No. _______

In the Supreme Court of the United States

STEVE CHABOT, *et al.*,
Appellants,

v.

OHIO A. PHILIP RANDOLPH INSTITUTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the district court erred in entertaining this partisan-gerrymandering claim, notwithstanding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

Ohio A. Philip Randolph Institute; LuAnn Boothe; Douglas Burks; Aaron Dagres; Kathryn Deitsch; Linda Goldenhar; Mark John Griffiths; Hamilton County Young Democrats; Andrew Harris; Beth Hutton; Sarah Inskeep; League of Women Voters of Ohio; Cynthia Libster; Ria Megnin; Elizabeth Myer; Lawrence Nadler; Northeast Ohio Young Black Democrats; The Ohio State University College Democrats; Tristan Rader; Constance Rubin; Teresa Thobaben; and Chitra Walker.

Defendants:

Larry Householder (Speaker of the Ohio House of Representatives); Larry Obhof (President of the Ohio Senate); and Frank LaRose (Ohio Secretary of State).

Intervenor-Defendants:

Representatives Steve Chabot, Brad Wenstrup, Jim Jordan, Bob Latta, Bill Johnson, Bob Gibbs, Warren Davidson, Michael Turner, Dave Joyce, Steve Stivers, and the Republican Party of Cuyahoga County, the Franklin County Republican Party, and private persons Robert F. Bodi, Charles Drake, Roy Palmer III, and Nathan Aichele.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Chabot v. Ohio A. Philip Randolph Inst.*, No. 19-__ (U.S.) (notice of appeal to this Court filed May 6, 2019).

2. *Chabot v. Ohio A. Philip Randolph Inst.*, No. 18A1166 (U.S.) (stay pending appeal granted May 24, 2019).

3. *Chabot v. Ohio A. Philip Randolph Inst.*, No. 18A1288 (U.S.) (extension of time to file jurisdictional statement granted June 11, 2019).

4. *Householder v. Ohio A. Philip Randolph Inst.*, No. 18A1165 (U.S.) (stay pending appeal granted May 24, 2019).

5. *Householder v. Ohio A. Philip Randolph Inst.*, No. 18A1242 (U.S.) (extension of time to file jurisdictional statement granted June 5, 2019).

6. *Householder v. Ohio A. Philip Randolph Inst.*, No. 19-70 (U.S.) (jurisdictional statement filed July 10, 2019).

7. *Ohio A. Philip Randolph Inst. v. Obhof*, No. 19-3551 (6th Cir.) (pending).

8. *Ohio A. Philip Randolph Inst. v. LaRose*, No. 18-4258 (6th Cir.) (appeal dismissed January 18, 2019).

9. *In re Subpoena Served on E. Mark Braden*, No. 18-mc-0095, No. 18-mc-0151 (D.D.C.) (granting motion to transfer on Oct. 31, 2018).

10. *In re Subpoenas Served on Edward Gillespie and John Morgan*, No. 18-mc-0105 (D.D.C.) (granting motion to transfer on Oct. 31, 2018).

11. *In re Subpoenas Served on Republican National Committee, National Republican Congressional Committee, and Adam Kincaid*, No. 18-mc-0140 (D.D.C.) (granting motion to transfer on Oct. 31, 2018).

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JURISDICTIONAL STATEMENT

Last Term, in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019), this Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." That principle resolves this case. The decision below adjudicated the same partisan-gerrymandering claims addressed in *Rucho*, adopted the same test the district court adopted in *Rucho* and under the same constitutional provisions, and found liability on claims of the same genre rejected by this Court in *Rucho* as non-justiciable. Just as this Court in that case reversed and remanded with instructions to dismiss, it should do the same here. There is no breathing room between this case and *Rucho*.

In fact, this case proves that *Rucho* was rightly decided. The three-judge panel below applied the *Rucho* district court's test to reach the bewildering conclusion that a redistricting plan that garnered the votes of half of Ohio's Democratic legislators discriminated against the Democratic Party. Even if in some "egregious" cases, partisan-gerrymandering claims presented justiciable questions—a position this Court has rejected—this case would not qualify as a matter of law.

The Court should summarily reverse the decision below or, alternatively, note probable jurisdiction and reverse.

OPINION BELOW

The three-judge district court's opinion is available at 373 F. Supp. 3d 978 and reproduced at J.S.App.1–406. Its judgment is reproduced at J.S.App. 407–08.

