No. 18A_____

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

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

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

Speaker Larry Householder, President Larry Obhof, and Ohio Secretary of State Frank LaRose (collectively, "Ohio" or the "State") seek to stay the lower court's ruling pending the resolution of the State's appeal in this Court. The decision below holds that Ohio's congressional map—which the General Assembly passed in 2011 with bipartisan supermajorities—is an unconstitutional "partisan gerrymander." The District Court reached this conclusion by adopting novel legal theories it copied from lower-court cases that this Court is now reviewing. That is bad enough on its own, but the relief the court ordered makes its holding even worse. The District Court required Ohio's General Assembly to repeal and replace its map no later than June 14—in all likelihood, a couple of weeks *before* this Court issues its decisions in *Rucho v. Common Cause*, 18-422 and *Lamone v. Benisek*, 18-726. It ordered this despite acknowledging that a new plan does not need to be in place until September 20, 2019 in order to be used in the 2020 elections. App.291. If the Court holds in *Rucho* or *Lamone* that so-called "partisan-gerrymandering" claims are non-justiciable, or if it issues any other decision that would require reexamination of the District Court's decision, then the General Assembly will have been needlessly pressured into either repealing a validly enacted law or wasting resources trying to accommodate a mooted decision. The Court can avoid these consequences by entering a stay.

If this Court wishes to assure speedy review of the lower court's decision, the State has no objection to treating this stay motion as a jurisdictional statement.

INTRODUCTION

On December 14, 2011, bipartisan supermajorities of the Ohio General Assembly enacted the 2011 map challenged in this litigation. Nearly eight years and four election cycles later, the court below declared that this bipartisan map is actually a "partisan gerrymander" on the basis of several totality-of-the-circumstances standards and a collection of social-science studies. In so holding, the District Court cast aside the fact that two other cases involving nearly identical issues—*Rucho v. Common Cause*, 18-422, and *Lamone v. Benisek*, 18-726—are pending before this Court, with opinions to be issued by the end of June.

This motion thus presents the following question: If a district court strikes down a State's congressional map on partisan-gerrymandering grounds before *Rucho* and *Lamone* come out, should it force the State to repeal its map and pass a new one before this Court issues its decisions in those cases?

The question arises because of the District Court's opinion and order, which it issued May 3, 2019. That opinion holds that Ohio's map reflects partisan gerrymandering, thereby violating the First Amendment and the Equal Protection Clause. The District Court further held that the State, by violating these provisions, exceeded its Article I authority to regulate elections. The court's order of relief requires Ohio's General Assembly either to enact a new map before June 14, or else accept whatever map the court comes up with on its own. Signaling its apparent lack of confidence in the General Assembly's ability to redistrict, the District Court further ordered the parties to agree on a list of mutually acceptable candidates for special master and to submit briefing, on June 3, 2019, regarding whether

the District Court should adopt a plan submitted by plaintiffs' expert. App.296–97. The result? The General Assembly is being coerced into repealing and replacing a duly enacted law on a needlessly rushed basis, all to follow an alleged constitutional imperative that *Rucho* and *Lamone* may decide does not exist.

The District Court's decision ought to be stayed. The relevant standard asks whether 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). The State satisfies that test. This Court has mandatory appellate jurisdiction over this case. There is a "fair prospect" that Ohio will prevail on appeal so long as there is a "fair prospect" of the Court's declaring partisan-gerrymandering claims to be nonjusticiable. Indeed, there is a fair prospect Ohio will prevail even if the Court rules for the *challengers* in *Rucho* and *Lamone*; if nothing else, the Court would likely vacate the decision below and remand with instructions to reconsider the case in light of whatever standard *Rucho* and *Lamone* settle on. Finally, Ohio will be irreparably harmed if it is forced to waste substantial resources unnecessarily passing new legislation mere weeks before learning that there is no need to do so.

