No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

League of Women Voters of Michigan, et al., Respondents,
v.
Jocelyn Benson, in Her Official Capacity as Michigan Secretary of State, Respondent; Lee Chatfield, in His Official Capacity as Speaker Pro Tempore of the Michigan House of Representatives, et al., Petitioners; and the Michigan Senate, et al., Respondents

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MICHIGAN SENATE AND SENATORS' RESPONSE TO 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

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

Gary P. Gordon*
Counsel of Record
Jason T. Hanselman
Courtney F. Kissel
Hilary L. Vigil
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933
Telephone: (517) 374-9100
Facsimile: (517) 374-9191
Counsel for Michigan Senators and the Michigan Senate

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On February 1, 2019, the United States District Court for the Eastern District of Michigan (the "District Court") granted intervenor status to the Michigan Senate and Individual Michigan Senators Jim Stamas, Ken Horn, and Lana Theis (collectively, the "Senate Intervenors"). (Order Granting Mots. to Intervene, ECF No. 237; PageID.8389). Shortly thereafter, this Court called for responses to the Congressional and Michigan House Defendants-Intervenors' (together, the "Congressional Intervenors") Application for Stay Pending Disposition of Petition for Writ of Mandamus (the "Application") to be filed no later than February 4, 2019. The Congressional Intervenors notified the Parties and the District Court of the request. (Notice re Stay Appl. & Mandamus Pet., ECF No. 239; PageID.8395).

INTRODUCTION

The Senate Intervenors support the Congressional Intervenors' Application for Stay until this Court rules on their Petition for Writ of Mandamus and completes its review of jurisdictional and other dispositive issues in cases involving claims of partisan gerrymandering. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 799 (M.D.N.C. 2018), *probable jurisdiction noted*, 138 S. Ct. 923 (2018) (no. 18-422) and *Benisek v. Lamone*, No. 13-cv-03233-JKB, 2018 U.S. Dist. LEXIS 190292 (D. Md. Nov. 7, 2018), *probable jurisdiction noted*, 202 L. Ed. 2d 510 (U.S. Jan. 4, 2019) (no. 18-726). Despite the overlapping questions involved between this case and *Rucho* and *Benisek*, the District Court is inexplicably ignoring the imminent (and potentially dispositive) guidance that this Court will offer on the precise legal issues

presented in this case and hastily setting a trial schedule that may lead to additional and unnecessary litigation.

All Parties to this case requested a stay from the District Court, albeit for different reasons. On January 22, 2019, in pretrial conference, the District Court indicated that it would not issue a stay, nor would it issue an order so stating. (Appl., 12). However, on February 1, 2019, the District Court denied all parties' motions for stays, finding "that the parties have failed to articulate sufficiently compelling justifications for staying and/or continuing trial." (Order Den. Mots. to Stay, ECF No. 238; PageID.8393). The District Court's Order did not acknowledge this Court's consideration of *Rucho* and *Benisek*.

There is, however, significant overlap between the issues presented in *Rucho* and *Benisek* and those presented in this litigation. All three cases involve partisan gerrymandering claims grounded in the First and Fourteenth Amendments. The dispositive issues to be decided by this Court include whether partisan gerrymandering claims are justiciable; whether plaintiffs have standing to pursue those claims; and if so, what the appropriate or accepted standard governing disposition and resolution of the claims should be. This case presents the same issues in front of the District Court. In short, this Court's decisions in *Rucho* and *Benisek* could, at minimum, provide a legal standard by which to judge this case; and at most, could be entirely dispositive of the litigation. It would waste precious resources of both the court and the parties to proceed before receiving guidance from this Court.

For example, if this Court finds that partisan gerrymandering claims are simply nonjusticiable, the upcoming trial (and related motions or actions) would have been for naught. But if this Court decides that such claims are justiciable, presumably this Court will also offer guidance on standing, the factual basis necessary for such claims, or other controlling legal principles that lower courts must apply in such cases. As recently recognized in very similar litigation in the Western District of Wisconsin, the overlapping questions to be considered by this Court are striking and a stay is appropriate. *See Whitford v Gill*, Nos. 15-cv-421-JDP and 18-cv-763-JDP, 2019 U.S. Dist. LEXIS 10993 (W.D. Wis. Jan. 23, 2019) (granting a stay, in part, in similar litigation raising partisan gerrymandering claims pending this Court's review of *Rucho* and *Benisek*). Staying the District Court proceedings in this case is appropriate for those same reasons.

