IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,	:	
Plaintiffs,	:	Civil Action No. 17-cv-14148
v.	:	Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist
RUTH JOHNSON, in her official capacity as Michigan Secretary of State	:	
Defendant.	:	

CONGRESSIONAL RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LACHES

CONCISE STATEMENT OF THE ISSUE PRESENTED

WHETHER THIS COURT SHOULD GRANT PARTIAL SUMMARY JUDGMENT ON CONGRESSIONAL INTERVENORS' LACHES AFFIRMATVE DEFENSE.

Movants/Plaintiffs answer: Yes

Congressional Intervenors answer: No

This Court should answer: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Rules

Fed. R. Civ. P. 56

Cases

Benisek v. Lamone, 138 S. Ct. 1942 (2018)

Block v. N.D., 461 U.S. 273, 292 (1983)

ACLU of Ohio v. Taft, 385 F.3d 641 (6th Cir. 2004)

Mich. Chamber of Commerce v. Land, 725 F. Supp. 2d 665 (W.D. Mich. 2010)

White v. Daniel, 909 F.2d 99 (4th Cir. 1990)

Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 366 F. Supp. 2d 887, 908-09, n.20 (D.C. Ariz. 2005)

INTRODUCTION

The League of Women Voters of Michigan ("LWVMI") and eleven (11) individual Michigan Voters (collectively "Democratic Voters" or "Plaintiffs") bring a Motion for Partial Summary Judgement pursuant to Federal Rule of Civil Procedure 52(c) on Congressional Intervenors' affirmative defense of laches. Pls.' Mot. Summ. J., ECF No. 117. Plaintiffs produce no evidence or facts, *none at all*, to show that laches is inapplicable in this specific case. Instead, Plaintiffs contend that laches, as a defense, is simply not applicable to constitutional violations or claims for injunctive relief. *See* Pls.' Mot. Sum. J. at 9-14. Plaintiffs' Motion fails as both a matter of fact and of law.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The facts at summary judgment are viewed in the light most favorable to the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). "[S]ummary judgment should only be granted where there is *no* genuine issue of material fact." *Bultema v. United States*, 359 F.3d 379, 382 (6th Cir. 2004). Therefore, a "properly supported response to a motion for summary judgment, the nonmoving party must show that there is, indeed, a genuine issue for trial." *Id.* (internal quotations omitted). At base, the rule is that "the record taken as a whole

could not lead a *rational* trier of fact to find for the nonmoving party." *Scott*, 550 U.S. at 380 (emphasis added). "[T]he substantive law will identify which facts are material." *Liberty Lobby, Inc*., 477 U.S. at 248.

ARGUMENT

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LACHES FAILS AS A MATTER OF FACT AND LAW.

Plaintiffs Motion for Partial Summary Judgment fails to identify any facts to contradict the elements that form a basis for a laches affirmative defense. Accordingly, this Court must accept Congressional Intervenors' proffered facts as admitted. Fed. R. Civ. P. 52(e).

When "a plaintiff seeks solely equitable relief, his action may be barred by the equitable defense of laches." *ACLU of Ohio v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004). Laches applies when "(1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay."[1] *ACLU of Ohio*, 385 F.3d at 647. Here, there can be no question that Plaintiffs' actions meet this test. *See* Cong. Intervenors' Mot. for Summ. J., ECF No. 121. As will be shown, Plaintiffs could and should have brought their claim much earlier. *See Benisek v. Lamone* 138 S. Ct. 1942, 1943 (2018) (per curiam); *cf. Bay Area Laundry & Dry Cleaning Pension*

[1] As Plaintiffs note in their brief, laches standards are nearly identical under Michigan and Federal law. *Compare ACLU of Ohio*, 385 F.3d at 647, *with Knight v. Northpoint Bank*, 832 N.W.2d 439, 442 (Mich. Ct. App. 2013).

Trust Fund v. Ferbar Corp., 522 U.S. 192, 201 (1997) ("A cause of action . . . become[s] complete and present . . . when the plaintiff can file suit and obtain relief.").

a. Plaintiffs' Motion Fails as a Matter of Fact.

i. Plaintiffs Unreasonably Delayed Bringing Their Claim.