In light of all this, it is hard to understand why the District Court declined to stay its order. Presumably it did so because of a good-faith concern about curing a perceived constitutional violation with all deliberate speed; the Ohio officials named in this suit have no reason to doubt the court's intentions. But when it comes to the

reputation of the federal judiciary, it is not official opinion that matters, but rather the opinion of the "intelligent man on the street." *See Gill v. Whitford*, No. 16-1161, Oral Arg. Tr. 37:11–12. When the intelligent man on the street learns that the District Court ordered the General Assembly to re-draw all of its congressional districts mere weeks before this Court may declare the exercise unnecessary, he is likely to ask why. Why did the court not set a mid-July deadline? Or August, as in the similar case out of Michigan? *See League of Women Voters of Mich. v. Benson*, No. 2:17-cv-14148, 2019 U.S. Dist. LEXIS 70167, at *223-24 (E.D. Mich. Apr. 25, 2019). There are no good answers to these questions. Certainly the court below did not give such an answer; to the contrary, it recognized that the State could administer the 2020 election under the new map so long as it settled on that map by September. *See* App.294. Unfair though it may be, a great many intelligent people on the street are likely to view the lower court's decision as an attempt to evade or frustrate Supreme Court review.

The lower court could have completely averted this risk, and preserved a clean vehicle for this Court's review, by simply staying its decision pending appeal. It should have done so. But it did not, so this Court should do so instead.

OPINION BELOW

The three-judge District Court's opinion below is reproduced in the Appendix, beginning at App.1. Its judgment is reproduced at App.302, and its order denying the State's stay request is reproduced beginning at App.303.

JURISDICTION

The three-judge District Court, empaneled under 28 U.S.C. § 2284, entered its opinion, order, and judgment on May 3, 2019. *See* App.1. The State filed its notice of appeal on May 7, 2019. This Court has jurisdiction under 28 U.S.C. § 1253.

STATEMENT

1. "Everyone complains about congressional gerrymandering. Ohio just did something about it." That is a headline published by the Cincinnati Enquirer on February 6, 2018. (The article is available online at https://tinyurl.com/y6zqva6g.) The headline does not refer to an Ohio *court* doing "something about" gerrymandering. Instead, the headline refers to Ohio's legislators (including President Obhof), a group of whom huddled together and developed a constitutional amendment to secure bipartisan support for all maps enacted after the 2020 election. *See* 132nd General Assembly, Substitute Senate Joint Resolution Number 5. The proposed amendment would require the General Assembly to pass congressional maps "by the affirmative vote of three-fifths of the members of each house of the general assembly, including the affirmative vote of at least one-half of the members of each the two largest political parties." *Id.* at art. XIX, § 1(A). In the event deliberations reached an impasse, the same commission responsible for drawing *state* legislative districts would take responsibility. That seven-member commission is made up of the several elected officials, "[o]ne person appointed by the" House speaker, another "appointed by the president of the senate," and two more appointed by the minority party leader in each house. *Id.* at art. XI. The commission can enact a map only after securing an "affirmative vote" from "at least two members of the commission

who represent *each* of the two largest political parties represented in the general assembly." *Id.* at art. XI, § 1(B)(3) (emphasis added). The proposed amendment further provided for a series of other bipartisan solutions if the commission itself reached an impasse—and it created various incentives to prevent such impasses from arising in the first place. *See id.* at art. XIX.

Ohio's General Assembly agreed upon the language of the constitutional amendment, but the question whether to adopt it went to Ohio's electorate. And in the May 2018 primary election, the People overwhelmingly approved the amendment by a 3-to-1 margin.

2. One might have thought that would be the end of the gerrymandering debate in Ohio, at least for a while. Instead, just a few weeks later, a number of individuals and associations filed this suit in the United States District Court for the Southern District of Ohio. They argued that the General Assembly had drawn the current map, in place since 2011, to favor Republicans. This, they said, violated both the Equal Protection Clause and the First Amendment, along with Article I of the Constitution.

