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, *et al.*,

Defendants.

Case No. 2:17-cv-14148

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

THE MICHIGAN SENATE INTERVENORS' MOTION FOR STAY PENDING APPEAL

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THE MICHIGAN SENATE INTERVENORS'
MOTION FOR STAY PENDING APPEAL

The Michigan Senate (the "Senate") and Michigan State Senators Jim Stamas, Ken Horn, and Lana Theis (the "Michigan Senators," and with the Senate, the "Senate Intervenors"), respectfully request a stay of this Court's April 25, 2019 Order while their appeal of right is pending before the United States Supreme Court. The Order enjoined use of the Challenged Districts (as defined in the Order), gave the Michigan Legislature and Governor the opportunity to enact "remedial" maps for the Challenged Districts by August 1, 2019, and effectively amended Michigan's Constitution by reducing senators' four-year terms of office by two years by ordering Secretary of State Benson to conduct special elections in 2020 for certain Senate districts.

In support of this Motion, the Senate Intervenors submit the accompanying Brief. Pursuant to LR 7.1(a), the undersigned counsel sought concurrence. The Congressional and State House Intervenors concurred, but Plaintiffs and Defendant Secretary of State Benson denied concurrence. The Senate Intervenors also submit the accompanying Motion for Immediate Consideration of this Motion for Stay Pending Appeal.

WHEREFORE, the Senate Intervenors respectfully request that the Court grant this Motion and stay the Order while their appeal is pending before the Supreme Court.

Respectfully submitted,

Date: May 3, 2019

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BRIEF IN SUPPORT OF THE MICHIGAN SENATE INTERVENORS' MOTION FOR STAY PENDING APPEAL

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CONCISE STATEMENT OF THE ISSUE PRESENTED

WHETHER THIS COURT SHOULD GRANT THE SENATE INTERVENORS' MOTION FOR STAY PENDING APPEAL WHEN THE SENATE INTERVENORS ARE LIKELY TO SUCCEED ON APPEAL, THE SENATE INTERVENORS AND PUBLIC WOULD BE IRREPARABLY HARMED WITHOUT A STAY, NO ONE WILL BE HARMED BY A STAY, AND THE PUBLIC INTEREST WEIGHS HEAVILY IN FAVOR OF A STAY.

Movants–Senate Intervenors' answer: Yes

Plaintiffs' answer: No

Defendant Secretary of State's answer: No

Intervening Defendants' answer: Yes

This Court should answer: Yes

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CONTROLLING OR MOST APPROPRIATE AUTHORITY

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INTRODUCTION

The Michigan Secretary of State (the "Secretary")—a Democrat who largely agrees with Plaintiffs and this Court on the merits of Plaintiffs' claims—has unequivocally stated that "a special election for State Senate offices during the upcoming State House election cycle in 2020 is not an appropriate remedy under the circumstances, and would be a substantial disruption to the normal election process." (Def.'s Tr. Brief, ECF No. 222, PageID.8161-89, 8191). Disregarding the Secretary's position, in its April 25, 2019 Opinion and Order (the "Order"), this Court ordered the Secretary to conduct a special Senate election in 2020,[1] truncating the four-year term of office established by the Michigan Constitution for senators. In addition, this Court enjoined the use of the districts challenged by Plaintiffs (the "Challenged Districts") in any future election and gave the Michigan Legislature and Governor the opportunity to enact "remedial" maps for the Challenged Districts by August 1, 2019. The Senate Intervenors respectfully request a stay of the Order pending their direct appeal of right to the United States Supreme Court. 28 U.S.C. §§ 1253, 2284; Fed. R. App. P. 8(a).

A stay is warranted because the Senate Intervenors are likely to succeed on the merits of their appeal. This Court's decision contradicts the Supreme Court's

[1] The special Senate election would be held in November 2020, but under the Order, the legislative work to draw the lines for the special election must be completed by August 1, 2019.

thus-far cautious and measured approach to partisan gerrymandering claims. Without discussing its underlying rationale, this Court adopted and applied a three-part standard to Plaintiffs' claims despite the Supreme Court's unwillingness to do so. The standard this Court chose—discriminatory intent, effect, and causation—is an exceedingly low threshold for partisan gerrymandering claims, such that any political considerations by map-drawers would be held unconstitutional. Yet the Supreme Court has stated that legislative districting is inherently political, and some amount of politics may be considered. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 242; 121 S. Ct. 1452; 149 L. Ed. 2d 430 (2001) (noting that "[c]aution is especially appropriate . . . where the State has articulated a legitimate political explanation for its districting decision"). Further, the Supreme Court signaled just last year that it is not ready to conclude that partisan gerrymandering claims are justiciable. The Court unanimously stated in *Gill v. Whitford* that the justiciability of partisan gerrymandering claims is unresolved. 138 S. Ct. 1916, 1926; 201 L. Ed. 2d 313 (2018). Given the Supreme Court's statements in *Gill* and its recent consideration of these issues in *Rucho v. Common Cause* (Sup. Ct. #18-422) and *Lamone v. Benisek* (Sup. Ct. #18-726),[2] the Supreme Court will likely reverse the Order or issue a decision contrary to the Order.

