

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, *et al.*,

Plaintiffs,

v.

JOCELYN BENSON, in her official  
Capacity as Michigan  
Secretary of State,

Defendant,

and

Lee Chatfield, in his official  
capacity as Speaker of the Michigan House  
of Representatives and Representative Aaron  
Miller, *et al.*,

Intervenor-Defendants.

Case No. 2:17-cv-14148

Hon. Eric L. Clay  
Hon. Denise Page Hood  
Hon. Gordon J. Quist

**CONGRESSIONAL AND STATE HOUSE INTERVENORS' EX PARTE  
EMERGENCY MOTION TO EXPEDITE BRIEFING AND  
CONSIDERATION OF INTERVENORS' MOTION TO STAY THIS  
COURT'S ORDER AND JUDGMENT.**

Congressional and State House Intervenors, by and through their attorneys, respectfully move this Court to order expedited briefing on their simultaneously-filed Emergency Motion to Stay The Court's Order and Judgment ("Emergency Motion") pending appeal to the United States Supreme Court. Specifically, Congressional and State House Intervenors request the following briefing schedule:

- Plaintiffs' Response Brief Filed May 7, 2019;
- Intervenors' Reply Brief Filed May 8, 2019;
- Ruling on May 10, 2019.

In support of this Motion, the Intervenors rely on the facts, law, and argument set forth in their accompanying Brief in Support. The undersigned counsel sought concurrence to the relief requested in this motion prior to filing. Both counsel for Plaintiffs and counsel for Defendant Secretary of State do not concur with the specific briefing schedule requested in this motion.

WHEREFORE, the Congressional and State House Intervenors respectfully request the Court grant their motion and order expedited briefing on their simultaneously-filed Emergency Motion To Stay this Court's Order and Judgment pending their appeal to the U.S. Supreme Court.

Dated: May 3, 2019

Respectfully submitted,

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**BRIEF IN SUPPORT OF CONGRESSIONAL AND STATE HOUSE  
INTERVENORS' EX PARTE EMERGENCY MOTION TO EXPEDITE  
BRIEFING AND CONSIDERATION OF INTERVENORS' MOTION TO  
STAY THIS COURT'S ORDER AND JUDGMENT.**

**CONCISE STATEMENT OF THE ISSUE PRESENTED**

WHETHER THE COURT SHOULD ORDER EXPEDITED BRIEFING ON DEFENDANT-INTERVENORS' EMERGENCY MOTION TO STAY PENDING APPEAL BECAUSE:

- 1) ABSENT EXPEDITED BRIEFING, THE LEGISLATURE WILL WASTE PRECIOUS AND LIMITED PUBLIC RESOURCES IN ATTEMPTING TO COMPLY WITH THIS COURT'S ORDER THAT IS PREMISED ENTIRELY UPON ORDERS AFFIRMING PENDING CASES TO BE DECIDED BY THE U.S. SUPREME COURT AND ARE EXPECTED TO BE ISSUED BY JUNE 24, 2019; AND,
- 2) MOTIONS TO STAY PENDING APPEAL IN REDISTRICTING CASES ARE GENERALLY DECIDED ON AN EXPEDITED BASIS.

Movant's answer: Yes

Plaintiffs' answer: No

Defendant Secretary of State's Answer: No

This Court should answer: Yes

**CONTROLLING OR MOST APPROPRIATE AUTHORITY**

**Rules**

Federal Rule of Appellate Procedure 8(a)(1)(A).

**Cases**

*White v. Weiser*, 412 U.S. 783, 789 (1973)

*Turzai, et al. v. League of Women Voters of Pennsylvania, et al.*,  
17A795 (U.S. Feb 5, 2018)

*Miller v. Johnson*, 515 U.S. 900, 915 (1995)

*Page v. Va. State Bd. of Elections*, No. 13-678, 2015 U.S. Dist. LEXIS 21346  
(E.D. Va. Feb. 23, 2015)

*Common Cause v. Rucho*, No. 16-1026 (M.D.N.C.)

