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 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' EMERGENCY MOTION TO STAY THIS COURT'S ORDER AND JUDGMENT.

Congressional and State House Intervenors ("Intervenors"), by and through their attorneys, respectfully move this Court to stay its Order and Judgment pending resolution of their appeal to the United States Supreme Court.

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 object to the relief requested in this Motion.

WHEREFORE, Intervenors respectfully request the Court grant their Motion and stay this Court's Order and Judgment pending their appeal to the Supreme Court.

Dated: May 3, 2019

Respectfully submitted,

Holtzman Vogel Josefiak Torchinsky PLLC

/s/ Jason Torchinsky
Jason Torchinsky
Shawn Sheehy
Phillip Gordon
45 North Hill Drive, S 100
Warrenton, Virginia 20106
(540) 341-8800
JTorchinsky@hvjt.law
ssheehy@hvjt.law
pgordon@hvjt.law
Attorneys for Intervenors

Clark Hill PLC

/s/ Charles R. Spies
Charles R. Spies
Brian D. Shekell (P75327)
David M. Cessante (P58796)
212 E. Cesar Chavez Ave.
Lansing, MI 48906
(517) 318-3100
cspies@clarkhill.com
bshekell@clarkhill.com
dcessante@clarkhill.com
Attorneys for Intervenors

/s/ Peter B. Kupelian
Peter B. Kupelian (P31812)
Kevin A. Fanning (P57125)
151 S. Old Woodward
Suite 200
Birmingham, MI 48009
(248) 642-9692
pkupelian@clarkhill.com
kfanning@clarkhill.com
Attorneys for Intervenors

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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 Aaron Miller, *et al.*,

Intervenor-Defendants.

Case No. 2:17-cv-14148

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

BRIEF IN SUPPORT OF CONGRESSIONAL AND STATE HOUSE INTERVENORS' EMERGENCY MOTION TO STAY THIS COURT'S ORDER AND JUDGMENT

CONCISE STATEMENT OF THE ISSUE PRESENTED

WHETHER THIS COURT SHOULD STAY ITS ORDER AND JUDGMENT PENDING APPEAL BECAUSE:

1) ABSENT STAY, THE LEGISLATURE WILL WASTE PRECIOUS AND LIMITED PUBLIC RESOURCES IN ATTEMPTING TO COMPLY WITH THIS COURT'S ORDER THAT MAY BE MOOT FOLLOWING THE SUPREME COURT'S DECISION EXPECTED BY JUNE 24, 2019.

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 (1973)

Wise v. Lipscomb, 434 U.S. 1329 (1977)

Gill v. Whitford, 138 S. Ct. 1916 (2018)

Vieth v. Jubelirer, 541 U. S. 267 (2004)

Gaffney v. Cummings, 412 U. S. 735 (1973)

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

Nken v. Holder, 556 U.S. 418 (2009)

INTRODUCTION

This case involves "an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). This Court should, therefore, stay its Order and Judgment to permit the United States Supreme Court time to deliberate, decide, and announce the contours and justiciability (if any) of Plaintiffs' claims and how to properly address claims of partisan dilution.

STANDARD OF REVIEW

A stay pending appeal is available to suspend the "judicial alteration of the status quo." *Nken v. Holder,* 556 U.S. 418, 429 (2009). Here, Congressional and State House Intervenors ("Intervenors") seek a stay of this Court's injunction that prevents Michigan from enforcing a presumptively valid statute and cuts short the terms of siting legislators. *See Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C. J., in chambers). Intervenors request this stay pending appeal to hold this Court's "ruling in abeyance to allow [the Supreme Court] the time necessary to review it." *Nken*, 556 U.S. at 421.

Four factors govern whether a stay should be granted: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (citing *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th

Cir. 2006)). "All four factors are not prerequisites but are interconnected considerations that must be balanced together." *Coal. to Defend Affirmative Action*, 473 F.3d at 244. The facts of this case, when "balanced together," lead inevitably to the conclusion that this case should be stayed. *See id.* For example, a strong showing of possibility of success on the merits can overcome a weak showing of the other factors and vice versa. *See id.* at 252; *Americans United for Separation of Church & State v. Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990).

ARGUMENT

I. CONGRESSIONAL AND STATE HOUSE INTERVENORS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL.

To satisfy this prong of the analysis, Intervenors are not required to demonstrate that they *will* succeed on their appeal to the Supreme Court. Nor are Intervenors required to demonstrate that they will *probably* succeed on the merits of their appeal. Intervenors must only demonstrate that the legal issues they raise are substantial enough to constitute "fair ground[s] for litigation and thus [require] more deliberate investigation." *Roth v. Bank of Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978). Intervenors do raise substantial questions of law that will require time for the Supreme Court to decide.