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[2] *Rucho* and *Benisek* involve allegations of unconstitutional partisan gerrymandering, and justiciability of the claims is a key issue in both cases. The

A stay is also warranted to prevent irreparable harm to Senate Intervenors because significant public resources will be expended to draw new Senate maps that will go unused if the Supreme Court reverses the Order. Irreparable harm will also result from disruption of Michigan's electoral system. State senators' constitutionally established four-year terms of office will be cut in half by judicial fiat, and many senators' reelection may be challenged due to uncertainty about Michigan's term limits under the circumstances. In short, electoral chaos will ensue if the Order stands. The public also stands to be harmed by a special election that would increase the cost of elections for taxpayers and candidates and undermine settled expectations. Michigan electors who voted Senators into office for four-year terms will now be told that, contrary to the Michigan Constitution, these Senators will serve only two years. A special election is without precedent as a remedy for partisan gerrymandering claims and should not be ordered here to the detriment of Senate Intervenors and the public. In sum, a stay is warranted.

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BACKGROUND

In December 2017, the League of Women Voters of Michigan and other named individuals (collectively, "Plaintiffs") filed a two-count Complaint for Declaratory and Injunctive Relief claiming that the Enacted Plan (as defined in the Order) violates the First and Fourteenth Amendments. (ECF No. 1).

Supreme Court held arguments in *Benisek* and *Rucho* on March 26, 2019, and a decision is expected before the Court's term ends in June.

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Until her term of office ended on December 31, 2018, former Secretary of State Ruth Johnson vigorously defended the Enacted Plan against Plaintiffs' claims. On January 1, 2019, Secretary of State Jocelyn Benson was sworn into office as former Secretary Johnson's successor and, under Fed. R. Civ. P. 25(d), was automatically substituted as a party in this case in her official capacity. Secretary of State Benson commenced negotiations with Plaintiffs seeking to have a number of districts declared unconstitutional. The negotiations resulted in Plaintiffs and the Secretary filing a Joint Consent Decree with the Court and moving for its approval. (Joint Mot. to Approve Consent Decree, ECF No. 211, PageID.7857, 7880; see also Def. Sec'y's Tr. Br., ECF No. 222, PageID.8188). The proposal did not call for a special Senate election, but instead argued strongly against the prospect of one. (Br. in Supp. of Joint Mot. to Approve Consent Decree, ECF No. 211, PageID.7867).

Shortly after Secretary Benson was elected, the Senate Intervenors moved to intervene to fill the adversarial void left by the Secretary of State's changed position. (ECF No. 206 and 208). On February 1, 2019, this Court: (1) denied the Motion to Approve Joint Consent Decree (Order Den. Joint Mot., ECF No. 235, PageID.8377); (2) granted the Senate Intervenors' Motions to Intervene (ECF No. 237); and (3) denied all motions for stay (ECF No. 238). The trial was scheduled to begin just four days later on February 5, 2019. Given the proximity to the

United States Supreme Court's consideration of partisan gerrymandering claims in *Rucho* and *Benisek*, the Senate Intervenors supported the Congressional and House Intervenors' emergency application for stay to the Supreme Court. That application was denied, and the trial in this case was held from February 5-7, 2019. (See Trial Tr. vols. 1-3, 2/5/19-2/7/19, ECF Nos. 248-250).

Although this Court rejected the Consent Decree, Secretary Benson announced prior to trial that she "d[id] not intend to defend the current apportionment plans at issue in this case." (Order Granting Pls.' Mot. For Determination of Privilege, ECF No. 216, PageID.8122 n.1). Despite this pronouncement, Secretary Benson took the position in both her counsel's opening statement and her Trial Brief that, "a special election for State Senate offices during the upcoming State House election cycle in 2020 is not an appropriate remedy under the circumstances, and would be a substantial disruption to the normal electoral process." (Def.'s Tr. Brief, ECF No. 222, PageID.8191).

