 13 members of Ohio's delegation were Republicans and 5 were Democrats. The ultimate plan, H.B. 369, passed with the support of 25 of 50 Democratic legislators, including a majority (21 of 40) of Democratic members of the Ohio House of Representatives.

The path to enactment was a winding political process. The plan began as H.B. 319, which passed both legislative chambers and was signed by Governor John Kasich but received little Democratic support. By law, that plan was set to govern Ohio's congressional elections. But the Ohio Constitution subjects redistricting

[1] The State of Ohio has appealed under the representation of the Ohio Attorney General and also seeks a stay pending appeal. This avoids whatever questions of standing might arise had the Applicants appealed and sought a stay alone.

legislation to a referendum process allowing Ohio voters to overturn it, and a referendum campaign was promptly commenced against H.B. 319. This threat spurred a return to the negotiating table. The lead negotiator for the Democratic Party was Representative Matthew Szollosi, the assistant House minority leader. Representative Szollosi testified in the case by deposition, which was admitted as evidence in the court below. The district court's 300-page decision does not cite that testimony even once.

As a result of these follow-on negotiations, dozens of changes were made to the districting legislation, including in areas of Ohio that vote overwhelmingly Republican. Representative Szollosi testified that he believed House Speaker William Batchelder was "sincere and motivated" to obtain Democratic support for a new redistricting plan. Szollosi Dep. 63:18–25. He also testified that at least six districts were made more politically competitive under the second plan. Szollosi Dep. 91:10–15. The revised map became H.B. 369, and (as noted) it received support from half of Ohio's Democratic legislators.

B. H.B. 369 was structured around several overarching policy goals that were the product of bi-partisan discussion and compromise.

First, Ohio House Speaker William Batchelder, based on bi-partisan input and with the support of U.S. House Speaker John Boehner, determined that the cost of reapportionment should be split evenly among the parties' respective incumbents. Because 13 Republican members and 5 Democratic members held office, this goal resulted in a plan with 12 Republican-friendly and 4 Democratic-friendly seats. That

purpose was accomplished in that the incumbents won reelection, carrying forward the 12–4 partisan split.

Witnesses affiliated with both political parties testified that proposals were circulated removing *two* Democratic-friendly seats, for a 13–3 plan. *See, e.g.*, Szollosi Dep. at 96:24–97:9. Republican Party employees in Washington advocated for that result, proposing that Franklin County be split four ways to achieve one-sided Republican Party gain. 5 Trial Tr. 232:7–21 (testimony of the lead consultant map-drawer). That proposal was rejected. Incumbents of both parties were protected, a single seat was removed from each party's historic region of support, and, otherwise, the plan protected the re-election prospects of members of both parties. To be sure, a third set of incumbents (one Republican, one Democratic) was paired in northeast Ohio because of severe population loss in that area and the legislature's bi-partisan goal to create a new Democratic-friendly district in the fast-growing Columbus region to replace it. The newly created seat was a safe Democratic seat, so the choice did not deprive Democratic voters of a district in which they would likely be able to elect their preferred representatives.

Second, there was broad bi-partisan support for two minority-community goals. One was to preserve district 11 as a majority-minority district, since a majority-minority district had existed in northeast Ohio since 1969. The other was to create a new minority-opportunity district (which became district 3) wholly in Franklin County. These goals were bi-partisan. Democratic draft maps contained districts of 50% black voting-age population or higher in northeast Ohio, and a prominent

Democratic staff member wrote in 2011 that the Democratic Party supported a new "Franklin County seat" that "maximizes minority voting strength." Int's Ex. 87. These districting decisions, by bringing minority voters into these districts, concentrated the Democratic vote share as a necessary incident. The districting decisions have not been challenged in this case as violating the Voting Rights Act or the Equal Protection Clause's guarantee of state racial neutrality.

Third, the legislature faced severe population constraints not only because Ohio lost two seats, but also because the State's population had shifted internally, resulting in severe malapportionment. Northeast Ohio saw population loss, and central Ohio saw gain. Given the border with Pennsylvania and Lake Erie and the minority-protection goal in district 11, the line-drawing in northern Ohio was severely constrained by the requirement of perfectly equal district population. *See Karcher v. Daggett*, 462 U.S. 725, 732, 736, 744 (1983) (invalidating a plan with .7% total deviation). These constraints and others had an overwhelming impact on the line drawing statewide, sending waves of changes across the plan.

In all of this, the record is brimming with evidence that Democratic proposals, at least between passage of H.B. 319 and H.B. 369, were heard and implemented, impacting district lines. *See, e.g.*, 5 Trial Tr. 182:11–19 (map-drawer testifying about adopting legislator's requests for the three districts in Mercer County), *id.* 182:20–25 (map-drawer testifying about proposal in district 16), *id.* 183:6–13, 183:17–24 (map-drawer testifying about request to include NASA Glenn Research Center in district 9 because of Representative Kaptur's involvement with the Armed Services

Committee).[2] Democratic and Republican proposals alike were heard and incorporated, Democratic and Republican incumbents alike were protected, and the General Assembly's lead consultant testified that drawing "Republican districts" was neither his directive nor his goal. *Id.* 158:7–18.

C. The Ohio legislature passed H.B. 369, and Governor Kasich signed it on December 14, 2011. The plan governed four election cycles and remained in effect for seven and a half years.

