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

OHIO A. PHILIP RANDOLPH INSTITUTE, LEAGUE OF WOMEN VOTERS OF OHIO, THE OHIO STATE UNIVERSITY COLLEGE DEMOCRATS, NORTHEAST OHIO YOUNG BLACK DEMOCRATS, HAMILTON COUNTY YOUNG DEMOCRATS, LINDA GOLDENHAR, DOUGLAS BURKS, SARAH INSKEEP, CYNTHIA LIBSTER, KATHRYN DEITSCH, LUANN BOOTHE, MARK JOHN GRIFFITHS, LAWRENCE NADLER, CHITRA WALKER, TRISTAN RADER, RIA MEGNIN, ANDREW HARRIS, AARON DAGRES, ELIZABETH MYER, BETH HUTTON, TERESA THOBABEN, and CONSTANCE RUBIN, Plaintiffs, v. RYAN SMITH, Speaker of the Ohio House of Representatives, LARRY OBHOF, President of the Ohio Senate, and JON HUSTED, Secretary of State of Ohio, in their official capacities, Defendants.	No. 1:18-cv-00357-TSB Judge Timothy S. Black Judge Karen Nelson Moore Judge Michael H. Watson Magistrate Judge Karen L. Litkovitz

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs have failed to allege facts demonstrating that they have suffered a concrete and particular injury, that is fairly traceable to the challenged conduct, and that is likely to be addressed by a favorable decision by this Court. *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Instead of explaining how their allegations fit this test for standing, plaintiffs incorrectly rely

upon the concurring opinion of Justice Kagan in *Gill* along with decisions by lower federal courts that have been vacated. Because plaintiffs have failed to allege or explain how they have standing to challenge Ohio's congressional plan, their complaint should be dismissed.

1. Plaintiffs failed to explain how their "packed" or "cracked" districts have caused them to suffer a concrete injury that is fairly traceable to the challenged districting plan or that the Court can fashion a remedy to address their alleged injury.

Plaintiffs invoke the terms "packing" and "cracking" as talismanic shibboleths. They assume that simply stating the words gives them a legal claim. They are incorrect.

The Supreme Court has never defined these terms in a partisan gerrymandering case. Indeed, no definition exists in this context. Nor did *Gill* provide a definition. The majority opinion did not endorse any formulation of "packing" or "cracking" in the partisan gerrymandering context and instead went out of its way to cast doubt on the future viability of any such claim. Plaintiffs find their refuge on this issue in the *Gill* concurrence, but not in the majority opinion. But the majority made it clear that the *majority* opinion was the *only* opinion that expressed the opinion of the court on these issues. *Gill*, 138 S. Ct. at 1931 ("the reasoning of this Court with respect to the disposition of this case is set forth in this opinion and *none other*.") (emphasis added). Merely invoking these words does not confer standing which, as made clear by *Gill*, is not "dispensed in gross." *Id*. at 1934.

The terms "packing" and "cracking" actually come from cases alleging unconstitutional racial discrimination or violations of Section 2 of the Voting Rights Act against a minority *group*, not an individual minority plaintiff. To prove racial packing or cracking, the minority group must show that it constitutes a majority in a geographically compact area, that it is politically cohesive, and that it cannot elect its preferred candidate of choice in the challenged district because of racial bloc voting by the majority. *White v. Register*, 412 U.S. 755 (1973);

Thornburg v. Gingles, 478 U.S. 30, 35, 50-51 (1986); *Bartlett v. Strickland*, 556 U.S. 1, 14-18 (2009). Cracking occurs when a geographically compact minority group is distributed in multiple districts so that it cannot constitute a majority in any district. Packing occurs when the minority group is packed into one district in such high numbers to prevent the creation of a second district in which the minority group could be the majority. *Thornburg*, 478 U.S. and 46; *Quilter v. Voinovich*, 507 U.S. 146, 153-54 (1993).