On April 25, 2019, this Court enjoined use of the Challenged Districts in any future election and ordered a special election for certain Senate seats in November 2020.[3] The Court largely ignored that the Supreme Court will be imminently issuing a ruling in *Benisek* and *Rucho* and instead noted that the United States

[3] As explained below, the Order could require a special election for *all* of Michigan's 38 Senate districts—not just the 10 Senate districts included in the Challenged Districts—depending on how the new maps are drawn.

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Supreme Court has not overturned *Davis v. Bandemer*, 478 U.S. 109; 106 S. Ct. 2797; 92 L. Ed. 85 (1986), which found that a political gerrymandering claim was justiciable. This Court applied a standard articulated by the three-judge panel in *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 800 (M.D.N.C. 2018), to Plaintiffs' Fourteenth Amendment vote-dilution claims and applied similar standards to their First Amendment claims on vote-dilution and associational theories. (ECF No. 268, PageID.11616-17).

The Court found that all 34 Challenged Districts[4] are unconstitutional partisan gerrymanders that violate Plaintiffs' First and Fourteenth Amendment rights by diluting the weight of Democratic votes and/or burdening associational rights.[5] (ECF No. 268, PageID.11690). As a result, the Court "enjoined the use of the Challenged Districts in future elections." (*Id.* at PageID.11702). Then the Court examined whether it should grant Plaintiffs' request to hold a special election with respect to the challenged Senate districts. Based on an "equitable weighing process," the Court ordered a special election in 2020 for "the Senate districts that are included in the Challenged Districts, and for any Senate district

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[4] Plaintiffs challenged the following districts: Congressional Districts 1, 4, 5, 7, 8, 9, 10, 11, and 12; Senate Districts 8, 10, 11, 12, 14, 18, 22, 27, 32, and 36; and House Districts 24, 32, 51, 52, 55, 60, 62, 63, 75, 76, 83, 91, 92, 94, and 95.

[5] This Court found that Plaintiffs lacked standing to challenge Senate Districts 10, 22, and 32 and House Districts 52, 62, 76, and 92 on vote-dilution theories (ECF No. 268, PageID.11656-57), but found that they had standing to challenge all 34 districts on a First Amendment associational theory (ECF No. 268, PageID.11657).

affected by any remedial map approved by this Court." (ECF No. 268, PageID.11701-02). Such relief in a partisan gerrymandering case is unprecedented. The Court allowed the Michigan Legislature and Governor until August 1, 2019, to enact remedial maps consistent with the Order. (*Id.* at PageID.11702).

STANDARD OF REVIEW

Courts use a four-factor balancing test to evaluate a motion for stay pending appeal under Fed. R. App. P. 8(a), weighing the merits of the appeal, the public interest, and the respective harms from granting or denying a stay:

1. The likelihood that the party seeking the stay will prevail on the merits of the appeal;
2. The likelihood that the moving party will be irreparably harmed absent a stay;
3. The likelihood that others will be harmed if the court grants the stay; and
4. The public interest in granting the stay.

Hilton v. Braunskill, 481 U.S. 770, 776; 107 S. Ct. 2113; 95 L. Ed. 2d 724 (1987); *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

ARGUMENT

This Court should grant the Senate Intervenors' Motion for Stay because they are likely to prevail on appeal and because they will be irreparably harmed if this Court does not grant a stay. Further, a stay will not harm any of the other parties in this matter, and there is a strong public interest in granting the stay.

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I. THE SUPREME COURT WILL LIKELY REVERSE THIS COURT'S ORDER ON APPEAL BECAUSE PARTISAN GERRYMANDERING CLAIMS ARE NOT JUSTICIABLE AND, EVEN IF THEY WERE, A SPECIAL ELECTION IS NOT AN APPROPRIATE REMEDY.

The Senate Intervenors are likely to prevail on the merits of their appeal to the Supreme Court for several reasons. Most prominently, the Supreme Court has not found that partisan gerrymandering is unconstitutional, as this Court held, or even that such a claim is justiciable. (4/25/19 Op. & Order, ECF No. 268, PageID.11561). To the contrary, the Supreme Court stated in *Gill* that the justiciability of claims alleging partisan gerrymandering is an open question:

> 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*. Here we do not decide the latter question . . . .

138 S. Ct. at 1929. Even if partisan gerrymandering were justiciable, it is not per se unconstitutional. Further, a special Senate election that would disrupt regular governmental operations by removing legislators from office and truncating four-year terms is not an appropriate remedy.