As a purely factual matter, Democratic Voters actions, or lack thereof, necessitate a finding on both elements of laches for Congressional Intervenors. The first element of laches is that "the plaintiff delayed unreasonably in asserting his rights." *ACLU of Ohio*, 385 F.3d at 647; *see also Brown-Graves Co. v. Cent. States, Se & Sw Areas Pension Fund*, 206 F.3d 680 (6th Cir. 2000). In effect, "laches" is an equitable principle to counter the inequity attendant with a party sleeping on their rights. *See* Black's Law Dictionary 953 (9th Ed. 2009). The facts in this case are not only significant enough to overcome the "genuine issue of material fact" threshold, *see Liberty Lobby, Inc*., 477 U.S. at 248, they are significant enough to find for summary judgment in *favor* of Congressional Intervenors. *See* Cong. Intervenors' Mot. Summ. J. at 16-25.

The League of Women Voters of Michigan is an avowed opponent of reapportionment by the Michigan Legislature and instead prefers independent

redistricting commissions.[2] *See* League of Women Voters of Michigan, Issues – Redistricting Matters, http://lwvmi.org/issues/redistricting.html ("The League of Women Voters of Michigan (LWVMI) supports the formation of an independent redistricting commission in lieu of the legislature as the primary redistricting body.") (Exhibit A); *see also* Susan Smith, *Column: Independent boards should draw voting districts*, The Detroit News (July 9, 2015), http://lwvmi.org/issues/redistricting.html (Ms. Smith is identified as the Vice President of the League of Women Voters of Michigan in this article and is currently listed as the redistricting director on the LWVMI website) (Exhibit B). To that end, the evidence shows that Plaintiffs were both aware of the Michigan Legislature's redistricting process and were unsatisfied with the post-census reapportionment in 2011.[3] For example, the Michigan Redistricting Collaborative, of which the LWVMI is a member, issued a press release the day after Governor Snyder signed the 2011 plans. In it, the Collaborative characterized the plans, among other things, as "partisan." *See* Press Release, Michigan Redistricting Collaborative, *Michigan's closed-door political redistricting process fails-again* (Aug. 10, 2011) http://lwvmi.org/press.html (Exhibit C). In fact,

[2] In effect, the League, and by extension the individual Plaintiffs, are opponents of the delegation of authority granted by the Constitution's Elections Clause. *See* U.S. Const. art. I, § IV (articulating that the "Times, Places and Manner of holding Elections . . . for Representatives, shall be prescribed in each State by the Legislature thereof . . . ." and granting Congress the power to "make or alter such Regulations.").

[3] However, at the time, LWVMI's efforts appeared to be focused on the future 2021 redistricting. *See* Exhibit C.

LWVMI was keenly aware of the redistricting process *as it was happening nearly eight years ago*. *See* Editorial, *Too many voters lost between the lines*, Detroit Free Press (Feb. 11, 2011) http://lwvmi.org/issues/redistricting.html (Exhibit D); *see also* Press Release, Michigan Redistricting Collaborative, *Michigan Redistricting Collaborative pushes for increased transparency, public input into state and local redistricting* (Feb. 10, 2011), http://lwvmi.org/issues/redistricting.html (Exhibit E); Press Conference, Comments by Jessica Reiser, President Michigan Redistricting Collaborative (Feb. 10, 2011) (Exhibit F) ("The League of Women Voters of Michigan calls for an open redistricting process . . . .").

Furthermore, Plaintiffs began to take affirmative steps to file a lawsuit in January of 2015 by hiring their first expert witness. *See* Cong. Intervenors' Mot. Summ. J. at Apps. A, G. Plaintiffs then hired their second expert in early 2016. *Id*. at Apps. A, H. As is abundantly evident, Plaintiffs had direct knowledge that the redistricting process was not of their liking, *see* Exs. A, D, and that the actual *maps* were, in their words, "less competitive and more partisan" at the time they were adopted. *See* Exhibit C. It is therefore uncontroverted that Plaintiffs knew that their rights were allegedly being harmed as early as 2011, and if they did not know then, they certainly knew in 2015 after they hired their first expert witness. The only question left to consider is if Plaintiffs delay in bringing their claims was unreasonable. There is an abundance of evidence in the affirmative.

