No. 18A769

In the Supreme Court of the United States

IN RE LEE CHATFIELD, ET AL., PETITIONERS

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR A STAY PENDING DISPOSITION OF APPLICANTS' EMERGENCY APPLICATION FOR A WRIT OF MANDAMUS

**To the Honorable Sonia Sotomayor,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit**

INTRODUCTION

The Petitioners in this case—the Congressional and Legislative Defendants-Intervenors below—come before this Court on the eve of trial seeking extraordinary relief: a writ of mandamus directing that the three-judge panel erred by declining to postpone trial in an increasingly time-sensitive matter, and an emergency stay of all proceedings in the district court, based almost entirely on speculation as to how this Court will rule in two pending cases. But the Intervenors have not identified any irreparable harm to their interests if trial were to continue as scheduled, particularly since a successful defense of the maps at issue (the outcome sought by the Intervenors) would moot the question of future relief, and any possible relief from a trial finding of a violation would be available to the Intervenors after the trial if warranted. They are not without a remedy.

Rather, both the public interest and judicial efficacy would be severely prejudiced if trial were postponed. Plaintiffs seek a remedy for the 2020 state election cycle—specifically, a court order enjoining continued use of the current challenged districts, directing the Michigan Legislature to redraw those districts, overseeing the approval of the new districts, and possibly mandating a special election for State Senate offices. As the time until the 2020 election cycle grows shorter, the challenges of completing a remedial redistricting process and implementing a new set of maps inversely grows larger. The Secretary, as the state's chief election officer, has a distinct interest in protecting the integrity and administrability of Michigan's electoral system, including its district maps. Therefore, if a trial is going to occur in this case, it should happen as currently scheduled, and the Intervenors' application for a stay should be denied.

JURISDICTION

The Intervenors invoke this Court's jurisdiction to review its emergency request for stay under the All Writ Acts, 28 U.S.C. § 1651, explaining that the underlying case falls within this Court's direct appeal jurisdiction under 28 U.S.C. § 1253. The Secretary of State notes that for a request for an extraordinary writ, as here, the ordinary course is to require the party to await final judgment even though the hardship of conducting a trial "is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment." *Unites States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202 (1945).

STATEMENT OF THE CASE

Plaintiffs brought this case under Sections 1983 and 1988 (42 U.S.C. §§ 1983, 1988) against the Secretary's predecessor-in-interest in her official capacity in December 2017, alleging that the State of Michigan's 2011 redistricting statutes were the result of unconstitutional, partisan gerrymandering. Compl., ECF 1. The Plaintiffs have challenged, in total, a combination of 34 State House, State Senate, and federal Congressional districts. The case was accordingly assigned to a three-judge panel. See 28 U.S.C. § 2284. The Republican Congressional Delegation moved to intervene shortly after the case commenced, on February 28, 2018 (ECF 21), and the individual Michigan Legislators subsequently filed their intervention motion on July 12, 2018 (ECF 70).[1]

Both requests to intervene were initially denied (ECF 47, 91), and those denials then appealed (ECF 50, 96). On August 30, 2018, the Sixth Circuit found intervention by the Congressional Intervenors appropriate (Case No. 18-1437; ECF 103), and on December 20, 2018, the court agreed that the individual legislators' intervention was likewise appropriate (Case No. 18-2383, ECF 166). While those interventions and appeals were pending, the parties engaged in extensive discovery prior to the August 24, 2018 discovery deadline. See ECF 53, Case Mgmt. Order No. 1. The Plaintiffs, the Secretary, and the Congressional Intervenors also fully briefed and argued motions to dismiss and for summary judgment on various grounds, including standing and laches (*e.g.*, ECF 11, 117, 119, 121).

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[1] Both the Legislative and Congressional Intervenors are the Petitioners before the Court.

In November 2018, the district court denied the Secretary's and the Congressional Intervenors' motions for summary judgment and ruled that the Plaintiffs had presented evidence of the following, sufficient to create triable issues of fact as related to the challenged districts:

- the map drawing process was confidential;
- no Democratic representative or interest group ever attended the map drawing meetings;
- the maps were "highly secretive";
- the map makers "relied on political data" in drawing the maps, namely, population and election data, including election results through the years;
- email evidence illustrated the "profound extent to which partisan political considerations" affected the redistricting process; the "mapmakers' efforts proved extremely successful";
- the history of Michigan elections from 2012 on reflects that the apportionment plan provided Republicans with a durable and material advantage in converting votes to seats;
- individual plaintiffs or Democratic League members lived and voted in each of the challenged districts;
- demonstration maps for each of the challenged districts show that the mapmakers could have drawn maps that complied with state law as well or better than the enacted maps but would be less cracked or packed than enacted map districts; and
- each League member voter lives in a district that is considerably more partisan than many or all of the one thousand simulated districts submitted for the same map.

