No. 18A769

In the Supreme Court of the United States

LEE CHATFIELD, ET AL.,

Petitioners,

v.

LEAGUE OF WOMEN VOTERS OF MICHIGAN, ET AL.,

Respondents.

On Emergency Application for a Stay Pending Disposition of Applicants' Emergency Application for a Writ of Mandamus to the United States District Court for the Eastern District of Michigan

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

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FEBRUARY 4, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the League of Women Voters of Michigan states that it is a private, independent 501(c)(4) corporation with no parent corporations and no publicly held company owns 10% or more of its stock.

/s/ Joseph H. Yeager, Jr.

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INTRODUCTION

Applicants are seeking a stay pending disposition of their emergency application for a writ of mandamus. Their application for a writ of mandamus in turn asks the Court to stop a trial from going forward tomorrow that has been on the calendar for nearly nine months now. Whether to proceed with a previously scheduled trial is a matter within the lower court's sound discretion and reviewable on appeal. But a writ of mandamus may only issue if the act in question is ***not*** within the lower court's discretion and ***not*** reviewable on appeal. So besides having unduly delayed in seeking their requested relief, Applicants are seeking a writ they cannot possibly get, and thus for either or both reasons the application for stay should be denied.

The stay also should be denied because the balance of equities favors the Voters, not the Applicants. Putting off the trial could well mean the Voters never getting the relief they are after—a reapportionment of Michigan's legislative districts in time for the 2020 election. Even now, if the trial goes forward as planned, absent a ruling later this term in *Rucho* and *Benisek* that puts an end to partisan gerrymandering claims altogether, it will almost certainly take at least until sometime in 2020 before this Court fully and finally resolves the Voters' claims here. It may well be that the Court rules that such claims are non-justiciable. But it is just as possible that the Court rules such claims are justiciable, or, as we saw last term in *Gill v. Whitford*, 138 S.Ct. 1916 (2018), that the Court rules on some other ground altogether. The point is that no one knows yet how *Rucho* and *Benisek* will turn out, and unless the Court wants to risk being inundated with

similar stay requests in the future—for it is always possible a Supreme Court ruling could alter the legal landscape for cases pending in the lower courts—then this uncertainty strongly counsels in favor of denying the stay.

The sole reason the Voters concurred in a continuance of the trial below was that they wanted to give the three-judge panel additional time to consider a proposed consent decree. Dist. Ct. Dkt. 200. Michigan's Secretary of State concurred in the stay request for the same reason. Dist. Ct. Dkt. 199. But now that that the lower court has denied the motion to approve the consent decree, Dist. Ct. Dkt. 235, the Voters want—and indeed they need—the trial to go forward as planned.

Voters therefore respectfully request that the applications for stay and mandamus be denied.

ARGUMENT

The Applicants invoke the Court's familiar three-part standard for securing a stay of a judgment subject to this Court's review, *see* Stay Application p. 13, but that is not the correct standard. Applicants are not seeking a stay of a judgment or any other immediately appealable decision. They instead are asking the Court to enter a stay so that it can exercise its supervisory authority over the proceedings in the lower court. This type of request "implicates a standard ***even more daunting*** than that applicable to a stay of a judgment subject to this Court's review." *Gray v. Kelly*, 564 U.S. 1301 (2011) (Roberts, C.J.). (emphasis added).

This heightened standard is derived from *Ehrlichman v. Sirica*, 419 U.S. 1310, 1311-12 (1974) (Burger, C.J., in chambers). There, Chief Justice Burger denied a request to stay the start of a criminal trial. In doing so, he noted that "[t]he function of a Circuit Justice in these circumstances is limited" and "does not ordinarily encompass overseeing pretrial orders" of this sort. *Id.* at 1311. And for good reason: "Such matters are essentially within the sound judicial discretion of the trial judge who must be presumed to be intimately aware of the case at hand and other factors which bear upon the relief sought." *Id.* (citing other cases). Thus "trial judges necessarily require a great deal of latitude in scheduling trials." *Morris v. Slappy*, 461 U.S. 1, 11 (1983).

Here, not just one judge reviewed Applicants' request to continue the trial, but three did—two district court judges and a circuit judge. And all three agreed "that the

parties ha[d] failed to articulate sufficiently compelling justifications for staying and/or continuing trial," and that the trial should go forward as planned. Dist. Ct. Dkt. 238.