## INTRODUCTION

After eight years, four election cycles, and after the last scheduled Senate election under the current Enacted Plan, this Court enjoined the House, Senate and Congressional district maps and prohibited the State from holding elections under the Enacted Plan. This Court further directed the legislature to draft new redistricting legislation, pass it, and have the Governor sign the legislation by August 1, 2019.

But this Court's order is premised upon the U.S. Supreme Court affirming in their entirety the lower court rulings in the currently pending *Rucho* and *Benisek* cases. The Supreme Court is expected to issue its ruling in these cases on or before June 24, 2019. This Court's order imposes a Hobbesian choice on the Michigan state Legislature: comply with the order and risk the United States Supreme Court reversing or modifying *Rucho* and *Benisek*, while wasting precious and limited public resources (including time, money, and progress on other critical matters pending before the legislature); or dedicate these resources to their current intended purposes while awaiting the decisions of the United States Supreme Court. To relieve the legislature and, by extension, taxpayers, from this unnecessary choice, this Court should expeditiously consider Congressional and State House Intervenors' Emergency Motion to Stay Pending Appeal.

Accordingly, Congressional and State House Intervenors respectfully request the following briefing schedule:

- Plaintiffs' Response Brief Filed May 7, 2019;
- Intervenors' Reply Brief Filed May 8, 2019;
- Ruling on Emergency Motion for Stay by May 10, 2019.

For reasons that follow, the Court should expedite briefing and decision on Congressional and State House Intervenors' Emergency Motion to Stay this Court's Order and Judgment.

### **ARGUMENT**

Under the normal briefing schedule, Plaintiffs would have until Friday, May 17, 2019 to file their opposition brief. *See* Local Rule 7.1(e)(2)(B). The local rules then provide seven days to file a reply brief. Local Rule 7.1(e)(2)(C). Under the normal briefing schedule, therefore, briefing would be completed by May 24, 2019. Assuming this Court rules within ten days, under the normal briefing schedule, this Court will rule on the requested stay by June 3, 2019. The Court's August 1, 2019, deadline, will require final legislation to pass both houses and be presented to the Governor by July 18, 2019. Under even the most aggressively revised session schedule, the first house of the legislature to pass the redistricting legislation would have to do so by no later than a week before then. A ruling on June 3, 2019, would thus provide insufficient time for the House to act given the numerous legislative and budgetary concerns facing Michigan. This does not sufficiently protect the precious and limited public resources allocated to the legislature nor does it protect Congressional and State House



Intervenors' appellate rights. This Court should therefore expedite briefing and decision.

I. **Expedited Briefing and Decision Is Necessary Because Under the Michigan Constitution the General Assembly Lacks Adequate Legislative Days to Draft And Deliberate Over a New Redistricting Plan.**

This Court ordered the Michigan Legislature to pass redistricting legislation, and the Governor to sign that legislation, by August 1, 2019. Mem. Op. at 144 (ECF 268). The following outlines the practical concerns with complying with the Court's deadline.

*First*, before the Governor can sign the legislation, Michigan's Constitution vests the Governor with fourteen calendar days to review the legislation and either sign it into law or veto it. Mich. Const. art. IV § 33. To satisfy this Court's deadline, Michigan's Legislature must pass redistricting legislation and present it to the Governor no later than July 18, 2019.

*Second*, Michigan's Constitution requires that legislation be considered, in both the House and the Senate, for at least five days. Mich. Const. art. IV § 26. This same provision also requires that both the House and the Senate read the redistricting legislation three times. *Id.* Assuming significant revisions of the session schedule were adopted, this would require the first of the houses to consider redistricting legislation to pass it by no later than a week prior to presentation to the Governor. By way of comparison, when courts draw maps, which does not involve the political and

logistical complications of the legislative process, they generally take at least several weeks. *League of United Latin American Citizens v. Perry*, 457 F. Supp. 2d 716 (E.D. Tex. 2006) (drawing a court ordered congressional district map in 37 days); *Adamson V. Clayton County Elections & Registration Bd.*, 876 F. Supp. 2d 1347 (N.D. Ga. 2012) (drawing a court ordered remedial map in 36 days); *Larios v. Cox*, 314 F. Supp. 2d 1357, 1359, 1363-64 (N.D. Ga. 2012) (drawing a map in approximately three weeks).

