

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 AND LEGISLATIVE DEFENDANTS-INTERVENORS'  
EMERGENCY MOTION TO STAY TRIAL**

The Congressional and Legislative Defendants-Intervenors, by and through their attorneys, respectfully move this Court to stay the trial of this case pending the final decisions of the United States Supreme Court in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. #18-726).

In support of this motion, the Defendants-Intervenors rely on the facts, law, and argument set forth in their accompanying Brief in Support. The undersigned counsel sought concurrence to the relief requested in this motion prior to filing. Neither counsel for Plaintiffs nor counsel for Defendant Secretary of State are in a position to make a decision with respect to concurrence at this time but they will promptly notify the Court regarding their position.

WHEREFORE, the Congressional Defendants-Intervenors respectfully request the Court grant their motion and stay the trial of this case pending the final decisions of the United States Supreme Court in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. 18-726).

Respectfully submitted,

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Date: January 11, 2019

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**BRIEF IN SUPPORT OF CONGRESSIONAL  
DEFENDANTS-INTERVENORS' EMERGENCY MOTION STAY TRIAL**

**CONCISE STATEMENT OF THE ISSUE PRESENTED**

WHETHER THE COURT SHOULD STAY THE TRIAL OF THIS CASE PENDING THE FINAL DECISIONS OF THE UNITED STATES SUPREME COURT IN COMMON CAUSE V. RUCHO (SUP. CT. #18-422) AND BENISEK V. LAMONE (SUP. CT. 18-726) WHERE:

- 1) IF THE SUPREME COURT DETERMINES GERRYMANDERING CLAIMS, (PRECISELY AS THOSE IN THE INSTANT CASE) ARE NOT JUSTICIABLE, AND THEREFORE FEDERAL COURTS LACK JURISDICTION OVER SUCH DISPUTES, THEN THE INSTANT LAWSUIT MUST BE DISMISSED FOR LACK OF JURISDICTION;

OR, ALTERNATIVELY

- 2) IF THE SUPREME COURT DETERMINES GERRYMANDERING CLAIMS (PRECISELY AS THOSE IN THE INSTANT CASE) ARE JUSTICIABLE AND THEREFORE FEDERAL COURTS HAVE JURISDICTION OVER SUCH DISPUTES, THEN THE SUPREME COURT'S DECISIONS ON THE MERITS OF RUCHO AND BENESIK WILL PROVIDE CONTROLLING PRECEDENT OVER THE LEGAL QUESTIONS AND FACTUAL ISSUES TO BE TRIED IN THE INSTANT LAWSUIT.

Movant's answer: Yes

Plaintiffs' answer: Undetermined

Defendant Secretary of State's Answer: Undetermined

This Court should answer: Yes

**CONTROLLING OR MOST APPROPRIATE AUTHORITY**

**Cases**

*Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948 (6th Cir. 1971)

*Caspar v. Snyder*, 77 F. Supp. 3d 616 (E.D. Mich. 2015)

*Clinton v. Jones*, 520 US 681 (1997)

*Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007)

*Garland v. Orlans PC*, No. CV 18-11561, 2018 WL 6074933 (E.D. Mich. Nov. 21, 2018)

*Landis v. N. Am. Co.*, 299 U.S. 248 (1936)

*Pierson v. DHL Holdings USA, Inc.*, 2014 U.S. Dist. LEXIS 27045 (E.D. Mich. Mar. 4, 2014)

*Purcell v. Gonzales*, 549 U.S. 1 (2006)

*Thibault v. Wierszewski*, No. 15-CV-11358, 2017 WL 5195893 (E.D. Mich. Oct. 4, 2017)

*United States v. Conception*, No. 88-80523, 2013 WL 1788589 (E.D. Mich. Apr. 26, 2013)

*United States v. Prisel*, 316 F. App'x 377 (6th Cir. 2008)

*United States v. Wells*, No. 98-80994, 2017 U.S. Dist. LEXIS 12902 (E.D. Mich. Jan. 31, 2017)