I. DECISION UNDER REVIEW

On January 11, 2019, the Congressional Intervenors filed an Emergency Motion to Stay Trial in the District Court. (ECF No. 183). All other parties to the case also filed or concurred in motions to stay or continue proceedings for different reasons. (ECF Nos. 199, 200, 214, 220). On January 22, 2019, during a pretrial conference, the District Court indicated that it would not issue a stay. (Appl., 12). On February 1, 2019, the District Court denied "the various motions to stay and continue trial" and stated that "[t]rial will begin as scheduled on February 5, 2019, at 9:00 am." (Order Den. Mots. to Stay and/or Continue Trial, ECF No. 238; PageID.8393).

II. QUESTION PRESENTED FOR REVIEW

Should this Court stay the trial in this case, which is scheduled to start tomorrow, until this Court rules on the Congressional Intervenors' Emergency Petition for Writ of Mandamus, which seeks to compel the District Court to stay trial pending this Court's expedited decisions in *Rucho* and *Benisek* with respect to whether partisan gerrymandering claims are justiciable and, if so, the standards for such claims?

Plaintiffs answer: unknown.

Defendants answer: unknown.

Congressional Intervenors answer: "yes."

Senate Intervenors answer: "yes."

III. STATEMENT OF THE CASE

A. FACTUAL/PROCEDURAL BACKGROUND OF THE CASE

The Factual/Procedural Background contained in the Application accurately recites the relevant facts and proceedings in this matter. Accordingly, the Senate Intervenors do not restate the facts but offer the following relevant background information for this Court's consideration specifically with respect to the Senate Intervenors.

On December 22, 2017, almost seven years after the April 9, 2011 enactment of Public Acts 128 and 129 codifying Michigan's 110 State House, 38 State Senate and 14 Congressional Districts, Plaintiffs brought an omnibus challenge seeking to void the acts as impermissible partisan gerrymandering. (Pls.' Compl., ECF No. 1).

The Plaintiffs have narrowed the scope of their challenge to fewer districts, but still include Congressional, House and Senate Districts.

The District Court last year rejected the Senate Intervenors' Motion to Quash Plaintiffs' subpoenas, forcing current and former legislators and legislative staff (some of whom are now represented by the Senate Intervenors) to disclose to Plaintiffs thousands of documents that should have been protected by legislative privilege. (Order Granting in Part and Den. in Part Non-Party Movants' Mots. to Quash, ECF No. 58; PageID.985).[1] Subsequently, the District Court found that no privilege existed between redistricting counsel, the map drawers, and legislators to the extent that they attended weekly meetings where legal issues relating to redistricting were discussed. The District Court also required disclosure of documents claimed to be privileged and possessed by Congressional map drawer Jeff Timmer and apparently will allow questioning of witnesses regarding the meetings with the map drawers, legislators, and their counsel. (Order Granting Pls.' Mot. for Determination of Privilege, ECF No. 216; PageID.8122).

[1] As non-parties, the Michigan Legislature had virtually no opportunity for interlocutory appeal regarding the District Court's denial of its Motion to Quash. On August 14, 2018, the District Court ruled that the Congressional Intervenors' Motion to Intervene was premature because the Secretary of State was adequately defending Michigan's apportionment plan. After a new Secretary of State took office in January 2018, the District Court explained in its Order Granting Plaintiffs' Motion for Determination of Privilege, "the Secretary does not intend to defend the current apportionment plans at issue in this case." (ECF No. 216). Upon learning of the new Secretary of State's position, the Senate Intervenors immediately sought to intervene, which the District Court granted on February 1, 2019.

B. DECISIONS IN CASES PENDING BEFORE THIS COURT WILL IMPACT THIS CASE.

In March 2019, this Court will consider dispositive issues in *Rucho v. Common Cause,* No. 18-422 (U.S. filed Oct. 1, 2018) and *Lamone v. Benisek,* No. 18-726 (U.S. filed Dec. 3, 2018) regarding: (1) whether partisan gerrymandering claims are justiciable; and (2) the merits of and standards for partisan gerrymandering claims. *Rucho*, 202 L. Ed. 2d 510 (2019); and *Benisek*, 202 L. Ed. 2d 510 (2019). On January 8, 2019, this Court ordered that appellants' briefs on the merits in *Rucho* and *Benisek* to be filed on or before February 8, 2019, and appellees' briefs on the merits to be filed on or before March 4, 2019. *Rucho*, No. 18-422, 2019 U.S. LEXIS 570 (Jan. 8, 2019); *Benisek*, No. 18-726, 2019 U.S. LEXIS 569 (Jan. 8, 2019). In other words, setting aside the distinct facts in each state and case, this Court will consider this case's substantive legal questions next month.

