No.__________

IN THE
SUPREME COURT OF THE UNITED STATES

League of Women Voters of Michigan, et. al. v. Jocelyn Benson, In Her Official Capacity as Michigan Secretary of State

EMERGENCY APPLICATION FOR A STAY PENDING DISPOSITION OF APPLICANTS' EMERGENCY APPLICATION FOR A WRIT OF MANDAMUS

On Petition for a Writ of Mandamus to the United States District Court for the Eastern District of Michigan, Clay, Circuit Judge; Hood, Chief District Judge; Quist, District Judge presiding

Jason Torchinsky*
Counsel of Record
Shawn Sheehy
Phillip Gordon
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: (540) 341-8808
Fax: (540) 341-8809
Attorneys for Applicants Republican Congressional Delegation, Lee Chatfield, and Aaron Miller

Charles R. Spies
Brian D. Shekell
Kevin A. Fanning
Peter B. Kupelian
CLARK HILL PLC
212 E. Cesar Chavez Avenue
Lansing, MI 48906
Phone: (517) 318-3100
Fax: (517) 318-3099
Attorneys for Applicants Republican Congressional Delegation, Lee Chatfield, and Aaron Miller

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT:

The primary issues below have been the justiciability of Plaintiffs' claims, whether Plaintiffs have standing to bring the same, and what is the accepted legal and factual standard for judicial adjudication of such claims if they even exist. On January 4, 2019, this Court announced that, in March 2019, it will consider jurisdictional and other likely dispositive issues associated with redistricting/partisan gerrymandering claims in *Common Cause v. Rucho*, No. 18-422 (U.S. filed Oct. 1, 2018) and *Lamone v. Benisek*, No. 18-726 (U.S. filed Dec. 3, 2018). The specific dispositive redistricting/gerrymandering issues common to both *Rucho* and *Benisek* are precisely the same dispositive issues currently before the three-judge panel in *League of Women Voters of Mich. v. Johnson*, No. 17-cv-14148 (E.D. Mich. filed Dec. 22, 2017); namely, whether such redistricting disputes are justiciable and, if so, what legal and factual standards courts must apply when resolving those disputes.

The *Rucho* and *Benisek* cases are thus directly applicable, instructive, and dispositive to this action, and the three-judge panel has recognized as such. Indeed, in denying the Intervenor-Defendants' Motion for Summary Judgment in this action, the panel relied heavily on the lower court decisions in *Rucho* and *Benisek* that are now on review to this Court (indeed, in the November 30, 2018 Opinion and Order denying summary judgment, the panel cited and relied upon the lower court opinion in *Rucho* at least fifty-five times and cited and relied upon the *Benisek* opinion twice).

Trial in the District Court is set to begin February 5, 2019. However, despite the directly applicable and dispositive nature of *Rucho* and *Benisek* to the below action, that the trial would commence while briefing in *Rucho* and *Benisek* is ongoing, and that this Court will consider the *Rucho* and *Benisek* cases at oral argument in only approximately one month, the district court appears disinclined to issue a prompt ruling on the Motion for Stay. *See* Defendant-Intervenors' Emergency Motion to Stay Trial, No. 17-cv-14148 (filed Jan. 11, 2019, not yet ruled on) (ECF No. 183).

On January 22, 2019, the panel convened an off the record conference to discuss a number of pre-trial matters. *See* Minute Entry of Jan. 22, 2019. At this conference, Intervenor-Defendants discussed the pending Motion to Stay pending decisions in *Rucho* and *Benisek*. The Plaintiffs and the Defendant Secretary of State each discussed their desire to continue trial to in order to conduct settlement discussions and possible resolution of the case on the merits via a consent decree. The three-judge panel was clear that they would not be staying or adjourning the trial in this case for any reason. Defendant-Intervenors requested additional clarity as to the district court's position, at which point the three-judge panel abruptly moved on to one minor additional matter related to the Defendant Secretary of State and ended the conference. In summation, Plaintiffs and Defendant both generally concurred with the Intervenor-Defendants' desire to stay or postpone trial proceedings. *See also* Defendant's Response to Defendant-Intervenors' Motion to Stay, No. 17-cv-14148 (filed Jan. 17, 2019) (ECF No. 199); Plaintiffs' Response to

Defendants-Intervenors' Motion to Stay, No. 17-cv-14148 (filed Jan. 17, 2019) (ECF No. 200). Nonetheless, the district court is seemingly unwilling to issue an order with sufficient time to appeal.