A. The Supreme Court Has Not Found Partisan Gerrymandering Claims To Be Justiciable or Provided a Standard by Which to Judge Constitutionality.

The Senate Intervenors are likely to succeed on the merits of their appeal because this Court decided that partisan gerrymandering is categorically

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unconstitutional, contradicting decades of Supreme Court precedent that refused to make such a finding. Far from holding that partisan gerrymandering is *unconstitutional*, the Supreme Court has not definitively decided whether such claims are *justiciable*. Although in *Davis v. Bandemer,* 478 U.S. 109 (1986), the Supreme Court determined that a partisan gerrymandering claim was justiciable, the Justices could not agree on a standard by which to judge whether the gerrymander was unconstitutional and have not agreed on one to date.

In fact, since *Bandemer*, the Court has stepped back from the position that partisan gerrymandering claims are justiciable. In *Vieth v. Jublirer*, the Court explicitly reconsidered its *Bandemer* holding. 541 U.S. 267, 272, 277; 124 S. Ct. 1769; 158 L. Ed. 2d 546 (2004). A plurality of the *Vieth* Court found that political gerrymandering challenges are nonjusticiable, with four justices deciding that no manageable standards exist for purely political gerrymandering cases. *Id*. at 281, 292. Then, in *Gill v. Whitford*, the Supreme Court unanimously acknowledged that it does not know "what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines." 138 S. Ct. at 1926. Allegations of unconstitutional political gerrymandering are, therefore, "an unsettled kind of claim th[e] Court has not agreed upon, *the contours and justiciability of which are unresolved*." *Id.* at 1934 (emphasis added).

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The Supreme Court has been wary of entertaining partisan gerrymandering claims because there are, as of yet, no judicially discoverable and manageable standards for resolving them. While several lower federal courts have adopted and applied standards, they have chosen those standards arbitrarily, without deciding the underlying question: How much politics is too much in the context of redistricting—an inherently political process? *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 844-52; *Benisek v. Lamone*, 348 F. Supp. 3d 493, 513 (D. Md. 2018); *Shapiro v. McManus*, 203 F. Supp 3d 579, 594 (D. Md. 2016). Indeed, this Court spent only about four pages of its 146-page Order discussing justiciability and the substantive standard by which to judge partisan gerrymandering claims. (4/25/19 Op. & Order, ECF No. 268, PageID.11614 *et seq.*). If the Supreme Court has not been able to define the contours of partisan gerrymandering claims during the decades it has considered them, then surely this Court's analysis would be robust. But instead, this Court perfunctorily adopted a standard that effectively prohibits *any* partisan considerations in redistricting.

The Supreme Court does not agree. It has consistently stated that some amount of politicking in districting is permissible. *See, e.g.*, *Hunt v. Cromatie*, 526 U.S. 541, 551; 119 S. Ct. 1545; 143 L. Ed. 2d 731 (1999); *Gaffney v. Cummings*, 412 U.S. 735, 753; 93 S. Ct. 2321; 37 L. Ed. 2d 298 (1973); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (ALITO, J., concurring in part and dissenting

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in part); *Vieth*, 541 U.S. at 286 (plurality opinion). Because some political considerations may be taken into account, this Court's adoption of a standard taken from racial gerrymandering cases—in which no amount of racial discrimination is permissible—was inapposite and unsupportable.

Political gerrymandering claims are dissimilar to other types of First and Fourteenth Amendment claims because districting is inherently political. The issue underlying partisan gerrymandering claims is the separation of powers. The United States Constitution entrusts districting to state legislatures through the Elections Clause[6] because elections are political and best left to legislatures to regulate. *See Miller v. Johnson*, 515 U.S. 900, 914; 115 S. Ct. 2475; 132 L. Ed. 2d 762 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . . ."). Partisan gerrymandering is a nonjusticiable political question for this reason. As noted by the Supreme Court in *Vieth*, "Sometimes . . . the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." 541 U.S. at 277. This case presents one such claim. Because the Supreme Court will likely rule that partisan gerrymandering claims are nonjusticiable, a stay is appropriate pending the Senate

[6] Article I, section 4 of the U.S. Constitution states: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof . . . ."

Intervenors' appeal. *See also Merritt-Ruth v. Latta*, No. 14-cv-12858, 2015 U.S. Dist. LEXIS 104999, at *14 (E.D. Mich. Aug. 11, 2015) (granting a stay pending appeal in part because the issue at bar was "debatable amongst jurists of reason").