As early as 2013, the League of Women Voters began work on a possible legal challenge to H.B. 369. A related organization, the Ohio Campaign for Accountable Redistricting, made a public-records request to the Ohio legislature for redistricting-related documents and received as many as 15 boxes of material. Henkener Dep. 18:16–20, 21:20–22:3. The legislature's original versions were subsequently destroyed once the applicable record-retention periods lapsed, there being no pending or foreseeable related litigation. The boxes obtained under the public-records request eventually were transferred to the custody of the League of Women Voters as it planned a lawsuit. Turcer Dep. 28:21–29:2. Officials at the League took "the most helpful ones" and abandoned (and likely shredded) the remaining material. 1 Trial Tr. 185:15–186:3.

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[2] Although Respondents objected to virtually all evidence about the map-drawing process as impermissible hearsay, the district court agreed that evidence even of third-party statements is admissible to show the effect and intent of the speaker. *See, e.g.*, App-50 n.266, App-51 n.267. Intent was central to the district court's ruling.

Also between 2011 and 2018, five individuals with knowledge of the redistricting process—Bob Bennett, then-chairman of the Ohio Republican Party; Louis Stokes, a prominent former African American congressman from Cleveland; Tom Hofeller, a Republican redistricting consultant; Mike Wild, a Republican National Committee official; and Steven LaTourette, an Ohio congressman—passed away. These names were referenced repeatedly at trial and evidence of their intent and statements was the subject of numerous hearsay challenges.

On May 8, 2018, Ohio voters passed Issue 1 into law, which reformed congressional redistricting in the State. Beginning with the 2020 census, the constitutional amendment requires 60% support of each chamber and majority support of each political party for a congressional redistricting plan to become law. If the legislature fails, a commission will redistrict instead. If the commission fails as well, the legislature may pass a plan with a simple majority, but that plan will only be valid for four years. The League of Women Voters supported and campaigned for Issue 1.

D. Just over two weeks later, on May 23, 2018, the League of Women Voters, the Ohio A. Philip Randolph Institute, and individual residents of each of Ohio's congressional districts filed this Section 1983 lawsuit, claiming that H.B. 369 violates the Equal Protection Clause, the First Amendment, and Article I of the Constitution. A three-judge panel (Timothy Black, Karen Nelson Moore, Michael H. Watson, JJ.) was convened pursuant to 28 U.S.C. § 2284. The Applicants, Republican members of Congress, county political parties, and voters, were allowed to intervene

under Rule 24(b) as defendants. After the district court denied the Ohio Attorney General's motion to dismiss, the case entered discovery. The district court expedited proceedings to ensure resolution in time to award relief to Respondents before the 2020 elections.

Discovery involved production of hundreds of thousands of pages of documents (from parties and non-parties) and over 50 depositions (of parties and non-parties). Respondents, who self-identify as supporters of Democratic candidates and causes, obtained broad discovery into confidential, internal political communications and strategy of the Republican National Committee, the National Republican Congressional Committee, and the Republican State Leadership Committee. The Sixth Circuit rejected an interlocutory First Amendment-privilege challenge to that discovery. *Ohio A. Philip Randolph Inst. v. Larose*, --Fed. App'x--, 2019 WL 259431, at *8 (6th Cir. Jan. 18, 2019).

On January 8, 2019, the Ohio Attorney General moved for summary judgment, and the Applicants joined that motion. They argued, among other things, that no justiciable partisan-gerrymandering standard exists and that Respondents had yet to identify the standard or standards they expected to govern their claims. In response, Respondents advocated that the district court utilize the "three-prong test" adopted in *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 929 (M.D.N.C. 2018). District Ct. Dkt. 177 at 9. The district court agreed with Respondents. In denying the summary-judgment motion, it cited *Rucho* as a case that "established justiciable standards" in "the absence of direction from the Supreme Court." District Ct. Dkt.

222 at 7. The court also cited *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016), which this Court vacated, and *Benisek v. Lamone*, 348 F.Supp.3d 493, 513–15 (D. Md. 2018), which adopted materially identical standards. District Dkt. 8, 15. The court ruled that *Rucho*'s test would govern all Respondents' claims.

E. After an eight-day trial, the court issued a 301-page ruling finding the 2011 plan unconstitutional and enjoining its use in further elections.

First, the court concluded that the individual Respondents have standing to challenge their respective districts of residence for the simple reason that they assert that all districts are cracked or packed and have established residency in them. App-115–34. The court also concluded that all Respondents have standing under an associational theory founded on the concurring opinion of Justice Kagan in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). App-135 (quoting *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring)). It found that social-science metrics of partisan asymmetry measure "'the fortunes of political parties'" and therefore "suit" an alleged associational injury. App-235 (quoting *Gill*, 138 S. Ct. at 1933).

Second, the Court held that Respondents' claims are justiciable. It noted that "[t]he Supreme Court has held that partisan gerrymandering claims are justiciable" in *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), which "[t]he Supreme Court…has not overturned." App-140. It also concluded that, because one-person, one-vote claims are justiciable, the Constitution's delegation of authority over congressional elections cannot be deemed to weigh in favor of non-justiciability. App-142–43. The court found that the Article I delegation of supervisory authority to Congress over time, place,

and manner election regulations is insufficient to cure its concerns about partisan gerrymandering because "Members of Congress…are part of the problem." App-143. The court therefore held that "[t]he courts are the logical branch to turn to in the face of such legislative self-dealing…." App-144. The court found no problem in identifying manageable standards for Respondents' claims because "three-judge federal district court panels have established justiciable standards." App-148. The court again cited *Rucho*, *Whitford*, and *Benisek* (and its forerunner decision, *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596–97 (D. Md. 2016)) for this proposition.

