

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

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

**Plaintiffs,**

**v.**

**LARRY HOUSEHOLDER, 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' MOTION FOR DISMISSAL FOR LACK OF JURISDICTION**

In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Supreme Court overruled its prior precedent holding that partisan gerrymandering claims were justiciable, *see Davis v. Bandemer*, 478 U.S. 109, 113 (1986). As a result, this Court now lacks subject matter jurisdiction over this action. *See Householder et al. v. A. Philip Randolph Inst.*, No. 19-70 and *Chabot v. A. Philip Randolph Inst.*, No. 19-110 (vacating this court's order and remanding with instructions to consider in light of *Rucho*). Plaintiffs thus move the Court, pursuant to Federal Rule of Civil Procedure 41(a)(2), for an order of dismissal for lack of jurisdiction.<sup>1</sup>

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<sup>1</sup> Such a dismissal, however, should not be deemed "with prejudice." *Thompson v. Love's Travel Stops & Country Stores, Inc.*, 748 F. App'x 6, 11 (6th Cir. 2018) ("[O]ur court has stated on several occasions that dismissal for lack of subject matter jurisdiction should normally be without prejudice."); *Ernst v. Rising*, 427 F.3d 351, 367 (6th Cir. 2005) ("Our cases, too, recognize that dismissals or lack of jurisdiction should generally be made without prejudice."); *see also Griener v. United States*, 900 F.3d 700, 705 (5th Cir. 2018) ("A dismissal for want of jurisdiction bars access to federal courts and is *res judicata* only of the lack of a federal court's power to act. It is otherwise without prejudice to the plaintiff's claims." (alteration omitted)); *Lennon v. City of Carmel, Ind.*, 865 F.3d 503, 509 (7th Cir. 2017) ("When a district court dismisses an action for lack of jurisdiction, the dismissal must be without prejudice. ).

The Court may dismiss the case “on terms the court considers proper.” Fed. R. Civ. P. 41(a)(2). Plaintiffs request that the Court order that each party bear its own costs and fees in this case.<sup>2</sup> See *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013) (explaining that “the decision whether to award costs [under Rule 54] ultimately lies within the sound discretion of the district court”). An award of costs is not appropriate here, where defendant and defendant-intervenor did not prevail on the merits, see *Mother & Father v. Cassidy*, 338 F.3d 704, 707 (7th Cir. 2003) (noting that only dismissal with prejudice warrants costs under Rule 54), and where the case is being dismissed only because the Supreme Court has overruled its precedent—binding when the case was filed—that the claims are justiciable. Moreover, Defendants and Defendant-Intervenors are not entitled to an award of attorneys’ fees. They have not prevailed on the merits, or obtained a judicially-ordered change in the relationship of the parties. Furthermore, such an award would be improper even if they were “prevailing” parties. See *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646 (2016) (“When a defendant is the prevailing party on a civil rights claim . . . district courts may award attorney’s fees if the plaintiff’s ‘claim was frivolous, unreasonable, or groundless,’ or if ‘the plaintiff continues to litigate after it clearly became so.’” (quoting *Christiansburg Garmant Co. v. EEOC*, 434 U.S. 412, 422 (1978))).

October 11, 2019

Respectfully submitted,

/s/ Freda J. Levenson, trial attorney  
Freda J. Levenson (0045916)

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<sup>2</sup> An award of costs and/or fees in this case would be particularly inappropriate, as the Defendants failed to follow the court’s rules and provide Plaintiffs with a statement of their fees costs and other expenses. Cincinnati Civil Procedures: Timothy S. Black, United State District Judge, Rev. 11/13 at 6 (“**Any party** who intends to apply to the Court for the payment of his or her attorney’s fees by an opposing party shall provide to opposing counsel a statement showing the gross amount of attorney fees, costs, and other expenses incurred every 120 days from the date the complaint is filed.”) (emphasis added).

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon all counsel of record in this case via ECF.

*/s/ Freda J. Levenson*  
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