*United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC v. Kelsey-Hayes Co.*, 795 F.3d 525 (6th Cir. 2015)

## INTRODUCTION

On January 4, 2018, the United States Supreme Court announced that, in March of 2019, it will consider dispositive issues associated with gerrymandering claims in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. 18-726). On January 8, 2019, the Supreme Court ordered that appellants' briefs on the merits are to be filed on or before February 8, 2019, and appellees' briefs on the merits are to be filed on or before March 4, 2019, in each case. The specific dispositive gerrymandering issues common to both *Rucho* and *Benisek* are the same dispositive issues currently before the Court in the instant case; namely, whether redistricting disputes are justiciable and, if so, then what standards must courts apply when resolving these disputes.

In light of the Supreme Court's expedited review in *Rucho* and *Benisek*, Defendants-Intervenors now seek to stay trial in this matter until these cases, which are dispositive to the issues at hand, are decided. Indeed, this Court's denial of the Defendants-Intervenors' Motion for Summary Judgment in this case relies heavily on the lower court decisions in both *Rucho* and *Benisek* that are now on review to the Supreme Court. (ECF No. 143). In fact, in this Court's November 30, 2018 Opinion and Order denying summary judgment, *Rucho* was cited and relied upon no fewer than fifty-five times and *Benisek* was cited and relied upon twice. (*Id.*). Thus, this Court itself has recognized the applicability of *Rucho* and *Benisek* to the

outcome of the dispositive issues in this case.

This action should therefore be immediately stayed pending the Supreme Court's final decisions in *Rucho* and *Benisek*. On January 4, 2019, the Supreme Court took several actions in *Rucho* and *Benisek* which warrant a stay here. First, and most importantly, the Supreme Court agreed to hear both cases in March of 2019, shortly after trial in this matter is set to conclude. *Rucho* and *Benisek* involve the same claims before the Court in this case, and both *Rucho* and *Benisek's* lower court decision served as the underpinning of the denial of the Motions for Summary Judgment in this case. The Supreme Court will ultimately resolve currently unanswered questions regarding the justiciability, legal standards, factual inquiries and appropriate remedy in political gerrymandering claims. Furthermore, it is critical to note that the Supreme Court notified the parties that it would postpone consideration of its jurisdiction over the plaintiffs' claims in *Rucho* and *Benisek* until the hearing on the merits.

Staying the proceedings in the instant cases in light of *Rucho* and *Benisek* is in the best interests of the parties and the court alike because, if the Supreme Court finds that political gerrymandering claims are nonjusticiable, then this upcoming trial will constitute a waste of time, money and resources of the litigants and the Court. Contrarily, if the Supreme Court recognizes these claims as justiciable, its opinions in *Rucho* and *Benisek* will provide guiding and controlling principles

attendant to the case at hand and may alter the factual and legal claims and presentations necessary to maintain or defend the case.

Moreover, if this Court proceeds to trial and rules against Defendant and Defendants-Intervenors, then any remedy it attempts to impose will likely be stayed while the Supreme Court considers, and ultimately issues opinions in *Rucho* and *Benisek*. The only consequence of proceeding under this cloud of uncertainty would be irreparable confusion by the public as to the status of Michigan's State House, State Senate and Congressional Districts. For these reasons, and as explained below, the Court should enter an order immediately staying trial pending the Supreme Court's final decisions in *Rucho* and *Benisek*.

