No. 19-70

IN THE

LARRY HOUSEHOLDER, ET AL.,

Appellants,

—v.—

OHIO A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO DISMISS

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QUESTIONS PRESENTED

1) The plaintiffs in this case seek to invalidate all sixteen of Ohio's congressional districts on the ground that those districts were the result of partisan gerrymandering. The District Court held that partisan-gerrymandering claims are justiciable, and granted the plaintiffs relief. Then, less than two months later, this Court held that partisan-gerrymandering claims are not justiciable. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). Should this Court summarily vacate the District Court's decision, and remand with instructions to dismiss for lack of jurisdiction?

2) Did the District Court err in finding that the plaintiffs had standing to bring this partisan gerrymandering suit?

3) Is Ohio's 2011 congressional map, in fact, an unconstitutional partisan gerrymander?

4) Does the laches doctrine apply to partisan gerrymandering claims?

CORPORATE DISCLOSURE STATEMENT

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

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

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

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

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

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

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

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

1. Procedural History 2

2. Findings of Fact 2

ARGUMENT 4

I. THE CASE SHOULD BE REMANDED WITH AN INSTRUCTION TO DISMISS FOR LACK OF JURISDICTION 4

II. PLAINTIFFS ESTABLISHED STANDING TO SUE 5

III. LACHES DOES NOT BAR PLAINTIFFS' CLAIMS 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Anderson v. Celebrezze,
460 U.S. 780 (1983) 9

Ex parte McCardle,
74 U.S. 506 (1868) 3, 6

Gill v. Whitford,
138 S. Ct. 1916 (2018) 7, 8, 9

Hayburn's Case,
2 U.S. 408 (1792) 3, 7

Hernandez v. New York,
500 U.S. 352 (1991) 8

Kansas v. Colorado,
514 U.S. 673 (1995) 10

Muskrat v. United States,
219 U.S. 346 (1911) 3, 7

Norman v. Reed,
502 U.S. 279 (1992) 9

Rucho v. Common Cause,
139 S. Ct. 2484 (2019) 3, 6, 7, 11

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 3, 6, 7

INTRODUCTION

At the end of the past term, this Court held, for the first time, that partisan gerrymandering claims present a non-justiciable political question. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). Given the Court's holding, the Ohio A. Philip Randolph Institute *et al.* ("Plaintiffs") acknowledge that this case should be remanded to the three-judge panel ("Panel") with instructions to dismiss. Because this case is now plainly non-justiciable, it is unnecessary, and would be inappropriate, for the Court to opine on the other grounds advanced by Speaker Larry Householder *et al.* ("State") in their jurisdictional statement, namely standing and laches. In apparently requesting this Court to go beyond its holding in *Rucho*, the State is effectively asking this Court to issue a decision that "comes to the same thing as an advisory opinion, disapproved by this Court[.]" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. 408, 408–10 (1792)). The only "function remaining" for the Court is to simply announce that the matter is non-justiciable and dismiss. *Id.* at 94 (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

STATEMENT OF THE CASE

The Panel found that Ohio's legislature intentionally diluted the votes of individual voters by packing and cracking them into districts designed to minimize Democratic influence and maximize Republican advantage, regardless of the electorate's preferences.

1. Procedural History

Plaintiffs filed their complaint in May 2018. R.1. During the summer of 2018, expedited motions to dismiss were decided. The parties engaged in expedited discovery throughout the rest of 2018. The State and Intervenors, who include Republican U.S. congressmen from Ohio, moved for summary judgment on January 8, 2019. R.136–40. On February 15, 2019, the Panel denied the motions for summary judgment. R.222. Commencing March 4, 2019, the Panel held an eight-day trial with 23 live witnesses. The Panel also received testimony from additional witnesses through designated deposition testimony. On May 3, 2019, the Panel issued its opinion, which constituted its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1). R.262. The Panel found that Ohio's congressional map was an unconstitutional gerrymander, violating the First and Fourteenth Amendments to the U.S. Constitution and exceeding the State's powers under Article I. *See generally* App. at 1a–399a.

2. Findings of Fact

After reviewing voluminous evidence, the Panel found that Ohio's map was the result of an explicit campaign to crack and pack Democratic voters in order to dilute their influence. The Panel considered and rejected the State's contention that the map was a result of a bipartisan compromise and legitimate redistricting criteria. *See, e.g.*, App. at 317a–51a, 370a–79a.