C. MOTIONS TO STAY

Given this case's impending trial and this Court's review next month of identical legal questions in *Rucho* and *Benisek*, on January 11, 2019, the Congressional Intervenors filed an Emergency Motion to Stay Trial in the District Court. (ECF No. 183). All parties concurred in the Congressional Intervenors' Motion to Stay Trial. (Def.'s Resp. to Mot. to Stay, ECF No. 199; Pls.' Resp. to Mot. to Stay, ECF No. 200).

On January 22, 2019 and January 24, 2019, the Senate Intervenors moved to intervene in the instant case. (Mots. to Intervene, ECF Nos. 206 and 208). On January 29, 2019, the Senate Intervenors filed a separate Motion to Stay

Proceedings.[2] (ECF No. 220). On February 1, 2019, the District Court denied "the various motions to stay and continue trial" and stated that "[t]rial will begin as scheduled on February 5, 2019, at 9:00 am."

IV. 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." 28 U.S.C. § 1651; *see also Lawrence on Behalf of Lawrence v. Chater,* 516 U.S. 163, 168 (1996) (per curiam) ("[T]his 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 pursuant to 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. Sup. Ct. R. 20.1.

V. 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

[2] Although the Senate Intervenors' Motion to Stay Proceedings was primarily premised on postponing trial until the District Court considered the Senate Intervenors' Motion to Intervene, the Senate Intervenors also explained in that Motion that a stay is appropriate and in the public interest because this Court would be addressing this case's dispositive issues on an expedited basis in *Rucho* and *Benisek*.

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 Hollingsworth v. Perry,* 558 U.S.183, 190 (2010) (per curiam).

VI. ARGUMENT

In response to the Congressional Intervenors' Application, the Senate Intervenors fully support the Application and adopt by reference all arguments contained therein. Specifically, the Senate Intervenors agree that the Congressional Intervenors have demonstrated that 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). The Senate Intervenors, therefore, concur in the Congressional Intervenors' Application and requested relief. In addition to adopting the arguments in the Application,, the Senate Intervenors provide the following additional information and arguments specifically related to the Senate Intervenors for this Court's consideration.

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

It is well-settled that courts have the inherent power to stay proceedings in one lawsuit until a decision is rendered in another. *See Landis v. N. Am. Co.*, 299 U.S. 248 (1936). Based on this principle, many courts have ordered stays pending a Supreme Court decision. See *Michael v. Ghee*, 325 F. Supp. 2d 829, 831-33 (N.D.

Ohio 2004) (staying one case pending a decision of the United States Supreme Court, after a grant of certiorari in another case, where the Supreme Court's decision would likely have a dispositive impact); *Homa v. Am. Express Co.*, No. 06-2985 (JAP), 2010 U.S. Dist. LEXIS 110518, 2010 WL 4116481, at *9 (D.N.J. Oct. 18, 2010) (staying one case pending resolution of issue by Supreme Court in another case); *In re Embry*, 831 F3d 377 (6th Cir. 2016) (instructing district courts to hold § 2255 motions in abeyance pending a Supreme Court decision).

Indeed, holding one proceeding in abeyance while awaiting the outcome of another is clearly within the courts' authority "especially where the parities and the issues are the same." *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). In fact, the Western District of Wisconsin just recently granted a stay in part on the precise issues raised by the Application. *Whitford v. Gill*, Nos. 15-cv-421-JDP and 18-cv-763-JDP, 2019 U.S. Dist. LEXIS 10993 (W.D. Wis. Jan. 23, 2019). In so doing, the *Whitford* Court found:

> *Rucho* and *Lamone* have important implications for our cases, which require this court to resolve four main issues: (1) whether partisan gerrymandering claims are justiciable; (2) whether any of the plaintiffs have standing to sue; (3) whether the legislative maps at issue in these cases violate the First Amendment; and (4) whether the maps violate the Fourteenth Amendment. *Rucho* and *Lamone* present these issues as well. *Rucho* and *Lamone* will likely be decided toward the end of the current Supreme Court term, in June 2019, after the currently scheduled trial and post-trial briefing in our cases.
>
> As the parties know well, this court cannot simply apply well-established principles to a new set of facts in deciding these cases. The Supreme Court has not yet provided a standard for determining whether a partisan

> gerrymander violates the First or Fourteenth Amendment or even determined whether such claims are justiciable. If the Court determines that partisan gerrymandering claims are not justiciable, these cases will have to be dismissed. If the Court articulates a standard for evaluating partisan gerrymandering claims that departs from any standard applied by this court, then a new trial under the correct standard may be necessary. Either way, holding a trial and taking full briefing in these cases before the Supreme Court decides *Rucho* and *Lamone* would almost certainly lead to a significant waste of resources for the parties and the court.

Whitford, 2019 U.S. Dist. LEXIS 10993, at *4-5. The court "agreed to stay a decision on the merits pending decisions in *Rucho* and *Lamone* and denied pending motions to dismiss "without prejudice to the Assembly's renewing its motions after the Supreme Court decides those cases." *Id.* The same analysis should apply in this case and this Court should grant a stay of proceedings.

B. THERE IS A FAIR PROSPECT THIS COURT WILL REVERSE THE DISTRICT COURT BECAUSE THERE ARE NO OTHER ADEQUATE MEANS TO OBTAIN THE RELIEF SOUGHT.

Neither the Congressional Intervenors nor the Senate Intervenors 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."). The Congressional Intervenors cannot wait until this Court decides *Rucho* and *Benisek* because trial is starting tomorrow and the decisions in *Rucho* and *Benisek* will be dispositive or, at least instructive, with regard to the instant case.

This case will consider whether claims of partisan gerrymandering are justiciable and, if so, who has standing to challenge reapportionment plans, and what standards apply when analyzing those plans. This Court will resolve those exact issues next month in *Rucho* and *Benisek*. As such, staying proceedings pending this Court's ruling will conserve time, money, and resources for the litigants and the District Court. Additionally, even if this Court determines that partisan gerrymandering is justiciable, its decision likely will provide guidance regarding the relevant issues to be addressed at trial, thereby promoting maximum efficiency as the parties litigate the case.

Staying trial pending this Court's guidance still provides plenty of time for a trial applying the *Rucho* and *Benisek* holdings. Given that Michigan's next election is not until 2020, a ruling in this case in the fall of 2019 provides plenty of time to the extent it is necessary to redraw districts for use in the November 2020 elections. If this Court's ruling makes trial unnecessary, the public good will be served by not wasting time and resources on an trial that need not be had.

Given that the District Court's denial of the parties' stay requests are not appealable as final judgments, there are no other adequate means to obtain the relief the Congressional Intervenors seek. Accordingly, the Congressional Intervenors' right to the writ is clear and indisputable and issuance of the writ is otherwise appropriate under the circumstances given that this Court will consider the *Rucho* and *Benisek* cases less than a month after trial in this case is scheduled to commence. In light of the likely impact those cases will have on the instant case,

it is reasonable and prudent to stay the instant case pending resolution of threshold substantive issues.

C. ABSENT A STAY, THE PARTIES AND ALL MICHIGAN RESIDENTS 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, the parties and all Michigan residents will suffer permanent and irreparable harm. Whether this Court's decisions in *Rucho* and *Benisek* completely dispose of, or merely frame, the issues to be litigated, there is no value in proceeding with a potentially irrelevant trial until this Court imparts its guidance to the parties and the three-judge panel. The Michigan Senate and individual Michigan Senators will be irreparably harmed if the requested stay is denied because the case will proceed to trial on February 5, 2019. In addition to the irreparable injuries that the Congressional Intervenors' asserted in their Application, the Senate Intervenors have unique interests that will be harmed regardless of the outcome of trial.

1. Denial of Stay Will Irreparably Harm the Senate Intervenors and Their Constituents Because Conflicting Decisions from the Courts Will Cause Confusion and Injure Representative-Constituent Relationships.