A. Whether Partisan Gerrymandering Claims Are Justiciable Remains An Open Question.

The opinion of this Court states that the Supreme Court has never overturned *Davis v. Bandemer*, 478 U.S. 109, 127 (1986), holding that partisan gerrymandering

claims are justiciable. Mem. Op. at 57. The Opinion also states that the Supreme Court has declined to revisit this holding, including in *Gill*. *Id.* Both of these assertions are incorrect as a matter of law.

First, the Supreme Court in *Bandemer* did not agree on a standard to evaluate partisan gerrymandering claims. *Vieth v. Jubelirer*, 541 U. S. 267, 279 (2004) (plurality op.)(noting that the six justices in *Bandemer* who stated that partisan gerrymandering claims are justiciable could not form a majority for what that standard is); *see also id.* at 282 (stating that Justice O'Connor's concurrence in *Bandemer*, joined by two justices, stated that the *Bandemer* plurality's test was unmanageable and Justice Powell, joined by one justice, held the same view, making it a majority opinion of the Court). To this day, 19 Supreme Court justices have issued opinions attempting to articulate a standard. *Davis v. Bandemer*, 478 U.S. 109, 127-37 (1986) (plurality op.); *id.* at 161-62 (Powell, J., and Stevens, J., concurring in part and dissenting in part); *Vieth*, 541 U.S. at 292 (noting that four dissenters proposed three different standards); *see League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 414 (2006) (Kennedy, J., concurring) (acknowledging that disagreement still persists in articulating the standard to evaluate partisan gerrymandering claims but declining to address the justiciability issue); *see also id.* at 471-72 (Stevens, J., and Breyer, J., concurring in part and dissenting in part) (stating that plaintiffs proved partisan gerrymandering under proposed test); *id.* at 483 (Souter, J., and Ginsburg, J., concurring in part, dissenting in part); *Gill*, 138 S. Ct. 1938-40 (Kagan, Ginsburg, Bryer, Sotomayor, J., concurring). At most, *Bandemer*

stands for the proposition that partisan gerrymandering claims are justiciable in theory, but not in practice.

Second, the Supreme Court did not decline to revisit the justiciability question. Mem. Op. at 57. The Supreme Court stated that the issue of whether partisan gerrymandering claims are justiciable remains an open question. Echoing the above analysis, the Court stated:"Our considerable efforts in *Gaffney, Bandemer, Vieth, and LULAC leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering*. In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable." *Gill*, 138 S. Ct. at 1929 (emphasis added). Furthermore, the Court clarified its holding in *Bandemer*, stating that it did not hold that partisan gerrymandering claims were generally justiciable. Instead, the *Bandemer* Court held that only the case immediately before the Court was justiciable. *Id.* at 1927.

On the justiciability question alone, Intervenors have—at the very least—raised legal issues that create "fair grounds" for litigation requiring more deliberation. *Roth*, 583 F.2d at 537. This is especially true since the 19 Justices who have considered the issue have not obtained five votes to support their positions. This Court should therefore afford the Supreme Court time to review this Court's decision. *Nken*, 556 U.S. at 421.

B. The Opinion's Articulated Legal Standard Is Tenuous.

The text of the Constitution vests the various state legislatures with the authority to draw districts and Congress to make or alter any of the state's actions. U.S. Const. art. I, § 4; *Growe v. Emison*, 507 U.S. 25, 34 (1993); *LULAC,* 548 U.S. at 414 (Kennedy, J.); *Vieth*, 541 U.S. at 275 (2004) (plurality op.). The framers purposefully chose this form of checks and balances. *Vieth*, 541 U.S. at 285; *Agre v. Wolf*, 284 F. Supp. 3d 591, 595, 598 (E.D. Pa. 2018) (three-judge court). Because the Constitution vests political bodies with the authority over legislative map drawing, Plaintiffs' claims are non-justiciable. *Baker*, 369 U.S. at 217; *Nixon v. United States*, 506 U.S. 224, 228 (1993).

The legal standard relied on by the Court is tenuous. The Court states to prove partisan intent, Plaintiffs must prove that the mapmakers drew the map with the "predominant purpose...to subordinate adherents of one political party and entrench a rival party in power." Mem. Op. 58. But the Supreme Court has already rejected this standard as non-justiciable. In *Vieth*, the plaintiffs proposed that to satisfy the intent element of their partisan gerrymandering claim, they must show that the "mapmakers acted with a predominant intent to achieve partisan advantage which can be shown by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." *Vieth*, 541 U.S. at 285. The Supreme Court ruled that this test is not judicially manageable. *See id.* at 285-86 (plurality op.); *id.* at 308 (Kennedy, J., concurring)

(stating that the plurality "demonstrates the shortcomings of the other standards that have been considered to date...including the parties before us...."); *LULAC*, 548 U.S. at 417-18 (opinion of Kennedy, J.) (rejecting plaintiffs' proposed "sole intent" standard).