The Panel found that the cracking and packing of Democrats in Ohio was driven by Republican operatives, including national Republican

congressional staff in Washington, who had final sign off the design of Ohio's congressional map. App. at 4a–5a, 15a–19a. The map drawers amassed a large collection of partisan data on Ohio's voters, which was used to surgically crack and pack Democratic voters. *Id*. at. 18a.

The intent of the map drawers was made manifest by contemporaneous statements and trial testimony by the map drawers. Statements considered by the Panel as probative included the map drawers' characterization of the "downtown" Democratic area in Columbus as "dog meat" voting territory and newly packed Democratic district in Franklin County as "the [] sinkhole." App. at 25a, 248a, 275a. The map makers stated that their map was crafted to guarantee that 12 Republican seats remained within the "safety zone." *Id.* at 214a, 279a. After a 12-4 partisan advantage had been secured by the Republican map-drawers, all other changes to the map were de minimis. *Id.* at 374a–75a. The Panel noted that the Speaker of the Ohio House "testified that while some negotiations occurred, there was never a chance that the Republicans in the majority would permit a map that altered the [12-4] partisan balance[.]" *Id.* at 330a–31a; *see also id.* at 33a–34a. That some Democratic legislators voted for the map in exchange for small, parochial concessions to their individual district lines did not negate the fact that the process was dictated by the Republican Party, which controlled both houses of Ohio's legislature and the governorship. *Id.* at 374a–75a.

Further, after careful assessment of the evidence at trial, the Panel determined that no legitimate redistricting criteria or state interest justified the map's congressional district lines. App.

at 317a–50a, 370a–78a. Examining each district in turn, the Panel concluded that many more rational districts, respecting traditional districting principles, could have been drawn. *Id.* at 263a–317a. The Panel considered and rejected the assertion that the goal of protecting incumbents explained the district lines based on the trial evidence. *Id.* at 318a–33a. The Panel also found that Voting Rights Act (VRA) compliance did not explain or justify the district lines. *Id.* at 333a–45a, 375a–76a. The Panel also determined that "Ohio's natural political geography in no way accounts for the extreme Republican advantage observed in the 2012 map." *Id.* at 345a–46a. The Panel concluded that Ohio's map had successfully cracked and packed Democratic voters for the purpose of entrenching the Republican Party's advantage.

ARGUMENT

I. THE CASE SHOULD BE REMANDED WITH AN INSTRUCTION TO DISMISS FOR LACK OF JURISDICTION.

Less than two months ago, this Court held, for the first time, that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho*, 139 S. Ct. at 2506–07. As this Court has now held that these claims are not justiciable in the federal courts, the only "function remaining" for the Court is to announce that the matter is non-justiciable and dismiss. *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. at 514). Given *Rucho*, the proper course at this point is

to "remand[] with instructions to dismiss for lack of jurisdiction." *Rucho*, 139 S. Ct. at 2508[1]

The State agrees that dismissal for non-justiciability is the proper course, Br. at 13, but argues further that the Plaintiffs lack standing and that their action should have been barred by laches. But there is no justification to resolve such questions, where the Court's newly announced doctrine makes clear that the case should be dismissed for lack of jurisdiction. *Steel Co.*, 523 U.S. at 101. Reaching out to decide the standing and laches issues in this non-justiciable case "comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Id.* (citing *Muskrat*, 219 U.S. at 362; *Hayburn's Case*, 2 U.S. at 408–10 (1792)). The Court should therefore simply order a remand with instructions to dismiss the case as non-justiciable, and need not, and therefore should not, address any other issues. In any event, as we show below, the State's standing and laches arguments are without merit.

II. PLAINTIFFS ESTABLISHED STANDING TO SUE.

The Panel's standing determination was not in error. The Panel properly applied the standing analysis for vote dilution claims clearly laid out less than a year before by this Court in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). App. at 158a–184a. The court likewise applied well-established precedent

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[1] Plaintiffs asked the State to stipulate to a "remand[] with instructions to dismiss for lack of jurisdiction" pursuant to Rule 46, following the now clear precedent of this Court, but the State declined.

regarding standing for First Amendment claims. *Id.* at 184a–189a. And all parties agreed that the standing analysis for Plaintiffs' Article I claims rose and fell with standing to pursue their other claims. *Id.* at 189a–190a; Br. at 18–19.

