No. 19-___

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,

Appellants,

v.

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

Appellees.

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

JURISDICTIONAL STATEMENT

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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*, No. 18-422, __ U.S. __ (June 27, 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?

LIST OF PARTIES

The appellants, all of whom are being sued in their official capacities, are:

1. Larry Householder (Speaker of the Ohio House of Representatives)
2. Larry Obhof (President of the Ohio Senate)
3. Frank LaRose (Ohio Secretary of State)

The appellees are:

1. LuAnn Boothe
2. Douglas Burks
3. Aaron Dagres
4. Kathryn Deitsch
5. Linda Goldenhar
6. Mark John Griffiths
7. Hamilton County Young Democrats
8. Andrew Harris
9. Beth Hutton
10. Sarah Inskeep
11. League of Women Voters of Ohio
12. Cynthia Libster
13. Ria Megnin
14. Elizabeth Myer
15. Lawrence Nadler
16. Northeast Ohio Young Black Democrats
17. Ohio A. Philip Randolph Institute

18. The Ohio State University College Democrats
19. Tristan Rader
20. Constance Rubin
21. Teresa Thobaben
22. Chitra Walker

The following individuals and entities were intervenors in the District Court:

1. Nathan Aichele
2. Robert F. Bodi
3. Steve Chabot
4. Charles Drake
5. Franklin County Republican Party
6. Warren Davidson
7. Bob Gibbs
8. Bill Johnson
9. Jim Jordan
10. Bob Latta
11. Dave Joyce
12. Roy Palmer, III
13. Republican Party of Cuyahoga County
14. Steve Stivers
15. Michael Turner
16. Brad R. Wenstrup

The following individual was a plaintiff on the original complaint, but was terminated from the case and is not a party to this appeal:

1. Erin Mullins

The following individuals were defendants in the District Court, in their official capacities, but are not parties to this appeal:

1. Jon A. Husted (former Secretary of State),
2. John R. Kasich (former Governor of Ohio),
3. Kirk Schuring (former Speaker Pro Tempore of the Ohio House of Representatives)
4. Ryan Smith (former Speaker of the Ohio House of Representatives)

The following individuals and entities are designated as "movants" on the District Court's docket, but were not parties below and are not parties to this appeal:

1. Ohio Attorney General
2. E. Mark Braden
3. Adam Kincaid
4. Thomas Whatman
5. Republican National Committee
6. National Republican Congressional Committee

The following people are listed on the lower court's docket because of their involvement in a discovery issue, but were not parties below and are not parties to this appeal:

1. John Morgan
2. Edward Gillespie

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Ohio A. Philip Randolph Institute, et al. v. Larry Householder, et al.*, No. 18-cv-357 (S.D. Ohio) (judgment entered May 3, 2019).
2. *In re Subpoena Served on E. Mark Braden*, No. 18-mc-29 (S.D. Ohio) (no judgment entered)
3. *In re Subpoenas Served on Edward Gillespie and John Morgan*, No. 18-mc-30 (S.D. Ohio) (no judgment entered)
4. *In re Subpoenas Served on Republican National Committee, National Republican Congressional Committee, and Adam Kincaid*, No. 18-mc-31 (S.D. Ohio) (no judgment entered)
5. *In re Subpoena Served on E. Mark Braden*, No. 18-mc-32 (S.D. Ohio) (no judgment entered)
6. *Ohio A. Philip Randolph Institute, et al., v. LaRose, et al., v. Republican National Committee, et al.*, No. 18-4258 (6th Cir.) (appeal dismissed January 18, 2019)
7. *Larry Householder, et al.*, *v. Ohio A. Philip Randolph Institute, et al.*, No. 18A1165 (U.S.) (stay pending appeal entered May 24, 2019)
8. *Steve Chabot, et al.*, *v. Ohio A. Philip Randolph Institute, et al.*, No. 18A1166 (U.S.) (stay pending appeal entered May 24, 2019)
9. *Larry Householder, et al.*, *v. Ohio A. Philip Randolph Institute, et al.*, No. 18A1242 (U.S.) (extension of time to file jurisdictional statement granted June 5, 2019)