First, the Senate Intervenors are interested in preserving and protecting the relationship between constituent and representative, and that relationship—along with Michigan citizens' trust in the integrity and certainty of representative government—will be irreparably damaged if this case proceeds to trial. While the trial itself will not cause irreparable damage to the Senate Intervenors and their

constituents, the imminent decisions of this Court in *Rucho* and *Benisek* may reverse, negate, or alter the District Court's post-trial ruling. The resulting upheaval and uncertainty about the validity of Michigan's Senate districts constitutes irreparable harm to the Senate Intervenors and their constituents.

This irreparable harm will result regardless of the trial's outcome: If this Court determines that the partisan redistricting issues raised by *Rucho* and *Benisek* are nonjusticiable, then the District Court would have held a trial on identical issues that it could not hear; its decision, which will be highly publicized regardless of what the decision is, would have to be rolled back if this Court determines that plaintiffs in cases such as this do not have standing to bring partisan gerrymandering claims. If this Court determines that the *Rucho* and *Benisek* plaintiffs have standing and their claims are justiciable, but establishes a new constitutional standard by which to judge partisan redistricting claims, then the evidence and arguments presented at trial would have been based on improper legal standards and would likely be nullified by an appeal and remand of the case. In almost any potential outcome, the trial will proceed under a legal framework that is likely to be overturned or negated by *Rucho* and *Benisek*. The District Court's decision—no matter what it is—will be highly publicized and then may ultimately be destabilized by this Court's decisions. The uncertainty of the Senate districts' lines being upheld or overturned or otherwise modified would cause irreparable harm to the Senate Intervenors and their constituents. A stay pending this Court's decisions in *Rucho* and *Benisek* would prevent that harm from occurring.

2. Denial of Stay Will Irreparably Harm the Senate Intervenors Because They May Be Subject to a Special Election and Their Terms of Office Will Be Cut Short.

Second, the Senate Intervenors will be irreparably harmed if this case proceeds to trial and the District Court orders that the state Senate districts must be redrawn and a special election must be held in 2020. Under Article IV, Section 2 of the Michigan Constitution, state Senators serve "four-year terms concurrent with the term of office of the governor." Mich. Const., art. IV, § 2. The individual Michigan Senators were elected to office in November 2018 and began their four-year terms on January 1, 2019. If the Senate Intervenors are required to redistrict and run for office again during a special election in 2020, then they will be irreparably harmed in two ways. First, they will not be permitted to fulfill constitutionally established four-year terms of elected office to represent the constituents of their districts. Second, they will be forced to spend a significant amount of public money that cannot be recouped to engage in redistricting and, separately, they will have to raise and expend significant campaign funds that are unrecoverable. "If expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J. in chambers) (citing *Mori v. Boilermakers*, 454 U.S. 1301, 1303; 102 S. Ct. 1046; 70 L. Ed. 2d 370 (1981) (Rehnquist, J., in chambers)).

Such an outcome is not merely speculative: In fact, when denying the Defendant's Motion to Dismiss Plaintiffs' Claims as to the Michigan Senate (ECF No. 63), the District Court noted that if it "were to find the Michigan apportionment

plan or any of its portions to be the product of unconstitutional partisan gerrymandering, this Court could issue an order to remedy the harm caused by the unconstitutional violations," specifically by "ordering that voting district maps be redrawn and ordering special elections." (ECF No. 88, PageID.2051.) Therefore, the Senate Intervenors will be irreparably harmed if this case is not stayed pending this Court's decisions in *Rucho* and *Benisek*.

3. Public Disclosure of Material That Should Have Been Protected By Privilege Causes Irreparable Harm.

If tomorrow's trial proceeds without this Court's intervention, the Senate Intervenors may be irreparably harmed by the disclosure of privileged materials that may not need to be disclosed, depending on how this Court disposes of the *Rucho* and *Benisek* cases. Although the Senate Intervenors sought at the time to protect material that this Court has long recognized as protected by legislative privilege, the District Court's May 2018 Order created a new exception to the Legislative Privilege doctrine that required the Michigan Legislature to disclose to Plaintiffs thousands of documents that should have been protected by legislative privilege.[3]

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[3] Legislative privilege, which "has its roots in the parallel concept of legislative immunity," *Pulte Home Corp. v. Montgomery Cty.*, No. GJH-14-3955, 2017 U.S. Dist. LEXIS 82935, at *5 (D. Md. May 31, 2017), weighs in favor of limiting disclosure. Legislative privilege is "a shield against the compelled production of documents and deposition testimony," *id.*, and "applies to any documents or information that contains or involves opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff." *Jackson Mun. Airport Auth. v. Bryant*, No. 3:16-cv-246-CWR-FKB, 2017 U.S. Dist. LEXIS 208649, at *19-20 (S.D. Miss. Dec. 19, 2017). "The privilege . . . also applies to any information that would reveal such opinions and motives. This