Third, the court announced again that it would apply the standard identified in the *Rucho* district-court decision. App-167. The first prong of that test is an intent prong of "*Shaw* racial-gerrymandering claims." App-167–173. The court conceded that five Justices in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), rejected this standard, App-168–69, but applied it anyway because it viewed the only alternative to be the lower substantial-factor test applied in other racial-discrimination cases, App-170 ("We note…that if Plaintiffs meet the predominant-purpose standard, they necessarily satisfy the motivating-factor standard as well."). The second element (also applied in *Rucho*) is an "effect" prong, which references "the effect of diluting the votes of members of the disfavored party by either packing or cracking voters into congressional districts." App-173. This could be established by showing that "a map is extremely unresponsive or noncompetitive." App-174. Then, under the third element, "the burden switches to Defendants to present evidence that legitimate

legislative grounds provide a basis for the way in which each challenged district was drawn." App-175.

Fourth, the court purported to apply this standard and to identify a constitutional violation. As to intent, it found a "heavy use of partisan data," App-177, a "deep involvement of national Republican operatives," App-179, and statements indicating that "partisan outcomes were the predominant concern of those behind the map," App-183. The court also relied on various social-science metrics, such as partisan symmetry and the efficiency gap, to conclude that the plan is a partisan outlier. As to effect, the court found that 12 Republican and 4 Democratic members had consistently been re-elected, App-189, and that "an array of social-science metrics demonstrate[] that the 2012 map has a significant partisan bias in favor of Republicans in that the Republicans possess a major advantage in the translation of votes to seats compared to Democrats," App-191. The court found that "Democratic candidates would win half the seats with 55% of the [statewide] vote," which it characterized as "stark" "asymmetry." App-276.

The court agreed that "Defendants tell an entirely different tale of the redistricting process," but it did not address that tale until the third prong, after it had shifted the burden to the defense. App-237. It rejected the Applicants' incumbency-protection arguments, finding that the Ohio legislature's goals were "not incumbent protection as understood by Supreme Court precedent," App-239, and that the Ohio legislature should have made different incumbency-protection decisions, such as by making the incumbents' districts more competitive (and, thus, making

incumbents less likely to win) and preserving more senior members of the delegation, App-240–46. It rejected the Applicants' argument that Democratic input was obtained in the map-drawing process, even though it "credit[ed] this assertion" as a factual matter. App-247. The Democratic input was not sufficient, in the court's view, to "meaningfully impact[] the central intent of H.B. 319." App-247. Because their input did not change "the partisan balance of H.B. 369," the court deemed the effect of the negotiations "de minimis," App-247–48, even though the Democratic assistant minority leader—who led the negotiations for the Democratic Party—testified that he viewed the negotiations as yielding meaningful concessions.

The court then rejected the Applicants' assertions that Voting Rights Act and minority-representation goals impacted the plan's partisan outcomes. App-249–258. The court recognized that no Voting Rights Act or racial-gerrymandering challenge was lodged against any district in the 2011 plan. App-250. But it held that, even in the absence of such a challenge, "the State must still establish that it had a basis in evidence for concluding that the VRA required the sort of district that it drew." App-250. The court concluded that Ohio lacked a strong basis in evidence to satisfy this strict-scrutiny standard. App-250–51.

Fifth, with these findings made, the court concluded that the *Rucho* test was satisfied, and Respondents had established their Equal Protection, First Amendment, and Article I claims. The tests under each "essentially mirror[]" each other, App-262, so the findings translated across all claims. App-270 (finding that Respondents'

associational-rights claim "overlap[s] with our discussion of the vote-dilution claim"); App-270–88 (rehashing virtually identical findings across claims).

Sixth, the court rejected the Applicants' laches defense, "disagree[ing]" that "Plaintiffs' seven-year delay in bringing this case is unjustified and has prejudiced Defendants." App-288. The court noted, "[a]s a preliminary point" that "the nature of Plaintiffs' rights has been uncertain since the *Vieth* case." App-289. The court then found no prejudice, even though witness memories have dulled and key witnesses have died, because, "even if there were negotiations" with Democratic members, "the desire to achieve a 12–4 map was not negotiable." App-291. The court also posited that the laches defense might be "completely inapplicable" because it viewed laches as reaching only to "damages" actions, not claims seeking prospective injunctions. App-293 n.902.

Finally, the court enjoined Ohio from conducting further elections under the 2011 plan. App-294. The court set a deadline of June 14, 2019, for the Ohio legislature to enact a new plan "consistent with this opinion." App-295. The court further provided that, if the legislature is unsuccessful, it "may appoint a Special Master" and ordered "the parties to confer" and file a list of "acceptable candidates." App-296. The court also ordered further briefing on whether an alternative proposed in the liability phase would be an acceptable remedy.

F. On May 6, 2019, the Ohio Attorney General and the Applicants filed separate notices of appeal. The same day, they filed stay motions with the district

court. On May 9, the district court denied the motions. App-303–05. This Court now has jurisdiction over this case under 28 U.S.C. § 1253.

ARGUMENT

Though long on verbiage, the district court's decision posits a simple concept: the two major political parties need federal-court assistance to protect them from the political choices of their own representatives. Twenty-five of 50 Democratic state legislators supported the plan the district court found discriminatory against Democrats, and the necessary premise of the ruling is that federal judges know better than politicians what is in the politicians' best electoral interests. That remarkable holding is unlikely to stand. The district court could reach it only by adopting a dubious set of principles, many of which have already been rejected in this Court's precedent. Chief among them is the view that so-called partisan gerrymandering is no different from racial gerrymandering. That proposition has been foreclosed for well over a decade.