B. The Senate Intervenors Are Also Likely to Succeed on the Merits of Their Laches and Standing Arguments Because No Senate Election Is Scheduled for 2020.

As a preliminary matter, this Court erred when it held that laches does not bar Plaintiffs' challenges against the Senate districts. Senate elections occur every four years under the Michigan Constitution, art. IV, § 2, and occurred most recently in 2014 and 2018. A regularly scheduled Senate election will not occur again until 2022. In contrast, elections for the U.S. and Michigan Houses occur every two years. U.S. Const. art. I, § 2; Mich. Const. art. IV, § 3.

While the Challenged Districts would be used in 2020 for state and federal House elections if this Court did not grant prospective injunctive relief, the challenged Senate districts will *never* be used again regardless of what this Court does. The decennial census will take place in 2020, and all district lines will be redrawn by the Independent Citizens Redistricting Commission[7] in 2021 based on the new census data. The Senate election in 2022 will use these new districts.

[7] In November 2018, Michigan voters approved Proposal 18-2 to amend the Michigan Constitution to "establish a commission of citizens with exclusive authority to adopt district boundaries for the Michigan Senate, Michigan House of Representatives and U.S. Congress, every 10 years."

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Plaintiffs "ask this Court to declare the Challenged Districts unconstitutional and *enjoin their use in future elections* to prevent further harm to their constitutional rights." (4/25/19 Op. & Order, ECF No. 268, PageID.11611). As explained in this Court's Order, laches cannot bar a plaintiff's claims for prospective injunctive relief from ongoing harms because any past dilatoriness by a plaintiff is "unrelated to a defendant's ongoing behavior that threatens future harm." (4/25/19 Op. & Order, ECF No. 268, PageID.11561.) Laches does not apply, therefore, to prevent relief with respect to future elections that would violate Plaintiffs' constitutional rights. But, laches may bar claims for past harms.

For the Senate districts, the only alleged harm has already occurred: Senate elections happened in 2014 and 2018. No future election will use the challenged Senate districts; prospective relief as to such an election is not possible or needed. Laches may—and does—bar claims against the Senate districts because Plaintiffs delayed so long that prospective relief is not needed. Plaintiffs' unreasonable delay has prejudiced the Senate Intervenors because: (1) redrawing district boundaries using outdated census data from 2010 would violate the United States Constitution's mandate for districts of equal populations;[8] and (2) ordering a

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[8] Redrawing districts using outdated census data from 2010 would violate the United States Constitution's mandate for districts of equal populations due to population shifts over the past nine years. As the Senate Intervenors have noted, the U.S. Census Bureau estimates that 27 Michigan counties have lost an aggregate

special election at this late hour would truncate Senators' four-year terms of office established by the Michigan Constitution, as discussed in detail below.

Plaintiffs lack standing to challenge Senate districts for the same reason that laches applies to Plaintiffs' claims against Senate districts: there is no regularly scheduled election for the Senate in 2020. Harm that may have occurred to Plaintiffs, if any, happened at the voting booth, during an election, which is the only time when districting may affect voters. Indeed, this Court based its standing decision in part on the fact that "at least one Individual or League Plaintiff resides in the Challenged District . . . [and] intends to live in the district in 2020 . . . ." (4/25/19 Op. & Order, ECF No. 268, PageID.11623.) In this case, Plaintiffs seek prospective injunctive relief to prevent the Challenged Districts from being used in future elections. But there is no harm to prevent because no future Senate election will ever use the Challenged Districts; the remedy sought is gratuitous. Therefore, the Supreme Court will likely reverse this Court's finding that Plaintiffs had standing as to their claims against Senate districts.

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C. The Senate Intervenors Are Likely to Succeed on the Merits of Their Appeal Challenging the Special Election as a Remedy.

The Supreme Court will also likely reverse this Court's Order requiring the Secretary to hold a special Senate election in 2020 because equitable

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population of 150,000 people, with about 70,000 of those having left Wayne County alone. (ECF No. 254, PageID.10385.)

considerations weigh heavily against it. Notably, no court has ever ordered a special election that would truncate the terms of legislators in contravention of a state constitution as a remedy for a partisan gerrymander.