Additionally, the predominant intent standard is manageable in the racial gerrymandering context but not in the partisan gerrymandering context. Racial classifications are always suspect. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Accordingly, the predominant intent standard was developed to insulate legislators from accusations of racial gerrymandering when they were making good-faith attempts at complying with the Voting Rights Act. *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). Stated differently, the predominant intent standard was developed to insulate legislators from the twin demands of complying with the Fourteenth Amendment and the Voting Rights Act. *Bush v. Vera*, 517 U.S. 952, 990, 993-95 (1996) (O'Connor, J., concurring). By contrast, in redistricting, political classifications are always *expected*. *Gaffney*, 412 U.S. at 753. In fact, redistricting is expected to have "substantial political consequences." *Id.*

The Supreme Court described political affiliation as a traditional redistricting criterion. *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). Furthermore, partisan affiliation—unlike race—is a mutable concept. *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287. Imposing the predominant intent standard on partisan gerrymandering is inapposite. Facts that were

credited under legal principles that are later to be declared improper cannot be credited. *Kirksey v. Jackson*, 625 F.2d 21, 21-22 (5th Cir. 1980). Accordingly, this Court should grant a stay.

Next, this Court's standard for determining partisan effects is tenuous. The Court's standard measures whether "the lines of a particular district have the effect of discriminating against—or subordinating—voters who support candidates of a disfavored party, if the district dilutes such voters' votes by virtue of cracking or packing." Mem. Op. at 59. But this test assumes partisan affiliation is readily discernable and a non-mutable concept. *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287. Furthermore, the proposed test does not establish what level of vote dilution triggers constitutional scrutiny. *Vieth*, 541 U.S. at 296; *LULAC*, 548 U.S. at 420 (2006) (Kennedy, J.) (stating that plaintiffs partisan asymmetry standard does not shed light on "how much partisan dominance is too much."). For example, in the one person, one vote context, the Supreme Court has determined that minor population deviations are not, by itself, constitutionally significant. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

Furthermore, the social science metrics that Plaintiffs proffer and this Court relied upon only show averages, not specific harm as to individual voters in individual districts. In fact, Dr. Mayer admitted as much. *See* (ECF 119-17 at 7) (Page ID 2583) ("An efficiency gap is not calculated for a single district."). In fact, Dr. Warshaw also stated that he did not demonstrate which districts were packed and cracked. (ECF

119-14 at 27) (Page ID 2553). Dr. Chen's analysis suffers from the same shortcomings, as he uses social science metrics to calculate statewide asymmetry. *See* (ECF 119 at 44-45, 48-49) (Page ID 2423-24, 2427-28). None of these tests are a "well-accepted" measure of partisan-fairness and these measures are subject of "serious criticism by respected political scientists." *Id.* at 49 (Page ID 2428).

As for the First Amendment standard, this Court's proposed standard risks rendering "unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." *Vieth*, 541 U.S. at 294 (plurality op.). This Court's opinion validates this concern because it relies on simulated maps to prove illicit partisan intent. Mem. Op. at 44-45, 51. These maps were supposedly drawn without any partisan input whatsoever. Mem. Op. at 25. Under this standard, it cannot be that partisan intent is permissible when maps that were drawn without any partisan influence are used to prove illicit partisan intent. This is especially true when legislators are able to engage in constitutionally permissible partisan gerrymandering. *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

Furthermore, in its remedial order, this Court demands the legislature inform it as to how partisan data was used and to reveal all the identities of those who were involved in drafting the redistricting legislation. Mem. Op. at 145. This Court's opinion, therefore, transforms partisan criteria from a traditional redistricting

principle, *Alabama Legislative Black Caucus*, 135 S. Ct. at 1270, to a suspect classification.

Finally, regardless of this Court's position on the propriety of its standard, this Court should grant a stay because it adopted its standards wholesale from *Common Cause v. Rucho*, and *Lamone v. Benisek*. Both cases are now before the Supreme Court. The Supreme Court is considering the justiciability of these very standards. *See Rucho v. Common Cause,* No. 18-422 (U.S. Jan. 4, 2019) ("Further consideration of the question of jurisdiction is Postponed to the hearing of the case on the merits."); *Lamone v. Benisek*, No. 18-726 (U.S. Jan. 4, 2019) ("Further consideration of the question of jurisdiction is Postponed to the hearing of the case on the merits."). This is especially true when the Supreme Court has not agreed on a standard for an equal protection claim and even a majority of the Court has not agreed that there exists a First Amendment claim. *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (describing a First Amendment partisan gerrymandering claim as a legal theory put forward by one Justice and not uncontradicted by the precedents of the Supreme Court); *Gill*, 138 S. Ct. at 1938-40 (Kagan, J., concurring) (proposing a legal theory of associational harm that received three additional votes). Accordingly, this Court should stay its order.