"It is well established that in election-related matters, extreme diligence and promptness are required." *McClafferty v. Portage Cty. Bd. of Elections*, 661 F. Supp. 2d 826, 839 (N.D. Ohio 2009). Plaintiffs have gone to great lengths to detail their alleged significant and irreparable harms; suffered as a result of this "ongoing and recurring . . . violation[] of . . . constitutional rights." *See e.g.,* Pls.'Mot. Partial Summ. J. at 5, ECF No. 117.

Plaintiffs had actual knowledge back in 2011 that, in their opinion, the maps were flawed, *see e.g.,* Ex. C, and then had further knowledge in early 2015 that an paid expert agreed with them, *see* Cong. Intervenors' Mot. Summ. J. at App. G, so the delay in seeking judicial relief must be *per se* unreasonable. To put it another way, if the harms alleged are as serious as alleged, there is no reasonable reason for Plaintiffs to wait to bring their claims. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 908-09, n.20 (D. Ariz. 2005) ("Plaintiffs have failed to offer a legitimate reason for not brining their claims earlier. The Court can only assume that they did not bring it because they were not sincerely concerned for its merits.").

ii. <u>Plaintiffs' Delay Prejudiced Congressional Intervenors.</u>

The second element of laches is the prejudice that a defendant suffers as a result of plaintiffs unreasonable delay. *ACLU of Ohio*, 385 F.3d at 647. The prejudice inquiry is important because "[l]aches does not simply concern itself with

the passage of time, but rather focuses on the question of whether a delay renders it inequitable to permit the claims to be enforced." *McClafferty*, 661 F. Supp. 2d at 840 (citing *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003)). "[O]ne general category of prejudice that may flow from unreasonable delay is prejudice at trial due to loss of evidence or memory of witnesses." *Natron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002) (internal citations and quotations omitted). The prejudice to Congressional Intervenors in this case is severe.

Due to the passage of time, several witnesses who were in a position to know the most significant details of the events that unfolded during the legislative process no longer remember. For instance, Mr. Jeff Timmer, who was the principle drafter of the congressional map, has forgotten significant details related to map development including: details regarding meetings, discussions, and events related to the development and passage of the 2011 plan. *See generally* Dep. of Timmer Def. (Cong. Int. Mot. for Summ. J. at App. D). The following exchange is fairly representative of this lack of memory:

> Q: [a]s part of the redistricting process that you performed or were – observed, did you have any communications with elected Democrats?
>
> A: Possibly. I'm trying to recall who was – who would have been elected at that time. Term limits makes it a bit fuzzy. So possibly.

Cong. Int. Mot. Summ. J. at App. D (Dep. of Timmer 110:2-7). Congressional Intervenors fully detail the extent to which witnesses with potentially probative information simply no longer recall that information in their Motion for Summary Judgment. *See* Cong. Intervenors' Mot. Summ. J. at Apps. D, J, K, L, M, N, O, & P.

Plaintiffs casting of aspersions on the memory of certain witnesses is disingenuous given that Plaintiffs waited *years* to bring their claims. *See* Pls.' Mot. Summ. J. at 7 n.2 ("[I]t is too tough to swallow the Secretary's argument that the memories of the Republican witnesses honestly have faded or their communications were innocently discarded."). However, faulty memory is not a "Republican" problem but a *human* one. This is best illustrated by Plaintiffs' own witness, who has the same faulty memory for things both long ago and relatively recent. *See, e.g.,* Cong. Int. Mot. Summ. J. at App. F (Dep. of Susan Smith, 62:1-63:11) (not remembering names of specific LWVMI members who have complained about their representation and which specific members were being complained about). This lack of memory is significantly impactful in Ms. Smith's case as her faulty memory precludes the discovery of key facts relating to standing.

In addition to this substantial evidence of knowledge and prejudice, which at minimum is sufficient to overcome Summary Judgment, there is every reason to believe *less prejudice* is required to prove a laches claim when the claim is brought close in time to the next reapportionment. *Maxwell v. Foster*, 1999 U.S. Dist. LEXIS

23447, *6-7 (W.D. La 1994) (three-judge court) ("Given this litigation's temporal proximity to the next installment of census data and associated redistricting [and] the amount of time that has elapsed since the cause of action arose, . . . less prejudice is required to show laches in such an instance than had Plaintiffs expeditiously asserted their rights.") (citing *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990)) (dismissing racial gerrymandering claims based on laches).

b. Plaintiffs' Motion Fails as a Matter of Law.