*Third*, the legislature will require time to prepare for, and acquire expertise in, any redistricting duties. Given Michigan's constitutional term limitations for its members, there is only one member of the Michigan House of Representatives who was a member of the House when the last redistricting map was drawn following the 2010 Census.<sup>1</sup> There is no geographic information systems (GIS) professional on staff in in the House of Representatives. The State House does not currently possess the software or hardware necessary to redistricting the state. The State House has no staff member currently trained on GIS systems, and the next opportunity for training on the redistricting process for legislative staff is not until a currently scheduled National Conference of State Legislatures (NSCL) seminar that begins on June 20, 2019 in Providence, Rhode Island. This lack of redistricting expertise, systems and training is further complicated by the compressed schedule of the House. As of now, Michigan's

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<sup>1</sup> Rep. Warren (D), who previously served two terms in the House before spending two terms in the Senate and then returning to the House for her third term, was part of the 2010 redistricting effort as a Senator. Interestingly, she was one of the Democrats who voted for the enacted plan.

State House session ends June 27, 2019, giving only the months of May and June to draft, craft, and deliberate over new redistricting legislation.

Importantly, redistricting legislation is not the only matter pending before Michigan's General Assembly. Michigan is required to pass a budget and that budget must be passed by October 1. *See Lindsay VanHulle, A deal to fix Michigan's roads looks to roll into summer, at least*, GRAND HAVEN TRIBUNE & BRIDGE MAGAZINE (Apr. 13, 2019).<sup>2</sup> The budget must pass both chambers of the General Assembly and be signed into law by the Governor under the same constitutional requirements. Complicating matters further, the Governor has threatened to veto any budget that does not include her \$0.45 fuel tax increase, an increase that no legislator, including of her own party, has expressly supported. Jonathan Oosting, *Whitmer threatens veto as Senate GOP strips gas tax hike from roads budget*, THE DETROIT NEWS (Apr. 23, 2019).<sup>3</sup> Without the budget process being completed, the State risks a shutdown of all but the most essential services for its citizens, and serious questions about payments for state government employees and contractors, along with state residents who recipients of financial assistance of all kinds.

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<sup>2</sup> <https://www.grandhaventribune.com/State/2019/04/13/A-deal-to-fix-Michigan-s-roads-looks-to-roll-into-summer-at-least>.

<sup>3</sup> <https://www.detroitnews.com/story/news/politics/2019/04/23/michigan-senate-strips-whitmer-gas-tax-hike-roads-budget/3550463002/>.

Additionally, the legislature must act on no-fault auto insurance or risk a federal court imposing new limits on Michigan, a state already saddled with the highest insurance rates in the country. See Jonathan Oosting, *Whitmer: Road funding, auto insurance deal could be 'win-win'*, THE DETROIT NEWS (Apr. 15, 2019).<sup>4</sup> Redistricting legislation will divert the limited resources of the legislature through the Summer recess absent expedited consideration of the Motion to Stay. Chad Livengood, *The agenda in Lansing just got gerrymandered*, CAIN'S DETROIT BUSINESS, April 26, 2019<sup>5</sup>; Editorial, *Gerrymander ruling hands Michigan a mess*, THE DETROIT NEWS, April 27, 2019.<sup>6</sup>

**II. Expedited Consideration Of The Motion Is Necessary Because Absent Expedited Consideration, The Legislature Will Work In Parallel With The United States Supreme Court's Pending Decision In *Rucho* And *Benisek*.**

Looming over the Michigan Legislature's efforts at drafting redistricting legislation—as well as this Court's order—is the United States Supreme Court's pending rulings in *Rucho v. Common Cause*, No. 18-422 (U.S. March 26, 2019) (oral

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<sup>4</sup> <https://www.detroitnews.com/story/news/local/michigan/2019/04/15/whitmer-road-funding-auto-insurance-deal-win-win/3476191002/>.

<sup>5</sup> [https://www.craindetroit.com/voices-chad-livengood/agenda-lansing-just-got-gerrymandered?utm\\_source=crain-s-afternoon-report&utm\\_medium=email&utm\\_campaign=20190429&utm\\_content=article10-headline](https://www.craindetroit.com/voices-chad-livengood/agenda-lansing-just-got-gerrymandered?utm_source=crain-s-afternoon-report&utm_medium=email&utm_campaign=20190429&utm_content=article10-headline).