This Court relied on *North Carolina v. Covington*, 137 S. Ct. 1624, 1625-26; 198 L. Ed. 2d 110 (2017), a racial gerrymandering case,[9] weighing *Covington*'s equitable factors for and against a special election as a remedy. However, this Court improperly weighed the equitable factors. The Court weighed the first

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[9] This case is distinguishable from *Covington* because racial gerrymandering is not legally analogous to partisan gerrymandering. According to the Supreme Court, "[l]aws that explicitly distinguish between individuals on racial grounds fall within *the core* of [the Equal Protection Clause's] prohibition." *Shaw v. Reno*, 509 U.S. 630, 642; 113 S. Ct. 2816; 125 L. Ed. 2d 511 (1993) (emphasis added). In contrast, the Supreme Court has not determined whether the Equal Protection Clause (or First Amendment) similarly prohibits political gerrymandering. Indeed, in *Bush v. Vera*, the Supreme Court contrasted racial and political gerrymandering, subjecting the former to strict scrutiny, while allowing the latter:

> If the State's goal is otherwise constitutional political gerrymandering, it is free to use . . . political data . . . precinct general election voting patterns, precinct primary voting patterns, and legislators' experience—to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district. . . . But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.

517 U.S. 952, 968; 116 S. Ct. 1941; 135 L. Ed. 2d 248 (1996). Therefore, it is not at all clear that *Covington*'s equitable balancing test applies in the context of partisan gerrymandering claims, and even if it does, partisan gerrymandering is not a constitutional violation of the same severity as racial gerrymandering.

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factor—the nature and severity of the constitutional violation—in favor of a special election because, in its opinion, "the nature of the constitutional violation is extremely grave." (4/25/19 Op. & Order, ECF No. 268, PageID.11699). But, as discussed at length, the Supreme Court has not found partisan gerrymandering claims to be justiciable, let alone unconstitutional or "extremely grave." To the contrary, the Supreme Court has permitted political gerrymandering in the past. *See, e.g.*, *Vera*, 517 U.S. at 968; *Hunt*, 526 U.S. at 551; *Gaffney*, 412 U.S. at 753. This Court erred by weighing this factor in favor of a special election.

This Court also found that the second factor—judicial restraint and state sovereignty—weighed in favor of ordering a special Senate election, reasoning that inconvenience to legislators and truncation of senators' four-year terms is not an intrusion on state sovereignty. (4/25/19 Op. & Order, ECF No. 268, PageID.11700.) But "inconvenience" is not the interest to be weighed here. The State has a sovereign interest in: (1) controlling the integrity of its system of elections, free from interference by federal courts; (2) maintaining the reasonable, settled expectations of legislators and their constituents in the results of previous elections; (3) determining at the state level the most appropriate remedy for any constitutional infirmities in its districting plans;[10] and (4) preventing increased

[10] Michigan's people have determined and put in place an appropriate remedy for any alleged partisan gerrymandering by adopting a constitutional amendment during the November 2018 election that established the Independent Citizens

costs of elections and campaigns to taxpayers and candidates. Each of these state interests counsels against this Court ordering a special Senate election.

On top of these interests, the State has an overarching interest in maintaining the system and parameters of government enshrined in its Constitution, adopted by vote of the people in 1962. The Michigan Constitution provides four-year terms for senators, running concurrently with that of the Governor. Mich. Const. art. IV, § 2. If conducted, the special election would truncate the terms of senators from certain districts to two years. While some legislators will be forced to run for reelection, others may be challenged based on Michigan's term limits.[11] A special Senate election that contravenes Michigan's Constitution would undoubtedly disrupt the ordinary operation of the Legislature by ousting a portion of its legislators from their representative seats. Thus, this Court's Order interferes with Michigan's sovereignty, even though the challenged Senate districts will never be used again in a Michigan election.

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Redistricting Commission. The Commission will draw Michigan's district lines based on nonpartisan considerations beginning with the 2020 census.

[11] The Michigan Constitution provides, "No person shall be elected to the office of state senate more than two times." Mich. Const. art. IV, § 54. Whether this provision would permit second-term senators to run for reelection if their terms are truncated by this Court is a question that is already generating debate among constitutional scholars in Michigan. See Exhibit A, The Detroit News, *Mich. lawmakers caught in middle of gerrymandering order, term limits* (April 29, 2019, 12:01 a.m.) https://www.detroitnews.com/story/news/politics/2019/04/29/mich-lawmakers-caught-middle-gerrymandering-order-term-limits/3588446002/