The stay factors are established here for a multitude of reasons. To obtain a stay pending appeal, "an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to [note probable jurisdiction]; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). This case easily qualifies. Indeed, every federal-court order striking down a plan as a so-called

partisan gerrymander appears to have been stayed either by this Court or the relevant district court. *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018); Order, *Benisek v. Lamon*, No. 1:13-cv-3233 (D. Md. Nov. 16, 2018), ECF No. 230; *Common Cause v. Rucho*, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018); *see also* Order, *Common Cause v. Rucho*, 1:16-cv-1026 (M.D.N.C. Sept. 12, 2018), ECF No. 155. A stay pending resolution of a direct appeal is a well-established remedy in redistricting cases. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 974 (2018); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers).

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

This case plainly satisfies the first two factors. The district court conceded that "the nature of Plaintiffs' rights has been uncertain since the *Vieth* case," App-289, and that it found liability in the "absence of clear guidance from the Supreme Court," App-170. That lack of guidance shows. But it is soon forthcoming because the Court is about to issue not one, but *two* partisan-gerrymandering decisions clarifying this area of law. Once those opinions issue, the Court will likely as a matter of course vacate and remand the lower court's decision and injunction for reconsideration. That

alone is a reason to stay the decision pending appeal, or at least until the *Rucho* and *Benisek* decisions are issued.[3]

Other reasons abound. "In particular, two threshold questions remain" unanswered: "what is necessary to show standing in a case of this sort, and whether those claims are justiciable." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). That these questions to this day remain unresolved means by definition that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious" for plenary review and "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth*, 558 U.S. at 190.

A. The District Court's Standing Analysis Is Unlikely To Survive Scrutiny on Appeal

For starters, the district court made errors in its standing analysis similar to those this Court criticized in *Gill*. The Court there faulted the challengers for failing to distinguish the situation of a "'naturally' packed" district from the situation of a district that "allegedly [had] been deliberately cracked." 138 S. Ct. at 1933. Here, the district court found each Respondent's allegation of living in an allegedly gerrymandered district sufficient to create standing, regardless of whether the Respondent could elect the Respondent's preferred candidate and regardless of the degree of difference under alternative configurations. The court found that multiple

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[3] Whether or not briefing is concluded on the Applicants' forthcoming jurisdictional statement, the Court can and should treat this stay application as a jurisdictional statement and summarily vacate during this Term. *See, e.g.*, *Perry v. Davis*, 565 U.S. 1090 (2011).

Respondents already reside in districts where they are able to elect Democratic members to Congress, and it failed to explain how an injury results from having too easy a time electing one's preferred candidates. App-118, App-122–125. An injury could only be realized by virtue of statewide results, but *Gill* held that this type of statewide harm does not present a cognizable standing claim. 138 S. Ct. at 1933.

The court's analysis of the "cracked" districts hardly fares better. The court found that several residents of districts represented by Republican members "would have" had "a higher likelihood of electing a Democrat" in alternative configurations, App-119–20 (quotations omitted), but the court did not find that this "likelihood" would realistically have materialized into an actual Democratic win. Nor could it have. Respondents' expert reports show that, in most districts, the ultimate result would have been the same in different district configurations, except with modestly different vote totals. For example, Respondent Teresa Thobaben currently resides in district 15, represented by Republican Steve Stivers, and under Respondents' alternative proposal, she would still reside in a safe Republican district. Pl's Ex. 91 at Ex. S. The same can be said of most individual Respondents. In fact, Respondents' alternative map would place one Respondent, Cynthia Libster, in a district with a *higher* Republican vote share than exists in her current district. *Id.*

All of that aside, Respondents' standing position fails for the separate reason that they identify no injury in fact from residing in a district represented by a member of another political party. The record reveals that this harm devolves inevitably to "generally available grievance[s] about government." *Lance v. Coffman*, 549 U.S. 437,

439 (2007) (per curiam). One Respondent (White) wants a representative who agrees with her on "healthcare reform, immigration, and unions." 1 Trial Tr. 113:8. Another (Washington) complains that his Republican representative does not share his views on the Affordable Care Act and reauthorization of Section 5 of the Voting Rights Act (Ohio has never been a Section 5 covered jurisdiction). 1 Trial Tr. 56:23–57:2. Another (Deitsch) wants a representative who comports with her view of "responsible government." Deitsch Dep. 18:24–25. Another (Libster) wants a representative who would have attended a League of Women Voters forum—that she herself did not attend. Libster Dep. 30:19–33:18. Another (Simon) agreed with his Republican representative that protecting schools from gun violence is a priority, and his representative even introduced a gun-violence bill in Congress, but they differed on details. Chabot Dep. 125:20–127:2, 127:15–129:14; 2 Trial Tr. 79:21–81:16. Yet another (Rader) would simply like to be "able to determine the outcome of an election." Rader Dep. 97:22–98:4. One Respondent (Nadler) candidly admits that the Republican representing his district was elected "fair and square." Nadler Dep. 40:25–41:15.

All of this illustrates why residency in a district represented by someone with differing political perspectives does not arise to "an invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Citizens disagree with each other and their representatives on all types of matters, in all ways, and to all degrees, and those disagreements can as easily occur within as between parties. For example, one Respondent (Harris) joined the lawsuit, even though he is

represented by a Democratic representative, because he wants a more moderate pro-business Democratic representative. Harris Dep. 16:25–18:20. That asserted interest, which is the logical conclusion of Respondents' standing and merits theories, necessarily conflicts with the interests of innumerable neighbors who want more liberal Democratic representatives—or Republican representatives. That is why this Court has long presumed that individuals receive adequate representation in Congress and state legislatures even from representatives who do not receive their vote. *Whitcomb v. Chavis*, 403 U.S. 124, 149–53 (1971). The district court's standing analysis runs contrary to that assumption.