"Cracking" and "packing" as defined in racial discrimination cases cannot be applied to so-called partisan gerrymandering. The rights protected in racial vote dilution cases belong to the minority group. In contrast, after *Gill*, it is clear that a partisan gerrymandering claim, assuming such claims are justiciable, must be brought by an individual – not a political group such as a political party, and not by individuals making the same generic claim as a political party. There is no cause of action for political groups whose members have been allegedly packed or cracked. *Gill*, 138 S. Ct. at 1933 (the effect that an alleged gerrymander has "on the fortunes of political parties" is irrelevant). Plaintiffs here have not attempted to provide a framework for "packing" and "cracking" that comports with *Gill* and, consequently, they cannot demonstrate an "injury" for standing purposes in this context. Simply uttering the words "packing" and "cracking" is not enough.

Plaintiffs have also failed to allege a judicially manageable standard explaining how a court can provide them relief. For example, plaintiffs have alleged that some of them have been packed into districts at larger numbers than needed to win their districts. This raises an obvious question unanswered by plaintiffs: why are voters of one party constitutionally entitled to be placed in a district with the minimum amount of like-minded voters needed to elect that party's candidate? The Supreme Court has already recognized that requiring states to draw districts to

maximize the political influence of minority voters would "raise serious constitutional questions." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 445-46 (2006) ("*LULAC*"). If the Fourteenth Amendment prohibits courts from remedying racial discrimination through the judicial creation of districts that maximize the voting strength of minorities, how can the Fourteenth Amendment or any other provision of the Constitution be the basis for maximizing the influence of a major political party or its supporters?

Plaintiffs' claims also raise a second obvious, but unanswerable, question: how exactly is a court to determine the minimum or optimal number of a party's voters needed to win any district? Courts are ill-equipped to make "political judgments" of this nature, assuming they have the constitutional authority to dictate political winners in congressional districts. *Bartlett*, 556 U.S. at 17-18 (quoting *Holder v. Hall*, 512 U.S. 874, 894 (1994)). Plaintiffs here have not alleged that "Democratic voters" are "cohesive" for vote dilution purposes, and nor could they. This is because "a person's politics is rarely discernable – and *never* permanently discerned – as a person's race." *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004). Moreover, "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Id*. Thus, many voters who vote for a Republican candidate in one election can and do change their minds and vote for the Democratic candidate in the next, and vice versa.

The failure of plaintiffs to articulate a specific standard for them to prove standing—other than making conclusory allegations about "packing" and "cracking"—demonstrates the wisdom of Justice O'Connor's concurring opinion in *Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (O'Connor, J., concurring in judgment) (once districting is turned over to the courts it is predictable that they will move away from "nebulous" standards to some rough form of

proportional representation). Plaintiffs here offer nothing more than "nebulous" standards based upon conclusory arguments without explaining *how* their districts were "packed" or "cracked." Nor have they alleged a judicially manageable standard explaining how a court could "unpack" or "uncrack" allegedly illegal districts, without resorting to statewide statistics and proportional representation. This is not an acceptable option for establishing standing. *Gill*, 138 S. Ct. at 1933; *Bandemer*, 478 U.S. at 132; *Vieth*, 541 U.S. at 288, 308 (Kennedy, J. concurring), 338 (Stevens, J. dissenting).

2. Plaintiffs incorrectly paraphrase defendants' arguments and incorrectly rely on the concurring opinion in *Gill*.

Plaintiffs are the ones who "misrepresent" defendants' argument regarding the summary affirmance in *Harris v. Cooper*, No. 16-166, 2018 WL 3148263, *1 (U.S. June 28, 2018). Plaintiffs ignore that the only decision by a lower federal court concerning partisan gerrymandering claims under the federal constitution that has been affirmed by the United States Supreme Court is the decision by the *Harris* court that such claims are not justiciable. Plaintiffs also continue to ignore that in *Vieth*, a plurality of the Supreme Court found partisan gerrymandering claims nonjusticiable and no Justice in that case dissented from the plurality opinion that claims under Article I, Sections 2 and 4 are nonjusticiable.[1] Plaintiffs also fail to grapple with the fact that the Supreme Court in *Gill* explicitly stated that the threshold issue of justiciability has not been decided. *Gill*, 138 S. Ct. at 1929.