C. <u>This Court's Holding That Plaintiffs' Have Standing Is Tenuous.</u>

This Court established standing by credited assertions that individual voters are "frustrated" and "less enthusiastic" about voting and that their representative is "less responsive" to the individual voters' concerns. *See, e.g.,* Mem. Op. at 65. Additionally,

this Court predicated its standing finding based upon Dr. Chen's simulations and Mr. Vatter's testimony that the Enacted Districts were much more Republican than previous districts. Mem. Op. at 66. Moreover, this Court established harm through the use of social science metrics, including the efficiency gap, mean-median difference, and declination. Mem. Op. 28-30, 39-42, 49, 51. This is insufficient to establish standing.

First, as to the social science metrics, this Court should stay its order pending appeal because the Supreme Court has already called into question whether the efficiency gap is sufficient to demonstrate the individual harm necessary to establish standing. *Gill*, 138 S. Ct. at 1933. The Supreme Court has also already questioned the applicability of mean-medium difference and other measures of partisan asymmetry. *Id*; *see Gill v. Whitford*, No. 16-1161 (U.S. Aug. 28, 2017) (Gill Appellee Br. at 13 n.5, 14 n.7, 46 n.14).

Second, stating that a voter is frustrated with a law, or is less enthusiastic about voting, or feels that their representative is less responsive to their needs cannot be sufficient to satisfy constitutional standing. Instead, this is a generalized grievance. *Gill*, 138 S. Ct. at 1932; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-43 (2006) (denying standing to plaintiffs whose injury was depletion of tax revenues that disproportionately burdens them requiring them to pay more). The asserted injury is

one felt generally by most people. *See id.* at 344.[1] If all that is needed to unlock the doors of federal courts is the allegation—and subsequently proof—that an enacted map makes a voter frustrated, less likely to vote, or that a legislator is not *fully* responding to constituent letters, then the federal judiciary will be transformed to "monitors of the wisdom and soundness" of both state and federal legislators. *Id.* at 346. This moves the judiciary far from the modest role Article III contemplates. *Id.*

Furthermore, just as there is a presumption that a law is constitutional, there is a presumption that an individual from one party is adequately represented by an elected official from a different party. *Bandemer*, 478 U.S. at 132. Merely claiming that a representative is not responsive is not sufficient to overturn that presumption.

Third, Dr. Chen's simulations and Dr. Warshaw's chart are problematic because it shows that many Plaintiffs and Members live in challenged districts whose exact "partisanship" could well have resulted from what the Plaintiffs present as a non-partisan districting process. There are a large number of Voters who live in a challenged district within the range of Chen's simulations as shown on the Warshaw Chart. *See* Pls' Ex. 278; *see also* Mot. J. Partial Findings (ECF No. 253) (ECF No. 253-253-2) (PageID# 9924-9997). If the Voters' enacted district falls within the grey area on the chart, then the Voter lives in a district that could have been created through a so-called non-partisan districting process. TT, Vol. I, p. 203-04. If the Voter lives in a

[1] Congress's approval rating is currently at 20% with a disapproval rating of 77%. *See Congress and the Public*, available at https://news.gallup.com/poll/1600/congress-public.*aspx* (last visited May 2, 2019).

district that could have been created by Dr. Chen's simulations—a district that is by Plaintiffs' own definitions are not "packed" or "cracked"—the Voter has not been harmed. FOF ¶1153. The Supreme Court has never held that to avoid liability under a partisan gerrymandering claim, the enacted districts must be in the middle of a political scientist's method of drawing simulated maps, using a computer, without *any* partisan input. This is all the more problematic here since Intervenors could not examine Dr. Chen's code because he deleted it. *See generally* Secretary's Mot. *in Limine* (ECF No. 147) (PageID# 5367-5391).[2]

D. A Stay Is Warranted Because This Court Seemingly Prohibits Political Considerations Raising Questions About How The Legislature Must Proceed.