The district court's alternative associational-standing theory is even less tenable. App-134–39. The court admitted that this theory is predicated on "'the fortunes of political parties'" and quoted *Gill*'s reference to such fortunes as supporting it. App-135 (quoting *Gill*, 138 S. Ct. at 1933). But *Gill* referenced the fortunes of political parties as *outside* judicial concern: "this Court is not responsible for vindicating generalized partisan preferences." *Gill*, 138 S. Ct. at 1933. That the district court's theory runs contrary to the core premise of *Gill* renders it, to put it mildly, vulnerable to reversal. The district court also relied on the *Gill* concurrence, but the *Gill* majority disclaimed any support for that concurrence and left this theory "for another day." *Id.* at 1931. At a minimum, the theory remains unendorsed, establishing a high likelihood of consideration and a fair prospect of reversal (since the Court could have endorsed the theory and declined).

B. The District Court's Justiciability Analysis Is Unlikely To Survive Scrutiny on Appeal

On justiciability, the district court's opinion is highly unlikely to survive scrutiny for the same reasons this Court has never found either a constitutional bar on political redistricting or a redistricting plan that violates such a bar. The Constitution vests political discretion over elections with the state legislatures and Congress, not the courts; there are no manageable standards for discerning which political considerations are right, which are wrong, and when a legislature goes "too far"; and the courts have no way to resolve these disputes without expressing disrespect for co-equal branches of government and usurping their constitutionally delegate policy choices. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (articulating political-question factors). These same arguments that justified plenary hearing in *Rucho* and *Benisek* apply here, and the district court's opinion and injunction prove their merits.

The district court's actions speak louder than its words. Set aside for one moment its arguments, and consider the case in context. The three-prong test applied in *Rucho* and in the decision below has now failed to differentiate a case like *Rucho*, where the legislature allegedly made "Partisan Advantage" an express redistricting criterion and sought to maximize the total number of one party's winnable seats, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 869–70 (M.D.N.C. 2018), from one like this, where the Ohio legislature sought and obtained bi-partisan compromise and crafted a plan that by all accounts yielded a less Republican-friendly split (12–4) than

was possible (13–3). That the test cannot differentiate such markedly different scenarios proves that it does not supply judicially manageable standards.

The court's test is doomed by its own bluntness. *Vieth v. Jubelirer*, 541 U.S. 267 (2004), rejected the test of *Davis v. Bandemer*, 478 U.S. 109 (1986), because "its application has almost invariably produced the same result"—i.e., the challengers lost every case. 541 U.S. at 279 (plurality opinion). The district court's standard is quickly creating the opposite scenario: not a single plan has survived. A Midas hand that turns every plan unconstitutional, finding each the most severe gerrymander ever, provides no more a manageable set of standards than one every plan passes.

This absurd result in practice proves what even a casual reading of the district court's opinion should make obvious in theory. A test of "intent," "effect," and "lack of justification" is "both dubious and severely unmanageable." *Vieth*, 541 U.S. at 286 (plurality opinion). How much intent is too much? What kind of intent? How much effect? What kind? How does a court discern the intent of a legislative body? How does the defendant disprove assertions of a legislative body's intent? None of this is clear, and the district court's purported resolution of all of these matters as factual, rather than legal, determinations only proves that wildly different applications will result across the courts.

Indeed, the district court proved itself incapable of handling the most basic questions. The court grudgingly conceded that "the Supreme Court has acknowledged that political considerations may sometimes have a place in redistricting." App-167. That is an understatement. *See, e.g.*, *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541,

551 (1999) ("[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering" (collecting cases)). But the court found Ohio's incumbency-protection goals not to qualify as "incumbent protection as understood by Supreme Court precedent." App-239.

That is, first of all, flat wrong. This Court's precedent expressly holds that states have an interest in "maintaining existing relationships between incumbent congressmen and their constituents." *White v. Weiser*, 412 U.S. 783, 791 (1973). More importantly, it misconstrues how this Court's opinions have treated politics in redistricting. They do not assume politics to be impermissible and carve out a few narrow, permissible exceptions; they rather assume all politics to be permissible and leave open the possibility that some narrow considerations might be identified as impermissible. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). The district court, however, did not attempt to answer the proverbial $64,000 question: how much politics is too much?

From this erroneous starting point, the district court erroneously rejected the legislature's political objectives as impermissible. For example, it found Ohio's incumbency-protection goal invalid because more incumbents were Republican than Democratic and because it disagreed with the legislature's choice of which incumbents to pair. App-239–46. But that is a political disagreement with a political branch of government. These choices do not involve some neutral "intent" standard; they usurp inherently political choices from the political branches constitutionally assigned to make them. The *Vieth* plurality warned of these precise problems. *See*

541 U.S. at 298 (plurality opinion) (observing that incumbency-protection efforts, conceded as legitimate by the *Vieth* dissents, would prove indistinguishable from other partisan goals). And the necessary consequence of this ruling is the bizarre principle that Ohio was legally obligated to protect only Democratic incumbents and place the entire burden of reapportionment on Republicans.

Similarly, the district court agreed that Democratic state legislators had input in the plan but found that input insufficient. App-247–48. But Democratic legislators were in the best position to know whether the implementation of their ideas resolved their concerns. The Democratic assistant minority leader testified that the alterations were meaningful and impacted district competitiveness, and half of the Democratic legislators voted for the plan. Judicial disagreement with these political judgment calls is entirely out of place. The district court arrogated political choices, assuming it was better situated to make them than even Ohio's Democratic legislators. As a result, it awarded a well-funded group of challengers a purely political victory.