There are several reasons why a stay entered by this Court is appropriate and warranted here. First, this Court agreed to hear *Rucho* and *Benisek* in March 2019, shortly after trial in the district court action is set to commence. *Rucho* and *Benisek* involve the identical claims as the below action, and both *Rucho* and *Benisek's* lower court decisions served as the underpinning of the denial of the Motions for Summary Judgment in this case. *See League of Women Voters of Mich. v. Johnson*, 2018 U.S. Dist. LEXIS 202805 (E.D. Mich. 2018). In *Rucho* and *Benisek*, this Court will ultimately resolve currently unanswered questions regarding the justiciability, legal standards, factual inquiries, and appropriate remedies in partisan gerrymandering/redistricting claims. Indeed, the instant action involves just such a claim.

Second, issuing a stay in this case would serve the interests of judicial economy. This case is the first of three cases alleging essentially the same claims set for trial before three-judge federal district courts. After trial in this case is scheduled to begin on February 5, 2019, the Southern District of Ohio has a nearly identical matter set for a two-week trial beginning March 4, 2019. *See* Calendar Order, *Ohio A. Philip Randolph Institute v. Kasich,* No. 1:18-cv-357 (S.D. Ohio July 17, 2018) (ECF No. 41). Immediately following that case, the Western District of Wisconsin has trial on the remand from the Court in *Whitford* set for April 23, 2019,

combined with a trial in a second action alleging many of the same claims. *See* Preliminary Pretrial Conference Order, *Whitford v. Gill,* Nos. 15-cv-421-jdp & 18-cv-763-jdp (W.D. Wis. 2018) (ECF No. 214). Whichever side loses the below case, and whichever side loses in the other two nearly identical trials, are nearly certain to bring appeals directly to this Court. Rather than invite three more cases onto this Court's appellate docket treading the same ground as *Rucho* and *Benisek*, a stay issued in this case would be a signal to these other two District Court actions to await further guidance from this Court before proceeding. Further, a stay would help to preserve the political neutrality of the Court, and lower federal courts institutionally, in the event the Court determines via *Rucho* or *Benisek* that there is no federal court jurisdiction in these types of claims.

Third, staying the proceedings in the district court action in light of *Rucho* and *Benisek* is in the best interests of the parties and the Court alike because, if the Court concludes that political gerrymandering/redistricting claims are non-justiciable, then the upcoming trial will constitute a waste of precious time, money, and resources for the litigants as well as the three-judge panel (consisting of one circuit judge and two district court judges). Contrarily, if the Court recognizes these claims as justiciable, its opinions in *Rucho* and *Benisek* will provide guiding and controlling principles with regard to the below action and may alter the factual and legal claims and presentations necessary to maintain or defend the case.

Fourth, if trial in the in this action proceeds as scheduled and the panel rules against Defendant and the Intervenor-Defendants, any remedy the panel attempts

to impose will likely be stayed while this Court considers, and ultimately issues, its opinions in *Rucho* and *Benisek*. The most likely consequence of proceeding under this cloud of uncertainty is the public's irreparable confusion as to the status of Michigan's State House, State Senate, and Congressional Districts.

For all these reasons, and those reasons discussed more fully herein, Applicants-Intervenors-Defendants move on an emergency basis for a stay of all proceedings before the three-judge panel in the United States District Court for the Eastern District of Michigan pending this Court's disposition of Applicants' Emergency Application for a Writ of Mandamus pursuant to S. Ct. R 23(1)-(2) and 28 U.S.C. § 1651, which is filed simultaneously with this Application. Absent relief, the action in this case will proceed to trial commencing on February 5, 2019 despite the fact that this Court is set to consider identical issues in *Rucho* and *Benisek* barely a month later. This Court's rulings in *Rucho* and *Benisek* will be applicable, instructive, and potentially dispositive to the action before the district court in the present case.

DECISION UNDER REVIEW

The January 22, 2019 Status Conference (off record) – in which the District Court, Clay, Circuit Judge; Hood, Chief District Judge; and Quist, District Judge, were neither inclined to grant the Applicants' Motion for Stay nor issue a timely ruling on the Motion to facilitate this appeal, notwithstanding the pendency of the *Rucho* and *Benisek* cases.

STATEMENT OF THE CASE

I. FACTUAL/PROCEDURAL BACKGROUND OF THE CASE

On August 9, 2011, Michigan Governor Snyder signed into law Public Acts 128 and 129 of 2011. These Acts codified, respectively, the boundaries of Michigan's 14 Congressional, 38 State Senate, and 110 State House districts (the "Current Apportionment Plan"). On December 22, 2017 – over six years and three election cycles after the enactment of the Current Apportionment Plan – Plaintiffs, The League of Women Voters of Michigan, Roger J. Brdak, Frederick C. Durhal, Jr., Jack E. Ellis, Donna E. Farris, William "Bill" J. Grasha, Rasa L. Holliday, Diana L. Ketola, Jon "Jack" G. Lasalle, Richard "Dick" W. Long, Lorenzo Rivera, and Rashida H. Tlaib (collectively, "Plaintiffs") filed a complaint seeking declaratory and injunctive relief, claiming that the Current Apportionment Plan is unconstitutional in that it constitutes an impermissible partisan gerrymander, violating Plaintiffs' rights as protected by the First Amendment and Equal Protection Clause. Essentially, Plaintiffs contend that the Current Apportionment Plan impermissibly maximizes the number of state Republican congressional representatives, i.e. that the Current Apportionment Plan is unconstitutional because there are too many Republicans in both delegations. Compl. at 1-34.

