No. 18A1165

In the Supreme Court of the United States

LARRY HOUSEHOLDER, SPEAKER OF THE OHIO HOUSE OF REPRESENTATIVES, LARRY OBHOF, PRESIDENT OF THE OHIO SENATE, AND FRANK LAROSE, OHIO SECRETARY OF STATE, IN THEIR OFFICIAL CAPACITIES,

Applicants,

v.

OHIO A. PHILIP RANDOLPH INSTITUTE, *ET AL.*,

Respondents.

ON APPLICATION FOR STAY FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Constitutional Provisions

Other Authorities

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

The Court should stay the lower court's judgment pending appeal. That judgment coerces Ohio's General Assembly to repeal and replace its current congressional map by June 14. The problem with that schedule is that this Court is unlikely to issue its decisions in *Rucho v. Common Cause*, 18-422 and *Lamone v. Benisek*, 18-726, until a couple of weeks later. It makes no sense to pressure the General Assembly into repealing a validly enacted law mere weeks before this Court will either declare the exercise unnecessary, or provide guidance regarding what state legislatures must do to satisfy the Constitution. That is especially true in light of the fact that this Court will likely either reverse the District Court's decision (if *Rucho* or *Lamone* hold that partisan-gerrymandering claims fail as a matter of law) or vacate and remand for further consideration (if *Rucho* and *Lamone* announce standards for adjudicating these claims). This Court has the final word on the legality of Ohio's congressional map, and Ohio should not be buffaloed into repealing its map before this Court can weigh in.

The respondents make no serious attempt to defend the June 14 deadline. Nor do they really attempt to defend the lower court's ruling. Instead, they describe what the District Court did, and insist that its vague tests are perfectly manageable for courts reviewing maps *ex post*, and easily satisfied by legislators drafting maps *ex ante*. But their summary of the District Court's analysis shows quite the opposite to be true: each of the District Court's tests requires considering the totality of the circumstances and assessing the map's legality in light of some undefined ideal—

apparently proportionality, though the respondents insist, at times incoherently, *see* Opp.5 n.2, that proportionality is *not* the goal.

At bottom, the respondents' argument rests on an unsupported assumption that this Court will affirm the District Court. After all, that is the only circumstance in which the remedial mapdrawing process will bear fruit, and so the only circumstance in which a stay even arguably harms anyone. The State is happy to mollify the respondents' concerns: it hereby moves the Court to treat the stay-stage briefing as satisfying the requirement for a jurisdictional statement. *See* Rule 18. This will permit the Court to summarily resolve the State's appeal immediately after *Rucho* and *Lamone* if that relief is appropriate, thereby allowing for the creation of a new map (if necessary) well in advance of the 2020 election. If the Court instead decides to vacate and remand, or to accept this appeal for plenary consideration, then the remedial process will need to be aborted anyway, and so a stay pending appeal will harm no one.

ARGUMENT

Courts will stay a judgment pending a direct appeal to the Supreme Court when there is "a reasonable probability" that the Court will note probable jurisdiction, "a fair prospect that a majority of the Court will vote to reverse the judgment below," and "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).

Ohio, in its opening brief, addressed each of these factors. First, and as the respondents silently concede, the Court's mandatory jurisdiction over this appeal

creates a "reasonable probability" that it will either note probable jurisdiction or set the jurisdictional issue for argument. Second, there is a "fair prospect" of reversal if there is a "fair prospect" of rejecting the partisan-gerrymandering claims in *Rucho* and *Lamone*. And there is a "fair prospect" that the State will win relief if there is a "fair prospect" that this Court will vacate the District Court's decision for reconsideration in light of *Rucho* and *Lamone*. Finally, because the District Court gave Ohio until just June 14 to amend its congressional map, Ohio will be irreparably harmed absent a stay. The General Assembly will be coerced into repealing and replacing a validly enacted state law in mid-June, all to remedy a supposed constitutional defect that this Court has never recognized and may reject just weeks later.

