IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

OHIO A. PHILIP RANDOLPH INSTITUTE, *et al.* Plaintiffs, v. RYAN SMITH, Speaker of the Ohio House of Representatives, *et al.* Defendants.	No. 1:18-cv-00357-TSB-KNM-MHW Judge Timothy S. Black Judge Karen Nelson Moore Judge Michael H. Watson Magistrate Judge Karen L. Litkovitz

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants are moving to dismiss this action on the grounds that the claims are non-justiciable, that the suit is barred by laches, and that the Plaintiffs lack standing to bring one (of their four) claims now before the Court. None of their arguments have merit, and their motion should be denied.

In their motion, Defendants routinely misstate the case law's application and reach. To advance their claim that the current challenge to the gerrymander of Ohio's congressional map is non-justiciable, Defendants distort the state of the law regarding the justiciability of partisan gerrymandering claims. The deferral to the "judicial process . . . to define standards and remedies where it is alleged that a constitutional right is burdened or denied," *Vieth v. Jubelirer*, 541 U.S. 267, 309–10 (2004) (Kennedy, J., concurring), does not foreclosure of partisan gerrymandering claims in the federal courts. Defendants' theory of laches would permit them to bar this case even as they engage in ongoing violations of Plaintiffs' rights, where the timing of this case has not resulted in any prejudice. This is unsupported by the case law. In Defendants' final attempt to bar Plaintiffs from having their injuries redressed, by claiming they lack

standing, Defendants fail to engage with either the Supreme Court's opinion in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), or the claims raised in the Complaint concerning the nature of the vote dilution theory of harm caused by partisan gerrymandering. Not only are their arguments defective, but Defendants do not even attempt to address three of the four theories of injury alleged by Plaintiffs, conceding that Plaintiffs have alleged facts sufficient to demonstrate standing for their First Amendment, right to vote, and Article I claims.

Throughout, Defendants also do not once identify the standard used when a court considers a motion to dismiss: it must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). A motion to dismiss "'should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Ricco v. Potter*, 377 F.3d 599, 602 (6th Cir. 2004)).

Ohio's congressional districts are the product of an unconstitutional partisan gerrymander that dilutes the votes of Democratic voters, including the individual Plaintiffs, by cracking and packing these voters based on invidious intent. The redistricting is also an unconstitutional partisan gerrymander that violates the First Amendment, the First and Fourteenth Amendment right to vote, and Sections 2 and 4 of Article I of the U.S. Constitution. In their pleadings, Plaintiffs have offered the Court manageable standards to redress their injuries and alleged facts sufficient to support their standing to bring each claim. And this action is timely as it pursues relief for an ongoing injury.

ARGUMENT

I. Plaintiffs' Claims Are Justiciable

The Supreme Court has not held that partisan gerrymandering claims are nonjusticiable and lower federal courts that have recently considered the issue have found such cases to be justiciable. The Court's recent decision in *Gill v. Whitford* expressly declined to address the question of justiciability. 138 S. Ct. at 1929. And Defendants misconstrue the Supreme Court's summary affirmance in *Harris v. Cooper*, No. 16-166 (U.S. June 28, 2018), which was limited to the particular facts and posture of that case. *Harris* did not stand for any categorical proposition that partisan gerrymandering claims are non-justiciable, as further demonstrated by the fact that the Supreme Court remanded a number of partisan gerrymandering cases for further proceedings on their merits. *Gill*, 138 S. Ct. at 1934; Order, *Rucho v. Common Cause*, No. 17-1295 (U.S. June 25, 2018).

Defendants misrepresent the Supreme Court's summary affirmance in *Harris* as a decision holding that partisan gerrymandering claims are nonjusticiable. Defendants' Mem. of Law in Supp. of Mot. to Dismiss, Doc No. 46 at PageID#456. In so doing, Defendants fail to heed the Supreme Court's own explanation that the "precedential effect of a summary affirmance can extend no further than 'the precise issues presented and necessarily decided by those actions,'" *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979) (internal citation omitted). And they also obscure the "precise issues" that were "presented and necessarily decided" in *Harris* itself.