Plaintiffs make two broad contentions as to why laches is inapplicable to this case: (1) "[t]he laches doctrine does not apply to claims asserting recurring violations of constitution rights", and (2) "[l]aches is inapplicable to claims of injunctive relief to stop a continuing harm." *See* Pls.' Mot. Summ. J. at 9, 12.

In reality there is no need to split the "recurring violations" and "injunctive relief" contentions into two separate arguments. This is principally because gerrymandering cases are brought exclusively for injunctive relief; either preliminarily, permanently, or both. To put it another way, *all* gerrymandering claims are claims for some sort of injunctive relief. For this reason, both of Plaintiffs' contentions will be discussed together and, as will be shown, both of these claims are incorrect.

i. Laches Applies to Claims for Injunctive Relief in General and Gerrymandering Claims Specifically.

"A constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 461 U.S. 273, 292 (1983) (8-1 opinion with O'Connor, J. dissenting) (citation omitted) (finding a continuing constitutional harm was no bar to the application of the statute of limitations[4]); *see also U.S. v. Clintwood Elkhorn Mining Co*., 553 U.S. 1, 9 (2008) ("[A] constitutional claim can become time-barred just as any other claim can.") (Roberts, C.J., for a unanimous court); *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665, 680 (W.D. Mich. 2010) (same). The absoluteness of the Supreme Court's phrasing leaves little room for disagreement. It also unequivocally rejects Plaintiffs' arguments on injunctive relief and ongoing constitutional harm. First, constitutional claims are subject to the equitable defense of laches. *See e.g., Clintwood Elkhorn Mining Co*, 553 U.S. at 9. Second, *any* claim for equitable relief can also be subject to laches. *See id*. The inquiry should end here. In the case of injunctive relief, "the availability of equitable relief depends on the same general principles as laches." *Ariz. Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at

[4] Laches is simply an equitable counterpart to the statute of limitations. *See Equal Emp't Opportunity Comm'n v. Dresser Indus., Inc.,* 668 F.2d 1199, 1201 (11th Cir. 1982); *see also Occidental Life Insurance Co. v. E.E.O.C.*, 432 U.S. 355 (1977).

909. As such, laches applies to all equitable relief; constitutional, injunctive, or otherwise.[5]

There are three cases that are particularly informative, the first case being *Block*, 461 U.S. at 275-77. In *Block*, North Dakota sought injunctive and mandamus relief against the United States alleging ownership to the bed of the Missouri River. *Id*. The Court found that, as a matter of constitutional law, and despite the ongoing nature of the violation, Congress likely violated the Tenth and Fifth amendments by authorizing the taking of the land underneath the Missouri River. *See id*. at 291. However, despite this, the statute of limitations at issue—even though it worked a permanent and ongoing deprivation of rights on North Dakota and its citizens—was applicable to the "constitutional claim . . . just as any other claim . . . ." *Id*. at 292.

Land is also certainly instructive in this context. *See Land*, 725 F. Supp. 2d 665 (W.D. Mich. 2010). In *Land*, Plaintiffs brought a civil-rights action under 42 U.S.C. § 1983 seeking to enjoin the Michigan Secretary of State over an alleged ongoing violation of the plaintiffs' First Amendment rights. *Id*. at 669. In analyzing the laches defense raised by the Secretary, the court first noted that "a constitutional claim can become time-barred just as any other claim can." *Id*. (internal alterations omitted) (quoting *Clintwood Elkhorn Mining Co.,* 553 U.S. at 9). The court then

[5] The lone exception, which is not really an exception, are intellectual property claims. *See infra* at 17-20.

found *for* the Secretary on the first element of laches—that the plaintiffs impermissibly delayed by waiting *two-months* to bring their suit, which was close in time to an election. *Land*, 725 F. Supp. 2d at 681. This case is particularly of note because: (1) the case involved a continuing constitutional violation, (2) plaintiffs sought injunctive relief, and (3) the Court addressed the *merits* of the laches defense. *Id*.