JURISDICTION

This appeal is from the district court's permanent injunction, issued on May 3, 2019, enjoining the State of Ohio from conducting any elections using the State's congressional redistricting plan enacted in 2011. Appellants filed their notice of appeal on May 6, 2019. J.S.App.409. This Court granted an extension to file this jurisdictional statement through July 19, 2019. *Chabot v. Ohio A. Philip Randolph Inst.*, No. 18A1288 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the First and Fourteenth Amendments and §§ 2 and 4 of Article I of the Constitution, which are reproduced at J.S.App. 412–414.

STATEMENT OF THE CASE

A. Ohio's 2011 Congressional Redistricting

In 2011, the Ohio legislature enacted a redistricting plan to govern elections to Congress from the Buckeye State. The principal challenge facing the legislature was that, due to comparatively slow population growth, Ohio was set to lose two congressional seats, taking its delegation from 18 to 16 members. At the time of the redistricting, members of the Republican Party

controlled majorities in both houses of the legislature and the governor's office.

After the 2010 election, Republican members held 13 Ohio congressional seats, and Democratic members held 5. Plans were drafted to remove two Democratic-friendly congressional seats for a 13–3 partisan split, thereby exacting the entire toll of the reapportionment from the Democratic Party.

But that was not the approach taken. Then-Speaker of the House John Boehner and State House Speaker William Batchelder agreed that a bi-partisan approach would be preferable. They sought a plan that would remove one Republican and one Democratic incumbent, for a 12–4 partisan incumbency split. That approach would divvy the partisan toll of the reapportionment evenly between the two major parties, resulting in a pairing of two Republican and two Democratic incumbents. A plan proposed by national Republican Party employees in Washington to split Franklin County four ways, for a 13–3 split, was not implemented.

The final enacted plan was the result of multiple rounds of negotiation between members of both parties in the Ohio legislature. Although an initial redistricting plan was enacted in the summer of 2011 with little Democratic support, the Ohio Constitution subjects redistricting legislation to a referendum process, and petitions were circulated to challenge the first enacted plan, H.B. 319. That threat incentivized a new round of negotiations and a second plan, H.B. 369.

The lead negotiator for the Democratic Party testified that House Speaker William Batchelder was "sincere and motivated" to obtain Democratic support for the redistricting plan. Szollosi Dep. 63:18–25. Republican legislators listened to the concerns of Democratic legislators and implemented them. The lead Democratic Party negotiator testified that at least six districts were made more politically competitive as a result. Szollosi Dep. 91:10–15.

The negotiations resulted in dozens of changes, including in areas of Ohio that vote overwhelmingly Republican. During these renewed negotiations, Democratic proposals were heard and implemented, impacting district lines. *See, e.g.*, 5 Trial Tr. 182:11–19 (map-drawer testifying about adopting legislator's requests for the three districts in Mercer County), *id.* 182:20–25 (map-drawer testifying about proposal in district 16), *id.* 183:6–24 (map-drawer testifying about request to include NASA Glenn Research Center in district 9 because of Representative Kaptur's involvement with the Armed Services Committee). Democratic and Republican proposals alike were heard and incorporated, Democratic and Republican incumbents alike were protected, and the legislature's lead consultant testified that drawing "Republican districts" was neither his directive nor his goal. *Id.* 158:7–18.

In addition to a bi-partisan incumbency-protection goal, the legislature implemented goals of enhancing racial equality in Ohio's congressional delegation. One goal was to preserve district 11 as a majority-minority district, since a majority-minority district had existed

in northeast Ohio since 1969. The other was to create a new minority-opportunity district (which became district 3) wholly in Franklin County.

These goals were bi-partisan. Democratic draft maps contained districts of 50% black voting-age population or higher in northeast Ohio, and a prominent Democratic staff member wrote in 2011 that the Democratic Party supported a new "Franklin County seat" that "maximizes minority voting strength." Int's Ex. 87. These districting decisions, by bringing minority voters into these districts, had the incidental impact of concentrating the Democratic vote. The districting decisions have not been challenged in this case as violating the Voting Rights Act or the Equal Protection Clause's guarantee of state racial neutrality.

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

The bi-partisan negotiations were a success. On December 14, 2011, the legislature passed H.B. 369,

and the next day the governor signed it into law. Half of the Democratic legislators voted for the plan, including a majority in the State house. H.B. 369 stood unchallenged for seven years and governed elections in 2012, 2014, 2016, and 2018.

On May 8, 2018, Ohio voters passed a State constitutional amendment providing for congressional redistricting reform. Beginning in 2020, supermajority support from each party's legislative members will be required for congressional redistricting legislation to become law, or else a commission will redistrict instead. Only if the commission also fails will the legislature redistrict by a simple majority. And, even then, a plan enacted under those circumstances will govern for only four years.