Before the three-judge court in *Harris* was a review of plaintiffs' objections to the remedial map enacted following a finding that certain North Carolina congressional districts violated the Fourteenth Amendment due to racial gerrymandering. *Harris v. McCrory*, 2016 WL

3129213, at *1 (M.D.N.C. June 2, 2016). That court was explicit that it denied "plaintiffs' objections as presented to this Court," and that the denial "does not constitute or imply an endorsement of, or foreclose any additional challenges to, the Contingent Congressional Plan." *Id.* (emphasis in original). One of the *Harris* plaintiffs' objections was that the new North Carolina plan was a partisan gerrymander, but the case was not litigated to present evidence of a partisan gerrymander. And in their objections, the *Harris* plaintiffs did not present the court with any particular standard, instead urging the court to reject the remedial plan under "whatever the standard may be" for assessing partisan gerrymanders. Pls.' Objs. and Mem. of Law Regarding Remedial Redistricting Plan at 32, *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3537185 (M.D.N.C. Mar. 3, 2016), ECF No. 157. Without standards or a full record as to the alleged partisan gerrymander, the *Harris* court concluded it did "not seem, at this stage" that it could "resolve this question based on the record before it," rejecting the objection "as presented." *Harris*, 2016 WL 3129213, at *2.

Defendants also misstate the holding of *Gill*. In *Gill*, the Supreme Court provided direction only on the question of standing for a partisan gerrymandering vote dilution claim, expressly noting that they were not answering the question of justiciability. *Gill*, 138 S. Ct. at 1929. Contrary to Defendants' contorted reasoning, *Gill* casts no shadow over the justiciability of partisan gerrymandering claims. Notably, both *Gill* and *Rucho v. Common Cause*, the North Carolina partisan gerrymandering case, were remanded to their respective lower courts for consideration under the new standing doctrine for vote dilution partisan gerrymandering claims. *Gill*, 138 S. Ct. at 1934; Order, *Common Cause*, No. 17-1295 (U.S. June 25, 2018). If the decision in *Gill* were to mean that partisan gerrymandering claims were non-justiciable, the remand of both it and *Common Cause* would make no sense.

Though not a part of their Argument, Defendants glancingly and inaccurately assert that Plaintiffs have no standard and rely only upon metrics for partisan asymmetry, which they contend are inapplicable to the claims in this case. Doc. No. 46 at PageID#452–53. They do so without any expert or factual analysis to support that contention. Moreover, Defendants' position is untenable on a motion to dismiss absent a broad legal rule barring Plaintiffs' claims. There is no such rule. Under the case law, a claim is justiciable if courts can identify manageable standards to adjudicate claims of partisan gerrymandering. Recent three-judge courts have found such claims to be justiciable, identifying judicially manageable standards to assess partisan gerrymandering claims. *See Common Cause v. Rucho*, 240 F. Supp. 3d 376, 387–91 (M.D.N.C. 2017) (denying motion to dismiss on justiciability grounds ruling that Supreme Court precedent does not foreclose partisan gerrymandering claims as pleaded); *Shapiro v. McManus*, 203 F. Supp. 3d 579, 598–600 (D. Md. 2016) (denying motion to dismiss because claim was justiciable); *Whitford v. Nichol*, 151 F. Supp. 3d 918, 923–24 (W.D. Wisc. 2015) (denying motion to dismiss on justiciability grounds, and noting "[u]ntil a majority of the Supreme Court rules otherwise, lower courts must continue to search for a judicially manageable standard"); *see also League of Women Voters of Michigan v. Johnson* (*LWV-Michigan*), No. 17-cv-14148 (E.D. Mich. May 16, 2018), ECF No. 54 (case proceeding on the merits following motion to dismiss regarding standing).