<sup>6</sup> <https://www.detroitnews.com/story/opinion/editorials/2019/04/28/editorial-gerrymander-ruling-hands-michigan-mess/3579293002/>.

argument heard) and *Lamone v. Benisek*, No. 18-726 (U.S. March 26, 2019) (oral argument heard). The Supreme Court expedited briefing in these cases and is expected to issue rulings by the end of the Court’s October 2018 term—on June 24, 2019. *See Rucho*, No. 18-422 (U.S. Jan. 8, 2019) (order establishing expedited briefing schedule); *Lamone*, No. 18-726 (U.S. Jan. 8, 2019) (order establishing expedited briefing schedule).

This Court’s opinion is premised upon the very standards expressed in *Rucho* and *Benisek* that the Supreme Court is currently considering. *See, e.g.*, Mem. Op. 58 (“We will evaluate Plaintiffs’ Fourteenth Amendment Equal Protection claims under the standard articulated by the *Rucho* panel.”); *id.* at 59 (“We will apply a similar three-part test for adjudicating Plaintiffs’ First Amendment claims.”) (citing both *Rucho* and *Benisek*). This Court’s liability finding and its order compelling the legislature to act is wholly contingent upon the United States Supreme Court’s total affirmation of the lower court rulings in *Rucho* and *Benisek*.

Intervenors have previously urged this Court to stay this case pending the outcome of these cases. *Rucho*’s holding has already been stayed once by the United States Supreme Court. *Rucho v. Common Cause*, No. 17A745 (U.S. Jan. 18, 2018). As this Court is well aware, the issuance of a stay indicates a fair prospect of reversal. The stay in *Rucho I* was lifted when the case was vacated and remanded in light of *Gill*. In *Rucho II*, the lower court stayed its own decision pending the outcome at the United States Supreme Court, once again indicating its lack of confidence that the lower court

would be affirmed on all fours. Even if a portion of these lower court rulings are affirmed, cases of this magnitude and importance are rarely affirmed without modification. As a result, there is a likelihood that this Court's decision will at the very least be subject to reversal and vacatur, if not outright dismissal, once *Benisek* and *Rucho* are issued by June 24, 2019.

Accordingly, these pending rulings from the United States Supreme Court will directly impact this case. The Supreme Court's decisions in *Rucho* and *Benisek* will necessarily impact this Court's ruling and, importantly, how Michigan's Legislature seeks to draft and deliberate over the new redistricting plan. In fact, the Supreme Court may determine that partisan gerrymandering claims are not justiciable. Additionally, in the event the Supreme Court modifies the *Rucho* and *Benisek* standards, it will require this Court to receive additional briefing from the parties, potentially take additional evidence, and then issue another order that considers the holdings of the Supreme Court in these two soon to be decided cases.

This could well result in the legislature being forced to duplicate its efforts, first complying with this Court's order and then complying with further orders of this Court as required by the Supreme Court. This is especially true because the Michigan Legislature must necessarily begin drafting and deliberating a remedial plan before the Supreme Court has reviewed this Court's recently issued order and injunction. Just when the legislative process would be nearly complete, the Supreme Court will then issue its rulings, likely requiring the Legislature to halt its work and wait for this Court

to receive briefing, potentially take additional evidence, and then issue additional orders consistent with the Supreme Court's opinion. In either of these scenarios, the Michigan Legislature will have wasted the limited resources that the public and the calendar allocate to it.