The respondents dispute all this in four principal ways. First, they challenge the applicable standard of review. Second, they dispute that Ohio will be irreparably harmed by the June 14 deadline. Third, they claim the June 14 deadline is necessary to protect their interests and the interests of the public. Finally, they insist that the District Court decided this case correctly. All four of these arguments fail.

I. OHIO IS ENTITLED TO A STAY IF THERE IS A "FAIR PROSPECT" THAT THIS COURT WILL REVERSE THE DISTRICT COURT.

The respondents' argument begins by charging the State with seeking a stay under the wrong standard. According to them, the "fair prospect" standard set out above is "the standard for a stay in a discretionary, rather than direct, appeal." Opp.11 n.3. The standard in the direct-appeal context, they say, permits courts to award relief only if it is likely that the decision below will be held "erroneous," only if the applicant will be irreparably harmed absent a stay, and only after considering

the "balance of equities" between the parties and the public at large. Opp.11 (citations omitted).

The respondents' distinction between direct and discretionary appeals is puzzling: the standard they propose is pieced together with isolated words from a number of cases, *only one of which* involved a direct appeal. And that one case does not say what the respondents say it does. In *Graves v. Barnes*, 405 U.S. 1201 (1972) (Powell, J., in chambers), Justice Powell issued an in-chambers order denying a stay application. His opinion notes that a "party seeking a stay of [a] judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm." *Id.* at 1203. The short decision does not elaborate on this requirement at all. It does not, for example, say whether the applicant must establish the decision below is "likely" erroneous or has a "fair prospect" of being deemed erroneous. And the opinion does not explain whether a lower court's decision is "erroneous" in the relevant sense if it will likely have to be vacated for reconsideration in light of some intervening decision. It certainly does not require any balancing of the equities—a requirement that the respondents extract from a stay decision from this court's *discretionary* docket. Opp.11 (citing *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)).

Even if the respondents had identified the correct standard, they failed to explain why the distinction between their standard and the fair-prospect standard matters. In recent years, partisan-gerrymandering defendants have consistently

sought to stay the lower courts' decisions pending appeal, they have consistently invoked the "fair prospect" standard from *Hollingsworth*, and this Court has consistently granted relief. *See* Emergency Application for Stay Pending Resolution of Direct Appeal, at 11, *Rucho v. Common Cause*, No. 17A745 (U.S. Jan 12, 2018); Application for Stay Pending Resolution of Direct Appeal, at 11, *Gill v. Whitford*, No. 16-1161 (U.S. May 22, 2017). That indicates either that the applicants briefed the correct standard, or that any difference between the standards is immaterial.

In sum, the respondents' argument leads off by asserting an error that it never establishes.

II. OHIO WILL BE IRREPARABLY HARMED IF THIS COURT DENIES A STAY.

The respondents next contend that Ohio will not be irreparably harmed by the District Court's order. Specifically, they deny that the June 14 deadline threatens irreparable injury to Ohio. The District Court, according to the respondents, "imposed no requirement that the State take any further action"; it simply allowed the State time to "exercise an *entirely voluntary option* to develop and submit a remedial map" to the District Court. Opp.14 (emphasis in original). "Being given an option to act is no injury at all, much less an irreparable one." Opp.14.

This argument ignores the coercive nature of the District Court's order. While the District Court did not threaten the General Assembly with contempt if it fails to act, it *did* threaten to invalidate and replace the 2011 map if the General Assembly fails to repeal and replace the map before June 14. In so doing, it threatened irreparable injury. After all, this Court has held that a State *always* suffers a form of irreparable injury when it is enjoined from enforcing its validly enacted

laws. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). It follows that the State is also irreparably harmed if it is made to repeal a validly enacted law on threat of judicial intervention. The injury is especially great if the intervention turns out to have been improper. In those circumstances, the "voluntary option," Opp.11, would include only the chance to take an unwanted step to avoid an unauthorized punishment.