The tests proposed by Plaintiffs are similar to those that have been found judicially manageable in other cases. The metrics for partisan symmetry set forth in the Complaint, Second Am. Compl. at ¶¶ 121-130, Doc No. 37, are evidence of when consideration of

partisanship goes too far,[1] though they are not the sole determinant of liability. While statewide evidence can be used to support district specific claims, *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015), each of the claimed constitutional theories of harm has its own test to determine what constitutes a violation. *See also Gill*, 138 S. Ct. at 1937 (Kagan, J., concurring) (noting that, as in *Alabama Legislative Black Caucus*, the use of statewide evidence in addressing district-specific claims should also apply to partisan gerrymandering claims, particularly that "'[s]uch evidence is perfectly relevant' to showing that mapmakers had an invidious 'motive' in drawing the lines of 'multiple districts in the State'"). That the Supreme Court sharpened the existing doctrine by elucidating the contours of the injury in a Fourteenth Amendment partisan gerrymandering vote dilution claim (and sent *Gill* and *Common Cause* back to be evaluated under the newly explicated standing rule) does not strip three-judge courts—such as this one—of their ability to develop manageable standards for addressing partisan gerrymandering. To the contrary, it supports this endeavor.

Gill also does not bar an Article I claim. Defendants' assertion that the decision in *Gill* addresses anything other than standing for a partisan gerrymandering vote dilution claim is puzzling. *See* Doc. No. 46 at PageID#458. While noting that the *Gill* plaintiffs had pleaded a First Amendment claim, the majority opinion in *Gill* spoke only to vote dilution, a variant of Fourteenth Amendment harm. The Court expressly left aside "other possible theories of harm not presented here." *Gill*, 138 S. Ct. at 1929–31.

Defendants theorize that because, unremarkably, redistricting decisions involve political considerations, Article I cannot place any constraints on such decisions. Doc. No. 46 at

[1] These metrics for measuring partisan asymmetry are just the sort of "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights," which Justice Kennedy left to the lower courts to define through the "judicial process." *Vieth*, 541 U.S. at 307–10 (Kennedy, J., concurring).

PageID#458–460. But Defendants' theory of Article I is not the law. To be sure, the Supreme Court has not yet recognized an Article I challenge to partisan gerrymandering, but such a claim has been recognized and adjudicated by this Court's sister panel in North Carolina. The three-judge court in *Common Cause v. Rucho* not only found the Article I claims justiciable, 279 F. Supp. 3d 587, 617–36 (M.D.N.C. 2018), but also struck down that map in part by finding that it violated both Section 2 and Section 4, the Elections Clause, of Article I of the Constitution, *id.* at 683–90. It did so after carefully parsing the text of the two Sections in question, tracing the historical reason behind them, and considering how a state legislature's partisan gerrymander of congressional districts violates these Sections of the Constitution. *See id*. That court identified a judicially manageable standard under Article I, and this Court may as well.

II. Plaintiffs' Claims Are Not Barred by Laches

Defendants have met neither prong of the test for laches: (1) a lack of diligence by the party against whom laches is asserted, and (2) prejudice to the party asserting it. *See, e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). As such, the Court should not dismiss on these grounds.

This Court should find "no merit in the defense of laches" where, as here, in "a suit for an injunction" the Defendants have been infringing the rights of the Plaintiffs "for years with impunity," and continue to do so. *France Mfg. Co. v. Jefferson Elec. Co.*, 106 F.2d 605, 609 (6th Cir. 1939) (considering laches defense in patent suit where continuing violation at issue). Because laches is available only when a plaintiff delays bringing a claim unreasonably long *after* suffering the harm they seek to redress, it should not be applied where a plaintiff seeks to prevent an ongoing or future violation of their rights. *See Lyons Partnership*, *L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001) ("Inherently, [ongoing] conduct cannot be so remote in

time as to justify the application of the doctrine of laches."); *cf. Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (in considering statute of limitations, holding that a "law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it" during limitations period).