#### **STANDARD OF REVIEW**

This Court “has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997). This includes the power to consider the implications of judicial economy and the time and effort involved with counsel and litigants. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

The Court considers four factors in determining whether “another case’s imminent disposition” warrants a stay. *Caspar v. Snyder*, 77 F. Supp. 3d 616, 644 (E.D. Mich. 2015) (summarizing Sixth Circuit and Supreme Court precedent). Those factors are (1) “the potential dispositive effect of the other case;” (2) the

“judicial economy achieved by awaiting adjudication of the other case;” (3) the “public welfare;” and (4) the “relative hardships of the parties created by withholding judgment.” *Id.*

### **ARGUMENT**

It is well-established practice to stay a case where the dispositive issue in that case is simultaneously pending before a higher court. *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC v. Kelsey-Hayes Co.*, 795 F.3d 525, 525 (6th Cir. 2015) (noting consideration of a petition for rehearing was stayed “pending the Supreme Court's decision in *M & G Polymers USA, LLC v. Tackett*”); *United States v. Prisel*, 316 F. App'x 377, 383 (6th Cir. 2008) (noting the “court granted Prisel's motion to stay proceedings pending the Supreme Court's decision in *Gall v. United States*”); *Cooley v. Strickland*, 479 F.3d 412, 415 (6th Cir. 2007) (“We later granted a stay pending the Supreme Court's decision in *Hill v. McDonough*”); *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 950 (6th Cir. 1971) (noting review of an FCC order was stayed “pending the Supreme Court decision in *United States v. Southwestern Cable Co.*”); *Thibault v. Wierszewski*, No. 15-CV-11358, 2017 WL 5195893, at \*1 (E.D. Mich. Oct. 4, 2017) (staying proceedings pending outcome of certiorari petition); *Arab Am. Civil Rights League v. Trump*, No. 17-10310, 2017 WL 2501060, at \*3 (E.D. Mich. June 9, 2017) (staying case pending

outcome of a petition for certiorari in *Int'l Refugee Assistance Project v. Trump*); *United States v. Wells*, No. 98-80994, 2017 U.S. Dist. LEXIS 12902 (E.D. Mich. Jan. 31, 2017) (holding case in abeyance after grant of certiorari and the Sixth Circuit's decision in *In re: Embry*, 831 F.3d 377 (6th Cir. 2016) asking district courts to hold cases pending the outcome of the Supreme Court case); *Pierson v. DHL Holdings USA, Inc.*, 2014 U.S. Dist. LEXIS 27045 (E.D. Mich. Mar. 4, 2014) (staying proceedings pending outcome of certiorari petition); *United States v. Conception*, No. 88-80523, 2013 WL 1788589, at \*1 (E.D. Mich. Apr. 26, 2013) (noting the court stayed proceedings pending the grant of certiorari in *Chaidez v. United States*).

In fact, recently a member of this Court stayed another case pending a decision on a threshold dispositive legal issue by the Supreme Court. *See Garland v. Orleans PC*, No. CV 18-11561, 2018 WL 6074933, at \*1-\*2 (E.D. Mich. Nov. 21, 2018) (Hood, J.) (staying case after Supreme Court granted a writ of certiorari on “[wh]ether the FDCPA applies to non-judicial foreclosure proceedings?”).

In this case, we know for certain the Supreme Court will decide two cases as to dispositive issues that are squarely before this Court in the instant case. As a result of this certainty, along with the fact all four relevant considerations strongly favor a stay, the Court should stay this matter pending the Supreme Court's final decisions in *Rucho* and *Benisek*.

### **1. The Dispositive Nature of *Rucho* and *Benisek* Warrants a Stay**

With respect to the application of the first factor, there is no doubt the outcomes of the dispositive issues in *Rucho* and *Benisek* are also dispositive here. The Supreme Court is now set to review the unpinning of these cases in the next 90 days. If *Rucho* or *Benisek* are reversed even in part, then it will have a significant impact on this Court's consideration of this matter. Most importantly, the Supreme Court has indicated it has doubts about whether the federal courts had jurisdiction in either case now before it. It is critical this Court carefully consider whether it should proceed with trial in a case where the Supreme Court has already expressed some doubt on the jurisdiction of federal courts over the very issues a trial will decide. *See Garland*, 2018 WL 6074933, at \*2 (staying case where "if the Court were to move forward, there is approximately a 50% chance that doing so will be for no purpose").