These claims are quite weak with respect to the 2011 map, because that map undisputedly resulted from the General Assembly's bipartisan negotiations. An initial congressional plan (HB 319) passed with narrower bipartisan support in the General Assembly on September 26, 2011. *See* R.212-1, PageID#11389–90. Subsequently, an advocacy group filed a referendum petition on HB 319. Concerned that the referendum might leave Ohio without a map for the next election cycle, R.212–

1, PageID#11390; R.243, PageID#21070, legislators went back to the drawing board. Republicans *and* Democrats in the General Assembly immediately began negotiating changes to HB 319. R. 243, PageID#21070–71. The revised map passed with supermajority bipartisan support, with a House vote of 77 to 17 and a Senate vote of 27 to 6. R.243, PageID#21077–78 In fact, a majority of House Democrats voted in favor of HB 369. R. 243, PageID#21077. Then-Governor John Kasich signed the map into law on December 15, 2011. It has been in place ever since.

At the time of the plaintiffs' filing, this Court already had before it two cases that might moot the issue. Both involved the question of whether partisan-gerrymandering claims are justiciable, along with the question of what standards govern such claims. *See Gill v. Whitford*, No. 16-1161; *Benisek v. Lamone*, No. 17-333. But the Court decided both cases on other grounds. *Gill v. Whitford*, 138 S. Ct. 1916, 1922–23 (2018); *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam). So by the end of June 2018, the parties could continue their work without any obvious risk of an intervening Supreme Court decision.

That changed the following January, when the Court set for argument two more cases presenting the same issues. *See Lamone v. Benisek*, 139 S. Ct. 783 (2019); *Rucho v. Common Cause*, 139 S. Ct. 782 (2019). The State moved to stay the trial until after this Court's decisions, explaining that the tremendous effort needed to litigate the case could be mooted by this Court's resolution of those cases. The plaintiffs opposed the stay, insisting that the District Court's opinion deserved to "see[] the light of day *before* the Supreme Court rules on partisan gerrymandering

litigation." R.246, PageID#21241 (emphasis added). They argued that the District Court's "opinion [was] going to be important for the public discussion and the judicial consideration of these issues," and that "it would be "important" for "the Supreme Court [to] have the benefit of and read this Court's opinion." *Id.* The District Court sided with the plaintiffs and denied the stay. It held an eight-day trial in March. App.29.

3. The District Court issued its decision and entered an order on May 3, 2019—less than two months from the end of the current Supreme Court term. The order holds that the plaintiffs have standing to bring their claims, their claims are justiciable, and the 2011 plan reflects unconstitutional partisan gerrymandering pursuant to the First Amendment, Fourteenth Amendment, and Sections 2 and 4 of Article I of the United States Constitution. App.139, 293–97. The District Court found that *all sixteen* of Ohio's congressional districts "were intended to burden [the plaintiffs'] constitutional rights, had that effect, and the effect is not explained by other legitimate justifications." App.2. The District Court further found that the 2011 plan burdened the plaintiffs' associational rights and "that burden is not outweighed by any other legitimate justification." App.2. Finally, the order found the 2011 plan exceeded Ohio's powers under Sections 2 and 4 of Article I of the United States Constitution. App.2, 287.

The District Court's equal-protection analysis mirrors that of the *Rucho* district court. The court adopted "a three-part test," under which plaintiffs must first "prove (1) a discriminatory partisan intent in the drawing of each challenged dis-

trict and (2) a discriminatory partisan effect on those allegedly gerrymandered districts' voters." App.167. If they make this showing, "[t]hen, (3) the State has an opportunity to justify each district on other, legitimate grounds." *Id.* The District Court held that Ohio failed this test. It reached this conclusion without adopting any precise formula for picking out—or even guidance regarding what constitutes—an impermissible "effect" or "intent." The District Court likewise gave no instructions regarding the process for identifying "legitimate" justifications. Instead, the District Court considered the totality of the evidence and concluded that Ohio's map failed the vague, three-part test it announced. (The court went on to hold that the same test governs vote-dilution claims pressed under the First Amendment. App.262–63). And its test is all the more confusing because it struck down Ohio's map notwithstanding evidence that Ohio's map reflects the need to conform to the Voting Rights Act and other legitimate concerns. Several of the 2011 plan's sixteen districts (*all* of which the District Court concluded were partisan gerrymanders) were even drafted at the specific request of Democratic members of the General Assembly. R.243, PageID#21056-62.