See ECF 143, Op. & Order.

Also in November 2018, Michigan voters elected Jocelyn Benson, a longtime proponent of non-partisan redistricting, to serve as Secretary of State. At the same time, the voters adopted Proposal 2, creating an Independent Citizens Redistricting

Commission to draw Michigan's election districts in a non-partisan manner. Secretary Benson assumed the office of Secretary of State on January 1, 2019, and was automatically substituted as a party defendant.

Shortly thereafter, on January 7, the Plaintiffs and the Secretary entered into settlement negotiations to resolve this case through the entry of a consent decree. On January 10, 2019, Plaintiff's counsel advised counsel for the Intervenors that the parties had begun preliminary discussions as to possible settlement of the case and outlined a potential settlement structure. Intervenors' counsel, although initially insisting on being a part of such negotiations, did not actually participate in settlement discussions. Once the Plaintiffs and the Secretary had outlined the basic structure of the agreement in writing, they shared the drafts with Intervenors' counsel and continued negotiations over the final terms; Intervenors' counsel was copied on those communications. Despite requests for their input, the Intervenors did not propose any alternative settlement terms or engage substantively in the negotiations. See generally ECF 211, § I. Rather, the Intervenors' simply objected.

On January 25, 2019, the Secretary and the Plaintiffs reached agreement on the final terms of a consent decree to present to the district court. The proposed consent decree would have submitted certain Michigan House districts—those House districts as to which the Plaintiffs have presented the strongest evidence regarding partisan gerrymandering—to the Michigan Legislature for redrawing for the 2020 House elections, while leaving untouched the Michigan Senate districts and the federal Congressional districts. ECF 211-1.

While consent decree negotiations were ongoing, on January 11, 2019, the Intervenors filed a motion with the district court seeking to stay trial pending this Court's disposition of two cases set for oral argument during the Spring 2019 term, *Rucho* v. *Common Cause* (No. 18-422) and *Lamone* v. *Benisek* (No. 18-726). ECF 183. The Secretary and the Plaintiffs concurred with the relief sought by the Intervenors on the alternate grounds that an adjournment of the trial would give the parties time to work out a consent decree. ECF 199, 200.

After the district court indicated at a status conference on January 22, 2019, that it was inclined to deny the Intervenors' motion for stay, the Intervenors petitioned for a writ of mandamus from this Court directing the district court to stay the case, and also applied for a stay of all proceedings in the district court pending a determination of that writ. The Intervenors also objected to the proposed consent decree on, among other grounds, this Court's pending decisions in *Rucho* and *Benisek*. ECF 231. On February 1, 2019, the district court denied the Plaintiffs' and the Secretary's joint motion to approve a consent decree, and concurrently denied the Intervenors' motion to stay trial. ECF 238.

Trial in this case is thus scheduled to commence tomorrow, on February 5, 2019. The parties have submitted their final trial witness and exhibit lists, final trial briefs, draft final pretrial order, and a partial stipulation and report setting out the parties' agreements and positions regarding trial procedures, which the district court thereafter finalized as a trial order (see, *e.g.*, ECF 172, 222–24, 234).

ARGUMENT

The Intervenors have not set forth a compelling justification for the relief they seek. To obtain a stay pending the filing and disposition of a petition for a writ of mandamus, an applicant must show a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). "A single Justice will grant a stay only in extraordinary circumstances." *Bartlett* v. *Stephenson*, 535 U.S. 1301, 1304 (U.S. 2002) (Rehnquist, C.J., in chambers) (internal quotation marks omitted).