Even though all this is enough to establish an irreparable injury, it is worth emphasizing the resources the General Assembly would have to expend in even *attempting* to enact a new congressional map. These resources will have been wasted if this Court declares the exercise to have been unnecessary, or if the District Court rejects the revised map. Every minute and dollar spent drawing a new map is a minute and dollar not spent enacting a state budget (which the General Assembly has a constitutional duty to pass by July 1, *see* Ohio Const., Art. II, § 22 and Ohio Rev. Code § 9.34(A)); considering major education reforms, *see* 133rd General Assembly, Senate Bill Number 110; addressing the opioid epidemic, *see* 133rd General Assembly, Senate Bill Number 51; or developing responses to any number of other pressing issues facing Ohio. The respondents belittle these concerns, dismissing the effort that a new map would take as a mere "inconvenience." Opp.15 (citation omitted). The Ohio voters who elected representatives and senators to address the State's many pressing issues—and who already ratified a constitutional amendment

to reform the redistricting process beginning in the 2022 election—would likely see things differently.

III. THE BALANCE OF EQUITIES HEAVILY FAVORS A STAY.

The respondents next insist that the balance of equities requires denying the stay. Denying the stay, they claim, "would simply mean that remedial proceedings may commence, to ensure that a remedy can be installed before the State's asserted deadline of September 20, 2019." Opp.17. In contrast, they say, granting a stay "has the real potential to cause irreparable harm to Plaintiffs, by creating a situation in which, once remedial proceedings re-commence, the State will insist that there is insufficient time to implement a remedial map." Opp.17. Thus, according to the respondents, there is no balancing to be done: *all* of the equities militate against the stay.

The respondents get both sides of the balance wrong. First, as just explained, the State *will* be irreparably harmed in the absence of a stay. In contrast, entering a stay exposes the respondents to no serious risk of injury—at least, not an injury they can fairly complain about. For one thing, the only reason this case is pressing up against the September deadline is that the plaintiffs waited until May of 2018 to sue. Having sat on their rights, they cannot reasonably complain about the risk that the case might not be resolved as quickly as they would like.

More fundamentally, the release of *Rucho* and *Lamone* will eliminate any risk of harm. If those cases require reversing or vacating the decision below, or if they justify plenary review in this Court, then the "remedial process" is going to be cut short anyway. In those circumstances, a stay would harm neither the respond-

ents nor the public. To the contrary, the respondents would be spared the wasted effort of a never-to-be-completed remedial process, and the public would be spared the confusion that an aborted mapdrawing effort would likely cause. If, on the other hand, the decisions in *Rucho* and *Lamone* require summarily affirming the District Court, then this Court can either vacate its stay or summarily dispose of this appeal. Indeed, Ohio already asked that the Court treat its stay application as a Rule 18 jurisdictional statement, which would expedite this appeal's resolution. Either way, the remedial process could resume in late June or early July. There is no evidence at all that this would meaningfully hinder the District Court's ability to wrap up the process by September.

The respondents' defense of the June 14 due date is particularly odd given their acknowledgment that it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (cited at Opp.15 & App.294). Here, the District Court's order denies Ohio's General Assembly a "reasonable opportunity . . . to meet constitutional requirements," since it requires the General Assembly to act just two to three weeks before this Court is likely to say definitively what those requirements are, and months before the September deadline for completing the mapdrawing process. Neither the District Court nor the respondents have given any reason why the deadline for legislative action must be June 14 instead of, say, July 14 or August 1.

IV. THE RESPONDENTS' DEFENSE OF THE DISTRICT COURT'S OPINION HIGHLIGHTS ITS PROBLEMS.

The District Court erred in concluding that the respondents claims were justiciable, and it erred by failing to find those claims barred by the laches doctrine. The respondents defend both aspects of the District Court's decision, to no avail.