The District Court adopted an equally vague test to determine whether a gerrymandered map violates a plaintiff's First Amendment right of association. It modeled this test on the so-called *Anderson-Burdick* framework. *See* App.265–69; *see also Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick v. Takushi*, 504 U.S. 428 (1992). And it held that courts faced with a partisan-gerrymandering challenge under the First Amendment should "weigh the burden imposed on a group of voters'

associational rights against the precise interests put forward by the State as justifications for the burden imposed by the challenged map." App.269. Once again, the District Court declined to settle on any fixed formula, instead deciding that these interests were to be balanced in light of all the circumstances. In this case, it held that the evidence considered as a whole established a First Amendment violation; the burdens outweighed their justifications.

Finally, the District Court held that Ohio exceeded its power to regulate elections under Article I for the same reason that it violated the Equal Protection Clause and First Amendment: its congressional map "unconstitutionally dilutes votes because of partisan affiliation" and "impermissibly infringes on the associational rights of voters." App.288.

The court then turned to fashioning relief. One would have expected that, with decisions in *Rucho* and *Lamone* likely by the end of June, the District Court would have adopted a schedule that would permit the State to adopt a new map in light of this Court's forthcoming decisions. It did the opposite. Notwithstanding undisputed evidence that the State could implement any map settled upon by September, *see* App.291, 294, the District Court ordered the State to "enact forthwith its own remedial plan consistent with this opinion no later than June 14, 2019," App.295—in all likelihood, before the *Rucho* and *Lamone* decisions are issued. The court explained that "[n]o continuances will be granted," and that the effective date of any plan would be either "the date on which the Governor signs the proposed remedial plan," or "the date on which the General Assembly overrides the Governor's

veto." *Id*. The State would then have to submit the revised plan to the court, along with "[a]ll transcripts of committee hearings and floor debates" (even though Ohio's General Assembly does not create such transcripts), "[d]ata on the remedial plan's population deviation, compactness, municipality and county splits, and any incumbent pairings," and more. *Id*. If the State failed to pass a new map, the court would make one on its own. *Id*. at 296.

4. On May 6, 2019, the State asked the District Court to stay its decision pending the resolution of an appeal in this matter. At the very least, the State argued, it should have sufficient time after this Court's *Rucho* and *Lamone* decisions to make its map comply with Supreme Court precedent. The District Court denied the stay request on May 9, 2019. Ohio filed its stay application in this Court the next day.

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*, 558 U.S. at 190; *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

I. THERE IS A REASONABLE PROBABILITY THAT THE COURT WILL NOTE PROBABLE JURISDICTION AND A FAIR PROSPECT THAT A MAJORITY OF THE COURT WILL VOTE TO REVERSE.

This Court is all but certain to note probable jurisdiction in this case (or defer the question of jurisdiction to the hearing on the merits), and quite likely to reverse or vacate once it does.

As an initial matter, Ohio's appeal of the three-judge District Court's order arises under this Court's mandatory appellate jurisdiction. 28 U.S.C. § 1253. And since the case involves "substantial question[s]" going to the merits, this Court is likely to note probable jurisdiction. *See In re Primus*, 436 U.S. 412, 414 (1978). Indeed, Ohio is unaware of any recent case on this issue in which the Court refused to either note probable jurisdiction or set the jurisdictional issue for argument. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 782 (2019); *Lamone v. Benisek*, 139 S. Ct. 783 (2019); *Gill v. Whitford*, 137 S. Ct. 2268 (2017); *Benisek v. Lamone*, 138 S. Ct. 543 (2017); *GI Forum v. Perry*, 546 U.S. 1075 (2005); *Vieth v. Jubelirer*, 539 U.S. 957 (2003).