Finally, the Supreme Court in *Benisek v. Lamone*, 138 S. Ct. at 1944, recently relied on laches principles in affirming the denial of a preliminary injunction in a gerrymandering case. *See also* Cong. Intervenors' Mot. Summ. J. at 18-19. The Court stated that "a party requesting a preliminary injunction must generally show reasonable diligence. That is true in election law cases as elsewhere." *Id*. The Supreme Court buttressed its analysis by approvingly citing to *Holmberg v. Armbrecht,* 327 U.S. 392, 396 (1946), a case dealing specifically with laches.

In fact, *Holmberg* similarly sheds light on the issues in this case. *Holmberg* details that, in cases involving federally created rights, it is implicit that, where Congress does not act, the court will apply "historic principles of equity in the enforcement of" equitable rights. See *Holmberg*, 327 U.S. at 395. Since the available remedy is equitable the defense too should be one in equity, that is laches. *See id*. at 396. ([A] court may dismiss a suit where the plaintiffs' 'lack of diligence is wholly unexcused; and both the nature of the claims and the situation of the parties was such

as to call for diligence.'" (internal alterations omitted) (quoting *Benedict v. City of New York*, 250 U.S. 321, 328 (1919)).

Plaintiffs may attempt to distinguish *Land* and *Block* because they are not *gerrymandering* cases. However, there is a long line of cases in addition to *Benisek* where laches served as a bar to claims of ongoing constitutional violations in the gerrymandering context. *See, e.g., White v. Daniel*, 909 F.2d 99, 102-04 (4th Cir. 1999) (finding laches barred constitutional and Voting Rights Act claims and noting that "a challenge to a reapportionment plan close to the time of a new census . . . is not favored."); *MacGovern v. Connolly*, 637 F. Supp. 111 (Dist. Mass. 1986) (three-judge court) (per curiam) (finding that laches was an "independent but related ground" to dismiss complaint alleging malapportionment of legislative districts in violation of the Equal Protection Clause of the Fourteenth Amendment); *Knox v. Milwaukee Cty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 407 (E.D. Wis. 1984) (denying a preliminary injunction on the basis of laches for relief under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments); *Ariz. Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at 908 ("The [laches] defense applies to redistricting cases as it does to any other."); *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1353-55 (S.D. Fla. 1999 (three-judge court) (dismissing gerrymandering claim based on laches at the motion to dismiss stage); *Maxwell*, 1999 U.S. Dist. LEXIS 23447 at *6-7 (three-judge court) (dismissing racial gerrymandering and

Voting Rights Act claims on laches grounds); *Varner v. Smitherman*, 1993 U.S. Dist. LEXIS 17721, *6-7 (S.D. Ala 1993) (finding laches barred a claim that at large voting violated Section 2 of the Voting Rights Act). There are also plenty of other cases outside the gerrymandering context where ongoing constitutional violations were subject to laches. *See e.g., Perry v. Judd*, 471 Fed. Appx. 219 (4th Cir. 2012) (affirming district courts ruling on laches and noting that even assuming an ongoing violation of plaintiffs' First Amendment rights exists "laches would still preclude" the court from granting relief.); *McNeil v. Springfield Park Dist.*, 656 F. Supp. 2d 1200 (C.D. Ill. 1987) (preliminary injunction denied based on laches for a claimed violation of the Voting Rights Act).

ii. Plaintiffs' Authority is Distinguishable.

Plaintiffs rely on several cases that are easily distinguishable and should be rejected. Plaintiffs primarily rely on *Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516 (6th Cir. 1997) for their contention that ongoing constitutional violations are immune from laches.[6] *See* Pls.' Mot. Summ. J. at 10-11. As an initial matter, *Block, Land, and Benisek* stand in direct opposition to the holding in *Kuhnle Bros*. *See e.g., Block*, 461 U.S. at 292 (finding a statute of limitations is applicable to constitutional

[6] Their other primary authority is of little moment. The second case Plaintiffs rely upon to show that claims for ongoing harms are not susceptible to a laches defense is *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001). This is yet another intellectual property case, and an out of circuit one at that.

claims); *Benisek*, 138 S. Ct. at 1944. Simply put, *Kuhnle Bros.* directly conflicts with multiple holdings of the Supreme Court. That alone should lead this Court to disregard *Kuhnle Bros.* However, there are additional reasons why *Kuhnle Bros.* is significantly distinguishable.