10. *Steve Chabot, et al.*, *v. Ohio A. Philip Randolph Institute, et al.*, No. 18A1288 (U.S.) (stay pending appeal entered June 11, 2019)

11. *Steve Chabot, et al.*, *v. Ohio A. Philip Randolph Institute, et al.*, No. 19-__ (U.S.) (notice of appeal to this Court filed May 6, 2019)

12. *Ohio A. Philip Randolph Institute, et al., v. Obhof, et al., and Republican National Committee, et al.*, No. 19-3551 (6th Cir.) (still pending)

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INTRODUCTION

The plaintiffs in this case sought relief for one reason and one reason only: they alleged that Ohio's congressional map was the product of an unconstitutional partisan gerrymander. That gave rise to the question whether partisan-gerrymandering claims are even justiciable. In its decision below, the District Court held that they are. It then held that all sixteen of Ohio's congressional districts are unconstitutional partisan gerrymanders.

Less than two months later, in *Rucho v. Common Cause*, No. 18-422, __ U.S. __ (June 27, 2019), this Court held that partisan-gerrymandering claims are *not* justiciable. *Rucho* directly rejects the District Court's holding. This Court should summarily vacate the judgment below and "remand[] with instructions to dismiss for lack of jurisdiction." *Id.*, slip op. at 34.

OPINIONS BELOW

The three-judge District Court's opinion below is published at 373 F. Supp. 3d 978, and reproduced in the Appendix, beginning at App.1a. Its judgment is reproduced at App.400a. Its Order Denying Emergency Motions to Stay Pending Appeal is available online at 2019 U.S. Dist. LEXIS 78221.

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.1a, 400a. The State filed its notice of appeal on May 6, 2019, App.402a, and timely filed this jurisdictional statement after obtaining an extension of time until July

19 in which to do so. *See Householder v. Ohio A. Philip Randolph Inst.*, No. 18A1242.

This Court has statutory jurisdiction under 28 U.S.C. §1253. But for two reasons, it lacks Article III jurisdiction, just as the District Court did below. First, the plaintiffs raised only partisan-gerrymandering claims, and those claims are non-justiciable. *See below* 13. Second, the plaintiffs lacked Article III standing to sue. *See below* 14–19. This jurisdictional statement elaborates on both points, below.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, §2, clause 1 of the United States Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article I, §4, clause 1 of the United States Constitution provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

> exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Ohio has used the same congressional map in every congressional election since 2012. Ohio's General Assembly passed that map in 2011 with bipartisan supermajorities in both chambers. Why did legislators from both parties come together? Because they had to. After the 2010 census, Ohio lost two congressional seats. App.7a. In its first attempt at adjusting the map to account for this, the General Assembly passed a map that received some bipartisan support. But when it looked like voters might reject the map in a referendum, the General Assembly got to work on a revised map. App.31a–33a.

At that point, the General Assembly needed a bipartisan solution. That is what it ended up with. Legislators from across the political spectrum eventually agreed on a compromise plan. App.36a. Majorities of Republican *and* Democratic state representatives voted for the revised plan, and the plan secured supermajority bipartisan support in both chambers. Governor John Kasich signed it into law in December 2011. App.36a.

2. In the 2012 election, Ohio elected twelve Republicans and four Democrats to the United States House of Representatives. If there is one unmistakable trend in the years since, it is the success of incumbents: no incumbent has ever lost re-election, and just *three* of Ohio's current districts have been represented by more than one person.

The success of incumbents complicates any effort to determine whether the persistent success of Republican and Democratic incumbents results from favorable districts or incumbent advantage. But while the results of these elections lend themselves

to different interpretations, some Ohioans came to believe that the time had come to make mapdrawing a more cooperative endeavor. And so a group of Ohio legislators (among them, appellant Larry Obhof, who is now the Senate President), drafted a constitutional amendment that would help ensure significant bipartisan support for all future maps. *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, Ohio's commission responsible for drawing *state* legislative districts would take responsibility. That seven-member commission is made up of three statewide elected officials, plus "[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 §1(B); *id.* at art. XI, §1(A). The commission would be able to 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. And in the May 2018 primary election, Ohioans overwhelmingly approved the amendment; it passed by a nearly three-to-one margin. Thus, in every election after 2020, voters will elect representatives to districts drawn through this cooperative process.