While ignoring the parts of *Gill* argued by defendants in their motion, plaintiffs instead rely on the nondispositive concurring opinion of Justice Kagan. *See* Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, Doc. No. 54 at PageID#562, 564. In doing so,

[1] Plaintiffs are also incorrect in arguing that defendants have not addressed their Article I or First Amendment claims. All of the arguments raised by defendants apply equally to plaintiffs' claims under Article I, the First Amendment, and the Equal Protection clause.

plaintiffs have ignored the majority's unequivocal statement in *Gill* that its opinion was the sole opinion of the Court, "and none other." *Gill*, 138 S. Ct. at 1931. Plaintiffs' allegations of standing must meet the requirements of the majority opinion, and not any test articulated by Justice Kagan. *Id.*

Finally, plaintiffs rely on the decisions in *Common Cause v. Rucho*, 240 F.Supp.3d. 376, 387-91 (M.D.N.C. 2017) and *Whitford v. Nichol*, 151 F.Supp. 3d. 918, 923-24 (W.D. Wis. 2015), in which both courts denied motions to dismiss for lack of justiciability. Both of these cases have been vacated and remanded for reconsideration in light of *Gill*, a decision in which the Supreme Court expressly stated that the threshold issue of justiciability remains undecided. Nothing in *Gill* forecloses a finding by this Court that plaintiffs' claims are nonjusticiable.

Regardless, plaintiffs have not alleged a concrete or particularized injury. Nor have they provided standards upon which the Court could provide a remedy, other than nebulous concepts of fairness or a proportional representation benchmark, devised from statewide statistics. Plaintiffs' allegations fall woefully short of alleging either an injury caused by the Ohio congressional plan or a justiciable standard for providing a remedy.

3. Plaintiffs' claims should be dismissed because of laches.

Plaintiffs' defense of their inexcusable seven-year wait amounts to this: we waited because we can. That should be a woefully inadequate defense. Plaintiffs offer no reason for the seven-year wait and indeed appear to claim that no justification is needed in redistricting cases. But the fact that a voting map has been continuously used throughout a decade is a reason to *apply* laches, not absolve plaintiffs from it. Unlike the example provided by plaintiffs of a map used in the 2010 election, with a new post-census map in 2012, and a remedial map in 2014, here plaintiffs are asking the Court for relief that will require three different maps in four years at the *end* of the redistricting cycle. This is far more prejudicial to Ohio voters because they have

become *more* accustomed to their voting districts as well as the candidates and elected officials in those districts as the plaintiffs' seven-year wait wore on. Had plaintiffs brought these claims in 2012—when they admittedly believed they had a claim—and a remedial map was imposed in 2014, voters would have voted only one time in that district, and would have enjoyed the ability to vote in a stable district the rest of the decade. Instead, plaintiffs sat, and waited.

Finally, plaintiffs do not refute the substance of why *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) counsels in favor of applying laches. They simply wave it off procedurally because it involved a request for preliminary injunction. This is insufficient for two reasons. First, plaintiffs here are also seeking injunctive relief. The fact that they are seeking that relief later rather than sooner does not make a difference. More importantly, in *Benisek*, the Supreme Court expressed serious reservations about asserting claims that would result in injunctions being entered many elections after a congressional map was in place. Despite plaintiffs' suggestion that there is something akin to a redistricting exception to laches, the Court emphasized the need to act with "reasonable diligence" in these cases. *Benisek*, 138 S. Ct. at 1945. There is no reason to think that such considerations in the equitable context of a preliminary injunction are not just as fully applicable in the equitable context of laches. Accordingly, the Court should exercise its discretion and dismiss the claims based on laches.

CONCLUSION

For the foregoing reasons, plaintiffs' Second Amended Complaint should be dismissed with prejudice.

This the 10th day of August, 2018.

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CERTIFICATE OF SERVICE

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