This Court should also stay the opinion and order because its opinion seemingly makes partisan considerations a suspect classification. Mem. Op. at 9-10. In fact, the Court compels the legislature to describe in detail who was involved with drafting a remedial map—both formally and informally—and how political data was used. Mem. Op. at 145. This Court's concern with partisan considerations in redistricting is contrary to the Supreme Court's understanding that constitutional partisan gerrymandering is legitimate and expected. *Hunt*, 526 U.S. at 551; *Gaffney*, 412 U.S. at 752-53. This Court's opinion also runs counter to the principle that

[2] Even though Dr. Chen claims to have not meaningfully altered his final code, the final code was in fact rendered unavailable for examination. The Court's analysis hinges on claims of an expert using computer code never actually examined by any other person. This is a dubious evidentiary basis on which this Court hinges its constitutional analysis.

redistricting is intended to have substantial partisan consequences. *Gaffney*, 412 U.S. at 753.

Additionally, this Court relies upon simulated maps supposedly drawn without partisan intent to prove the Enacted Map was drawn with unconstitutional partisan intent. Mem. Op. at 27. When it comes to complying with this Court's order to draw remedial maps, this Court's description of partisan intent and the use of non-partisan maps places the legislature in an untenable position. Can the legislature even use election return information? If so, how and for what purposes? How much use of election return data and at what stage of the process is permissible or impermissible? From the Court's opinion, it appears that the use of political information is essentially prohibited. Until these questions are resolved by the Supreme Court, the legislature does not have guidance on how it must exercise its most sovereign of functions, drawing congressional and state legislative districts. *Miller*, 515 U.S. at 915 ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.").

A Stay Is Warranted Because This Court's Remedial Order Constitutes A Substantial Encroachment Into The State Legislative Process.

The Constitution vests Michigan's legislature with the authority to draw districts. U.S. Const. art. I, § 4. Consequently, redistricting is primarily the duty of the state legislature. *Growe v. Emison*, 507 U.S. 25, 34 (1993). Therefore, "Federal-court review of districting legislation represents a serious intrusion on the most vital of local

functions." *Miller*, 515 U.S. at 915. When a federal court must draw districts, it is an "unwelcome obligation." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). In summary, a federal courts' review of state redistricting legislation constitutes an intrusion into a sovereign function. The court drawing of districts is an unwelcome obligation. But this Court takes it a step further. Not only did this Court declare a state redistricting plan unconstitutional, the order requires federal court control of how the Michigan legislature complies with the order.

Rather than reluctantly enter the political thicket of drawing districts, *Colegrove v. Green,* 328 U.S. 549, 556 (1946), this Court has dove headfirst into the thicket. This Court demands the Michigan legislature describe the process to craft, draft, and deliberate over redistricting legislation, including producing records of who the legislature consulted both formally and informally. Mem. Op. at 145. Additionally, the legislature must detail its mental processes, including the identification of any and all criteria, formal and informal, that it used to develop redistricting maps. This includes the description of how partisan considerations were used in drawing districts and how political data factored into redistricting decisions, and every alternative map considered but not adopted. *Id.* The legislature must describe in detail why certain proposed remedial plans were rejected or proposed. *Id.* Finally, this Court wants the legislature to explain itself for why the remedial plan it adopted—and the Michigan Governor signed—addresses this Court's constitutional concerns. *Id.*

This is both an unwelcome invasion into the Michigan legislature's sovereign function to draw districts, it is also an invasion into the Michigan's legislature's protection under its Speech or Debate Clause. Mich. Const. art. IV, § 11. The Supreme Court still recognizes the force of state Speech or Debate Clauses in federal court in civil cases. *Supreme Court v. Consumers Union of United States*, 446 U.S. 719, 732-34 (1980).

Furthermore, the extent of the intrusion into this most vital of local functions is unprecedented. The Michigan Constitution has term limited its state representatives to three elections and its state senators to two elections. Mich. Const. art. IV, § 54. Because this Court is ordering a special senate election, Mem Op. at 144, it will cut the terms of various state senators short.

Recent three-judge panels finding violations under racial gerrymandering claims have not gone this far. *See Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 180-81 (E.D. Va. 2018) (three-judge court) (ordering the Virginia legislature to draw remedial districts within four months of the Court's order without demanding detailed explanations for how the districts remedy the court's concern); *Page v. Va. State Bd. of Elections*, No. 13-cv-678, 2015 U.S. Dist. LEXIS 73514, *58 (E.D. Va. June 5, 2015) (three-judge court) (same); *Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017). While this Court has the authority to order new districts drawn in compliance with its order, it does not have the authority to micromanage the legislature's process in complying with its order. *See Shelby County v. Holder*, 570 U.S.

529, 542-43 (2013) ("The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect...States retain broad autonomy in structuring their governments and pursuing legislative objectives."); *Bush v. Vera*, 517 U.S. 952, 978 (1996) ("[The Supreme Court] adhere[s] to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan.").

Because of this unprecedented intrusion into a state's legislative process, this Court should stay its order pending the Supreme Court's review of whether this Court has jurisdiction in the first place.