3. For some, the changes above did not go far enough, fast enough. Just a few weeks after voters approved the constitutional amendment—but seven years and almost four election cycles after the 2011 map's passage—the plaintiffs challenged the 2011 map's legality in the United States District Court for the Southern District of Ohio. These plaintiffs, who are the appellees here, include both individuals and organizations. Among them, there is at least one person from each of Ohio's sixteen congressional districts. Many of these individuals, and all of the organizational plaintiffs, claim that they associate with or try to advance the policies of the Democratic party. They say the map was the product of unconstitutional "partisan gerrymandering," and that the map makes it harder to elect Democratic candidates, causes voter apathy, and confuses many voters. *See* App.2a–5a, 42a–52a.

The plaintiffs asked the Court to strike down Ohio's map in time to implement a new one for the 2020 election. They argued that the alleged partisan gerrymanders dilute their votes (or their members' votes) in violation of the First and Fourteenth Amendments, and restrict associational rights in violation of the First Amendment. The plaintiffs further argued that, because the map violated those amendments, the General Assembly exceeded its au-

thority under Article I, §§2 and 4 of the United States Constitution when it adopted the 2011 map.

4. The trial in this case lasted eight days. App.41a. Though both sides introduced fact witnesses, the testimony from their experts is more relevant here.

The plaintiffs for their part, relied considerably on the expert testimony of Dr. Wendy K. Tam Cho, a political scientist at the University of Illinois. Dr. Cho used something called an "EMCMC algorithm" to draw over three million simulated maps. In drawing these maps, Dr. Cho's model accounted for "neutral" factors of her own choosing, including "county and city preservation" and "compactness." App.92a–97a. After developing the maps, Dr. Cho compared the "competitiveness" of the maps her model produced to the competitiveness of the 2011 map, scoring competitiveness based on how close the map came to evenly dividing Ohio's sixteen congressional seats between the major parties. App.91a, App.142a n.594. Cho's algorithm did not account for one-person–one-vote principles; it permitted "a population deviation of up to 1 percent." App.96a n.380, 150a–51a. Nor did it account for other non-partisan factors that the General Assembly relied on in drafting the map, such as incumbent protection. App.95a–97a, 146a–47a.

The plaintiffs also called William Cooper, "a mapping consultant," who proposed a remedial map that the Court might implement for the 2020 election if it struck down the 2011 map. Cooper "used census data and mapping software 'to reexamine the plan that was adopted in [2011] and apply traditional redistricting principles to result in a map that was a little

more fair for Democratic voters and at the same time visually more appealing.'" App.123a (quoting Cooper testimony). The proposed plan divided fewer counties and political subdivisions. App.126a. But if the General Assembly had adopted that map in 2011, it would have had to pair six sets of incumbents. App.132a.

The defendants—who are the appellants here, and whom this brief will refer to collectively as "Ohio" or the "State"—introduced evidence of their own. For example, Drs. Janet Thornton and Thomas Brunell testified about the flaws in Dr. Cho's model. These flaws included: the model's failure to account for certain partisan-neutral factors (such as incumbent protection) that Ohio's General Assembly considered when drafting the 2011 map; its failure to account for one-person–one-vote; Dr. Cho's use of outdated data from the 2008 and 2010 elections; and the model's assessment of the maps' "competitiveness" based on how close they came to equally dividing Ohio's seats between the two major parties. App.142a–43a, 150a–51a.

Dr. M.V. Hood III, a political scientist from the University of Georgia, testified to the many neutral factors that contributed to the Republican lean of Ohio's congressional map. For one thing, about 78.5 percent of Ohio's land mass leans Republican. App.134a. For another, much of the incumbents' success could be attributed to the fact that their opponents tended to be political novices. Incumbents further bolstered their odds of beating challengers by outspending them by $1.2 million on average. App.138a.