The lower court's resolution of a stay application, having been "taken in aid of its own jurisdiction, is entitled to great weight." *Holtzman v. Schlesinger,* 414 U.S. 1304, 1314 (1973) (Marshall, J.). *See also*, *e.g.*, *Krause v. Rhodes,* 434 U.S. 1335 (1977) (Stewart, J.); *Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.,* 434 U.S. 1316 (1977) (Marshall, J.); *Magnum Co. v. Coty,* 262 U.S. 159, 164 (1923). Indeed, as the former Justice for the Second Circuit, it was Justice Jackson's "almost invariable practice" to refuse stays that the appellate court, "or its judges," had denied. *United States ex rel. Knauff v. McGrath,* 1 Rapp 36 (1950) (Jackson, J.). This was in large part because lower court judges "are closer to the facts" of the case *Id.* Thus, as Justice Harlan put it, a single Justice should give "due regard" to a lower court's denial of a stay. *Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) (Harlan, J.). *See also Houchins v. KQED, Inc.,* 429 U.S. 1341, 1345 (1977) (Rehnquist, J.) (stating "due deference" is owed); *Whalen v. Roe,* 423 U.S. 1313, 1316 (1975) (Marshall, J.) (viewing the lower court's denial of a stay as "presumptively correct").

A particularly heavy burden therefore rests on the Applicants to demonstrate the need for a stay in spite of the three-judge panel's unanimous decision to deny one. Applicants do not come close to satisfying this burden. This is for at least three independent reasons.

1. Applicants have no chance of success on their application for a writ of mandamus.

Applicants are asking for a stay "pending disposition of [their] emergency application for a writ of mandamus." Stay Application cover page. Writs "are drastic and extraordinary remedies" to be "reserved for really extraordinary causes," in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259, 260 (1947); *Will v. United States*, 389 U.S. 90, 106–07 (1967). *See also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); *Roberts v. United States Dist. Ct.*, 339 U.S. 844, 845 (1950). "The power to issue [the writ] is discretionary and it is sparingly exercised." *Parr v. United States*, 351 U.S. 513, 520 (1956). Writs may only issue "in aid of [a court's] appellate jurisdiction." *Id.* (citing 28 U.S.C. § 1651); *accord* S.Ct. R. 20.1. The party seeking issuance of the writ must show that there is "no other adequate means to attain the relief he desires," *Kerr v. U. S. Dist. Ct. for N. Dist. of Calif.*, 426 U.S. 394, 403 (1976), and satisfy the burden of demonstrating that the right to issuance of the writ is "clear and indisputable," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288–90 (1988) (quoting *Bankers Life & Cas. Co.,* 346 U.S. at 384).

Applicants cannot succeed on their application for writ of mandamus, also for at least three reasons. *First*, the denial of a stay or continuance of a trial is reviewable on appeal, *see, e.g.*, *Morris v. Slappy*, 461 U.S. 1 (1983); *Delgado v. Pawtucket Police Dep't*, 668 F.3d 42, 50 (1st Cir. 2012); *United States v. Miller*, 327 F.3d 598, 601 (7th Cir. 2003), and it has long been the law "that the extraordinary writs cannot be used as substitutes for

appeals," *Bankers Life & Cas. Co.*, 346 U.S. at 383. This is true "even though hardship may result from delay," including "perhaps [an] unnecessary trial." *Id.* "[W]hatever may be done without the writ [by taking an appeal] may not be done with it." *Id.*

Second, "[t]his is not a case where a court has exceeded or refused to exercise its jurisdiction, nor one where appellate review will be defeated if a writ does not issue." *Parr*, 351 U.S. at 520 (citations omitted). Here the most that could be claimed is that the lower court somehow abused its discretion in ruling on a matter within its jurisdiction. "The extraordinary writs do not reach to such cases . . . ." *Id.* at 520-21.