II. INTERVENORS AS WELL AS THE CITIZENS OF MICHIGAN WILL SUFFER IRREPARABLE HARM ABSENT A STAY, AND THE BALANCE OF THE EQUITIES FAVORS A STAY

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012). This injury is magnified in the redistricting context because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. In evaluating irreparable harm, courts look at the following three factors: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). All three factors support a stay in this case.

A. Irreparable Harm Common to House and Congressional Intervenors.

There are several substantial and irreparable harms that are common to both House and Congressional Intervenors. These shared harms include mootness, impending candidate recruitment, election strategy, and constituent relations.

a. Mootness.

An irreparable harm common to all intervenors is that, without a stay, this case may become moot before appellate review is possible. The possibility of mooting a case during the pendency of an appeal is irreparable harm. *See*, *e.g.*, *Wise v. Lipscomb*, 434 U.S. 1329 (1977) (Powell, J. in chambers), *cert. granted,* 434 U.S. 1008 (1978); *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J. in chambers), *cert. granted,* 449 U.S. 898 (1980); *see also Barefoot v. Estelle*, 463 U.S. 880, 1983) ("[A] court of appeals, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal . . ."); *Weingarten Nostat, Inc. v. Serv. Merch. Co.,* 396 F.3d 737, 740 (6th Cir. 2005) (noting the possibility of irreparable harm without a stay due to a statutory mootness provision of the bankruptcy code). As the Supreme Court has noted:

> It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. "No court can make time stand still" while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review.

See Nken v. Holder, 556 U.S. 418, 421 (2009).

This Court rendered judgment and issued its Opinion on April 25, 2019. *See* ECF Nos. 268, 269). In its Opinion, this Court ordered that a remedial plan be "passed by both chambers of the Michigan legislature, and signed into law by the Governor of Michigan, on or before August 1, 2019." Mem. Op. (ECF No. 268) (Page ID# 11702). Simply put, there is not enough time, even on an expedited basis, between April 25 (the date of the Opinion and Order) and August 1, 2019 (the date a bill is due to be presented to this Court) for a full appeal on the merits.[3] As this Court well knows, review to the Supreme Court can be a lengthy process. *See generally*, *Nken*, 556 U.S. at 421.

Even an expedited merits appeal to the Supreme Court is a months long process. *See*, *e.g.*, *Lamone v. Benisek,* No. 18-726 (2018) (three-judge panel decision on November 7, 2018; distributed for conference on December 19, 2018; jurisdiction postponed to merits hearing on January 4, 2019; merits briefing complete on March 15, 2019; oral argument held on March 26, 2019[4]). Even under a *Benisek*-like time frame, a decision by the Supreme Court may not be forthcoming on the merits of this appeal until November 2019 at the earliest. Even assuming this lightning fast appellate timeframe could be further expedited, it is a near impossibility that the Supreme Court

[3] The additional 40 days of time allotted by the Court for briefing on the remedial plan does nothing to change this analysis, as that additional time is still insufficient to take an expedited appeal to the Supreme Court and have a decision rendered before this Court implements a remedial plan. *See Nken,* 556 U.S. at 421.

[4] The Supreme Court typically releases opinions in the same term it hears a case, which would mean a decision in *Benisek* can be expected by the end of June 2019.

will have an opinion ready before this Court orders implementation of any remedial plan under its Opinion and Order.

b. Impeding Candidate Recruitment, Election Strategy, Resource Allocation, Constituent Services, and Constituent Relationships.

Planning for election campaigns takes time. Candidates must plan and organize ballot access efforts, raise funds sufficient to conduct campaigns, and make difficult decisions on whether and how to run for office. Further, the parties and political organizations must conduct candidate recruitment. This all is reliant on knowing what the composition of the political districts are. In fact, candidates have already begun running for office.[5] Throwing every house, senate, and congressional district into disarray while an appeal is pending causes untold harms upon the candidates and the people of Michigan.

Candidates' personal efforts, activities, duties, and stakes in their candidacies are well underway. These activities require knowing with certainty the geographic parameters of congressional districts with sufficient lead time to permit candidates to develop a campaign strategy that is tailored to the needs of the unique voters in their district. The decision to undertake such an investment in the time, money, and

[5] For example, Representatives Huizenga and Upton have already filed their "Statement of Candidacy" for 2020 with the Federal Election Commission. *See, e.g.,* http://docquery.fec.gov/cgi-bin/forms/H6MI04113/1291750/ (Congressman Upton statement of candidacy filed November 20, 2018); http://docquery.fec.gov/cgi-bin/forms/H0MI02094/1301099/ (Congressman Huizenga statement of candidacy filed December 13, 2018).

material needed to effectively mount an election campaign is based in large part on the existing boundaries of the districts. *See e.g.* Mich. Const., art IV, § 7 (providing that senators and representatives must be "an elector of the district he represents"). Disruption of political geography can cause harm through the disruption of the political process. *See Reynolds*, 377 U.S. at 585 (a court "should act and rely upon general equitable principles . . . to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.").