B. Procedural History

On May 23, 2018, the Plaintiffs—two not-for-profit organizations that were instrumental in sponsoring Ohio's redistricting reform amendment, several organizations aligned with the Democratic Party, and individual residents of each congressional district—filed this case. They raised only "partisan gerrymandering" claims against H.B. 369 under the Equal Protection Clause, the First Amendment, and Article I of the Constitution.

A three-judge panel (Timothy Black, Karen Nelson Moore, Michael H. Watson, JJ.) was convened pursuant to 28 U.S.C. § 2284. The Appellants, Republican members of Congress, county political parties, and voters, were allowed to intervene under Rule 24(b) as defendants. After the district court denied the Ohio

Attorney General's motion to dismiss, the case entered discovery. The district court expedited proceedings to ensure resolution in time to award relief to Plaintiffs before the 2020 elections.

The trial commenced on March 4, 2019 and lasted eight days. J.S.App.43. On May 3, 2019, the district court issued a 301-page ruling finding the 2011 plan unconstitutional and enjoining its use in further elections. *See* J.S.App.1–408.

First, the court concluded that the individual Plaintiffs have standing to challenge their respective districts of residence for the simple reason that they assert that all districts are cracked or packed and have established residency in them. J.S.App.166–92. The court also concluded that all Plaintiffs have standing under an associational theory founded on the concurring opinion of Justice Kagan in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). J.S.App.194 (quoting *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring)). It found that social-science metrics of partisan asymmetry measure "'the fortunes of political parties'" and therefore "suit" an alleged associational injury. J.S.App.193 (quoting *Gill*, 138 S. Ct. at 1933).

Second, the court held that Plaintiffs' claims are justiciable. It noted that "[t]he Supreme Court has held that partisan gerrymandering claims are justiciable" in *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), which "[t]he Supreme Court…has not overturned." J.S.App.199–200. It also concluded that, because one-person, one-vote claims are justiciable, the Constitution's delegation of authority over congressional elections cannot be deemed to weigh in

favor of non-justiciability. J.S.App.202–04. The court found that the Article I delegation of supervisory authority to Congress over time, place, and manner election regulations is insufficient to cure its concerns about partisan gerrymandering because "Members of Congress…are part of the problem." J.S.App.204. The court therefore held that "[t]he courts are the logical branch to turn to in the face of such legislative self-dealing…." J.S.App.205. The court found no problem in identifying manageable standards for Plaintiffs' claims because "three-judge federal district court panels have established justiciable standards." J.S.App.210 (footnote omitted). The court again cited *Whitford*, along with *Rucho*, *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867, 911–14 (E.D. Mich. 2019), and *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596–97 (D. Md. 2016)) for this proposition. *Id.*

Third, the court announced that it would apply the equal protection standard identified in the *Rucho* district-court decision. J.S.App.235, 239. The first prong of that test is an intent prong of "*Shaw* racial-gerrymandering claims." J.S.App.237, 236–42. The court conceded that five Justices in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), rejected this standard, J.S.App.237, but applied it anyway because it viewed the only alternative to be the lower substantial-factor test applied in other racial-discrimination cases, J.S.App.239 ("We note…that if Plaintiffs meet the predominant-purpose standard, they necessarily satisfy the motivating-factor standard as well."). The second element (also applied in *Rucho* district-court decision) is an "effect" prong, which references "the effect of diluting the votes of members of the disfavored party

by either packing or cracking voters into congressional districts." J.S.App.243. This could be established by showing that "a map is extremely unresponsive or noncompetitive." J.S.App.245. Then, under the third element, "the burden switches to Defendants to present evidence that legitimate legislative grounds provide a basis for the way in which each challenged district was drawn." J.S.App.245.

Fourth, the court purported to apply this standard and to identify a constitutional violation. As to intent, it found a "heavy use of partisan data," J.S.App.248, a "deep involvement of national Republican operatives," J.S.App.250, and statements indicating that "partisan outcomes were the predominant concern of those behind the map," J.S.App.255. The court also relied on various social-science metrics, such as partisan symmetry and the efficiency gap, to conclude that the plan is a partisan outlier. As to effect, the court found that 12 Republican and 4 Democratic members had consistently been re-elected, J.S.App.264, and that "an array of social-science metrics demonstrates that the 2012 map's significant partisan bias in favor of Republicans in that the Republicans possess a major advantage in the translation of votes to seats compared to Democrats," J.S.App.266. The court found that "Democratic candidates would win half the seats with 55% of the [statewide] vote," which it characterized as "stark" "asymmetry." J.S.App.375.