As required by *Gill*, Plaintiffs satisfied standing for their vote dilution claims on a district-by-district basis with evidence that their districts had been packed or cracked to dilute their votes. App. at 159a (citing *Gill*, 138 S. Ct. at 1930). Plaintiffs amply demonstrated, with more than "just two forms of district-specific proof," Br. at 15, that their districts had been cracked or packed, causing their votes "to carry less weight than they would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931; *see* App. at 159a–184a. The Panel considered each district and each plaintiff individually in order to determine whether plaintiffs had established standing based on vote dilution. For each district, the court examined: the plaintiff's history of voting for Democratic candidates, whether Democratic candidates had been successful in the district, whether the plaintiff's district was an outlier in comparison to simulated districts drawn pursuant to neutral redistricting criteria,[2] and whether the

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[2] The State continues to insist, even after the Panel's contrary factual finding, that incumbency protection explains the challenged map. Br. at 15–16; *see* App. at 95a–97a. The State cannot demonstrate that the Panel's factual finding was clearly erroneous. *See Hernandez v. New York*, 500 U.S. 352, 364–65 (1991). The Panel credited evidence that illustrated that incumbency was not a primary concern of the map drawers. For example, the sponsor of the map disavowed incumbency protection as a motivation for the map at the time of enactment. App. at 95a–97a. Also the map-drawers put three sets of incumbents against each other, when only two needed to be

remedial map provided a higher likelihood of electing the plaintiff's candidate of choice. App. at 159a–184a.

Plaintiffs also demonstrated standing to pursue their "distinct" non-dilutionary First Amendment injuries. *Gill*, 138 S. Ct. at 1938–39 (Kagan, J., concurring). Plaintiffs' First Amendment harms constitute an injury in fact under this Court's precedent. *See Anderson v. Celebrezze*, 460 U.S. 780, 788–90 (1983); *see also Norman v. Reed*, 502 U.S. 279, 288–89 (1992). The State is wrong to suggest that Plaintiffs' First Amendment standing was foreclosed by *Gill*. *See Gill*, 138 S. Ct. at 1931. On the contrary, Plaintiffs proved, as the Panel found, that the State's actions, motivated by Plaintiffs' political views and associations, undermined their speech and associational rights, including by limiting their ability to attract volunteers and members, generate support from other citizens, and recruit candidates to run for office. App. at 184a–189a.

Accordingly, the Panel correctly held that Plaintiffs had standing to pursue their claims.

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paired to account for the loss of two districts. *Id.* at 322a–23a. In light of the evidence proving that incumbency protection did not drive the map drawing, Dr. Cho did not include it as a criterion when running her map simulations. Br. at 16.

Furthermore, the State misconstrues the purpose of Plaintiffs' Proposed Remedial Map. It was not introduced to establish that the districts could be "more competitive," Br. at 16, but to demonstrate that neutral redistricting criteria could not explain the cracking and packing of Democratic voters throughout the state, App. at 123a–128a.

III. LACHES DOES NOT BAR PLAINTIFFS' CLAIMS.

As with standing, there is no need to reach the State's laches argument. But in any event, it is meritless.

The Panel correctly found that the State failed to meet either prong of the test for laches: (1) a lack of diligence by the party against whom laches is asserted, and (2) prejudice to the party asserting it. *See, e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). The Panel found that Plaintiffs were reasonable in waiting several election cycles to show a "durable gerrymander" before filing their complaint, given the "high bar for proving partisan effect" under the governing case law. App. at 385a. The Panel further rejected the State's contention that it was prejudiced through the passage of time and loss of evidence. All of the relevant evidence was in the custody and possession of the State and Republicans affiliated with the State because they were the map drawers. The documents that the State claims were lost were copies of documents produced by the State to Plaintiffs pursuant to public records requests. As part of discovery, agents of the State and Republican operatives produced tens of thousands of pages of documents that they retained in their custody. There was more than ample evidence to adjudicate and defend the claims before the Panel.

CONCLUSION

Given this Court's holding in *Rucho*, 139 S. Ct. at 2506–07, finding that partisan gerrymandering cases present political questions beyond the reach of the federal courts, the decision of the lower court should be remanded with an order to dismiss the case.

Respectfully submitted,

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