Candidates will be forced to expend funds in portions of districts, or entire districts, that they will no longer represent if this Court is overruled. Given various state and federal fundraising requirements, the loss of these funds is by very definition an irreparable harm. *See Democratic Party v. Benkiser*, 459 F.3d 582, 586-88 (5th Cir. 2006) (an injury exists when "campaign coffers" are "threatened"). Finally, constituent services and engagement is a significant and important aspect of the work of every elected official, especially those who represent smaller more localized populations. *See McCormick v. United States*, 500 U.S. 257, 272 (1991) ("Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator."). If this Court is overruled on appeal, Intervenors, and indeed every State Senator, State Representative, and Member of the U.S. House from Michigan impacted by the redrawing of lines will have the

confusing, time-consuming, and harmful duty to reach out to and serve new constituents, only to subsequently have those people represented by other representatives.

Here, the Court has ordered the state to pass a law with absolutely no certainty if that law will even be "permitted" to be implemented. Throwing candidates' election machinery into disarray is unconscionable and unreasonable until after an appeal has been fully heard and decided upon.

B. Irreparable Harm Specific to State House Intervenors.

In addition to the harms to be suffered by both State House and Congressional Intervenors, in the absence of a stay there will be significant irreparable harms to the State House intervenors specifically. The State House Intervenors will suffer the following harms absent a stay: (1) the disruption of the legislative process including the postponement of priority legislation; (2) significant expenditures of state funds; and (3) harm to their authority pursuant to the principles of separation of powers and federalism.

Under the best of circumstances, redistricting is a long and drawn out process. *See French v. Boner*, 771 F. Supp. 896, 903 (M.D. Tenn. 1991) ("Fairly apportioning [political] districts pursuant to the many constitutional requirements is a time-consuming and sensitive process. It should not be unduly rushed at the risk of imprudent decision-making.") *affirmed in part without opinion and vacated in part without opinion*, 940 F.2d 659 (6th Cir. 1991); *League of Women Voters v. Commonwealth*, 181 A.3d

1083, 1122 (Penn 2018) (Baer J., dissenting) ("Democracy generally, and legislation specifically, entails elaborate and time-consuming processes."); *Id.* at 1121-22 (Saylor, Baer, Mundy, JJ. dissenting). *See also e.g., Abrams v. Johnson*, 521 U.S. 74, 104 (1994) (citing *Chapman v. Meier*, 420 U.S. 1, 10-14 (1975); *Daggett v. Kimmelman*, 864 F.2d 1122, 1126-27 (3d Cir. 1988); *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 623 (D. S.C. 2002); *Barnett v. City of Chi.*, 969 F. Supp. 1359, 1375 (N.D. Ill. 1997); *Wheat v. Brown*, 2004 MT 33, *P21 (Mont. 2004). Typically, state legislatures have months or even years to plan and prepare for the reapportionment process. That is time separate and apart from that needed for the actual drafting of the maps themselves. Importantly, redistricting legislation is not the only matter pending before the Michigan Legislature.

Michigan must pass a budget by October 1, 2019. *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).[6] The budget must pass both chambers of the Michigan Legislature and be signed into law by the Governor under the same constitutional requirements. Without these actions being completed, the State risks a shutdown of all but the most essential services for its citizens, payments for state government employees and contractors, along with state residents who receive financial assistance of all kinds may be threatened.

[6] https://www.grandhaventribune.com/State/2019/04/13/A-deal-to-fix-Michigan-s-roads-looks-to-roll-into-summer-at-least.

The legislature must consider a gas tax that is purportedly aimed at defraying the costs of repaving roads. *See id.* The Governor has threatened to veto any budget that does not include her proposed $0.45 fuel tax increase. Jonathan Oosting, *Whitmer threatens veto as Senate GOP strips gas tax hike from roads budget*, THE DETROIT NEWS (Apr. 23, 2019)[7]. Additionally, the legislature must act on no-fault auto insurance or risk a federal court imposing new limits on Michigan, which is 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)[8]. The legislature also plans to address the issue of water quality in Michigan, which is the subject of much bi-partisan support. Jonathan Oosting, *5 Years Into Flint Water Crisis and It's Still Not Over*, TRIBUNE NEWS SERVICE & GOVERNING (Apr. 26, 2019)[9]. Finally, the legislature must address issues regarding Michigan's marijuana licensing laws. Larry Gabriel, *Michigan judge slams LARA over marijuana licensing, denies motions to block caregiver sales*, DETROIT METRO TIMES (May 2, 2019)[10].