Courts, therefore, regularly grant stays pending appeal in redistricting cases, allowing time for the United States Supreme Court to provide guidance to legislatures prior to the legislatures embarking on the remedial configuration of districts. *See, e.g., White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968); *Whitcomb v. Chavis*, 396 U.S. 1064 (1970); *Rucho v. Common Cause*, No. 17A745 (U.S. Jan. 18, 2018); *Common Cause v. Rucho*, No. 16-1026 (M.D. N.C. Sept. 12, 2018) (three-judge court) (ECF 155); *Benisek v. Lamone*, No. 13-03233 (D. Md. Nov. 16, 2018) (ECF 230); *Page v. Va. State Bd. of Elections*, No. 13-678, 2015 U.S. Dist. LEXIS 21346, \*4-8 (E.D. Va. Feb. 23, 2015) (three-judge court) (granting a five-month extension of time to comply with court's order to Virginia General Assembly to redraw congressional districts because the Supreme Court was likely to issue ruling soon on a redistricting case that "reasonably can be expected to bear on the resolution of the appeal in this case."). In fact, the three-judge court in *Page* reasoned:

[I]t is wasteful for the General Assembly to devise a redistricting plan without the views and instructions of the Supreme Court...To proceed with review before the parties and we know the views and instructions of the Supreme Court would be wasteful of the resources of the parties and the Court.

*Id.* at \*6.

Accordingly, this Court should expedite briefing and issue a decision shortly so that the Michigan Legislature does not risk wasting precious public resources, diverting its energies from the state budget and other pressing matters that require the legislature's limited time.

Expedited consideration also respects the principles of federalism because this federal Court should not direct a state legislature to deliberate over and pass redistricting legislation based upon liability and reasoning that is contingent upon the impending rulings of the United States Supreme Court. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) (“Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.”); *Perry v. Perez*, 565 U.S. 388, 392 (2012) (“The failure of a State's newly enacted plan to gain preclearance prior to an upcoming election does not, by itself, require a court to take up the state legislature's task. That is because, in most circumstances, the State's last enacted plan simply remains in effect until the new plan receives preclearance.”).

Therefore, expedited consideration of the Motion to Stay is necessary so as to avoid imposing the unwelcome obligation on the Legislature to begin drafting new legislation in accordance with an order that may be based upon reasoning soon to be modified or reversed by the Supreme Court, or risk that this Court will usurp the Legislature's primary jurisdiction and draw new maps itself.



**III. Expedited Briefing and Decision Is Common in Redistricting Cases When Filing a Motion to Stay Pending Appeal.**

As this Court states in its order, it joined a “chorus” of federal district courts to declare enacted Congressional, State House, or State Senate maps unconstitutional. Mem. Op. at 3. That same chorus of district courts also expedited consideration of Motions to Stay - and granted them in both cases.

In *Common Cause v. Rucho*, the three-judge panel issued its decision on January 9, 2019. The defendants filed their motion to stay on January 11, 2019, the plaintiffs filed their opposition on January 12, 2019, and the district court issued its ruling on January 16, 2019.<sup>7</sup> See, e.g., *Common Cause v. Rucho*, No. 16-1026 (M.D.N.C.) (ECF 117, 118, 121, 122).

Similarly, the three-judge court for the United States District Court for the District of Maryland entered a consent stay one day after the request was made. See *Benisek v. Lamone*, No. 13-03233 (D. Md. Nov. 16, 2018) (ECF 230) (granting motion to stay one day after consent motion to stay was filed, ECF 226). The Supreme Court routinely expedites briefing and consideration of emergency motions to stay in redistricting cases. See *Abbott v. Perez*, No. 17A225 ( Sept. 12, 2017) (granting stay where defendant filed emergency application on August 25, plaintiffs filed response September 5). *Turzai, et al. v. League of Women Voters of Pennsylvania, et al.*, 17A795 (U.S. Feb 5, 2018) (denying emergency application for stay pending appeal in redistricting

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<sup>7</sup> The United States Supreme Court granted Defendants’ request for a stay pending appeal two days later. See *Rucho v. Common Cause*, No. 17A745 (U.S. Jan. 18, 2019).

case where applicants filed application on Jan. 26, plaintiffs filed opposition on February 2). Therefore, this Court should also order expedited briefing and decision in this case.

### **CONCLUSION**

For the foregoing reasons, this Court should expedite consideration of the Congressional and State House Intervenors' Motion to Stay Pending Appeal.

Dated: May 3, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been filed via the CM/ECF system which instantaneously sent a Notice of Electronic Filing to all counsel of record.

/s/ Jason Torchinsky  
Jason Torchinsky