Once the Court notes probable jurisdiction in Ohio's appeal, there is a "fair prospect" that the Court will vote to reverse or vacate. This follows from the fact that this Court will decide, before the end of June, *Rucho v. Common Cause*, 18-422 and *Lamone v. Benisek*, 18-726. Those two cases collectively present precisely the same issues as this case: whether so-called "partisan gerrymanders" are unconstitutional; if so, whether those suits are justiciable; and if they are, what standards partisan-gerrymandering challenges are to be judged by. There is at least a "fair prospect" that the Court in *Rucho* and *Lamone* will hold either that partisan gerry-

manders do not violate the Constitution, or that claims challenging their constitutionality are not justiciable. Even the proponents of these claims concede as much. *See, e.g.*, Tokaji, *How to Win the Partisan Gerrymandering Cases*, SCOTUSblog (Feb. 6, 2019) (noting "reasons to doubt the plaintiffs' chances in the Supreme Court."), online at https://www.scotusblog.com/2019/02/symposium-how-to-win-the-partisan-gerrymandering-cases/ (last visited May 4, 2019). Rightly so. In 2004, a plurality of the Court would have held that partisan-gerrymandering claims are non-justiciable, *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality). Since there is a "fair prospect" that the Court might adopt the same position as the *Vieth* plurality, there is necessarily a "fair prospect" that the Court will reverse the District Court's ruling below.

What is more, there is a "fair prospect" that the Court would vacate the lower court's decision and remand for further proceedings *even if* it were to recognize some ability to challenge partisan gerrymanders. If the Court finds for the challengers in *Rucho* or *Lamone*, it will have to announce a test for analyzing the legality of alleged partisan gerrymanders. Since litigants and courts have suggested a number of possible tests, one can only speculate which the Court might settle on. But even if the Court announces a test, the proper course would be to vacate and remand so that the District Court may apply that new test in the first instance. After all, this Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). This means there is a "fair prospect" that Ohio will win relief—vacatur—*even if* the challengers in *Rucho* or *Lamone* prevail. (And though it is be-

yond the scope of this stay motion, Ohio disputes that its map is the result of an unconstitutional "partisan gerrymander" under any definition of that term.)

Rucho's first trip to this Court illustrates the likelihood that the Court would vacate and remand the District Court's decision even if it does not hold partisan-gerrymandering claims to be non-justiciable. In *Rucho I*, as in this case, the district court held that a state legislature had violated the First and Fourteenth Amendments by districting in a partisan fashion. *See Common Cause v. Rucho*, 279 F. Supp. 3d 587, 597 (M.D.N.C. 2018). In *Rucho I*, as in this case, the district court ordered the North Carolina legislature to draw new maps in a matter of weeks, and declared that it would appoint a special master to do so if the legislature failed to act. *Id.* at 691. And in *Rucho I*, as in this case, the district court ordered this relief notwithstanding the fact that this Court had two partisan-gerrymandering cases pending before it—*Gill v. Whitford*, No. 16-1161; *Benisek v. Lamone*, No. 17-333—both of which threatened to moot or force reconsideration of the district court's decision. This Court, with just two Justices dissenting, "stayed" the lower court's order "pending the timely filing and disposition" of an appeal to the Supreme Court. *Rucho v. Common Cause*, 138 S. Ct. 923 (2018). Then, after it decided *Gill*, it "vacated" the district court's *Rucho* decision and "remanded" it "to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill v. Whitford*." *See Rucho v. Common Cause*, 138 S. Ct. 2679 (2018). If like cases are to be treated alike, the Court should do the same here: it should stay

the lower court's decision, and then vacate and remand if there is any need to apply the Court's decision to Ohio's map.

The likelihood that this Court would vacate and remand grows stronger still in light of the tests the lower court adopted. The District Court did not adopt "rules" of the sort that "limit and confine judicial intervention." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). It did not, for example, adopt anything approximating the bright-line formulas for weeding out "extreme" gerrymanders that the Court discussed with counsel at oral argument in *Rucho*. *See* No. 18-422, Oral Arg. Tr., 20:1–23, 61:2–22. Instead, the District Court adopted two flexible standards that require courts to assess partisan impact under the totality of the circumstances. Its "three-part test" for vote-dilution claims under the Equal Protection Clause, for example, requires courts to assess the legality of a gerrymander based on "discriminatory partisan intent" and "discriminatory partisan effect," along with any "legitimate legislative grounds" that justify the challenged districts. App.167. The Court may recognize this test, because it is the same test that the lower court adopted in *Rucho*. *See Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C. 2018). So if there is a fair prospect of the Court's rejecting that test, there is a fair prospect that Ohio will win *at least* a decision vacating and remanding the Equal Protection Claim.