The main thrust of the reasoning in *Kuhnle Bros*. is the concern that an "ongoing violation of constitutional rights [will] become immunized from legal challenge for all time . . . ." 103 F.3d at 522. There is no such concern in this case. Since the Supreme Court's rulings in *Reynolds v. Sims*, 377 U.S. 533 (1964) (state legislative districts) and *Wesberry v. Sanders*, 376 U.S. 1 (1964) (U.S. Congressional districts), reapportionment must be conducted at least once per decennial census. The next decennial census will be conducted in 2020. There will be a new map before the 2021 elections. Accordingly, there is no possibility of harm from here to infinity.[7] Furthermore, the claim in *Kuhnle* was not for equitable relief but was instead for monetary damages. *Kuhnle Bros.*, 103 F.3d at 518-19. Laches differ from that of a statute of limitations, as found in *Kuhnle Bros.*, in that laches lies in equity to defeat equitable claims. Laches as an affirmative defense "is founded in a salutary policy", *Brown v. Cty. of Buena Vista*, 95 U.S. 157, 161 (1877), because "[n]othing can call forth a court of equity into activity but conscience, good faith, and

[7] However, as has been noted, the Supreme Court in *Block* held that "nothing in the constitution" prohibits a statute of limitations from applying to ongoing constitutional injuries irrespective of timeline. *Block*, 461 U.S. at 292.

reasonable diligence." *Id*. at 161. For this reason, "[l]aches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was *always* a limitation of suits in this court." *Id*. (emphasis added).

Plaintiffs also rely on two cases for the claim that "[l]aches is inapplicable to claims for injunctive relief to stop a continuing harm." Pls.' Mot. Summ. J. at 12-14. The first case relied on by Plaintiffs is *France Mfg. Co. v. Jefferson Elec. Co.*, 106 F.2d 605 (6th Cir. 1939). *France Mfg*. is an intellectual property case.[8] *Id*. at 606. *France Mfg.* can be read to buttress, not subvert, Congressional Intervenors' arguments. Plaintiffs frame *France Mfg.* incorrectly and that "error" infects the rest of their reasoning. Plaintiffs frame *France Mfg.* as follows: "It is recognized that there is 'no merit in the defense of laches' where, as here, the claim is 'a suit for an injunction.'" Pls.' Mot. Summ. J. at 13 (quoting and citing *France Mfg.*, 106 F.2d at 609). The *France Mfg.* court, however, was less absolute than Plaintiffs describe. What the court in *France Mfg.* actually stated was:

> We find no merit in the defense of laches. There is no evidence that the delay in instituting suit resulted in injury or prejudice to appellant or that there has been any change in circumstances as the result of such delay as would render it inequitable for appellee to be granted an injunction at this time with damages for past infringement.

[8] Interestingly, most of the cases relied upon both by Plaintiffs and by the district court in *Ohio A. Philip Randolph Inst. v. Smith*, 2018 U.S. Dist. LEXIS 137734, *24-25 (S.D. Ohio Aug. 15, 2018), are cases arising out of the intellectual property context. These types of cases are readily distinguishable as intellectual property cases. *See infra* 17-20.

Id. at 609. This seems to indicate that the court is applying the equitable weighing that is inherent in the laches defense. This reading is validated by what the court says latter *in the same paragraph*:

> The statute limits the recovery of profits and damages to those arising from infringement committed within six years prior to the institution of suit (35 U.S.C.A. § 70) and we know of no other period of limitation which may be invoked by an infringer to bar recovery but where circumstances appear which render it inequitable for relief to be granted ***because of delay in instituting suit, notwithstanding the statute of limitations, relief may be denied on the ground of laches*** *or estoppel.*

Id. (emphasis added) The court in *France Mfg.* simply applies a basic equitable principle in determining that laches was not warranted based on the facts of that specific case and not, as Plaintiffs contend, that laches is inapplicable to injunctive relief writ large. *Compare id.*, *with* Pls.' Mot. Summ. J. at 13.

iii. Plaintiffs' Reliance on Intellectual Property Cases is Flawed.