Ohio might have introduced even more evidence had it not been significantly hampered in finding it. The plaintiffs admitted to losing (and possibly shredding) relevant documents before trial. They did this even though they anticipated litigation as early as 2013. *See* R.239, PageID#20120; R.138-12, PageID#4386–87. Now that the evidence is unavailable, it is impossible to guess what that evidence might have shown about the mapdrawing process.

5. On May 3, 2019, less than two months after the trial ended, the District Court released a 301-page opinion and order, in which it held unconstitutional all sixteen of Ohio's congressional districts. The opinion and order holds that the plaintiffs have standing to bring their claims, that their claims are justiciable, and that the 2011 plan reflects unconstitutional partisan gerrymandering under the First Amendment, Fourteenth Amendment, and §§2 and 4 of Article I of the United States Constitution. App.159a, 225a–26a, 349a–51a, 370a–79a, 383a.

Standing. The court treated the standing inquiry differently for each theory of relief. With respect to the vote-dilution theory, the District Court recognized that *Gill v. Whitford* dictated a district-by-district analysis. 138 S. Ct. 1916, 1930 (2018). In other words, it recognized that the plaintiffs had to show that Ohio's map diluted their votes in the districts where they lived. The court identified at least one plaintiff who lived in each district. It further determined that, according to Dr. Cho's model, each of those districts was less competitive than the vast majority of hypothetical districts the General Assembly might have chosen. And whenever a plaintiff would have been in a more competitive district under Cooper's map, the court considered that to be evi-

dence that the actual map diluted the plaintiff's vote. Finally, the court asserted that the evidence of statewide gerrymandering supported its district-specific findings. App.159a–84a.

With respect to the associational-rights theory, the District Court held that plaintiffs *did not* need to show standing on a district-by-district basis. Rather, they could show that the alleged gerrymandering made it harder to band together with other Democratic voters to elect Democratic representatives. This, the court held, established an "injury-in-fact" that gave rise to Article III standing. *See* App.184a.

Finally, the court concluded that, because the plaintiffs' Article I theory rested on the other theories, the plaintiffs' standing to assert vote-dilution and associational-rights theories meant they had standing to bring an Article I challenge. *See* App.189a–90a.

Merits. The District Court then took up the merits. It accepted all of the plaintiffs' theories, held that each was justiciable, and held that each required invalidating all sixteen of Ohio's congressional districts.

First, the Court adopted a vote-dilution theory, which it said rested on the First and Fourteenth Amendments. This theory's application turns on a "three-part test." App.227a. At the first two steps, plaintiffs bear the burden of proving: "(1) a discriminatory partisan intent in the drawing of each challenged district and (2) a discriminatory partisan effect on those allegedly gerrymandered districts' voters." App.227a. If plaintiffs make this showing, "[t]hen, (3) the State has an opportunity to justify each district on other, legitimate grounds."

App.227a. 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 three-part test it announced. App.240a–351a

The District Court next embraced an associational-rights theory, under which partisan gerrymanders may violate the First Amendment right to association. App.350a. The Court modeled this test on the so-called *Anderson-Burdick* framework. *See* App.353a–54a; *see also Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick v. Takushi*, 504 U.S. 428 (1992). Applying this framework, it held that courts faced with an associational-rights challenge to a congressional map 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.359a–60a. 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 the justifications.

Finally, the District Court held that Ohio exceeded its power to regulate elections under Article I. The Court did not adopt a new theory this time. Instead, it held that any map that "unconstitutionally dilutes votes because of partisan affiliation," or "im-

permissibly infringes on the associational rights of voters," violates the First and Fourteenth Amendments. And any map that violates those amendments, it held, exceeds the state legislature's Article I power to draw legislative districts. App.383a.

After considering all this, the Court took up the issue of whether the plaintiffs' suit was barred by laches. The State argued that it was: the plaintiffs had waited seven years and almost four full election cycles to sue. During that time, important witnesses had died, evidence had been lost, and the State had thus been prejudiced. The Court rejected this argument. It reasoned that the plaintiffs' delay was not unreasonable, since the law regarding partisan gerrymandering had been unsettled, and since the plaintiffs' waiting allowed them to develop evidence of partisan effect. *See* App.384a–86a. The court further held that the delay did not prejudice the State, reasoning that no amount of further evidence could make the map constitutional. App.388a.