Second, the Court adopted a novel First Amendment framework for associational-rights claims. As one scholar accurately reported, "the Ohio decision was the first to analyze the plaintiffs' association claim using *Anderson-Burdick* balancing."

See Stephanopoulos, *The Ohio Gerrymandering Decision*, Election Law Blog (May 3, 2019), online at https://electionlawblog.org/?p=104996 (last visited May 9, 2019). In other words, the District Court held that courts presented with a partisan-gerrymandering claim under the First Amendment "must weigh the burden imposed on a group of voters' associational rights against the precise interests put forward by the State as justifications for the burden imposed by the challenged map." App.269. The trouble, however, is that the court provided no insight at all into the manner in which courts are supposed to perform this balancing. It seems to be "some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). Open-ended tests of this sort are no solution to partisan-gerrymandering claims' non-justiciability; they are the problem that *needs* a solution if the claims are to be justiciable. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). The *Anderson-Burdick* framework was already well-established at the time of *Vieth*, so if that were enough to make the claims justiciable, a majority of the Court would have said so.

There is also at least "a fair prospect" that this Court will review and reverse the District Court's conclusion that partisan gerrymandering violates Sections 2 and 4 of Article I of the Constitution. See U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States…."); art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the

Legislature thereof…."). Once again copying *Rucho*, the District Court concluded that "a state necessarily exceeds its authority under the Elections Clause if the State violates the First and/or Fourteenth Amendments." App.287. Without further analysis, the court held that the 2011 plan violated not only the First and Fourteenth Amendments, but also Sections 2 and 4 of Article I of the Constitution. App.287. This argument incorporates and extends all the flaws of the rest of its analysis to still more constitutional clauses. It also fails to provide any guidance whatsoever to the Ohio General Assembly, which is now tasked with drawing a new map under an inscrutable standard within a matter of weeks.

Ohio's "fair prospect" of winning vacatur or reversal is strengthened by arguments and facts specific to this case—arguments on which it could prevail even if the Court adopted the lower court's tests wholesale. First, consider one alternative argument for reversal. The plaintiffs' waited years to file this case, and so their claims are barred by laches. Laches reflects the principle that "equity aids the vigilant and not those who slumber on their rights." *Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (quoting Black's Law Dictionary 875 (6th ed. 1990)). The plaintiffs here slumbered long and hard. Even though Ohio passed the challenged map in 2011, the plaintiffs waited until 2018 to sue, ensuring that any resolution would cause significant confusion for the 2020 election. The District Court dismissed this argument, reasoning that "Plaintiffs were reasonable in waiting three election cycles before bringing this action," since they needed to develop evidence of partisan intent and bias. App.289. But the difficulty of the burden does not justify a delay in meet-

ing it. In any event, if the challengers needed evidence, they had no justification for waiting three (rather than one or two) election cycles. And even if they were justified in waiting three cycles, they cannot justify the fact that they filed less than six months before the *fourth* election cycle. If laches is inapplicable in this case, it is hard to envision the partisan-gerrymandering case in which the doctrine applies.