Plaintiffs here seek to prevent the ongoing constitutional violation of their rights, and the harm suffered anew with each election held under the challenged map. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (in a case filed in 1988 regarding a 1981 redistricting, concluding that laches did not bar plaintiffs' apportionment claim because the "ongoing nature of the violation" meant that plaintiffs' injury "has been getting progressively worse" with each passing election cycle).

In *Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*, the Supreme Court permitted an Equal Protection challenge to a local district to proceed nine years after its creation, 429 U.S. 651, 653 (1977), over Justice Rehnquist's objections in dissent that the case should have been barred by laches, *id.* at 656 (Rehnquist, J., dissenting). And other courts considering redistricting cases have likewise found laches inapplicable due to the ongoing harm of a violative map. *See, e.g.*, *Garza*, 918 F.2d at 772; *Luna v. Cty. of Kern*, 291 F. Supp. 3d 1088, 1143–44 (E.D. Cal. 2018); *Smith v. Clinton*, 687 F. Supp. 1310, 1312–13 (E.D. Ark. 1988); *Dotson v. City of Indianola*, 514 F. Supp. 397, 401 (N.D. Miss. 1981).

Defendants cannot support the application of laches, as they do not seriously attempt to demonstrate any "prejudice to the party asserting [it]." *Kansas*, 514 U.S. at 687. They instead argue the present case should be dismissed because a remedial map "would result in three different congressional maps in four years, causing certain confusion and prejudice to the state of Ohio and its citizens," Doc. No. 46 at PageID#460, and that "[a]ll of this confusion could have

been avoided if plaintiffs had brought these claims in 2012 . . . ," *id*. at PageID#463.[2] But challenging the map in 2012 would also have resulted in three different maps over four years—a pre-decennial Census map in 2010, a post-reapportionment map in 2012, and a remedial map in 2014.

In short, the number of maps across four years is not uniquely caused by the timing of Plaintiffs' case. It is a function of decennial redistricting: a new map is always a set number of years in the future or past, and if an unconstitutional map is remedied, it results in another new map. For the second prong of laches to be met, there must be prejudice to defendants caused not just by plaintiff's success on the merits, but by the purported delay in the filing of the case. *See, e.g.*, *Hor v. Chu*, 699 F.3d 1331, 1334 (Fed. Cir. 2012) (defendant must face "material prejudice attributable to the delay"); *see also Wise v. Armontrout*, 952 F.2d 221, 223 (8th Cir. 1991). Defendants have shown no harm due to the timing of the case, only identifying the relief that would be granted if Plaintiffs prevail.

Finally, in advancing their claim of laches, Defendants once again mangle the applicability of a recent Supreme Court decision to the present case. Though not entirely clear, but seemingly regarding the first prong of the test for laches, they assert that the Court's "decision in *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) counsels in favor of the application of laches to this case." Doc. No. 46 at PageID#463. While they admit that *Benisek* deals with a preliminary injunction, they deploy it not on those terms but with respect to the application of laches. As Plaintiffs here do not seek a preliminary injunction, this case simply does not "fall[] squarely within the precedent of *Benisek*," as Defendants would have it. *Id.* at PageID#464. Nor

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[2] Moreover, Defendants mischaracterize the allegations in the complaint regarding what was known to Plaintiffs about the durability of the partisan harm inflicted by the challenged plan. Doc. No. 46 at PageID#452. Paragraph 84 simply makes clear that the partisan effects of the challenged districts endured throughout the decade. Doc. No. 37 ¶ 84.

does this case fall within the further case law invoked by Defendants in support of their claim of laches. Doc. No. 46 at PageID#461 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006), *SEIU Local 1 v. Husted*, 698 F.3d 341 (6th Cir. 2012), and *McClafferty v. Portage Cty. Bd. of Elections*, 661 F. Supp. 2d 826 (N.D. Ohio 2009)). Like *Benisek*, *Purcell* dealt with the grant or denial of a preliminary injunction—indeed, one within weeks of an election, 549 U.S. at 4–6, so too *SEIU*, which addressed a preliminary injunction granted 11 days before the election, 698 F.3d at 343, and *McClafferty* involved seeking "extraordinary relief" when an "election [was] already underway," 661 F. Supp. 2d at 839, 841. Plainly, none of these situations are analogous to this case, which was brought with solicitude to when relief could be granted.