Plaintiffs' Complaint asserts claims under 42 U.S.C. §§ 1983, 1988, and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs allege that by continuing to implement the Current Apportionment Plan, Defendant Secretary of State has impermissibly discriminated against Plaintiffs as "likely

Democratic voters" in contravention of the Equal Protection Clause of the Fourteenth Amendment, and unreasonably burdened Plaintiffs' right to express their political views and associate with the political party of their choice in contravention of the First Amendment. Plaintiffs seek to enjoin the further use of the current district lines in the upcoming congressional and state legislative elections scheduled for 2020. And, while the state Senate elections in Michigan are not scheduled again until 2022 after the next constitutionally required redistricting, the district court denied motions to dismiss portions of the case related to the State Senate because the district court indicated there is a possibility it could order special elections for the state Senate. *See* Order Denying Motion to Dismiss, No. 17-cv-14148 (E.D. Mich. Aug. 3, 2018) (ECF No. 88).

Ruth Johnson, in her official capacity as Michigan Secretary of State, was the original named Defendant, and moved to dismiss the Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(1) on the basis that Plaintiffs lacked standing to pursue statewide claims. Motion to Dismiss, No. 17-cv-14148 (E.D. Mich. filed Jan 23, 2018) (ECF No. 11). On May 16, 2018, the three-judge panel in the district court dismissed Plaintiffs' statewide claims but held that Plaintiffs had standing to pursue district-specific claims. *League of Women Voters of Mich. v. Johnson*, 2018 U.S. Dist. LEXIS 82067 (E.D. Mich. 2018).

On November 6, 2018, the Michigan held its General Election and the Democratic Party candidate, Jocelyn Benson, was elected as the new Secretary of State of Michigan. She assumed her office on January 1, 2019. On January 15,

2019, Jocelyn Benson was automatically substituted as a party defendant. Order Substituting Party Defendant, No. 17-cv-14148 (E.D. Mich. Jan. 15, 2019) (ECF No. 194).

Representative Lee Chatfield, in his official capacity as Speaker Pro Tempore of the Michigan House of Representatives, and Representative Aaron Miller, in his official capacity as a Member of the Michigan House of Representatives, (collectively, "Legislators"), and, along with the Michigan Republican Congressional Delegation, are Intervenor-Defendants in this matter.[1]

The primary issues in the District Court Action have been the justiciability of Plaintiffs' claims, whether Plaintiffs have standing to bring same, and what the accepted/manageable standard is for such claims. The parties have engaged in dispositive motions relevant to the issues now present. Namely, on September 21, 2018, Plaintiffs moved for partial Summary Judgment with regard to Defendant Johnson's and the Intervenor-Defendants' affirmative defense of laches Motion for Partial Summary Judgment, No. 17-cv-14148 (E.D. Mich. filed Sept. 21, 2018) (ECF No. 117); Defendant Johnson filed a Motion to Dismiss and for Summary Judgment arguing, *inter alia*, that Plaintiffs' claims are non-justiciable, Motion for Summary Judgment and to Dismiss, No. 17-cv-14148 (E.D. Mich. filed Sept. 21, 2018) (ECF

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[1]For both groups of Intervenor-Defendants, intervention was granted by the United States Court of Appeals for the Sixth Circuit after the District Court denied intervention. *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018) (granting permissive intervention to the Republican Congressional Delegation); *League of Women Voters of Mich. v. Johnson*, 2018 U.S. App. LEXIS 36083 (6th Cir. 2018) (granting intervention to Representative Lee Chatfield and Representative Aaron Miller).

No. 119); and the Intervenor-Defendants moved for summary judgment on the basis that Plaintiffs lack standing to pursue their claims and on the basis of laches. Motion for Summary Judgment, No. 17-cv-14148 (E.D. Mich. filed Sept. 21, 2018) (ECF No. 121). On November 30, 2018, the three-judge panel denied each of the parties' foregoing dispositive motions. *League of Women Voters of Mich.*, 2018 U.S. Dist. LEXIS 202805. Under the current Case Management Order in this case, trial briefs must be filed by January 28, 2019 and trial is set to begin on February 5, 2019 at 9:00 a.m. Case Management Order No. 1, No. 17-cv-14148 (E.D. Mich. May 9, 2018) (ECF No. 14).