A. Justiciability. The State's stay application highlighted some of the many flaws with the District Court's approach to partisan-gerrymandering claims. The heart of the problem with the District Court's approach is this: the District Court did not identify any judicially manageable standards for partisan-gerrymandering claims—"rules to limit and confine judicial intervention"—which is what it would take for these claims to be deemed justiciable. *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment). Instead, it proposed a three-part test for vote-dilution claims that asks whether a congressional map: (1) results from some unquantifiable amount of partisan intent; (2) causes some ineffable degree of partisan effect, and (3) is not justified by some undefined class of "legitimate" state interests. App.167. And it proposed an associational-rights framework that requires courts to "weigh the burden imposed on a group of voters' association rights against the precise interest put forward by the State as justifications for the burden imposed by the challenged map." App.269. Because both tests require courts to conduct a vague balancing after considering all of the evidence, neither test limits or confines anything, and neither can fairly be called a rule. To the contrary, each amounts to "that test most beloved by a court *unwilling to be held to rules* (and most feared by litigants who want to know what to expect): th' ol' 'totali-

ty of the circumstances' test." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (emphasis added).

The respondents have no answer to any of this. To be sure, they recite the District Court's totality-of-the-circumstances tests and insist these tests are judicially manageable. Opp.20–26. But they do not support those assertions with arguments.

To illustrate, consider the respondents' discussion of justiciability. The respondents concede that the fundamental question regarding this issue is whether there are "judicially manageable" standards for adjudicating partisan-gerrymandering claims. Opp.21. And they repeat the District Court's assertion "that standards to address partisan gerrymandering claims are judicially manageable, as illustrated by the unanimous judgment of four three-judge panels in recent cases." Opp.21. But they never defend that assertion—they never argue that the standards are as manageable as the "four three-judge panels in recent cases" insist.

In fact, the respondents' discussion of the District Court's analysis shows just how unworkable it is. For example, they emphasize that "statistical metrics serve as *evidence* of the elements of the underlying claims," as opposed to tests in and of themselves. Opp.22 (emphasis in original). But statistics cannot "limit and confine" judicial discretion, *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment), unless it is clear what they are supposed to be measuring. On that score, the respondents, just like every litigant and court to come before them, have nothing useful to say. They allude to the fact that achieving "a rough approxima-

tion of the statewide political strengths of the Democratic and Republican parties" is relevant, Opp.16 (citation omitted), but elsewhere they insists that "[p]artisan bias is a proportionality-agnostic measure," Opp.5 n.2. Perhaps the degree of support the map received from the out-of-power party might be relevant. Then again, the respondents (following the District Court's lead) discount the fact that the 2011 plan passed with bipartisan, supermajority support: they speculate that the out-of-power party must have gone along "in exchange for small, parochial concessions to their individual districts." Opp.8; *accord* App.248–49. In other words, party-line votes indicate partisan bias, but so do the votes of bipartisan supermajorities. The fact that the District Court's approach can facilitate this heads-I-win-tails-you-lose outcome is a good sign there is something wrong with it.

Without any guidance on what factors are relevant and what considerations matter, the District Court's test begins to look less like a "rule," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment), and more like "an invitation to make an *ad hoc* judgment." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

The respondents' discussion of the evidence further bolsters this impression. For example, they claim that the "mapmakers characterized the 'downtown' Democratic area in Columbus, in Franklin County, as 'dog meat' voting territory." Opp.7–8. In fact, the "dog meat" quote comes not from a "mapmaker," but from an out-of-state Republican with no official role in the mapdrawing process. *See* App.12, 183. The District Court deemed the evidence relevant nonetheless, presumably because he was a "Republican operative"—an undefined, sinister-sounding term that

the District Court used twelve separate times, and that the respondents repeat here. Opp.7; App.3, 8, 11, 12, 14, 18, 179, 180, 246. Again, any test that permits consideration of emails with so little connection to the mapdrawing process is incapable of "limit[ing] and confin[ing]" judicial intervention. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). It does, however turn courts into a useful political weapon—since everything is relevant, there is no telling what discovery might turn up.