[7] https://www.detroitnews.com/story/news/politics/2019/04/23/michigan-senate-strips-whitmer-gas-tax-hike-roads-budget/3550463002/.
[8] https://www.detroitnews.com/story/news/local/michigan/2019/04/15/whitmer-road-funding-auto-insurance-deal-win-win/3476191002/.
[9] https://www.governing.com/topics/transportation-infrastructure/tns-flint-water-crisis-continues.html.
[10] https://www.metrotimes.com/detroit/michigan-judge-slams-lara-over-marijuana-licensing-denies-motions-to-block-caregiver-sales/Content?oid=21566820.

C. A Stay Will Not Harm Plaintiffs.

A grant of a stay here will not "substantially injure" Plaintiffs or the Secretary Defendant. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Even given the length of time to appeal, *see supra* at 24-25, a decision of the Supreme Court would allow enough time for primary elections under a remedial plan in the unlikely event one is necessary here. A decision by the Supreme Court in 2019 would allow sufficient time for the implementation of a remedy well before the Michigan primary elections on or around August 4, 2020. Furthermore, the Court largely adopted Plaintiffs' proposed schedule, setting a trial in early 2019. Report From 26(f) Conference and Discovery Plan at 3. (Page ID #278) (ECF 22). Plaintiffs' concern about having districts in place by March 2020 permits ten months for an appeal and ruling from the Supreme Court. Expedited briefing can speed the process to alleviate any of Plaintiffs' concerns. As long as there is sufficient time to implement a remedy, there can be no possible harm to the other parties- especially when Plaintiffs waited over 7 years to bring this lawsuit.

III. GRANTING A STAY IS IN THE PUBLIC INTEREST

Many of the factors showing irreparable harm to the State House Intervenors also show why the public interest is furthered by a stay. *See Nken*, 556 U.S. at 435 (noting that the irreparable harm and public interest "merge" when the government is a party). "[T]he public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and

ultimately. . . upon the will of the people of Michigan being effected in accordance with Michigan law." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (internal quotation and citation omitted). Logically, the public has an interest in any pending legislation impacted by the need to consider and pass redistricting legislation per this Court's order. *See supra* at 28-29; *League of Women Voters v. Commonwealth*, 181 A.3d at 1122 (Penn 2018) (Baer J., dissenting). The public similarly has an interest in a deliberative redistricting process that is not unduly and unnecessarily rushed. *See supra at ; French v. Boner*, 771 F. Supp. at 903. This Court should therefore stay its Order pending appeal the Supreme Court.

Finally, because this Court's order requires late-decade redistricting, there is the concern for confusion among the electorate. A new districting map will displace voters from a district they have voted in for the past eight years. Additionally, absent a stay, these voters will vote again in a district different from their 2020 district, in 2022. All of these confusion interests are amplified by the risk that the process will begin in the legislature, only to grind to a halt if the Supreme Court alters *Rucho* and *Benisek*'s proposed standards. This outcome will waste precious taxpayer resources and legislative time. This counsels in favor of granting a stay. *See, e.g.*, *LULAC*, 548 U.S. at 448 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part) ("But the interests in orderly campaigning and voting, as well as in maintaining communication between representatives and their constituents" weighs against mid-decade redistricting).

CONCLUSION

For the foregoing reasons, this Court should grant Intervenors' Motion to Stay Pending Appeal.

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Respectfully submitted,

Holtzman Vogel Josefiak Torchinsky PLLC

/s/ Jason Torchinsky
Jason Torchinsky
Shawn Sheehy
Phillip Gordon
45 North Hill Drive, S 100
Warrenton, Virginia 20106
(540) 341-8800
JTorchinsky@hvjt.law
ssheehy@hvjt.law
pgordon@hvjt.law
Attorneys for Intervenors

Clark Hill PLC

/s/ Charles R. Spies
Charles R. Spies
Brian D. Shekell (P75327)
David M. Cessante (P58796)
212 E. Cesar Chavez Ave.
Lansing, MI 48906
(517) 318-3100
cspies@clarkhill.com
bshekell@clarkhill.com
dcessante@clarkhill.com
Attorneys for Intervenors

/s/ Peter B. Kupelian
Peter B. Kupelian (P31812)
Kevin A. Fanning (P57125)
151 S. Old Woodward
Suite 200
Birmingham, MI 48009
(248) 642-9692
pkupelian@clarkhill.com
kfanning@clarkhill.com
Attorneys for Intervenors

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