As for vacatur, the facts of Ohio's case will not permit an easy application of whatever test the Court settles on. If the Court decides *Rucho* or *Lamone* based on standing principles, it may well have to vacate and remand for the District Court to collect the relevant evidence or apply those principles in the first instance, as it did in *Gill*, 138 S. Ct. at 1934, and *Rucho I*, 138 S. Ct. at 2679. Even putting that aside, Ohio has strong arguments that its map is largely the product of non-partisan concerns. There is no way to summarize those arguments or the evidence in a stay motion—that is why the District Court's opinion is 300 pages long. (For anyone interested, Ohio made these arguments in detail in its post-trial brief. R.252.) Suffice it to say, the fact that the lower court took 63 pages to address the evidence in this case, and another 125 to decide whether that evidence warranted relief, is a good sign that there are plausible arguments on both sides. And there are indeed good arguments supporting the State. For example, the District Court's decision "was the first to confront a *serious argument* that the Voting Rights Act justified" a map's alleged bias. Stephanopoulos, *The Ohio Gerrymandering Decision*, online at https://electionlawblog.org/?p=104996 (emphasis added). The District Court rejected that argument. But the very fact that there *is* a serious argument will complicate the

application to this case of any test this Court announces. Add all this to the uncertainty of what the Court will do in *Rucho* and *Lamone*, and Ohio has established far more than a "fair prospect" of relief.

* * *

In the end, there is at least a "fair prospect" of the Court's resolving *Rucho* and *Lamone* in a manner that requires reversal or vacatur of the District Court's decision. There is likewise a "fair prospect" that the Court would reverse on some other ground.

II. OHIO WILL BE IRREPARABLY HARMED ABSENT A STAY, AND THE PUBLIC INTEREST STRONGLY MILITATES IN FAVOR OF A STAY.

The District Court's decision—and, in particular, its command that the General Assembly pass a new map by June 14 or suffer the consequences—will irreparably harm the State of Ohio.

As an initial matter, a State suffers "a form of irreparable injury" every time it is "enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). In recognition of this, the Court typically stays decisions enjoining state laws, provided there is a reasonable prospect of Supreme Court review. *See, e.g.*, *id.*; *Herbert v. Kitchen*, 571 U.S. 1116 (2014); *San Diegans for the Mt. Soledad Nat'l War Mem. v. Paulson*, 548 U.S. 1301, 1303–04 (2006) (Kennedy, J., in chambers). Here, review is almost certain and there is no reason not to maintain the status quo. For one thing, the irreparable injury associated

with injunctions of state law is especially great when a federal court enjoins "districting legislation," as this "represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *see also, e.g.*, *id.* at 934–35 (Ginsburg, J., dissenting) ("[F]ederalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions"). For another, the 2020 election is far enough away that the District Court can *at least* wait long enough to see what this Court has to say about partisan gerrymandering in late June before demanding that the General Assembly draw a new map. If indeed this Court's decision supports the District Court's decision, then that court will have time to settle on a remedy following remand or summary affirmance. This Court could even vacate any stay if this Court's *Rucho* and *Lamone* decisions make the issue sufficiently obvious.

The propriety of a stay here also follows *a fortiori* from previous partisan gerrymandering cases in which the Court has granted stays pending appeal. *See Gill v. Whitford*, 137 S. Ct. 2289 (2017) (granting application for stay pending resolution of an appeal from a district court order requiring a sovereign state to draw a new congressional map even though a justiciable partisan gerrymandering claim may not even exist); *see also Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (granting stay six days after legislative defendants filed application for stay premised on similar reasons). In *Gill*, the district court issued its remedial order more than a year before the 2018 election cycle was set to commence and gave the Wisconsin legislature nine months to draw a new map. No. 15-cv-421-bbc, 2017 U.S. Dist. LEXIS

11380, at *6–7 (W.D. Wisc. Jan. 27, 2017). Moreover, the Court specifically emphasized that the Wisconsin mapdrawers had "produced many alternate maps, some of which may conform to constitutional standards," which it thought would "significantly assuage the task now before them." *Id.* at *4, 8. If this Court judged that stays were warranted in *Gill* and *Rucho*, then a stay is all the more appropriate here.