Courts can decline to apply laches to dismiss a case even when both requirements for it have been met. As Defendants have not made out either of them here, this Court should not exercise its considerable discretion in equity to dismiss this case based on laches.

III. Plaintiffs Have Standing for Each Claim Pleaded

As a threshold matter in response to Defendants' arguments regarding standing, Defendants do not even purport to assert an argument that any Plaintiff, either individual or organizational, has pleaded insufficient facts to support standing for their First Amendment, right to vote, and Article I claims.[3] Instead, Defendants delve fixedly into an attack on Plaintiffs' standing to pursue their Fourteenth Amendment vote dilution claim post-*Gill*. It is clear on the face of their pleadings that Plaintiffs have pleaded sufficient facts to demonstrate their standing with respect to all of the claims pursued.

[3] Litigant "waived the new evidence and new arguments set forth in his reply. New evidence and new arguments are not appropriate in a reply brief." *Abraitis v. United States*, No. 1:11-cv-2077, 2012 WL 2885586, at *1 (N.D. Ohio July 13, 2012).

A. Defendants Misstate the Standard for Pleading a Vote Dilution Claim

To begin, it is important to clarify what the Court held in *Gill*, as Defendants have studiously avoided doing so in their brief. In *Gill*, the plaintiffs pursued only a statewide challenge to Wisconsin's state legislative map. In analyzing standing, the Court held that "[t]o the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific." *Gill*, 138 S. Ct. at 1930. A vote dilution harm "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Id.* at 1931.

It bears emphasis that the Court in *Gill* assessed standing *following a trial* at which the facts establishing standing needed to be proved. The facts here at the pleading stage, of course, need "only be alleged." *Id.* In their vote dilution claim, Plaintiffs specifically pleaded both that the Ohio congressional map "had the effect of cracking and packing the individual Plaintiffs and Democratic members of the organizational Plaintiffs into districts so as to dilute the power of their votes," Doc. No. 37 ¶ 163, and that "the way the districts were drawn had the effect of causing [Plaintiffs in cracked districts] to lack an opportunity to elect their congressional candidates of choice, and/or a meaningful opportunity to influence congressional elections, absent special circumstances," *id.* ¶ 164.

Defendants' insistence that the vote dilution injuries alleged by the Plaintiffs are just generalized claims of partisan preference ignores the language of *Gill* itself in describing a vote dilution harm and what is a sufficiently particularized pleading of this harm. The Supreme Court stated that a vote dilution harm "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—*to carry less weight* than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931 (emphasis added). Further, in her concurrence, Justice Kagan summed up the relevant precedent, including the

majority opinion in which she joined, with respect to the standing needed to sustain a partisan gerrymandering vote dilution harm:

> To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been "contract[ed]." *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964). And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked. *See Gill*, 138 S. Ct. at 1931–32. For packing and cracking are the ways in which a partisan gerrymander dilutes votes. *Cf. Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993) (explaining that packing or cracking can also support racial vote dilution claims). Consider the perfect form of each variety. When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight—has less consequence—than it would under a neutrally drawn map. *See Gill*, 138 S. Ct. at 1929–1930, 1931. So when she shows that her district has been packed or cracked, she proves, as she must to establish standing, that she is "among the injured." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *see Gill*, 138 S. Ct. at 1931–1932.

Gill, 138 S. Ct. at 1935–36 (Kagan, J., concurring) (citations revised to reflect full or short form based on whether citations were already included in this brief).

