

**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 SENATE INTERVENORS' EX
PARTE MOTION FOR
IMMEDIATE CONSIDERATION
OF MOTION FOR STAY PENDING
APPEAL**

**THE SENATE INTERVENORS' EX PARTE MOTION FOR IMMEDIATE
CONSIDERATION OF MOTION FOR STAY PENDING APPEAL**

Intervenors 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"), through their attorneys, Dykema Gossett PLLC, hereby move for immediate consideration of their Motion for Stay Pending Appeal and respectfully request expedited briefing on the following schedule:

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

This Motion is accompanied by a Brief in Support pursuant to LR 7.1(d).

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.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: May 3, 2019

By: /s/ Jason T. Hanselman

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**THE MICHIGAN SENATE'S AND
THE MICHIGAN SENATORS'
BRIEF IN SUPPORT OF THEIR
EX PARTE MOTION FOR
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**THE MICHIGAN SENATE’S AND THE MICHIGAN SENATORS’ BRIEF
IN SUPPORT OF THEIR EX PARTE MOTION FOR IMMEDIATE
CONSIDERATION OF MOTION FOR STAY PENDING APPEAL**

In support of their Ex Parte Motion for Immediate Consideration of their Motion for Stay Pending Appeal, the Senate Intervenors, through their attorneys, Dykema Gossett PLLC, state as follows:

1. 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 (ECF No. 1) against the Michigan Secretary of State in her official capacity, asserting that Michigan’s current congressional and state legislative apportionment plan is unconstitutional pursuant to 42 U.S.C. § 1983, § 1988, and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs subsequently narrowed their challenge to thirty-four congressional and state legislative districts (the “Challenged Districts”).

2. On April 25, 2019, this Court issued an Order and Opinion (ECF No. 268) (the “Order”) declaring the Challenged Districts unconstitutional under the First and Fourteenth Amendments, enjoining further use of the Challenged Districts, giving the Legislature the opportunity to pass—and the Governor to sign into law—remedial district maps by August 1, 2019, and instructing the Secretary of State to hold special elections in November 2020 for the Senate districts included in the Challenged Districts and any “affected” Senate districts.

3. Senate Intervenors are appealing this Court’s decision to the United States Supreme Court pursuant to 28 U.S.C. § 1253.

4. Two cases that will have a direct impact on the outcome of this case—*Rucho v. Common Cause* (Sup. Ct. #18-422) and *Lamone v. Benisek* (Sup. Ct. #18-726)—are currently pending before the United States Supreme Court. Those cases will offer further guidance for analyzing claims of partisan gerrymandering, and the Supreme Court’s decisions may ultimately prove dispositive in this case. Decisions are expected by June 24, 2019, the end of the Supreme Court’s current term.

5. Through their Motion for Stay Pending Appeal and Brief in Support, the Senate Intervenors respectfully request that this Court stay the Order in this case pending resolution of the appeal to the United States Supreme Court.

6. Immediate consideration of the Senate Intervenors’ Motion for Stay Pending Appeal is requested to prevent irreparable harm to the Senate Intervenors and the public. Absent an immediate stay of this Court’s Order, the Michigan Legislature will have to begin in earnest the enormous effort required to comply with this Court’s August 1, 2019 deadline. This effort will absorb a large portion—if not all—of the limited legislative resources available to the Senate Intervenors, which must also be allocated to other legislative priorities currently under consideration, such as the State budget, road funding, and schools, to name a few.

7. If the Supreme Court modifies, reverses, or vacates the Order, the Senate Intervenors will have needlessly expended state resources and put other legislative priorities on hold, to the detriment of all Michigan taxpayers. This needless waste can be avoided if this Court grants a stay until the Senate Intervenors' appeal is resolved. If the Supreme Court affirms this Court's Order, there will be enough time remaining before the November 2020 elections to draw and implement new district maps; if the Supreme Court reverses the Order, then the Senate Intervenors will have saved taxpayer resources and focused them on other legislative priorities.

8. Looming over the Michigan Legislature's efforts to draft redistricting legislation—as well as this Court's Order—are the Supreme Court's pending rulings in *Rucho* and *Benisek*. This Court's opinion is premised on the very standards enunciated in those cases. (4/25/19 Op. & Order, ECF No. 268, PageID.11616 (“We will evaluate Plaintiffs’ Fourteenth Amendment Equal Protection claims under the standard articulated by the *Rucho* panel.”); *id.* at PageID.11617 (“We will apply a similar three-part test for adjudicating Plaintiffs’ First Amendment claims.”)). This Court's Order is wholly contingent upon the Supreme Court affirming, in total, the lower court rulings in *Rucho* and *Benisek*. More likely, because partisan gerrymandering cases involve important questions of unsettled law, this Court's decision will be subject to modification, reversal, or even dismissal for lack of

justiciability. The Supreme Court is poised to decide these questions in *Rucho* and *Benisek* in the very near future, and an immediate stay is warranted to allow the Supreme Court to decide an issue so integral to the foundation of the Order.

9. Indeed, if the Senate Intervenors must immediately begin drawing new districts, in less than two months the Supreme Court's decisions in *Rucho* and *Benisek* may directly impact how districts maps must be drawn and the Senate Intervenors would be required to start their work again to accommodate the new holdings. A stay with immediate effect would prevent such irreparable harm for both the Senate Intervenors and Michigan taxpayers. The Senate Intervenors also question whether requiring them to redraw maps using 10-year-old census data inevitably leads to maps that violate principles of one person one vote, due to the indisputable population shifts since the last census. For example, thousands of residents moved out of the City of Flint over the last several years, but the Senate Intervenors would have to draw the maps as if those people still lived there.

10. Additionally, this Court went farther than any prior court when it applied the factors discussed by the Supreme Court in *North Carolina v. Covington*, 137 S. Ct. 1624; 198 L. Ed. 2d 110 (2017) (per curium) and reduced, modified and/or eliminated several Michigan Constitutional requirements for electing State Senators: (a) four-year terms for Senators; (b) simultaneous elections for all Senators; and (c) concurrent Senate and gubernatorial elections. This Court's Order changed those

requirements for some but not all sitting Senators. There are profound questions of federalism in this Court's decision, specifically as to the scope and extent that this Court can mandate that the Michigan Legislature ignore Michigan's Constitution. The Supreme Court must consider these issues before this Court orders compliance.

11. If this Court does not stay the Order pending appeal to the Supreme Court, the Senate Intervenors will be irreparably harmed because they will be forced to expend state resources and taxpayer dollars preparing for a special election that conflicts with the state and federal Constitutions, disrupts Michigan's electoral and legislative systems, and may ultimately never occur, which will cause confusion in the electorate and engender disillusionment with the electoral process, harming its integrity.

WHEREFORE, for the foregoing reasons, the Senate Intervenors respectfully request that this Court grant their Motion for Immediate Consideration of their Motion for Stay Pending Appeal.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: May 3, 2019

By: /s/ Jason T. Hanselman

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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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