Given the inherent unmanageability of the court's standard and its inherent political decision-making, it is unsurprising that the district court's rationale on justiciability was incoherent. For example, it rejected Justice O'Connor's observation in *Bandemer* that "political gerrymandering is a self-limiting enterprise," 478 U.S. at 152 (O'Connor, J., concurring in the judgment), because "technology makes today's gerrymandering altogether different from the crude linedrawing of the past," App-156–57 (quotations omitted). But, in the next breath, it found that the Ohio

legislature chose not to pursue a 13–3 Republican/Democrat partisan split, not out of selfless motive, but because "that split would result in more competitive elections for Republican candidates." App-257. In the court's own telling, partisan gerrymandering proved to be the very self-limiting enterprise Justice O'Connor described. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring in the judgment) ("In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat-risks they may refuse to accept past a certain point.").

Another of the court's rationales for justiciability was that state-level efforts to curb partisan gerrymandering do not mitigate the constitutional harm. App-163–65. But this assumes that gerrymandering is a constitutional harm and that the Constitution's delegation to the states is not itself the constitutional answer. And, again, the facts of this case cut against the court's logic. Respondents filed this action just three weeks after Ohio's voters adopted a sweeping congressional redistricting reform requiring bi-partisan support for all future congressional redistricting plans and super-majority legislative support or, alternatively, bi-partisan redistricting by a commission. The court's conclusion that courts are the "logical" forum for these issues failed even to address the fact that political responses are well underway. App-143–44. The referendum mechanism that incentivized further negotiations in 2011 undermines the district court's position as well.

The district court also reasoned that, in entertaining the partisan-gerrymandering claim, it was not "dictating political winners" because "*the voters* pick

the winners and losers in districts." App-154 (emphasis in original). But that, again, proves the futility of the entire enterprise: state legislatures *also* are not "dictating political winners" since, however the districts are drawn, "the *voters* pick the winners and losers in districts." *See Vieth*, 541 U.S. at 287 (plurality opinion) ("We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering….").

The bottom-line takeaway from the district court's 300-page opinion is that what a court does is right, and what a legislature does is wrong. The court was not shy to say as much, opining that "Congress is unlikely to fix partisan gerrymandering" because "Members of Congress…are part of the problem" and that "[t]he courts are the logical branch to turn to in the face of such legislative self-dealing." App-143–44. The overt disdain for a co-equal branch of government—aside from demeaning both branches—ignores that Congress and the state legislatures are the constitutionally prescribed bodies to regulate congressional elections. U.S. Const. Art. I, § 4 cl. 1. The court's disagreement is with the very Constitution it is charged with interpreting. *Gill* unanimously rejected the argument "that this Court *can* address the problem of partisan gerrymandering because it *must*." 138 S. Ct. at 1929. The district court's reliance on that very premise for its decision renders the entire opinion untenable and a strong bet for reversal.

C. The District Court's Legal Test Is Unlikely To Survive Scrutiny on Appeal

Even if partisan-gerrymandering claims were justiciable, the district court's test could not be adopted because it is foreclosed by binding precedent and unmoored from the Constitution. The court applied a predominant-intent standard even while conceding that five Justices of this Court rejected that standard in *Vieth*. App-168–69; *Vieth*, 541 U.S. at 286 (plurality opinion) (addressing and rejecting the district court's standard); *id.* at 308 (Kennedy, J., concurring) ("The plurality demonstrates the shortcomings of the other standards that have been considered to date."). When at least five Justices agree on a legal holding, even in different opinions, that holding is as binding as a majority opinion on the subject. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983). The district court's adoption of a legal standard rejected in this Court's precedent is an obvious legal error—a basis on its own for concluding that reversal is likely, even certain.

The district court's rationale appears to have been that the only alternative it had in mind, a substantial-factor test, was less stringent than a predominance standard and therefore the more logical choice of the two. App-170 ("We note…that if Plaintiffs meet the predominant-purpose standard, they necessarily satisfy the motivating-factor standard as well"). It is, of course, true that a substantial-factor test is more lenient than a predominance test, but this means the court was bound to reject *both* tests—since *Vieth*'s rejection of a predominance test impliedly foreclosed more lenient standards. The court instead was bound to adopt a more stringent test,

such as the sole-purpose test suggested in the lead opinion of *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006), which rejected a challenge to a plan drawn "with the sole purpose of achieving a Republican congressional majority" because that purpose did not impact "every line [the legislature] drew." *Id.* at 417.

The flaw with both a predominance and substantial-factor test is that they are predicated on cases alleging racial discrimination. But, as Justice Kennedy's *Vieth* opinion explained, "[t]hat courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here," since "[r]ace is an impermissible classification," whereas "[p]olitics is quite a different matter." 541 U.S. at 307 (Kennedy, J., concurring). Again, this view garnered five votes and bound the district court. *See* 541 U.S. at 285–86 (plurality opinion). The court ignored this ruling. A similar problem inheres in the district court's lack-of-justification element: this Court's precedent looks to the challenger to establish a claim of gerrymandering, *id.* at 313 (Kennedy, J., concurring), so shifting the burden to the defense on most of the key case questions (e.g., political geography, alternative intents) cannot be the right approach.