Remedy. This left only the remedy. The court determined that it had to wrap up any mapdrawing efforts by September 20, 2019—any later and the map may not be implemented in time for the 2020 election. On that basis, it ordered Ohio's General Assembly to pass a new map before June 14. If the General Assembly failed to do so, the District Court said, it would appoint a special master and draw a map itself. App.392a–95a.

6. Ohio sought to stay the District Court's decision pending appeal, and this Court granted its request on May 24, 2019. *See Householder v. Ohio A. Philip Randolph Inst.*, No. 18A1165. Ohio then timely filed this jurisdictional statement, after obtaining

an extension of time until July 19 in which to do so. *See Householder v. Ohio A. Philip Randolph Inst.*, No. 18A1242.

ARGUMENT

The Court has mandatory jurisdiction to hear this appeal under 28 U.S.C. §1253. But it does not have Article III jurisdiction; nor did the District Court, because the plaintiffs' claims are non-justiciable and because the plaintiffs lack standing to bring this suit. The Court should therefore vacate the lower court's judgment with instructions to dismiss the case for lack of jurisdiction.

I. Partisan-gerrymandering claims are non-justiciable.

The plaintiffs in this case alleged that all sixteen of Ohio's congressional districts were partisan gerrymanders, and sought to invalidate all sixteen districts on this ground. Thus, the plaintiffs are not entitled to relief unless partisan-gerrymandering claims are justiciable. But in *Rucho v. Common Cause*, this Court held that partisan-gerrymandering claims *are not* justiciable. __ U.S. __, at slip op., 30 (June 27, 2019). This defeats the plaintiffs' claims as a matter of law. The Court should therefore summarily vacate the judgment below and "remand[] with instructions to dismiss for lack of jurisdiction." *Id*. at 34.

That is enough to resolve the case, and there is no need to read further. But in an abundance of caution, Ohio addresses two more points in the following sections. *First*, the plaintiffs lack standing to sue, which provides a second basis for vacating the decision below. *Second*, if this Court had jurisdiction,

the case would have presented substantial questions worthy of the Court's plenary consideration.

II. The plaintiffs failed to establish standing to bring this suit.

Even if partisan-gerrymandering claims were justiciable, the plaintiffs' claims would fail because the plaintiffs lack standing.

"To ensure that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society, a plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (internal citation and quotation marks omitted). This follows from Article III itself, which vests courts with "the judicial Power" that they may exercise in "cases" and "controversies." U.S. Const., art. III, §§1, 2. A case or controversy requires, at bare minimum, a plaintiff who has or will imminently suffer an "injury-in-fact" (that is, the invasion of a concrete and particularized invasion of a legal interest), fairly traceable to the complained-of conduct, that will likely be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

In this case, none of the plaintiffs established an injury-in-fact. Thus, the federal courts lack jurisdiction to decide this dispute. The District Court erred in deciding the case anyway.

A. Vote-dilution claims.

"To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific." *Gill*, 138 S. Ct. at 1930. After all, a voter in congressional elections votes in a single district. So to estab-

lish the harm alleged, the plaintiffs would have to show (at least) that they were "placed in legislative districts deliberately designed to 'waste' their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking)." *Id.*

The District Court erred in finding that the plaintiffs proved such district-specific harm. It assessed the existence of a district-specific injury with reference to just two forms of district-specific proof: Dr. Cho's model and Cooper's proposed map. Based on one or both of these pieces of evidence, the court concluded that every Ohio resident—including the individual plaintiffs and the organizational plaintiffs' members—suffered district-specific harm from packing or cracking.

Neither Dr. Cho's model nor Cooper's map supported the court's conclusion. Begin with Dr. Cho's model, and recall how it worked: Dr. Cho selected several partisan-neutral criteria; she generated over three million hypothetical maps using those criteria; and she then compared the competitiveness of the districts in maps she generated against the competitiveness of the actual districts that Ohio adopted in 2011.