II. ***RUCHO* AND *BENISEK***

As the action in the district court was ongoing – i.e., as the parties hereto were litigating whether partisan gerrymandering claims were justiciable and what the merits and standards of of those claims should and should not be – this Court announced on January 4, 2019 that it will consider dispositive issues associated with such gerrymandering claims (as exist in the present case) in *Rucho*, No. 18-422 and *Benisek*, No. 18-726 in March 2019.

On January 8, 2019, the 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 both *Rucho* and *Benisek*. The specific dispositive gerrymandering issues common to both *Rucho* and *Benisek* are the same dispositive issues currently before the three-judge panel in this action; namely,

whether gerrymandering/redistricting disputes are justiciable and, if so, what standards courts must apply in resolving these disputes.

I. INTERVENOR-DEFENDANTS' MOTION TO STAY

In light of this Court's expedited review of *Rucho* and *Benisek*, and the fact that trial is set to begin in this case on February 5, 2019, Intervenor-Defendants filed an Emergency Motion to Stay Trial and an Ex Parte Motion for Expedited Briefing on Emergency Motion to Stay Trial on January 11, 2019. Emergency Motion to Stay Trial, No. 17-cv-14148 (filed Jan. 11, 2019) (ECF No. 183) Ex Parte Motion to Expedite Briefing, No. 17-cv-14148 (filed Jan. 11, 2019) (ECF No. 184). By those Motions, Intervenor-Defendants sought to stay trial in the District Court Action until *Rucho* and *Benisek* – which are dispositive to the issues in the District Court Action – are decided. The Plaintiffs and Defendant both concurred in the Intervenor-Defendants' Motion to Stay Trial and agreed that a stay was appropriate and necessary. Defendant's Response to Defendant-Intervenors' Motion to Stay, No. 17-cv-14148 (filed Jan. 17, 2019) (ECF No. 199); Plaintiffs' Response to Defendants-Intervenors' Motion to Stay, No. 17-cv-14148 (filed Jan. 17, 2019) (ECF No. 200).[2]

The three-judge panel in the District Court Action recognized the applicability of *Rucho* and *Benisek* to the outcome of the dispositive issues in this matter, as the panel's denial of the Intervenor-Defendants' Motion for Summary Judgment relies heavily on the lower court decisions in *Rucho* and *Benisek* (that are now on review to this Court). *League of Women Voters of Mich.*, 2018 U.S. Dist.

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[2] Although all Parties agreed that trial should be stayed, they did so for different reasons. Plaintiffs and Defendant agreed to a stay to pursue settlement. Congressional and Legislative Intervenors agreed to a stay pending the outcome of *Rucho* and *Benisek*.

LEXIS 202805. In fact, in the panel's November 30, 2018 Opinion and Order denying summary judgment, *Rucho* was cited and relied upon at least fifty-five times and *Benisek* was cited and relied upon twice. (*Id.*).

On January 22, 2019, the district court panel made it clear that a stay will not be granted and an order will not be forthcoming. However, clearly a resolution and ruling by this Court in the *Rucho* and *Benisek* cases will be directly applicable, instructive, and dispositive with regard to the action in the district court, and an Order staying trial therefore is warranted.

JURISDICTION

This Court has jurisdiction to grant a stay pending the disposition of a petition for a writ of mandamus as the stay is "necessary and appropriate in aid of [the Court's] respective jurisdiction [] and agreeable to the usages and principles of law." *See* 28 U.S.C. § 1651; *see also Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam) ("[T]he Court's longstanding approach to applications for stays and other summary remedies granted without determining the merits of the case under the All Writs Act" is flexible).

Because the underlying case is within this Court's mandatory and direct appeal jurisdiction, 28 U.S.C. § 1253 granting a stay here pending the disposition of the Emergency Application for a Writ of Mandamus is a necessary aid to this Court's mandatory jurisdiction. *See* Sup. Ct. R. 20.1; 28 U.S.C. § 1651. Adequate relief cannot be obtained from any other court. *See id.*

STANDARD OF REVIEW

This Court can issue a stay where there is (1) "a reasonable probability" that this Court will issue the writ of mandamus, (2) "a fair prospect" that the Court will then reverse the decision below, and (3) "a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers); *see also Lux v. Rogrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers); *see also Hollingsworth v. Perry*, 558 U.S.183, 190 (2010) (per curiam).

ARGUMENT

The Supreme Court has the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). To obtain a writ of mandamus, the applicant must demonstrate that he has "no other adequate means to attain the relief he desires." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). This requirement limits an applicant's ability to circumvent the normal appeals process. *See id*. The applicant must then demonstrate that the applicant's right to the writ is "clear and indisputable." *Id*. at 381. Finally, the applicant must demonstrate that the writ is otherwise appropriate under the circumstances. *See id*.