The court agreed that "Defendants tell an entirely different tale of the redistricting process," but it did not address that tale until the third prong, after it had shifted the burden to the defense. J.S.App.324. It

rejected the Appellants' incumbency-protection arguments, finding that the Ohio legislature's goals were "not incumbent protection as understood by Supreme Court precedent," J.S.App.327, and that the Ohio legislature should have made different incumbency-protection decisions, such as by making the incumbents' districts more competitive (and, thus, making incumbents less likely to win) and preserving more senior members of the delegation, J.S.App.328–36. It rejected the Appellants' argument that Democratic input was obtained in the map-drawing process, even though it "credit[ed] this assertion" as a factual matter. J.S.App.337. The Democratic input was not sufficient, in the court's view, to "meaningfully impact[] the central intent" behind the redistricting plan. J.S.App.337. Because the input did not change "the partisan balance of H.B. 369," the court deemed the effect of the negotiations "de minimis," J.S.App.337–38, even though the Democratic assistant minority leader—who led the negotiations for the Democratic Party—testified that he viewed the negotiations as yielding meaningful concessions.

The court then rejected the Appellants' assertions that Voting Rights Act and minority-representation goals impacted the plan's partisan outcomes. J.S.App.340–52. The court recognized that no Voting Rights Act or racial-gerrymandering challenge was lodged against any district in the 2011 plan. J.S.App.341. But it held that, even in the absence of such a challenge, "the State must still establish that it had a basis in evidence for concluding that the VRA required the sort of district that it drew" in northeast Ohio. J.S.App.341. The court concluded that Ohio

lacked a strong basis in evidence to satisfy this strict-scrutiny standard. J.S.App.342.

Fifth, with these findings made, the court concluded that the *Rucho* test was satisfied, and Plaintiffs had established their Equal Protection, First Amendment, and Article I claims. The tests under each "essentially mirror[]" each other, J.S.App.357, so the findings translated across all claims. J.S.App.367 (finding that Plaintiffs' associational-rights claim "overlap[s] with our discussion of the vote-dilution claim"); J.S.App.367–90 (rehashing virtually identical findings across claims).

The court enjoined Ohio from conducting further elections under the 2011 plan. J.S.App.398. The court set a deadline of June 14, 2019, for the Ohio legislature to enact a new plan "consistent with this opinion." J.S.App.399. The court further provided that, if the legislature is unsuccessful, it "may appoint a Special Master" and ordered "the parties to confer" and file a list of "acceptable candidates." J.S.App.401.

On May 6, 2019, the Ohio Attorney General and the Applicants filed separate notices of appeal. J.S.App.409. On May 24, 2019, this Court stayed the district court's injunction pending appeal. *Chabot v. Ohio A. Philip Randolph Inst.*, No. 18A1166 (U.S.). On June 11, 2019, Justice Sotomayor granted Appellants' application to extend time to file this jurisdictional statement to and including July 19, 2019. *Chabot*, No. 18A1288.

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION AND REVERSING

I. This Court's *Rucho* Decision Forecloses Plaintiffs' Claims

This Court's decision in *Rucho* leaves no stone of the district court's decision standing upon another. *Rucho* holds that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." 139 S. Ct. at 2506–07. The district court here adjudicated and ruled on partisan-gerrymandering claims—and *only* partisan-gerrymandering claims.

The district court identified three constitutional provisions as the basis of its ruling: the Equal Protection Clause, the First Amendment, and the Elections Clause and Section 2 of Article I. Those were the same provisions at issue in *Rucho*. Moreover, the district court expressly adopted the test the district court adopted in *Rucho*. J.S.App.235. This Court's *Rucho* decision addressed and rejected that test as supplying judicially manageable standards. *Rucho*, 139 S. Ct. at 2502–04.

The Court therefore should make quick work of this appeal. The district court's decision is squarely and completely foreclosed by *Rucho*, and the only step left to take is to vacate the district court's injunction, reverse its decision, and remand with instructions to dismiss this case for want of jurisdiction. That is what this Court did in *Rucho*, *id.* at 2508, and this case is no different.

II. Ohio's Congressional Districting Plan Is Not an "Egregious" Gerrymander—or a Gerrymander at All

This case proves that this Court's *Rucho* decision was rightly decided. The test the *Rucho* district court adopted, and which was used in multiple district-court decisions, did not, in *any* them, result in a finding that a redistricting plan was *not* an unconstitutional partisan gerrymander. The ability to make basic distinctions is a prerequisite to a test's being judicially manageable, and the district court's inability to distinguish a bi-partisan incumbency-protection plan like Ohio's from more tilted plans proves that these questions are not justiciable in nature.