The scope of the lower court's order exacerbates the injury. Its decision requires the General Assembly to negotiate and pass a new congressional map by June 14. If it fails to do so, the District Court (with the help of a special master) will draw a new map itself. *See* App.294–97. One fundamental problem with this is that this Court is unlikely to release its decisions in *Rucho* or *Lamone* until *after* June 14. This means that the ordered relief risks forcing the General Assembly to amend its law unnecessarily, and on an artificially rushed basis. If this Court ultimately holds that these claims are non-justiciable, or issues any other decision that would require reexamination of the lower court's decision, then the General Assembly may well have been needlessly pressured into repealing and replacing a validly enacted law. If it is an injury to enjoin the enforcement of a duly enacted law, it is a much worse injury to require the General Assembly to *repeal* that law unnecessarily, on the threat of judicial intervention. At best, the District Court's decision creates a serious risk that the General Assembly will be forced to waste time and legislative resources negotiating a map that it would have had no reason to pass had the District Court simply waited for *Rucho* and *Lamone*. The People would be better

served if the General Assembly could go about addressing pressing issues—ranging from the opioid epidemic to education to consideration of a now-pending state budget—instead of spending valuable time and energy responding to an opinion that has a high likelihood becoming inconsistent with Supreme Court precedent almost immediately after the June 14 deadline.

Another fundamental problem with the District Court's command that a new map be enacted by June 14 is that its standard makes it virtually impossible for the Ohio General Assembly to know in advance how to draw a map that will be approved by the court. Even given more time, how is the Ohio General Assembly to negotiate and introduce a map that can achieve a majority vote in each chamber (and the Governor's signature) under the District Court's totality-of-the-circumstances test? The District Court seems to grasp the difficulty of this task by gearing up to appoint a special master to draw a map of the court's choosing; or, alternatively, to impose on the State a map that plaintiffs' own expert drew.

It gets worse. Drafting a map that is ultimately unlikely to be used is exceptionally unfair and confusing for voters and candidates. This lawsuit alone has created a likelihood of confusion. If the lower court's ruling were to be affirmed, the voters of Ohio would have to vote under at least three different congressional district maps in three elections. First, voters voted in 2018 in the current districts. Then in 2020 voters would vote in any new map produced as a result of this litigation. Finally, in 2022, the map will change yet again because of the decennial census, and voters will have to learn new districts for a third time. Foisting new dis-

tricts on voters and candidates in a matter of months will cause irreparable confusion and harm to those voters and candidates, especially if that map drawing exercise turns out to be for naught. What is more, the lower court "enjoin[ed] the State from conducting any elections using the" current map "in any future congressional elections," App.294, making it entirely unclear what Ohio is supposed to do if it needs to hold a special election before it finalizes any new map.

The harm to the State and the public is particularly stark in light of the fact that new districts need not be drawn until September to be implemented in time for the 2020 elections. Doc. 185, PageID#11065. It is not clear why the State and its citizens must be forced into a truncated, confusing, and difficult map-drawing exercise prior to a ruling in *Rucho* and *Lamone* when there is plenty of time to wait. The District Court acknowledged the September deadline in its Opinion and Order but failed to explain why a plan would need to be enacted even before the end of this Court's term. App.291, 294.

These are not theoretical concerns. This Court has noted that lower courts should be mindful of the "considerations specific to election cases" and avoid the very real risks that conflicting court orders changing election rules close to an election may "result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Incumbents and candidates for congressional offices under the 2011 plan have been planning campaigns in these districts for months, if not years. Drawing new districts before knowing this Court's action in *Rucho* and *Lamone* will effectively freeze campaigns, disrupt fund-

raising, and confuse voters. Some candidates who would otherwise run for Congress may opt out because of the confusion. Voters may ultimately fail to participate not understanding which plan is in place. If this final judgment is ultimately vacated (as every other similar judgment in cases like this one has been in the past several years), then the damage cannot be undone.

Once again, this Court's decision to stay the decision in *Rucho* is instructive. Recall that the district court in that case ordered almost the exact same relief; it required North Carolina to pass a new map in just two weeks, all while *Gill* and *Benisek* were still pending at this Court. Instead of forcing the General Assembly to risk wasting its time, this Court should stay the District Court's decision pending appeal. *Rucho*, 138 S. Ct. at 923. There is no good reason to treat this case any differently.

CONCLUSION

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

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