This standard is not insurmountable as the Court has issued writs to restrain federal district courts from intruding into areas involving delicate federal-state relations. *See id.*; *see also Maryland v. Soper*, 270 U.S. 9 (1926). Accordingly, the writ is appropriate in matters where a district court has usurped its authority or committed a clear abuse of discretion. *See id*. at 380; *see also Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of

appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.").

Here, the Court should issue the writ of mandamus because there are no other adequate alternative means to obtain the relief sought, namely a stay. Currently the trial in the district court is scheduled for February 5, 2019, Case Management Order No. 1, No. 17-cv-14148 (E.D. Mich. May 9, 2018) (ECF No. 14), despite the fact that this Court is scheduled to consider dispositive issues associated with the claims nearly a month later in *Rucho* and *Benisek*.

I. THERE IS A REASONABLE PROBABILITY THAT A MAJORITY OF THIS COURT WILL ISSUE THE WRIT OF MANDAMUS

A. The Court Has Authority to Stay the District Court Action Pending Resolution of *Rucho* and *Benisek*

It is well-settled that "[i]n the exercise of sound discretion, [a court] may hold one lawsuit in abeyance to abide the outcome of another, *especially where the parties and the issues are the same*." *American Life Ins. Co. v. Stewart*, 300 U.S. 203 (1937) (emphasis added). As noted *supra*, the issues pending in this District Court Action are precisely the same as those pending before this Court in *Benisek* and *Rucho*.

In addition, this Court's interest in managing its docket counsels in favor of staying this proceeding. The below action is the first in a waterfall of cases heading to the Court's docket. The cases below involve nearly identical factual and legal questions. Courts, including the Sixth Circuit from where two of these cases arise, have often stayed cases pending resolution of issues pending before this Court. *In re*

Embry, 831 F.3d 377 (6th Cir. 2016); *See also* Order Holding Briefing in Abeyance pending resolution of case before this Court, *Germain v. Teva*, No. 12-5368, (May 30, 2013) (Doc. 100-1, CA6).

B. There are No Other Adequate Means to Obtain the Relief Applicants Seek

Applicants/Intervenor-Defendants do not have any adequate alternative means to obtain the relief they seek because denials of stays are not appealable as a final judgment. *See Catlin v. United States*, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271, 277-78 (1988) (holding that a three-judge panel's denial of a stay is not appealable under the collateral-order doctrine, but noting the availability of an extraordinary writ when entitlement to relief is clear); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (recognizing that the denial of a stay is not appealable through the interlocutory appeal statute because it is not an injunction altering the status quo of the parties).

Here, there are several reasons why Applicants/Intervenor-Defendants cannot wait until the *Rucho* and *Benisek* cases are decided by this Court, as trial in the District Court Action is set to commence prior to this Court's decisions in *Rucho* and *Benisek*, and this Court's decisions in those cases are instructive and dispositive with regard to the case below.

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

The primary issues in the District Court concern the justiciability of partisan gerrymandering claims, whether Plaintiffs even have standing to pursue same, and if so, the appropriate or accepted standard governing disposition and resolution of such claims. These are the exact same issues that this Court will address and resolve in the *Rucho* and *Benisek* cases in March 2019, **less than a month** after trial is set to commence. *Rucho* and *Benisek* involve the same claims as the District Court Action; indeed, the three-judge panel in the District Court Action recognized the applicability of *Rucho* and *Benisek* to the outcome of the dispositive issues in this matter, as the panel's denial of the Intervenor-Defendants' Motion for Summary Judgment relies heavily on the lower court decisions in *Rucho* and *Benisek*. (ECF No. 143). In fact, in the panel's Opinion and Order denying summary judgment, *Rucho* was cited and relied upon at least fifty-five times and *Benisek* was cited and relied upon twice. (*Id.*). If *Rucho* or *Benisek* are reversed even in part, then it will have a significant impact on the panel's consideration of the matter.

In *Rucho* and *Benisek*, this Court will ultimately resolve currently unanswered questions regarding the justiciability, legal standards, and factual inquiries and appropriate remedy in partisan gerrymandering claims (as in the instant case). An order staying trial in the District Court Action is thus critical and necessary because this Court's rulings in *Rucho* and *Benisek* will dictate – and be dispositive of – the justiciability, scope, and standards in the case below.

2. *The Goals of Judicial Economy Warrant a Stay*

Staying the proceedings in the District Court in light of *Rucho* and *Benisek* is in the best interests of the parties and the court alike because, if this Court concludes that partisan gerrymandering claims are non-justiciable, then the upcoming trial in the District Court will constitute a waste of time, money, and resources for the litigants and the three-judge panel alike. Contrarily, if this Court recognizes these claims as justiciable, its opinions in *Rucho* and *Benisek* will provide guiding and controlling principles that may alter the factual and legal claims and presentations necessary to maintain or defend the case.