Third, and closely tied to the second reason for why a writ may not issue, Applicants do not have a "clear and indisputable" right to an indefinite continuance of the trial. As just discussed, such matters are within the lower court's "sound discretion." *Ehrlichman*, 419 U.S. at 1311. Even the Applicants acknowledge that a court "may" hold one case in abeyance pending the outcome of another. Stay Application p. 14 (citing *American Life Ins. Co. v. Stewart*, 300 U.S. 203 (1937)). Which just means a court "may" choose ***not*** to hold a case in abeyance, and that's the point. Writs of mandamus are for the purpose of "confin[ing] 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." *Bankers Life & Cas. Co.*, 346 U.S. at 382 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)) (emphasis added). The lower court had no "duty" to continue the trial; rather, consistent with the inherent powers reserved to all trial courts to control their own dockets, *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997), the lower court merely exercised

its "sound discretion" to adhere to a schedule it had established the previous year, deciding there were no "sufficient compelling justification" for putting off the trial any longer, Dist. Ct. Dkt. 238. Mandating a lower court to do something that it has no duty to do in the first place is entirely at odds with the "drastic" remedy of a writ of mandamus.

Applicants therefore have no chance of getting the ultimate relief they want—none. No right to a writ, no right to a stay.

2. Applicants will not suffer irreparable harm if they are forced to go to trial as scheduled, but the Voters will be harmed if the trial is delayed.

2.a. The principal harm that Applicants claim they will suffer if the Court denies a stay is that, depending on how the Court rules in *Rucho* and *Benisek*, the trial might turn out to have been unnecessary, or in some way incomplete or flawed. Stay Application pp. 21-22. But even granting that possibility, and it is only one possibility, a trial "for naught" (to use Applicants' words) has never been understood by the Supreme Court to constitute "irreparable harm" and thus grounds for granting an extraordinary remedy. *See Bankers Life & Cas. Co.*, 346 U.S. at 383. "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Nor does the disclosure during litigation of information produced in discovery not under a protective order, the other harm Applicants claim they will suffer. Stay Application pp. 23-25. Even the disclosure of highly sensitive information ***not*** ordinarily discoverable cannot justify a departure

from the normal appellate process. *See*, *e.g.*,. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 112 (2009) ("That a fraction of orders adverse to the attorney-client privilege may nevertheless harm individual litigants in ways that are 'only imperfectly reparable' does not justify making all such orders immediately appealable as of right . . . ." (citation omitted)). "[T]he expense and annoyance of litigation is part of the social burden of living under government." *Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209, 222, (1938) (internal quotation marks and citation omitted); *accord F.T.C. v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 (1980). If the possibility of an unnecessary trial cannot justify granting a writ—and it can't, *see Bankers Life & Cas. Co.*, 346 U.S. at 383—then surely that possibility cannot justify a stay to consider granting a writ.

The simple fact is that no one at this point knows how *Rucho* and *Benisek* will be decided. It is certainly possible the Court could hold that partisan gerrymandering claims are non-justiciable, which, if that happens, may well spell the end of the Voters' claims here. But it is equally possible the Court could hold just the opposite, and, in doing so, issue a narrow ruling without resolving the full spectrum of First Amendment and equal protection issues at stake here. Or, to raise still another possibility, as in *Gill v. Whitford*, 138 S.Ct. 1916 (2018), the Court might not rule on the merits at all, and instead decide *Rucho* and *Benisek* on standing grounds.

Given these uncertainties—uncertainties that inhere in all Supreme Court litigation, especially in the voting rights context—it makes little sense for the Court to grant a stay. If it were otherwise, the Court would be deluged with stay applications pending

this Court's resolution of cases that present the same or similar issues as other cases, and "every interlocutory order which is [claimed to be] wrong might be reviewed under the All Writs Act." *Bankers Life & Cas. Co.*, 346 U.S. at 382–83. This would enlarge the office of a writ of mandamus "to actually control the decision of the trial court rather than [to be] used in its traditional function of confining a court to its prescribed jurisdiction." *Id.* at 383. That is not the proper function of the All Writs Act.

The folly of the Applicants' request is only proved by the Secretary of State's own failed attempt to get a stay one year ago. At that time, in January 2018, the Secretary argued that the lower court panel should wait until the Supreme Court "resolved" *Gill* and *Benisek*, which were both then pending at the Court. Dist. Ct. Dkt. 11. The lower court panel denied that motion, noting there was a "fair possibility" that even with Supreme Court rulings in those cases, given the "history of voting rights litigation," matters would not be completely settled in time for the 2020 elections. Dist. Ct. Dkt. 35. As it turned out, of course, while the Supreme Court's decisions in 2018 provided some guidance on standing, those decisions did not resolve the justiciability issue or command a particular result in any particular case, one way or another. For all anyone knows, the same thing could happen again this term.