There are two problems with this model. (In fact, there are more than two, but there are two worth highlighting here.) The first is that Dr. Cho's model, instead of using all of the General Assembly's *own* partisan-neutral criteria—for example, incumbent protection—used partisan-neutral criteria that Dr. Cho selected on her own. As a result, it is impossible to tell from her model how the actual map fares, in terms of competitiveness, against hypothetical maps

drawn with the partisan-neutral criteria the General Assembly used. Without knowing that, it is impossible to fairly infer from Dr. Cho's model that Ohio's "legislative districts" were "deliberately designed to 'waste'" the plaintiffs' votes. *Gill*, 138 S. Ct. at 1930. Perhaps the 2011 map was quite competitive, or at least reasonably competitive, compared to all of the hypothetical maps that could have been drawn using the General Assembly's partisan-neutral criteria—there is no way to know based on Dr. Cho's model. Even the *Rucho* dissent would have held that, when it comes to redistricting, there is no constitutional "problem" unless "legislators or mapmakers substantially deviate from the baseline distribution"—that is, from the legislature's own non-partisan criteria—"for partisan gain." *Rucho*, slip op., 25 (Kagan, J., dissenting). Because Dr. Cho's model failed to account for that baseline distribution, it failed to establish the sort of "harm" relevant to a vote-dilution theory.

The second problem with Dr. Cho's model is its failure to account for one-person–one-vote principles. While Cho's algorithm produced three million maps, there is *no* evidence regarding how many of those maps were viable options for the General Assembly—perhaps nearly all of them would have violated one-person–one-vote. To infer packing or cracking, one would have to see (at minimum) how Ohio's districts stack up against other *legally viable* options. Cho's model sheds no light on that.

Cooper's map is even less relevant than Cho's model. It establishes, at most, that the General Assembly might have adopted a map that placed some of the plaintiffs in more competitive districts. But to have standing to bring a vote-dilution claim, voters

must show that they live in a "cracked" or "packed" district. *See Gill*, 138 S. Ct. at 1930–31. The fact that the district is not as competitive as it could have been does not establish cracking or packing.

Finally, with respect to each district, the court concluded that the *statewide* evidence of gerrymandering also suggested district-specific gerrymandering. App.177a–79a. Nothing prohibited the court from considering such statewide evidence to *bolster* district-specific evidence. But courts may not rely heavily, let alone exclusively, on such evidence. *See Gill*, 138 S. Ct. at 1930. And since neither Cho's model nor Cooper's map provides any meaningful district-specific evidence of standing, the statewide evidence had nothing to bolster.

B. Associational-rights claims.

The plaintiffs have not suffered any injury-in-fact with respect to their associational-rights claims. Standing "turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The "source" of an associational-rights claim, as contemplated by the District Court, is the theory that partisan gerrymanders cause injury by making it harder for likeminded voters and organizations to band together to accomplish their political goals. App.184a.

The *Gill* majority already rejected the idea that this sort of "injury" constitutes an injury-in-fact for Article III purposes. The *Gill* plaintiffs argued that "their legal injury [was] not limited to the injury that they … suffered as individual voters." 138 S. Ct. at 1931. Instead, they claimed their injuries included "the statewide harm to their interests in the collective representation in the legislature, and in influ-

encing the legislature's overall composition and policymaking." *Id.* (internal quotation marks omitted). The Court dismissed this as "'the kind of undifferentiated, generalized grievance about the conduct of government'" that cannot constitute an injury-in-fact. *Id.* (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007)). "A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Id.* Thus, "the citizen's abstract interest" in legislative policies "is a nonjusticiable 'general interest common to all members of the public.'" *Id.* (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam)).

True enough, *Gill* repeatedly qualified the just-quoted statements with phrases like "[o]n the facts of this case," and "on the facts here." *Id.* But the facts in the plaintiffs' case against Ohio make for an *even weaker* claim to a particularized injury than the facts of *Gill*. That is because, in contrast to the map in *Gill*, which set districts for Wisconsin's *state* legislature, the 2011 map governs *congressional* elections. The plaintiffs did not introduce evidence concerning whether Ohio's map affects their ability to join together to change the composition of the *federal* House of Representatives. And in any event, the plaintiffs' interests in Congress's composition, and in the policies that body enacts, are *more* abstract than the *Gill* plaintiffs' interests in the composition and policies of the state legislature—instead of being a generalized grievance within a State, the grievance is generalized as to the entire nation.