Rucho and *Benisek* are set to be heard by this Court by March of 2019, and opinions will likely issue no later than June of 2019. Given the dispositive nature of *Rucho* and *Benisek* on the below case, the three-judge panel could reschedule trial in this matter to July or August and permit time for the Court, the parties, and counsel to better address this matter upon receipt of guidance and instruction from this Court. There is little point in holding a trial that could last the better part of four weeks and put the court, parties, and counsel through trial preparation and the accompanying costs and expenses, and then require post-trial briefing, as this Court is hearing oral arguments in two cases (*Rucho* and *Benisek*) that will be controlling on the District Court's analysis of the facts and law.

Moreover, proceeding with 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 this Court potentially means that the three-judge district court panel might decide a case over which it lacks jurisdiction, or the

parties could be presenting facts and analysis that are subject to alteration by forthcoming/pending opinions from this Court. Further, if trial proceeds as scheduled and the panel rules against Defendant and the Intervenor-Defendants, any remedy the panel attempts to impose will likely be stayed while this Court considers, and ultimately issues, its opinions in *Rucho* and *Benisek*.

Further, with two more nearly identical cases proceeding to trial before other three-judge district courts in the next three months which are legally required to take appeals to this Court, this Court's management of its docket would be aided by pausing the trial and signaling to the other two three-judge district courts that they should consider doing the same while this Court considers *Rucho* and *Benisek*.

3. *The Public Welfare Concerns Warrant a Stay*

Holding a trial in the District Court while this Court is hearing controlling cases runs the risk of creating the very confusion this Court warned against in *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006). Given that this Court will be reviewing and ultimately deciding the two main cases that the three-judge panel has relied upon to allow the case below to proceed, the confusion that will be imposed on the constituents of the Applicants will be substantial, and runs the risk of confusing millions of residents of Michigan about the status of their representation in Lansing and Washington. There is no doubt that awaiting guidance from this Court before conducting what likely will be a highly publicized trial, 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 this Court is reviewing controlling and potentially dispositive cases in *Rucho* and *Benisek*, suggest that the public welfare is best served by staying the below case until June 2019.

If trial in the District Court is stayed for a few months while all of the participants await guidance from this Court, then expedited proceedings can be held in the summer and fall of 2019 to, *inter alia*, finalize Michigan's lines for 2020. On the other hand, if this Court determines that federal courts do not have jurisdiction over these types of 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.

Assuming *arguendo* that the three-judge panel rules in favor of Plaintiffs below, it will then need to issue an Opinion and Order that provides Michigan's legislature with specific guidance as to how a new redistricting plan must be drafted.

Moreover, it is important to note that there is no state or federal election presently impending, and thus, there is no need for the three-judge panel to rush to a decision within the next two months. There is no specific need for clarity/resolution with regard to the substantive redistricting claims contained in Plaintiffs' Complaint before this Court rules on *Rucho* and *Benisek*. The most likely consequence of rushing to trial and proceeding under this cloud of uncertainty is irreparable confusion by the public as to the status of Michigan's State House, State Senate, and Congressional Districts.

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

It is important to note the relative hardships of the parties below. Plaintiffs slept on their rights and waited seven years and three election cycles before bringing their claims. Indeed, the three-judge panel 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). And, the District Court has raised the possibility of special State Senate elections even though the next regularly scheduled Senate elections in Michigan are not until 2022, after the post-2020 Census redistricting is set to occur.

Census day 2020 is still 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 as a result of a ballot measure adopted in November 2018 instituting a redistricting commission for legislative and congressional reapportionment. There is no additional hardship on Plaintiffs if the case below is resolved in the second half of 2019 rather than the first half, and certainly no hardship that Plaintiffs did not bear without complaint for three election cycles before bringing suit.

Such an expedited schedule for trial currently in the District Court Action is further unnecessary as the Current Apportionment Plan went into effect in 2011 and has been in use ever since. Plaintiffs waited over six years and three election cycles after the enactment of the Current Apportionment Plan to assert claims they

could have asserted years ago, but chose not to. Plaintiffs should not be permitted to benefit through any purported emergency arising out of their own delay.

5. *The Elements for the Issuance of a Writ of Mandamus are Satisfied*

As demonstrated by the foregoing, the elements required for issuance of a writ of mandamus are satisfied. There are no other adequate means to seek the relief sought by Applicants, as denials of stays are not appealable as a final judgment. Moreover, Applicants' right to the writ is clear and indisputable and issuance of the writ is otherwise appropriate under the circumstances. The *Rucho* and *Benisek* cases are scheduled to be considered less than a month after trial in the District Court Action is scheduled to commence. Those cases are applicable, instructive, and potentially dispositive on the case below, such that issuing the writ and staying the case until after this Court decides *Rucho* and *Benisek* best serves the interests of judicial economy and public welfare.