Most of the authority relied upon by Plaintiffs is in the copyright or intellectual property context. *See e.g., Lyons Partnership, L.P. v. Morris Costumes, Inc.,* 243 F.3d 789 (4th Cir. 2001) (copyright case); *Natron Corp. v. STMicroelectronics, Inc.,* 305 F.3d 397 (6th Cir. 2002) (Lanham Act[9] case). While

[9] *Petrella* also discusses claims falling under the Lanham Act. The Court notes that the Lanham Act has no statute of limitations provision but that Congress "expressly provides for defensive use of equitable principles, including laches." *Petrella v. MGM*, 134 S. Ct. 1962, 1974 n.15 (2014). Therefore, intellectual property claims, being creatures of statute, are unique in terms of their application of laches. *See, e.g., id*. at 1974.

Plaintiffs also rely on *Ohio A. Philip Randolph Inst. v. Smith*, 2018 U.S. Dist. LEXIS 137734, *24-25 (S.D. Ohio Aug. 15, 2018), that case too relied on intellectual property cases for its reasoning.

Intellectual property cases are a unique species of case that provide little insight into the case at bar. The Supreme Court in *Petrella v. MGM*, 134 S. Ct. 1962 (2014) discusses laches in the copyright context at great length. The Copyright Act provides for specific legal and equitable remedies for infringement. *See Petrella*, 134 S. Ct. at 1968. However, "most significant here" is the fact that "[a] claim ordinarily accrues when a plaintiff has a complete and present cause of action" whereas a copyright claim "arises or accrues when the infringing act occurs." *Id.* at 1969 (internal alterations and quotations omitted). The Court in *Petrella* goes on to outline why the application of laches is different in the copyright context then the ordinary context. The Court explains that "laches is a defense developed by courts of equity; its principle application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation." *Id*. at 1973. The Court further outlines that "laches within the term of the statute of limitations is no defense to an action at law." *Id*.

In other words, the statute of limitations continues to renew every time there is a new infringement. Therefore, since the application of the statute of limitations,

enacted by Congress for copyright claims, accrues in a different manner than ordinary claims, laches is inappropriate.[10] And in any event, the "separate-accrual rule" applicable in copyright claims, has never been applied to gerrymandering cases by the Supreme Court.[11]

Lastly, *Ohio A. Philip Randolph Inst.* is distinguishable and, in any event, wrongly decided. *See Ohio A. Philip Randolph Inst.*, 2018 U.S. Dist. LEXIS 137734, *24-25. While *Ohio* is a partisan gerrymandering case, the decision was issued in the context of a Motion to Dismiss. While not unheard of, it is typically too early to grant a laches affirmative defense at the Motion to Dismiss stage, especially when one must prove undue delay and prejudice. *Cf. Fouts*, 88 F. Supp. 2d at 1353-55 (dismissing gerrymandering claim based on laches at the motion to dismiss stage). Furthermore, the court in *Ohio* relied entirely on distinguishable intellectual property

[10] It is also important to note that the Courts decision in *Benisek* came after the decision in *Petrella*, which directly implies that nothing in *Petrella* could be read to preclude the application of laches in the *gerrymandering* context. *Compare Petrella*, 134 S. Ct. 1962 (decided 2014), *with Benisek,* 138 S. Ct. 1942 (decided 2018).

[11] Finally, the reasoning in *Petrella* contradicts that found in *Natron*. The *Petrella* Court disclaimed laches due to the interplay of the accrual rule and the statute of limitations. *Petrella*, 134 S. Ct. at 1976-77. Because of this, the Court specifically allowed estoppel as a gap filler. *Id.* at 1977. This Court's reasoning in *Natron* also relied on elements of estoppel in the Lanham Act context. *Natron*, 305 F.3d at 412-13. However, *Petrella* seems to disclaim such usage because there is no unique interplay of a statute of limitation and accrual rule that creates the same dynamics as those found in *Petrella*. *Petrella*, 134 S. Ct. at 1974 n.15. In any event, this is further evidence of that the uniqueness of claims which arise in the intellectual property context are not applicable in the context of gerrymandering.

precedent. *See supra* at 17-20; *see also* Cong. Intervenors' Mot. Summ. J. 22-25. Consequently, *Ohio* should be given little weight by this Court.

CONCLUSION

For the aforementioned reasons, this Court should deny Plaintiffs' Motion for Summary Judgment on laches.

Dated: October 12, 2018

Respectfully Submitted,

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Certificate Of Service

I hereby certify that on October 12, 2018 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all of the parties of record.

HOLTZMAN VOGEL
JOSEFIAK TORCHINSKY, PLLC

/s/ Jason Torchinsky
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