C. Article I claims.

Everyone agrees that the plaintiffs had standing to bring their Article I claims only if they had stand-

ing to proceed on their other theories. So their failure to establish standing under either of the other theories necessarily defeats their standing as to the Article I claim.

* * *

Because the federal courts have no jurisdiction to resolve this dispute, the District Court erred by trying to resolve it. This provides a second ground for vacating the District Court's judgment and remanding with instructions to dismiss for lack of jurisdiction.

III. If this Court had jurisdiction, this case would have presented substantial questions worthy of this Court's plenary consideration.

If partisan-gerrymandering claims were justiciable, and *if* the plaintiffs in this case had standing, this case would have presented significant merits questions worthy of this Court's review. First and foremost, it would have presented the question whether Ohio's map *is* an unconstitutional "partisan gerrymander." It is impossible to say much about that, since *Rucho*'s non-justiciability holding rests on the fact that there is no test for determining what makes a congressional map unconstitutionally "partisan." But it would have given rise to a second merits question, too: Does the doctrine of laches apply to partisan-gerrymandering claims? As to this question, it is possible to say a bit more.

A. An injunction is a form of equitable relief, governed by principles of equity. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). One of equity's longstanding principles is that equity will

not reward those who sleep on their rights. *See Kansas v. Colorado*, 514 U.S. 673, 687 (1995). Laches grows out of this principle. *Id.* The laches defense bars equitable relief if the party raising it can prove "'(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Id.* (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)).

The State proved both prongs of the laches defense. With respect to diligence, the plaintiffs waited to sue until May of 2018—nearly seven years after the General Assembly passed the 2011 map, and just six months before the 2018 midterm elections. If this is not a lack of diligence, it is hard to imagine what would be. As for prejudice, the seven-year delay allowed for the loss and destruction of evidence. Key witnesses died—including Ohio Republican Party chair Bob Bennett, who served as a key go-between for Republicans and Democrats during the mapdrawing process. *See* R.243, PageID#21058–59, 21064–65. The plaintiffs either lost or destroyed documentary evidence. *See* R.239, PageID#20120. And, needless to say, even those who had participated could not reasonably be expected to remember the details of the mapdrawing process from seven years earlier.

B. The District Court rejected the laches 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.385a. But the difficulty of the burden does not justify a delay in meeting 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.

The plaintiffs themselves took an even bolder position in their stay-stage filings. They argued that the laches doctrine does not apply *at all* to continuing constitutional violations. The trouble with this argument is that it rests on nothing aside from the plaintiffs' *ipse dixit*. Traditional equitable principles apply even in constitutional cases. Thus, prisoners claiming that they are being unconstitutionally imprisoned cannot seek equitable relief (such as equitable tolling) if they inexcusably delay in seeking relief. *See Holland v. Florida*, 560 U.S. 631, 653 (2010). Even death-row inmates with facially plausible arguments for a stay pending execution are not entitled to relief if they wait too long to sue. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

The plaintiffs relied on two cases in their stay-stage filings: *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982); *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 653 (1977). The first interprets a statute of limitations and thus has nothing to do with equitable principles. The second does not address timeliness. So neither has anything to do with the application of laches, or any other equitable principle, to cases of alleged "continuing" violations.

Finally, it is worth responding to the District Court's prejudice finding. It found that the plaintiffs' delay in filing suit did not prejudice the State, since any evidence lost as a result of the delay would have gone "primarily … to the purported 'bipartisan negotiations'" the State argued "justify the map." App.388a (citation omitted). The court determined

that the absence of this evidence did not prejudice the State because *no evidence* of bipartisan negotiations could overcome the partisan nature of the map. Of course, it is hard to know what the lost evidence would have related to, since no one got to review it. But the idea that such evidence would be *irrelevant* to the partisan-gerrymandering analysis is a sure sign that something was wrong with the District Court's tests for picking out partisan gerrymanders—and, therefore, that something was amiss in its no-prejudice ruling.

CONCLUSION

The Court should summarily vacate the District Court's judgment and remand with instructions to dismiss the case for lack of jurisdiction.

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