II. ABSENT ISSUANCE OF THE REQUESTED STAY, APPLICANTS WILL SUFFER IRREPARABLE HARM

Irreparable harm is harm that cannot be undone through monetary remedies. *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1382 (6th Cir. 1995). Absent a stay, Intervenor-Defendants will undoubtedly suffer permanent and irreparable harm by proceeding with trial on February 5, 2019, in light of this Court's consideration of *Rucho* and *Benisek.* To be sure, this Court's decision in these cases, will either be completely dispositive of the case below as lacking in subject matter jurisdiction, or will provide the parties and the three-judge panel the

proper framework to adjudicate the merits of the case. Accordingly, if the February 5, 2019 trial is not stayed, the parties' time and efforts, as well as the time and efforts of the judicial resources involved (those of a circuit judge, a chief district judge, and another district judge) may have been for naught, either because no jurisdiction existed over the matter or because the case was decided under the wrong legal framework. This waste of time and efforts by the parties and the judiciary, amounts to irreparable and unquantifiable harm, which indeed harms the public at large.

A. The Public Resources Spent on Trial Constitute Irreparable Harm to Intervenor-Defendants and the Public at Large

First, the public resources, time, and money spent for the trial would not only irreparably harm Intervenor-Defendants, but also the public at large. Not only would the Intervenor-Defendants (and all other litigants) be required to spend the substantial amount of time, resources, and expenses in preparing for and trying a case that could be significantly changed – if not completely dismissed – pending the outcome of this Court's rulings in *Rucho* and *Benisek* mere months later, but public resources spent for the trial by both the federal government (for the district court, three-judge panel, and corresponding staff) and by the State of Michigan (for the Defendant Secretary of State and Intervenor-Defendants, who are members of the Michigan Legislature) would be extensive, significant, and potentially unnecessary given this Court's upcoming disposition of *Rucho* and *Benisek*. Accordingly, the amount of public resources spent for the trial by both the federal government and the state government, in addition to the Intervenor-Defendants (and all other

litigants) themselves, would irreparably harm the Intervenor-Defendants and warrant a stay of trial in the District Court Action.

B. The Disclosure of Sensitive Political and Legislative Information, Communications, and Strategy in Trial in the District Court Action Constitutes Irreparable Harm

Second, trial would necessarily involve the disclosure of political and legislative information in federal court and thus, to the public. Legislative information/materials produced in the course of discovery would become public at trial because the federal court overrode the legislative privilege in discovery, and political strategy, messages, and communications would likewise be publicly disclosed.

These statements regarding political thoughts and strategy cannot be made private once they're made public – one cannot "put the toothpaste back in the tube." There is no way to cure the harm done once this type of sensitive legislative and political information is made public, as there is no way to restore their confidentiality or protected status. *See In re Professionals Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009) ("[A]n erroneous forced disclosure of confidential information could not be adequately remedied on direct appeal because a court cannot restore confidentiality to documents after they are disclosed"); *see also In re Lott*, 424 F.3d 446, 452 (6th Cir. 2005) ("If the District Court's discovery order is in error and [respondent's] counsel is wrongfully forced to disclose privileged communications, there is no way to cure the harm done to Lott or to the privilege itself, even if some of the disclosure's consequences could be remedied on direct

appeal.”). Indeed, “once privileged materials are ordered disclosed, the practical of the order is often ‘irreparable by any subsequent appeal.’” *UMG Recording, Inc. v. Bertelsmann AG (In re Napster Copyright Litig.)*, 479 F.3d 1078, 1088 (9th Cir. 2007) (internal citations omitted). Although the foregoing cases address ordered disclosure of privileged or confidential information, they are illustrative and applicable to the instant matter insofar as they demonstrate the proposition that the improper or unnecessary disclosure of certain sensitive information – such as legislative and political information – constitutes irreparable harm, as political and legislative thoughts, strategy, and communications cannot be made confidential or private once disclosed.

Moreover, from a Constitutional perspective, one purpose of the First Amendment (and the privilege that attaches thereto) is to encourage associational communications to formulate strategies and messages. In this way, the First Amendment and its corresponding privilege is similar to the attorney-client privilege. *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) (stating that the purpose of the attorney-client privilege is to encourage communication between client and attorney); *see also Perry v. Schwartzenegger*, 591 F.3d 1147, 1162-63 (9th Cir. 2010) (“Implicit in the right to associate with others to advance one’s shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private. Compelling disclosure of internal campaign communications can chill the exercise of these rights.”). Once the legislative and political strategy, communications, and other information are disclosed, this

purpose – avoiding chill on internal communications made in private – is irreparably harmed. *See Lott*, 424 F.3d at 451-52. While slightly different than the issue at present, the cases nonetheless support the proposition that irreparable harm occurs through the public disclosure of politically private and sensitive information.