D. The District Court's Application of *Rucho* to the Facts of This Case Is Unlikely To Survive Scrutiny on Appeal

The district court's opinion is erroneous for the additional reason it applied the *Rucho* test in a legally indefensible manner. For starters, it attempted to measure partisanship in the enacted 2011 plan by comparing its political effect against that of alternatives that were governed by different criteria (e.g., as to population deviation,

compactness and so on). This failed to discern partisan motive and, worse, subjected the Ohio legislature to the court's "own notion of the public good." *Perry v. Perez*, 565 U.S. 388, 396 (2012). Then, rather than address the Applicants' counter evidence of intent and effect, it considered only some of the evidence and only *after* shifting the burden to the Applicants to prove a justification for the plan's partisan impact.

The court credited a map-simulation analysis in which an expert witness compared trillions of computer-generated maps against the enacted plan. But this was an apples-to-oranges comparison. The algorithm did not include the legislature's redistricting criteria: it did not preserve the cores of pre-2011 districts, attempt to create a majority-minority district in northeast Ohio or a minority-opportunity district in Franklin County, or even attempt to reach the constitutionally required perfect equality of population. Thus, the 2011 map is an "outlier" as compared to the trillions of simulated maps in the same sense that any particular person's IQ is an "outlier" when compared to the IQs of trillions of chickens.

The district court credited this analysis and made other findings on the view that the legislature's *non*-partisan goals were legally improper.

First, as noted above, it found that the legislature's incumbency-protection goal was "unprotected" and illegitimate. App-245. There was extensive trial testimony, including from the plan sponsor and the map-drawing consultant, that incumbency-protection considerations—applied even-handedly for representatives of both parties—drove the line-drawing process. This Court's precedent recognizes incumbency protection as a legitimate interest. *Burns v. Richardson*, 384 U.S. 73, 89

n.16 (1966); *White*, 412 U.S. at 791; *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 legitimacy of this goal also follows from *Gaffney*, 412 U.S. at 753, which holds that "[p]olitics and political considerations are inseparable from districting and apportionment."

It therefore should have been Respondents' burden to prove that some type of improper partisan purpose and *not* incumbency protection motivated the line-drawing. *See Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 243 (2001) (requiring the challenger to distinguish legitimate and illegitimate motives as part of the *prima facie* case). For example, the court found that a 12–4 partisan split was an improper goal, but it did not require Respondents to prove that it was not in fact an incumbency-protection goal. There was a correlation between the 12–4 split and incumbency protection, since the pre-redistricting split was 13–5. And the witnesses testified that their motive was to protect incumbents, not rig the map for abstract Republican interests. Similarly, that the 12–4 split was carried forward in election results is unremarkable where incumbents have repeatedly been reelected. The court only considered this correlation *after* shifting the burden, at which time it fell erroneously on the Applicants, and then found the incumbency interest unlawful. That amounted to two legal errors.

Second, there was also extensive evidence that non-partisan Voting Rights Act-compliance and minority-opportunity goals drove the line drawing in northeast and

central Ohio, and that these goals had a partisan impact, given the correlation of racial and political identity. Because Respondents did not challenge these decisions as improperly racial or as violative of the Voting Rights Act, they should have been required to show that these plainly non-partisan goals were somehow improperly partisan. But the district court addresed these questions after shifting the burden and, worse, subjected the Applicants to a racial-gerrymandering strict-scrutiny standard. It held that "the State must…establish that it had a basis in evidence for concluding that the VRA required the sort of district that it drew." App-250.

That holding directly contradicts this Court's unanimous decision in *Voinovich v. Quilter*, 507 U.S. 146 (1993). That case squarely rejected the argument that states must prove the need for a majority-minority district under the Voting Rights Act before drawing one. It observed that, although the "federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law[,]…that does not mean that the State's powers are similarly limited." *Id.* at 156. The Court explained that creating a majority-minority district is among the states' valid "apportionment choices" that "federal courts are bound to respect." *Id.* at 156. Without a showing or even allegation that race predominated in the line drawing, Respondents were obligated to prove that this clearly non-partisan goal was somehow, in fact, partisan. Instead, the district court required the State and the Applicants to prove a strong basis in evidence for these goals. That is yet another legal error.

The district court strayed far afield from merely identifying some type of invidious partisan intent. It expressed overt disagreement with most of the legislature's non-partisan redistricting choices. In this, too, its partisan-gerrymandering approach runs afoul of numerous precedents of this Court, which hold that federal courts must defer to "legislative policies" present in redistricting plans. *Perry*, 565 U.S. at 393 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). The district court's error is especially germane to this stay application because the rejection of state policy is sure to infect the court's analysis and crafting of any remedy. This infection provides yet another independent basis for a stay.

E. The District Court's Laches Ruling Is Unlikely To Survive Scrutiny on Appeal

The district court's rejection of the Applicants' laches defense is as indefensible as its other rulings. Respondents waited seven years to bring their claims, and, in the meantime, they lost or destroyed a significant quantity of relevant documents, and critical witnesses passed away, taking relevant facts with them to the grave. There is no escaping the conclusion that the delay was unreasonable and prejudiced the defense of this case.

The district court's contrary positions do not hold water. To begin, its belief that laches applies only to "damages," not prospective injunctive relief, could hardly be more backwards. App-293 n.902. "[L]aches is a defense developed by courts of equity; its principal application was, and remains to claims of an equitable cast…." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014). Prospective

injunctive relief is the quintessential equitable claim and the most obvious cause of action to which the doctrine applies.