The mandamus remedy to which the instant application for stay is linked is likewise a "drastic and extraordinary" measure "reserved for really extraordinary causes." *Ex Parte Fahey*, 332 U.S. 258, 259–60 (1947). "Only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney* v. *U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004) (internal citations and quotation marks omitted). In order to justify a writ of mandamus, the Intervenors must demonstrate that (1) they have no other adequate means to attain the relief sought; and (2) the right to the writ is "clear and indisputable"; as well as (3) satisfy this Court that a writ is appropriate under the circumstances. *Kerr* v. *U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976).

Moreover, this Court issues writs of mandamus directly to a federal district court "only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court

should be taken." *Hollingsworth*, 558 U.S. at 190. Where there is even a "fair possibility" that a stay will harm another party's interests, the applicant must demonstrate a "clear case of hardship or inequity" in being required to proceed with the litigation. *Landis* v. *N. Am. Co.*, 299 U.S. 248, 255 (1936).

The Intervenors have not carried that burden here. Their application is almost entirely grounded in unsupportable speculation regarding what this Court *may* decide in two cases it has not yet heard and furthermore elides the timing and interests that this case implicates. As a threshold matter, it is impossible for any litigant, including any and all litigants to this case, to divine how this Court will decide a case before the opinion actually issues. Consequently, neither the Secretary, nor the Intervenors, nor the Plaintiffs, can effectively predict whether and how a decision in *Benisek* or *Rucho* would impact this case, whether at the pre-trial or post-trial stages. The degree of speculation on which the Intervenors rely does not constitute a "clear and indisputable" right to relief under the circumstances. *Kerr*, 426 U.S. at 403.

Contrary to the Intervenors' assertions, if a trial is going to take place in this action, the public interest and goals of judicial efficacy strongly counsel that it should do so now. Plaintiffs seek to redraw the districts at issue with sufficient time to be implemented for the 2020 Michigan House election cycle and, moreover, have indicated that they intend to pursue a special election for the Michigan Senate to be held concurrently with the 2020 State House races. If this Court were to stay this case pending a decision in *Rucho* and *Benisek* late this spring, it would be exceedingly

impracticable, if not impossible, for the parties to reinstate the litigation; expediently schedule a trial that would require accommodation of three independent judges' previously scheduled dockets; prepare evidence and witnesses for and conduct a lengthy trial; and thereafter engage in what could become a protracted remedial phase, involving numerous attempts at redrawing the maps, all in time for the 2020 election cycle to commence.

As the constitutional officer in Michigan charged with administering the state's electoral system, the Secretary would be responsible for implementing any changes to the maps and for administering any special election for State Senate. See Mich. Comp. Laws § 168.21; see also Mich. Const., art. V, §§ 3, 21; Mich. Comp. Laws § 3.53 (2011 PA 128) (congressional redistricting statute stating: "The secretary of state shall prepare a map and a legal description of each district constituted under this act."); Mich. Comp. Laws § 4.2003 (2011 PA 129) (legislative redistricting statute stating: "The secretary of state shall prepare a map and a legal description of each district constituted under this act."). The administrative and financial burden and expenditure of State and taxpayer resources to effectuate any change to the district maps increases as the time to the next election cycle decreases. At some point, no matter the resources devoted to the task, it will become practically impossible to implement new maps before an election cycle commences. That harm would be irreparable.

Under that scenario, there is a real possibility that any court-ordered relief could not be effectuated in time for the 2020 election, even if the Plaintiffs were to

prevail at trial on the merits. Such a quandary would constitute irreparable harm to the public interest, and potentially to the federal courts themselves. *Cf. Hollingsworth*, 558 U.S. at 190; see also *Landis*, 299 U.S. at 255 ("Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.").

By contrast, if this case were to proceed to trial tomorrow, there is a significant likelihood that *Benisek* and *Rucho* would have no impact on this case at all: if the Intervenors succeed in defending the maps at issue and they are found to be constitutional, this case ends, and no further proceedings are necessary. If instead the Plaintiffs succeed on their claims, the parties could proceed to the remedial stage with sufficient time to implement any relief prior to the 2020 election cycle, if such relief continues to be appropriate post-*Benisek* and *Rucho*. The case does not warrant the drastic and extraordinary relief sought by the Intervenors. *Fahey*, 332 U.S. at 259–60.

CONCLUSION

For all of the foregoing reasons, the Secretary opposes the Intervenors' Emergency Application for a Stay Pending Disposition of Applicants' Emergency Application for a Writ of Mandamus and respectfully requests that this Court deny the application.

Respectfully submitted,

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