Thus, by going forward with the trial in the District Court – and thereby compelling the public disclosure of certain political and legislative information, communication, and strategy – Intervenor-Defendants would suffer permanent and irreparable harm. This is only exacerbated by the fact that such information would not only be disclosed to the public, but also to very individuals and entities to whom disclosure would harm Intervenor-Defendants most.

C. This Court's Impending Consideration and Rulings in *Rucho* and *Benisek* Heighten the Irreparable Harm Occasioned by Proceeding to Trial in the District Court Action

As this Court is well-aware (and as has been discussed at length herein), starting in March 2019 (less than a month after trial is scheduled to commence), this Court is scheduled to consider and rule upon two cases that are directly applicable, instructive, and potentially dispositive to the case below – *Rucho* and *Benisek*. The Court's disposition of these cases will not only change the jurisprudence in partisan redistricting cases, but will very likely make the Plaintiffs' case much less viable (if viable at all). The three-judge panel's determination regarding the parties various dispositive motions relies in substantial part on the lower court decisions in *Rucho* and *Benisek*, and if either

case is reversed even in part, it will have a significant impact on the consideration of this case and redistricting cases generally.

Indeed, the fact that this Court has postponed consideration of the question of jurisdiction rather than noting probable jurisdiction greatly increases the likelihood that these cases could be decided on threshold questions of jurisdiction or standing.[3] This signals that at least some members of the Court, if not the majority, doubt whether federal courts have jurisdiction in either case. Thus, it would appear that Plaintiffs have little to no prospect of succeeding on the merits due to the pending *Rucho* and *Benisek* decisions, and proceeding with trial in the District Court Action therefore only heightens the irreparable harm caused by the trial and the corresponding resources expended by the litigants, the courts, the state and federal government, and the public at large, as well as the (likely) public disclosure of sensitive political and legislative information of the parties.

However, assuming Plaintiffs do have a prospect of succeeding on the merits in spite of the impending decisions in *Rucho* and *Benisek* by this Court, it goes without saying that this Court's decision on the merits in those cases will be extraordinarily impactful on any decision of the District Court. If this Court even reaches the merits of *Rucho* and *Benisek*, it will either give litigants an entirely new framework by which to adjudicate partisan gerrymandering challenges or create

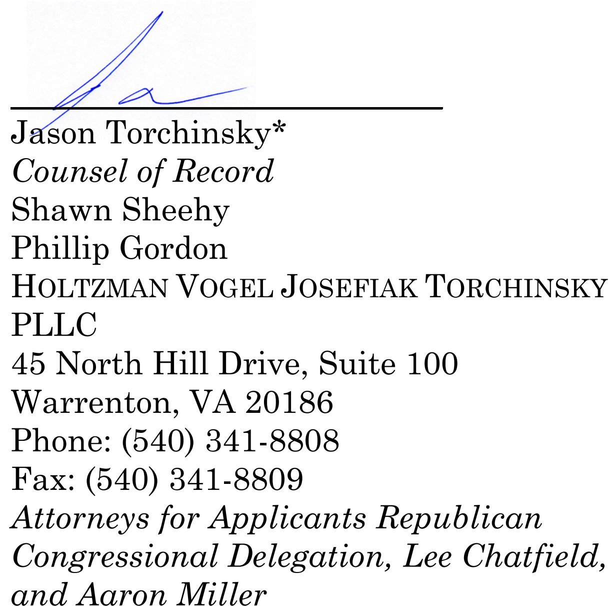
[3] "[T]he Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. *If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction.*" Sup. Ct. R. 18(12) (emphasis added).

new standards directly affecting the merits of the case below. The harms thus suffered by Intervenor-Defendants will be significant, irreparable, and further heightened given that there is a real possibility that the trial in the District Court – and any relief arising therefrom – will either be rendered moot and dismissed by this Court's opinions in *Rucho* and *Benisek*, or at the very least, an entirely new framework and standards for adjudicating such claims will arise from those cases.

CONCLUSION

For the foregoing reasons, this Court should issue the stay of all proceedings before the three-judge panel in the U.S. District Court for the Eastern District of Michigan pending this Court's disposition of Applicants' Emergency Application for a Writ of Mandamus.

Respectfully Submitted on this 25th day in January, 2019.



Jason Torchinsky*
Counsel of Record
Shawn Sheehy
Phillip Gordon
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: (540) 341-8808
Fax: (540) 341-8809
Attorneys for Applicants Republican Congressional Delegation, Lee Chatfield, and Aaron Miller

Charles R. Spies
Brian D. Shekell
Kevin A. Fanning
Peter B. Kupelian
CLARK HILL PLC
212 E. Cesar Chavez Avenue
Lansing, MI 48906
Phone: (517) 318-3100
Fax: (517) 318-3099
Attorneys for Applicants Republican Congressional Delegation, Lee Chatfield, and Aaron Miller