2.b. On the other side of the ledger, a stay means delay, and delay will likely mean the Voters cannot vindicate their rights in a timely fashion. The Voters are asking for 34 of Michigan's legislative and congressional districts to be reapportioned in time for the next election in 2020. To have a real chance of this happening, they need a trial now.

In fact, even if the trial goes forward as planned, beginning tomorrow, and *Rucho* and *Benisek* are not ultimately dispositive of the Voters' claims here, there is little chance that this case will be fully and finally resolved before next year, which, as it is, will be cutting things dangerously close to the 2020 election. Under the parties' agreed framework, the case will take approximately a week to try, *see* Dist. Ct. Dkt. 235, ¶ 9, the lower court then will need time to enter its findings (which often are extensive in gerrymandering cases, *see*, *e.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016)), and then the parties will need time to ask the Court to accept jurisdiction over any appeal, and if the Court does accept jurisdiction, to brief the matter on the merits and for the Court to hear oral argument and issue a decision of its own.

Accordingly, if the trial is delayed until after *Rucho* and *Benisek* are decided, which likely won't happen until the end of June, the very real possibility exists that the Voters will not get final resolution on their claims until the term after next—October Term 2020—making it next to impossible to reapportion the districts in time for that fall's election. Make no mistake: that is precisely what the Applicants want.

Under these circumstances, given that *Rucho* and *Benisek* could be resolved in any number of ways, some of which might have no effect on this case at all, it would be inequitable to put off the trial, even for a short time. The harm of not getting a remedy in time for the 2020 election is much greater than the potential hardship of an unnecessary trial. For not only would the Voters be unable to vindicate their rights in a timely manner, it would potentially prevent the wider electorate from participating in what

should be a fair, free, and (as argued by the Voters here) constitutional election. If the Court is to balance the equities, then, and determine "on which side the risk of irreparable injury weighs most heavily," as it would under the standard for reviewing a stay application from a final judgment, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J.) (citation omitted), those equities strongly favor the Voters—not the Applicants.

3. Applicants sat on their rights and waited to apply for a stay in this Court until the last minute.

As the Applicants themselves acknowledge, this case has been set for a trial to begin tomorrow since May 9, 2018. Stay Application p. 10. As of this writing, we are nearly nine months out from that scheduling order, and yet Applicants waited until January 25, 2019 to file their stay and writ applications. Needless to say, at this point, there is "little time left" to meaningfully evaluate either application. *Montgomery v. Jefferson,* 468 U.S. 1313, 1314 (1984) (Marshall, J.) (application filed at 3:30 p.m. to place names on ballot in an election to be held the next day). Under these circumstances, "[p]ractical considerations" alone "weigh heavily against granting the extraordinary type of relief requested here." *Spencer v. Pugh*, 543 U.S. 1301, 1302 (2004) (Stevens, J.)

At all events, Applicants' "failure to act with greater dispatch tends to blunt [their] claim of urgency and counsels against the grant of a stay." *Ruckelshaus v. Monsanto Co.,* 463 U.S. 1315, 1318 (1983) (Blackmun, J.). It likewise "vitiate[s] much of the force of their allegations of irreparable harm." *Beame,* 434 U.S. at 1313 (1977). *See also Gomperts*

v. Chase, 404 U.S. 1237 (1971) (Douglas, J.) (too late to enter adequate school integration order three days before school opened); *Westermann v. Nelson,* 409 U.S. 1236 (1972) (Douglas, J.) (too late to reprint challenged ballots in an imminent election).

The only reason this matter is as urgent as it is—if it is urgent at all—is because the Applicants, by their own delay, have made it so. The Supreme Court announced it would consider *Rucho* and *Benisek* on January 4—now a month ago, Stay Application p. 2—and of course both cases have been on the Court's docket for much longer than that. If the Applicants actually believed a trial in this matter should be stayed pending the outcome in those matters, they could have (and should have) brought their request for relief to this Court much earlier than they did, even allowing for the fact that the lower court was entitled to a fair opportunity to rule on the matter first. They instead waited until the last minute to ask for the relief they now seek. For this reason alone, the applications for stay and writ of mandamus should be denied.

CONCLUSION

The application for stay should be denied, as should the application for a writ of mandamus.

Respectfully submitted,

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