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While courts have equitable power to craft appropriate remedies, that power is not without limit. The Supreme Court has stated that, "[i]n the reapportionment context, it is the duty of a court seeking to remedy an unconstitutional apportionment to right the constitutional wrong *while minimizing disturbance of legitimate state policies*." *Sixty-Seventh Minn. State S. v. Beens*, 406 U.S. 187, 202, 92 S. Ct. 1477, 1486 (1972) (emphasis added). The Supreme Court has also noted that "a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable . . . demands on a State in adjusting to the requirements of the court's decree." *Reynolds v. Sims*, 377 U.S. 533, 585; 84 S. Ct. 1362 (1964). The Sixth Circuit has counseled against truncating a state elected official's term of office to meet constitutional requirements.[12] *French v. Boner*, 963 F.2d 890, 891-92 (6th

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[12] While other courts have ordered special elections that truncate terms of office, they have never done so to remedy a partisan gerrymandering claim in a way that contradicts a state constitution. Courts have only truncated terms of office to remedy racial gerrymandering and malapportioned districts of unequal populations. *See, e.g.*, *Covington*, 137 S. Ct. at 1625-26 (examining equitable factors when deciding whether to truncate existing legislators' terms by ordering a special election as a remedy for racial gerrymandering); *Travia v. Lomenzo*, 381 U.S. 431; 85 S. Ct. 1582; 14 L. Ed. 2d 480 (1965) (discussing three-judge panel's order providing for truncated one-year terms after unequally populated districts were found to violate the Equal Protection Clause); *In re Apportionment Law Appearing As Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1046 (Fla. 1982) (finding that "the courts have both the power and the duty to truncate the terms of legislators elected from malapportioned districts which violate the 'one-person one-vote' command of the equal protection clause" in part because the Florida Constitution explicitly provided for truncated terms after redistricting).

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Cir. 1992) (refusing to order new elections before terms expired, noting that such a decision would "increase the costs of elections for taxpayers and candidates . . . [and] undermine the settled expectations that both voters and elected officials hold as a result of the [previous] election."). Thus, courts recognize that disruption of a state's ordinary electoral and legislative processes through a special election is an extraordinary remedy and that states have an interest in protecting the terms of elected officials.[13] This interest weighs against ordering a special election.

Finally, this Court also found that the third factor—disruption to the ordinary processes of government—weighed in favor of ordering a special election. As to this factor, too, the Court erred. It only considered that the *timing* of a special election would not cause substantial disruption because congressional and state House elections are already scheduled in 2020. It did not consider the myriad other elements of Michigan's ordinary government processes that would be upset. These considerations, previously discussed, include the upheaval caused by the special Senate election and campaigns, truncation of senators' constitutionally established four-year terms, and the potential impact of term limits on second-term

[13] Furthermore, Secretary Benson agrees with the Senate Intervenors that the ordered special election will "disrupt the election system in Michigan." (Trial Tr. vol. 1, 2/5/19 ECF No. 248, PageID.8736.) As Michigan's chief elections officer, Secretary Benson is in a better position than this Court to determine what remedy would or would not disrupt the election system, and this Court's disregard for her position on the issue evidences its intrusion on state sovereignty. In this case, both judicial restraint and Michigan's sovereign interests weigh against ordering a special election.

senators. Transition periods always come with costs, and transitioning between legislators in the middle of a term would be no different. Disruption of government from a special election would be inevitable. The Court erred when it failed to take these considerations into account and should have weighed this factor against ordering a special election, as well. Overall, all three equitable *Covington* factors counsel against this Court's Order for a special election, and the Supreme Court will likely reverse it on appeal.

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II. THE SENATE INTERVENORS WILL SUFFER IRREPARABLE HARM FROM DISRUPTION OF THE ELECTORAL PROCESS AND LEGISLATIVE OPERATION IF A STAY IS NOT GRANTED.

The Senate Intervenors will be irreparably harmed if the Court does not issue a stay pending appeal. According to the Sixth Circuit, to evaluate "the harm that will occur depending upon whether or not the stay is granted, [the court] generally look[s] to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Griepentrog*, 945 F.2d at 154 (citations omitted). "[T]he harm alleged must be both certain and immediate, rather than speculative or theoretical." *Id.*

The injury that will be incurred in the absence of a stay here is abundantly clear. This Court has taken the extraordinary and unprecedented step of ordering a special Senate election, as well as giving the Michigan Legislature only until August 1, 2019, to pass "remedial" maps and have them signed by the Governor. Absent a stay, both remedies in this case will cause irreparable harm to the

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Michigan electorate, the electoral process, and to the impacted senators who may see their four-year terms under the Michigan Constitution truncated.