Defendants ignore that the basic standing defect in *Gill* arose not from its pleadings, but from the plaintiffs' failure to introduce evidence of their alleged injuries. *Gill*, 138 S. Ct. at 1932–33 (standing defects arose from "the fundamental problem with the [*Gill*] plaintiffs' case as presented on [its] record"). *Gill*, in identifying the problems with the plaintiffs' presentation in that particular case, certainly does not stand for the proposition that only malapportionment cases can be pursued or that the consideration of the weight of one's vote under a redistricting scheme is only of constitutional concern in such a case. *See* Doc. No. 46 at PageID#466.

B. The Supreme Court Recognized the Standing of Plaintiffs in Packed Districts for Claims of Vote Dilution

Contrary to Defendants' assertions, Doc. No. 46 at PageID#465, *Gill* did not hold that a plaintiff in a packed district could not allege a vote dilution harm. In fact, the Court identified a

number of plaintiffs in *Gill* who "pleaded a particularized burden" through their "placement in a 'cracked' *or 'packed'* district." *Gill*, 138 S. Ct. at 1931 (emphasis added). Each of these voters alleged that the redistricting at issue "'dilut[ed] the influence' of their votes as a result of packing or cracking in their legislative district."[4] *Id.* Thus, in the Supreme Court's own assessment, this constitutes pleading of a "particularized" vote dilution injury. *Id.* Plaintiffs here allege the same thing (with more detail than the Supreme Court deemed "particularized" in *Gill* about how the districts were constructed, *see generally* Doc. No. 37 ¶¶ 88-119), with respect to the Plaintiffs living in both packed, *id.* ¶¶ 91, 93, 95, 96, and cracked, *id.* ¶¶ 97, 100, 103, 104, 109, 120, districts.

And likewise, Plaintiffs have not conceded that those living in packed districts have not suffered vote dilution harms. *See* Doc. No. 46 at PageID#465. Rather, as to each, Plaintiffs have alleged that they live in a particular district that is packed under the current map, Doc. No. 37 ¶¶ 24, 30, 31, 33, 35, and that, in those packed districts, their votes "carr[y] less weight than [they] would have in a district not constructed to privilege partisan ends," *id.* ¶¶ 91, 93, 95, 96. That Plaintiffs have also pleaded that those Plaintiffs living in cracked districts have a vote dilution harm characterized by their lacking the "opportunity to elect their congressional candidate of choice, and/or a meaningful opportunity to influence congressional elections," *id.* ¶ 120, does not mean that they have not pleaded facts sufficient to support finding standing for Plaintiffs in packed districts. And, as noted above, in their vote dilution count, Plaintiffs pleaded that the Ohio congressional map "had the effect of cracking and *packing* the individual Plaintiffs

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[4] Looking at the underlying pleading, which the Supreme Court identifies as "plead[ing] a particularized burden," demonstrates that the other four plaintiffs at issue in *Gill* lived in both cracked and packed districts. *See* Complaint ¶¶ 20, 26 (plaintiffs in cracked districts); ¶¶ 23, 24 (plaintiffs harmed when "packed" into districts "diluting the influence of [their] vote"), *Whitford v. Gill*, No. 3:15-cv-421 (W.D. Wisc. July 8, 2015).

and Democratic members of the organizational Plaintiffs into districts so as to dilute the power of their votes," *id.* ¶ 163 (emphasis added).