### **2. The Goal of Judicial Economy Warrants a Stay**

With respect to the second factor, judicial economy is best served by staying any further proceedings in this case until after the Supreme Court issues its opinions in *Rucho* and *Benisek*. Those cases are set to be heard by March of 2019, and opinions will issue no later than June of 2019, but given the similar litigation

pending elsewhere around the country,<sup>1</sup> the likelihood remains strong that the Supreme Court will issue its opinion sooner than later. This court could reschedule trial in this matter to July or August and permit time for the Court, the parties, and the counsel involved in this case to better address these matters upon receipt of guidance from the Supreme Court, if necessary at all. There is little point to holding a trial that could last the better part of four weeks, put the court, parties and counsel through trial preparation and the expenses that comes with it, and then require post-trial briefing literally as the Supreme Court is hearing oral argument in two cases that will be controlling on this Court's analysis of the facts and law. *See Garland*, 2018 WL 6074933, at \*2 (staying case where pending Supreme Court ruling will determine what law is controlling and where the ruling risks "requiring the parties and the Court to unnecessarily expend significant resources").

Holding a trial where the elements of the claim, the relevant factual issues and the federal courts' basic jurisdiction over the case are currently being reviewed by the Supreme Court potentially means this Court might decide a case over which it lacks jurisdiction, or the parties could be presenting facts and legal analysis that are about to be altered by the forthcoming Supreme Court opinions.

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<sup>1</sup> The Southern District of Ohio is set to hear Ohio's political gerrymandering case at trial in March, and the Western District of Wisconsin is set to hear Wisconsin's political gerrymandering case at trial in April unless stay motions are filed and granted in those cases.

In addition, holding a trial in this matter while the Supreme Court is hearing controlling cases runs the risk of creating the very confusion the Supreme Court warned against in *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006). With the Supreme Court reviewing the cases this Court has relied upon to allow this case to proceed, the confusion that will be imposed on the constituents of the Defendant-Intervenors will be substantial, and runs the risk of confusing millions of residents of Michigan about the status of their representation in Lansing and in Washington.

### **3. The Public Welfare Concerns Generated by a Trial Warrant a Stay**

With respect to the public welfare, there is no doubt that awaiting guidance from the Supreme Court before conducting what likely will be highly publicized Court proceedings, putting political leadership from both sides of the aisle on the stand in federal court, and forcing the expenditure of significant amounts of public dollars by the governmental defendants all while the Supreme Court is reviewing controlling and potentially dispositive cases, suggest the public welfare is best served by staying these proceedings until June.

If these proceedings are stayed for a few months while all of the participants await guidance from the United States Supreme Court, then expedited proceedings can be held in the summer and fall to finalize Michigan's lines for 2020 and resolve whether this Court might order a special election for the State Senate. If, on the other hand, the Supreme Court determines that federal courts do not have

jurisdiction over partisan gerrymandering claims or that judicially manageable standards still do not exist, then this case can be dismissed without trial and without posing any risk to the public welfare.

#### **4. The Lack of Hardship to Plaintiffs Warrants a Stay**

With respect to the relative hardships of the parties, it is important to note that Plaintiffs slept on their rights and waited seven years and three election cycles before bringing this action. This Court has recognized the materiality of Plaintiffs' delay in seeking relief by reserving decision on whether laches should result in dismissal of the case. (ECF No. 143). Census day 2020 is fourteen months away, new data will be released in early 2021, and a wholly new process for drawing maps in Michigan will be in place for the 2020 redistricting. There is no additional hardship on Plaintiffs if this court resolves this matter in the second half of 2019 rather than the first half, and certainly no hardship which Plaintiffs did not bear without complaint for nearly a decade before bringing suit.

#### **CONCLUSION AND RELIEF REQUESTED**

For the foregoing reasons, Defendants-Intervenors respectfully request that the Court grant the motion and stay trial of this case pending the United States Supreme Court's decisions on the dispositive issues in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. 18-726).

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Date: January 11, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2019, 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.

**CLARK HILL PLC**

/s/ Brian D. Shekell