Just as Congress could not force this Court's disclosure of deliberative material, core separation of powers doctrines preclude the District Court's review and disclosure of privileged material specifically "to insure that the legislative function may be performed independently without fear of outside interference." *Sup. Ct. of Va. v. Consumers Union of the U.S, Inc.*, 446 U.S. 719, 731 (1980). It is important for the Senate Intervenors to be able to have candid conversations regarding pending legislation without being subject to post hoc analysis of their intent.

Doubling down on the compelled production of privileged material, the District Court on January 29, 2019, also ordered the production of dozens of documents for which attorney-client privilege and attorney work product doctrine should have prevented production (ECF 216). Although the District Court has already compelled disclosure of internal legislative communication and documents to Plaintiffs, the harm caused by Plaintiffs disclosing the Senate Intervenors' privileged material at a public trial will be irreparable.

Plaintiffs now plan a public parade at trial of material that should have been protected by legislative or attorney-client privilege. This Court has noted the inherent irreparable harmfulness resulting from the compelled disclosure of privileged communications: "We find, as have several courts, that forced disclosure of privileged material may bring about irreparable harm." *In re Perrigo Co.*, 128

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includes any procedures used by lawmakers in the legislative process as well as the identification of any specific legislators that were involved in any particular step in the process." *Bryant*, 2017 U.S. Dist. LEXIS 208649, at *20.

F.3d 430, 437 (6th Cir. 1997). The DC Circuit has also found that the breach of privilege alone constituted irreparable harm. *United States v. Philip Morris, Inc.*, 314 F.3d 612, 621-22 (D.C. Cir. 2003); *see also In re Ford Motor Co.*, 110 F.3d 954, 962-64 (3d Cir. 1997)("Appeal after final judgment cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials. . . . The cat is already out of the bag. . . . There is no way to unscramble the egg scrambled by the disclosure . . . .").

Accordingly, allowing the disclosure at trial of privileged documents constitutes irreparable harm that can be avoided by granting the stay. This Court should avoid unnecessarily, or at least prematurely, scrambling the egg.

VII. CONCLUSION

For the foregoing reasons and those provided in the Application, 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 4th day in February, 2019.

DYKEMA GOSSETT PLLC

/s/ Gary P. Gordon
Gary P. Gordon
Counsel of Record
Jason T. Hanselman
Courtney F. Kissel
Hilary L. Vigil
201 Townsend Street, Suite 900
Lansing, MI 48933
Telephone: (517) 374-9100
ggordon@dykema.com
jhanselman@dykema.com
ckissel@dykema.com
hvigil@dykema.com
Counsel for Michigan Senators and the Michigan Senate

Appendix A

Order Denying All Motions to Stay and/or Continue Trial

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,	)	
Plaintiffs,	)	
v.	)	No. 2:17-cv-14148
JOCELYN BENSON, in her official capacity as Michigan Secretary of State, et al.,	)	
Defendants.	)	

ORDER DENYING ALL MOTIONS TO STAY AND/OR CONTINUE TRIAL

Several motions to stay and/or continue are currently pending before the Court, specifically:

- Emergency Motion to Stay Trial by the Congressional and Michigan House Intervenors (ECF No. 183);
- Motion for Continuance of Trial (Unopposed) by Plaintiffs (ECF No. 214); and
- Motion to Stay Proceedings by the Michigan Senate and the Michigan Senators (ECF Nos. 220, 221).

The Court has reviewed the above motions and the accompanying briefs in support. The Court finds that the parties have failed to articulate sufficiently compelling justifications for staying and/or continuing trial.

Therefore, the Court **DENIES** the various motions to stay and continue trial (ECF Nos. 183, 214, 220, 221). Trial will begin as scheduled on February 5, 2019, at 9:00 am.

IT IS SO ORDERED.

Dated: February 1, 2019

/s/ Eric L. Clay
Signed for and on behalf of the panel:

HONORABLE ERIC L. CLAY
United States Circuit Judge

HONORABLE DENISE PAGE HOOD
United States District Judge

HONORABLE GORDON J. QUIST
United States District Judge