C. Plaintiffs' Injuries Are Fairly Traceable To the 2011 Ohio Congressional Redistricting

In asserting that Plaintiffs have not sufficiently alleged that their injuries are "fairly traceable" to the 2011 Ohio congressional redistricting, Defendants grossly mischaracterize the injuries that Plaintiffs seek to be redressed and what is required for an alleged injury to be "fairly traceable" to the complained of conduct. Doc. No. 46 at PageID#468-69. Defendants focus only on the "election results," mischaracterizing Plaintiffs' injury as consisting of the fact that Democratic candidates won 5 of 18 congressional seats in the 2010 election, and won 4 of 16 congressional seats in the 2012 election and thereafter. But any reading of the Complaint shows that this is plainly not the injury asserted. The asserted vote dilution injury is that each individual Plaintiff's "vote carries less weight—has less consequence—than it would under a neutrally drawn map." *Gill*, 138 S. Ct. at 1936 (Kagan, J., concurring); Doc. No. 37 ¶¶ 22–38; 91, 93, 95–97, 100, 103, 104, 109, 120, 163–64. The allegations demonstrate that the enacted map was the cause of Plaintiffs' vote dilution injuries. Defendants do not even cite a standing decision discussing what constitutes an injury that is "fairly traceable" to complained-of conduct. Once again misrepresenting the applicable law, they cite the First Amendment framework (instead of vote dilution law) created by the three-judge court in Maryland and used to deny a preliminary injunction to the plaintiffs in *Benisek v. Lamone*, 266 F. Supp. 3d 799, 810–12 (D. Md. 2017). Doc. No. 46 at PageID#468–69.

D. The Organizational Plaintiffs Plainly Have Standing

With respect to the organizational Plaintiffs, Defendants do not assert that they lack standing in their own right. Doc. No. 46 at PageID#467-68. An organization has standing in its

own right when it alleges the same facts as an individual would: "(1) an injury in fact; (2) a causal connection between the injury and the challenged conduct that is fairly traceable to the defendant's actions; and (3) that the requested relief will redress the injury." *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013). When there is a "concrete and demonstrable injury to [an] organization's activities," this constitutes such an injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). And when pursuing claims in their own right, organizational plaintiffs need not ever establish that their members have suffered individual injury or even that they have members. *See, e.g.*, *Miami Valley*, 725 F.3d at 576–77. Plaintiffs have alleged sufficient facts demonstrating that each of the organizational Plaintiffs has been injured in its own right. *See* Doc. No. 37 ¶¶ 17-21.

Regarding associational standing, it is true that at this point the organizational Plaintiffs have not yet named particular members who have been injured. Plaintiffs Ohio A. Philip Randolph Institute and League of Women Voters of Ohio ("LWVO") have both pleaded the existence of members throughout the state, and for the LWVO, in each congressional district, Doc. No. 37 ¶¶ 17–18, similar to what was proffered in *Alabama Legislative Black Caucus*, 135 S. Ct. at 1269. There, the Supreme Court found similar assertions sufficient to confer associational standing on an organization challenging a district-specific gerrymander (in the racial gerrymandering context). *Id*. Likewise, in the ongoing challenge to the Michigan reapportionment plans as partisan gerrymanders, the organizational plaintiff did not identify particular injured members in its pleadings. Complaint ¶¶ 7–8, *LWV-Michigan*, No. 17-cv-14148 (E.D. Mich. Dec. 22, 2017), ECF No. 1. And the three-judge court—in this same Circuit—applied *Alabama Legislative Black Caucus* to find the pleadings sufficient. Op. and Order at 15, *LWV-Michigan*, No. 17-cv-14148 (E.D. Mich. May 16, 2018), ECF No. 54. The

Plaintiffs have pleaded sufficient facts to demonstrate standing on a claim of vote dilution for Democratic voters residing in each congressional district, Doc. No. 37 ¶¶ 86-121, and these same allegations support associational standing for the organizational Plaintiffs. As the three-judge court in *LWV-Michigan* held, if—at the time when facts later need to be proven—these organizations are unable to support their allegations of injury to members in any particular district, the question of their associational standing may be assessed differently. Op. and Order at 15, *LWV-Michigan*, No. 17-cv-14148 (E.D. Mich. May 16, 2018), ECF No. 54.

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Defendants' argument that Plaintiffs lack standing to bring a vote dilution claim lacks merit. Plaintiffs have sufficiently pleaded allegations to support a finding of standing. This court should, therefore, deny Defendants' motion to dismiss on this ground.

CONCLUSION

For the reasons set forth above, this Court should deny Defendants' motion to dismiss.

August 3, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss was served upon all counsel of record in this case via ECF.

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