Next, the district court excused Respondents' seven-year delay because their rights have "been uncertain since the *Vieth* case." App-289. But if Respondents had a colorable basis to assert a claim—uncertain or not—they should have and could have brought their claim earlier than 2018. Nothing was clarified between 2011 and 2018, as the Court's *Gill* decision and its current review of *Rucho* and *Benisek* illustrate. The same problem inheres in the district court's reasoning that Respondents were justified in waiting for multiple elections to pass under the 2011 plan: they waited well over a year and a half after the 2016 election to file the case, and they filed before the 2018 election (and without enough time to impact that election). The decision to bring the case in May 2018 has no logical connection with anything, and the delay is entirely unreasonable. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (finding a far smaller delay to be unreasonable).

It is also prejudicial. The fading of memories, the deaths of key fact witnesses, and the disappearance or destruction of boxes of relevant evidence (by an interested party) between 2011 and 2018 obviously impaired the ability of the defense to reconstruct what happened during the frenetic map-making process in 2011. To that point, the district court conceded that more evidence could have revealed more about negotiations between Republican and Democratic legislators but found that the information would be unhelpful because "the desire to achieve a 12–4 map was not negotiable." App-291. But this assumes the conclusion that a 12–4 map was

necessarily a problem and necessarily resulted from one-sided partisan purposes. Evidence, for example, that Democratic input caused the 12–4 split or that Democratic members were indifferent to it would undermine those assumptions. The court's conclusion that the evidence it cited could not be undercut by other evidence assumes information that is simply unknowable—because of Respondents' delay.

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

The Applicants will suffer irreparable harm absent a stay or injunction pending appeal. As this Court recently held, "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)); *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."). Accordingly, the Court's "ordinary practice is to suspend… injunctions from taking effect pending appellate review" "[w]hen courts declare state laws unconstitutional and enjoin state officials from enforcing them." *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat. War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers)).

The district court has enjoined the 2011 plan, a duly enacted state law, and ordered the legislature to replace it or have a new plan foisted upon it in forthcoming remedial proceedings. Thus, the irreparable harm here is compounded because the

Ohio legislature "must either adopt an alternative redistricting plan…or face the prospect that the District Court will implement its own redistricting plan." *Karcher*, 455 U.S. at 1306 (Brennan, J., in chambers) (granting a stay on this basis). The Court's June 14 deadline for a new plan underscores this harm by declaring a date certain for its contemplated usurpation of Ohio's legislative power—a power that finds its origin in the federal Constitution. The June 14 deadline may pass prior to the forthcoming *Rucho* and *Benisek* decisions, so the legislative effort may conclude and then turn out to be a waste in light of *Rucho* and *Benisek*. What's more, if the state legislature were to pass new legislation that eventually proved unnecessary, it would be required to pass more new legislation to re-enact the 2011 districts into law for the 2020 elections. It makes little sense to proceed with a remedial process before the inevitable remand for further consideration in light of *Rucho* and *Benisek*.

"[C]onsiderations specific to election cases" also militate in favor of a stay. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The federal-court intrusion into state election processes is disfavored, especially as candidates and voters set their sights on the 2020 election season. For that reason, the Court has recently granted stays on similar timelines. *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (granting stay on June 19 in an odd-numbered year); *Abbott v. Perez*, 138 S. Ct. 49 (2017) (granting stay on September 12 of an odd-numbered year). Generating new redistricting maps risks sowing chaos and undermining the public interest in an orderly election process. Ohio's voters, after four elections under the 2011 plan, are acclimated to it, and there is no reason to disrupt the relationships between constituents and congressmembers

until it is clear that such disruption is necessary. The mere existence of competing congressional plans—after four straight election cycles under the 2011 plan—will create confusion, as it will result in election preparations beginning to proceed on dual tracks. And, if the Court finds Respondents' claims nonjusticiable or otherwise reverses, the State will revert back to the 2011 plan, causing even further confusion.

There is no comparable harm to Respondents from a stay, as the district court's opinion itself makes clear. The court identified September 20, 2019, as the ideal date for a new plan, if necessary, to be in place, App-294, which affords time after the likely vacatur and remand in light of *Rucho* and *Benisek* for further proceedings, if necessary. More importantly, the court observed that "the actual plan that was used in the 2012 elections" was not signed into law until "December 15, 2011." App-294. That provides over six months for resolution of this appeal (which, again, is likely to be short lived due to a prompt vacatur and remand) and further district-court proceedings.

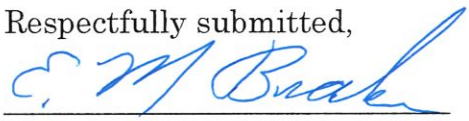
On balance, a stay is the optimal way to resolve the competing interests. The harm to the Applicants and the State is certain without a stay, and the harm to Respondents of a stay is likely negligible or non-existent. Moreover, there is a possibility of affirmance on some and reversal on other districts, since the Court invalidated all of Ohio's congressional districts, and the scope of the remedy will necessarily shift depending on the ultimate ruling. Additionally, the Court's forthcoming *Rucho* and *Benisek* opinions may shed light on remedial considerations. Thus, a remedial proceeding now may prove useless even if Respondents are

successful or partially successful on appeal. It is impossible to make those predictions at this time.

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 in light of their guidance.

Respectfully submitted,



EFREM M. BRADEN
Counsel of Record
KATHERINE L. MCKNIGHT
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW,
Suite 1100
Washington, DC 20036
(202) 861-1504
mbraden@bakerlaw.com

PATRICK T. LEWIS
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114

ROBERT T. TUCKER
ERIKA DACKIN PROUTY
BAKER & HOSTETLER LLP
200 Civic Center Drive,
Suite 1200
Columbus, OH 43215

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