Notwithstanding all this, the respondents insist that "[n]ot drawing a partisan gerrymander is straightforward." Opp.16. "So long as" a map is drawn without "improper intent, it [will] pass muster." Opp.16. But what *is* improper intent? Surely a legislature—a political body made up of human beings who have to compromise to get anything done—cannot be expected to completely disregard all political considerations. So the question will be how much partisan intent is too much. The respondents claim the District Court solved this when it "adopted" the "'predominant-purpose standard' from this Court's racial gerrymandering case law." Opp.23 (citing App.169–70). As an initial matter, this is not even what the District Court did; it *assumed* that the predominant-purpose standard applied, but never ruled out the possibility that partisan intent might be established whenever partisanship is a "motivating factor." App.168–70. In any event, the fundamental distinction between the racial-gerrymandering and partisan-gerrymandering contexts is that a legislature can easily avoid racial prejudice, but it *cannot* avoid considering partisan interests. Indeed, it would be well-nigh impossible to win bipartisan sup-

port for a congressional map *without* considering partisan interests. And because partisan interests are so interwoven with the mapdrawing exercise, the question whether partisan interests "predominated" or merely "motivated" will be more a matter of characterization than of discernment.

Even if the predominant-purpose test made the intent prong of the vote-dilution analysis "straightforward" in this context, it would not make the District Court's associational-rights framework any clearer. The respondents never claim otherwise, and rightfully so. To decide whether a congressional map violates the First Amendment under this framework, a legislator or judge must ask whether "the burden imposed on a group of voters' association rights" outweighs "the precise interest put forward by the State as justifications for the burden imposed by the challenged map." App.269. How can one weigh these abstract concepts in light of infinite variables that bear on each? The inquiry is about as straightforward as the question "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Ents., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). It would seem that the only safe harbor would be perfect proportionality, though the respondents insist that is not what they want. Opp.5 n.2.

What stands out most about the District Court's decision, and the decisions of the other "three-judge panels in recent cases," Opp.21, is just how non-limiting and non-confining their tests turn out to be. A few years ago, proponents of political-gerrymandering claims attempted to fashion judicially manageable standards using

mathematical formulas—the "efficiency gap," for example. *See* Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015). The district courts have eschewed strict reliance on such formulas, likely because they are arbitrary and have no basis in the Constitution's text. Instead, the district courts have retreated to vague tests like the ones offered below—precisely the sort of tests that kept a majority of this Court in *Vieth* from holding that partisan-gerrymandering claims are justiciable. The lower courts have surrendered: after thirty years of effort, vague, totality-of-the-circumstances tests are the best anyone can do.

B. Laches. The respondents' claims fail for the independent reason that they are barred by laches. *See* Application at 17. Though Ohio passed the map in 2011, the respondents did not sue until May of 2018, just six months before the *fourth* election cycle under the 2011 map. The respondents do not dispute that their claims would be barred by laches normally. But they claim that the doctrine "does not apply where there is a continuing constitutional violation." Opp.26.

This supposed carve-out for continuing constitutional violations "happens to fit this case precisely, but it needs more than that to recommend it." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 921 (2015). The respondents seek an injunction; an injunction is a form of equitable relief; and "[u]nder long-established principles," a plaintiff's "lack of diligence precludes equity's operation." *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005) (citing the laches doctrine as evidence of this principle). These principles apply even in constitutional cases. Indeed, equitable prin-

ciples forbidding delay apply even to prisoners who claim they are being imprisoned unconstitutionally. *See Holland v. Florida*, 560 U.S. 631, 653 (2010). There is no basis for refusing to apply the same principles here. The respondents' contrary argument rests on two cases. The first interprets a statute of limitations, and thus has nothing to do with the equitable doctrine of laches. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). The other ignores the timeliness issue altogether. *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 653 (1977). Neither supports the just-so rule for which the respondents advocate.

CONCLUSION

The Court should stay the District Court's decision pending the resolution of the State's appeal in this Court.

Respectfully submitted,

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