It is common ground that, even if *some* partisan-gerrymandering claims were justiciable (they are not), judicial intrusion would be appropriate "in only egregious cases." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). A case like this, where the plan passed with meaningful bi-partisan support—including from half the members of the minority party—does not present an "egregious" gerrymander. The federal courts cannot credibly claim to know better than Democratic legislators what is in the Democratic Party's interests.

Although the district court became fixated with evidence that legislative leaders sought a 12–4 partisan split, this was because they rejected a more Republican-friendly 13–3 split—which witnesses from both sides testified was considered as a possibility—and ignored the evidence that the 12–4 split was simply the result of a bi-partisan decision to eliminate one Democratic seat and one Republican seat

to address Ohio's congressional delegation decreasing from 18 to 16. A 12–4 split meant that two Republican incumbents would be paired and a Republican-friendly seat eliminated, which the legislature was not politically (or legally) obligated to accomplish. In concluding that this goal was impermissible, the district court necessarily concluded that the Ohio legislature was legally obligated to exact the entire toll of the reapportionment from the Republican Party's incumbents. This proves that, in the zero-sum game of redistricting, a legal obligation to help one party (here, the Democratic Party) results in a legal obligation to harm the other (here, the Republican Party). As the *Rucho* majority rightly concluded, these are all "political, not legal" questions. *Rucho*, 139 S. Ct. at 2500.

This is not a case like *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (decided alongside *Rucho*) where the Maryland legislature dismantled a traditional Republican district. *Rucho*, 139 S. Ct. at 2493. Quite the opposite, the district court held that the Ohio legislature was legally obligated to do just that—dismantle traditional Republican districts to provide some type of "fairness" to the Democratic Party. Nor is this a case like *Rucho*, where the North Carolina legislature admitted to one-sided partisan goals. *Id.* at 2491. Here, the testimony from witnesses on *both* sides was that compromise was sought and, to a significant degree, obtained. The district court found liability because it believed there was not enough compromise or that the compromise was not favorable enough to the Democratic Party—a quintessential

political judgment call that was approved by the majority of Democrats in the Ohio house.

In fact, the district court ignored the entirety of the State's and the Appellants' evidentiary presentation until *after* it shifted the burden, finding the plan to be presumptively unconstitutional based entirely on Plaintiffs' presentation. That presentation was deeply flawed. Plaintiffs' experts ran mapping simulations that, instead of imitating the State's redistricting criteria, rewrote them wholesale—simply because Plaintiffs' experts disagreed with the criteria. But the Court did not address these flaws with the burden on Plaintiffs; it shifted the burden, requiring the State to justify its own criteria, and concluded that it failed to satisfy what amounted to strict scrutiny.

For example, there was extensive evidence that non-partisan Voting Rights Act-compliance and minority-opportunity goals drove the line drawing in northeast and central Ohio, and that these goals had a partisan impact, given the correlation of racial and political identities. Because Plaintiffs did not challenge these decisions as improperly racial or as violative of the Voting Rights Act, they should have been required to show that these plainly non-partisan goals were somehow improperly partisan. But the district court addressed these questions after shifting the burden and, worse, subjected the Appellants to a racial-gerrymandering strict-scrutiny standard. It held that "the State must…establish that it had a basis in evidence for concluding that the VRA required the sort of district that it drew." J.S.App.341.

This approach was foreclosed in *Voinovich v. Quilter*, 507 U.S. 146 (1993), which held that (absent a showing of suspect racial intent) a State has *discretion* in deciding whether to create a majority-minority (or other minority-opportunity) district. The district court, by contrast, required the State to prove that its decisions in this respect were strictly required by the Voting Rights Act.

In addressing these and a myriad of other goals, the district court substituted its own ideas for State discretionary choices. It failed to judge partisanship against the "State's *own* criteria." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). The district court judged the plan by criteria created by Plaintiffs' experts. So there is no support for the district court's decision in either *Rucho* opinion.

Nor does this case present an appropriate vehicle for reconsidering *Rucho*'s core holding—which, as noted, forecloses all Plaintiffs' claims. The ink is barely dry on *Rucho*, so it is hardly an appropriate time to revisit it. This case is a far weaker candidate for being unconstitutional than the plans rejected in *Rucho* under some *still* yet to be identified standard. And this is no occasion for assessing whether *Rucho* turns out to be workable in practice, since Ohio's plan stood unchallenged for four elections, and, after 2020, Ohio's congressional redistricting plans will be the subject of Ohio's redistricting reform. *Stare decisis* therefore controls.

CONCLUSION

The Court should summarily vacate the judgment below and remand the case with instructions to dismiss as non-justiciable. Alternatively, the Court should note probable jurisdiction and reverse.

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