To draw remedial maps prior to August 1, 2019, the Michigan Legislature will be forced to devote massive resources—including hiring map-drawers, lawyers, experts, and other staff, purchasing appropriate software, and expending untold hours reviewing and revising any proposed plans—to ensure compliance with Apol standards and this Court's decision. The financial cost to accomplish such efforts would be substantial, to say the least, and will be borne by taxpayers. To start the process while the Supreme Court is considering the Senate Intervenors' direct appeal—and the *Rucho* and *Benisek* cases—will cause confusion for the electorate and be financially costly (not to mention requiring elected officials to devote unnecessary time and resources to the districting process that would be otherwise spent on issues that will help Michigan residents).

With respect to the special election, Secretary Benson acknowledged that it "is not an appropriate remedy under the circumstances, and would be a substantial disruption to the normal electoral process." (Def.'s Tr. Brief, ECF No. 222, PageID.8191). The impact of this remedy is severe and irreparable. As discussed above, special elections interfere with the integrity of the election system and state sovereignty. Moreover, as the Senate Intervenors have previously noted for this Court (ECF No. 254, PageID.10385), the 2010 census data is outdated. Districts

created using that data would very likely contain unequal populations that violate the Equal Protection Clause's one-person, one-vote standard.

The practical result of ordering special elections in Senate districts is a violation of Mich. Const. art. IV, § 2, which mandates four-year Senate terms. A remedy that contravenes the Michigan Constitution irreparably harms the Senate Intervenors and impugns Michigan's right as a sovereign to govern without federal interference. Constitutional violations are routinely recognized as triggering irreparable harm. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 996 (S.D. Ohio 2013) (citing *Elrod v. Burns*, 427 U.S. 247, 373 (1976)). If "a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). In other words, the threatened violation of a constitutional right is irreparable harm per se. Granting a stay would avoid such irreparable harm.

III. NO OTHER PARTY WILL BE HARMED BY GRANTING A STAY AND THE PUBLIC INTEREST FAVORS GRANTING A STAY.

As explained at length above, the harm at issue here—both to state senators and the electorate—is irreparable absent a stay. But granting a stay will harm no others. Indeed, the status quo will continue during the stay pending appeal. As this Court is aware, the parties to this case have a direct appeal of right to the United States Supreme Court and that Court is already considering issues that may be dispositive of this case. Indeed, the Senate Intervenors believe that there is a

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very strong likelihood that the Supreme Court will find that partisan gerrymandering claims are not justiciable before the end of the Court's term in June. Thus, this case may be moot in the very near future, which means that staying this Court's decision would have no impact on any other person in the State of Michigan. Even if the Supreme Court does not so hold, a stay would not harm any others as there would still be time to redraw the required maps if the Supreme Court were to affirm this Court's holding. As this Court noted, there are eighteen months before the November 2020 election, which would provide time for any remedial plans to be put in place without expending unnecessary resources.

Relatedly, there is a strong public interest in granting a stay pending appeal in this case. First, the public has a strong interest in the efficient use of government dollars. This Court's Order requires the Senate Intervenors, the Legislature as a whole, and ultimately the taxpayers to expend significant legislative funds and resources toward the extraordinary costs of developing a new apportionment plan. The Senate Intervenors, legislative staff, and others would also waste energy, time, attention, and effort to draw new Senate district maps that will go unused if the Supreme Court reverses the Order for a special election. This human capital could be better used to move current legislative priorities forward.

Additionally, a stay is appropriate and in the public interest in this case because two cases addressing issues that are potentially dispositive of partisan

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gerrymandering claims are currently pending before the United States Supreme Court and will be decided before the end of the Court's term on June 24, 2019: *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 799 (M.D.N.C. 2018) and *Benisek v. Lamone*, 348 F. Supp. 3d 493, 513 (D. Md. 2018). The dispositive issues to be decided by the Supreme Court include whether partisan gerrymandering claims are justiciable, whether plaintiffs have standing to pursue those claims, and if so, what the appropriate standard governing disposition and resolution of the claims should be. The Supreme Court heard argument on these issues in March 2019, and its decision is imminent. Awaiting guidance from the Supreme Court is in the public interest because it will provide a legal standard by which to judge the case and prevent any conflict with this Court's Order. Waiting for such guidance will also prevent confusion among Michigan citizens as to the status of the congressional and state legislative districts and their representation in the legislatures. Issuing a stay of the Order during the pendency of the Senate Intervenors' appeal would provide enough time to receive the *Rucho* and *Benisek* decisions.

CONCLUSION

For the foregoing reasons, the Senate Intervenors respectfully request that this Court grant the Motion for Stay Pending Appeal.

Respectfully submitted,

Date: May 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

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