IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

OHIO A. PHILIP RANDOLPH INSTITUTE, *et al.* Plaintiffs, v. LARRY HOUSEHOLDER, Speaker of the Ohio House of Representatives, *et al.* Defendants.	Case No. 1:18-cv-357 Judge Timothy S. Black Judge Karen Nelson Moore Judge Michael H. Watson Magistrate Judge Karen L. Litkovitz

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL AND INTERVENORS' EMERGENCY MOTION FOR STAY PENDING APPEAL

In a continuing effort to run out the clock, Defendants and Intervenors rehash the arguments rejected by this Court in its February 8, 2019 Order denying Defendants' motion to stay trial. *See* Order Denying Motion to Stay Trial, ECF No. 213. In particular, Defendants and Intervenors contend that the Supreme Court will issue rulings in the North Carolina and Maryland cases that will be dispositive in this case and necessarily result in reversal or remand. *See* Defendants' Emergency Motion to Stay Injunction Pending Appeal ("Defendants' Motion"), ECF No. 266 at 8; Intervenors' Emergency Motion for Stay Pending Appeal ("Intervenors' Motion"), ECF No. 268-1 at 4-5. As this Court noted in its February 8 Order, however, "whether *Rucho* and *Benisek* will be dispositive in this case is unclear." Order Denying Motion to Stay Trial, ECF No. 213 at 3. The same is true today.

This Court already refused an invitation to participate in the folly of "predicting what the Supreme Court might do in *Rucho* and *Benisek*." *Id.* It should reject that same invitation again today. In the intervening three months since this Court's Order denying the previous motion for

a stay, all that has changed is that this Court has invested in the trial process and produced its May 3, 2019 Opinion addressing the applicable legal and factual issues in depth. There is no cause for the Court now to abandon that substantial effort and no basis to believe that the Court's well-reasoned opinion will not be sustained.

Dismissing this Court's careful and robust analysis as "vague" and "standardless," Defendants and Intervenors declare that they are likely to succeed at the Supreme Court. Defendants' Motion, ECF No. 266 at 10. They have not sufficiently supported this assertion and instead argue that they have a "fair prospect" of success. *Id*. at 8-11. This is not the law.

Defendants' and Intervenors' suggestion that the Ohio Legislature will be prejudiced by meeting this Court's schedule has it exactly backwards. Notwithstanding the fact that the Legislature ***intentionally*** enacted an unconstitutional set of congressional districts, this Court extended the Legislature the courtesy of an opportunity to remedy its misdeeds. Defendants and Intervenors now seek to take advantage of that courtesy, and use it as an opportunity to foment additional delay.

Defendants and Intervenors assert that further delay will not prejudice Plaintiffs, or the people of Ohio. Their representation that there is no need to worry about delay is, at best, disingenuous. This is not the first attempt by Defendants and Intervenors to stay the case. Their strategy is clear. They aim to obtain through the passage of time what they cannot achieve on the merits: yet another election held under an unconstitutional map.

Once again, this Court should deny Defendants' and Intervenors' motions to stay.

I. LEGAL STANDARD

Courts in the Sixth Circuit evaluate four factors when considering a motion to stay pending appeal:

> (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 prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Michigan State A. Philip Randolph Inst. v. Johnson, 833 F.3d 656, 661 (6th Cir. 2016) (Moore, J.) (citation omitted); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (Roberts, C.J.) (articulating the traditional stay standard as "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies" (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The moving party has the burden of showing that the stay is warranted. *Michigan State A. Philip Randolph Inst.*, 833 F.3d at 662.

This Court has already denied a stay in this case when considering similar factors and nearly identical arguments. The February 8 Order explains that when considering a motion to stay, pending the outcome of another case, courts must consider "the potential dispositive effect of the other case, judicial economy achieved by awaiting adjudication of the other case, the public welfare, and the relative hardships to the parties created by withholding judgment." Order Denying Motion to Stay Trial, ECF No. 213 at 2. Applying that standard to this case, this Court found that "the balance of the factors weighs against granting a stay." *Id*. at 4.

Defendants and Intervenors shirk their burden of showing likelihood of success on the merits by quoting out of context the phrase "fair prospect" from a per curiam decision in *Hollingsworth v. Perry*, 558 U.S. 183 (2010), in an attempt to support an argument that it sets a very low bar. *See* Defendants' Motion, ECF No. 266 at 6; Intervenors' Motion, ECF No. 268-1

at 3.[1] In *Hollingsworth* itself, though, the Supreme Court found that this standard was met only after concluding that it was "likely" that the challenged decision violated the law. 558 U.S. at 190-91. Thus *Hollingsworth* is not a departure from the traditional factors set forth in *Nken* and *Michigan State A. Philip Randolph Institute*. And, as the Supreme Court expressly stated in *Nken*, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken*, 556 U.S. at 434 (internal quotation marks and citation omitted).

II. ARGUMENT

A. The Assertion that *Rucho* and *Benisek* Will Necessarily Reverse this Case Is Speculation.

In their motions, Defendants and Intervenors attempt to read the Supreme Court's tea leaves and invite this Court to do the same. Citing the pendency of *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726, Defendants assert that the Supreme Court will decide certain unresolved questions at issue in those cases and will then be "likely to either reverse this Court or to vacate and remand for further proceedings." Defendants' Motion, ECF No. 266 at 5-6.

This Court has already addressed, and rejected, this argument in its February 8, 2019 Order denying Defendants' and Intervenors' earlier motion to stay trial. As this Court explained, "whether *Rucho* and *Benisek* will be dispositive in this case is unclear." Order Denying Motion to Stay Trial, ECF No. 213 at 3. Defendants and Intervenors once again assume that the Supreme Court will resolve certain legal issues presented by this case in their favor. However, as this Court noted in its February Order, that is only one of a slew of possible outcomes: "the

[1]Defendants and Intervenors also cite a case in which the "fair prospect" standard was used in the specific context of a single Circuit Justice's consideration of in-chambers stay applications. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

Supreme Court might set out a new substantive standard for partisan gerrymandering claims, it might endorse the tests adopted by several three-judge panels, or other issues might arise like the standing issue that arose in *Gill v. Whitford*, 138 S. Ct. 1916 (2018)." *Id.*

Defendants and Intervenors presuppose that the Supreme Court will inevitably grant a stay in this case, but there is no indication that the Supreme Court will necessarily grant a stay pending its decisions in *Rucho* and *Benisek*. Earlier this year, after *Rucho* and *Benisek* had been calendared for oral argument, the Supreme Court denied an application for stay in another partisan gerrymandering case. *In re Lee Chatfield*, No. 18A769 (U.S. Feb. 4, 2019) (Sotomayor, J.) (denying application for a stay). As this Court noted in its February Order, the applicants in that case advanced essentially the same arguments as Defendants and Intervenors have here, yet no stay was granted. Order Denying Motion to Stay Trial, ECF No. 213 at 4-5.

B. There Is No "Ordinary Practice" to Grant Stays Pending Appeals of State Laws Found to be Unconstitutional.

Intervenors similarly assert that the Supreme Court's "ordinary practice" is to stay any injunction of a state law found to be unconstitutional pending appeal. Intervenors' Motion, ECF No. 268-1 at 8-9. The case they cite for this proposition, however, belies their assertion. In *Strange v. Searcy*, 135 S. Ct. 940 (2015), the Attorney General of Alabama sought a stay of an injunction preventing the enforcement of "several provisions of Alabama law defining marriage as a legal union of one man and one woman." *Id*. at 940 (Thomas, J., dissenting). At the time of the stay application, four cases were scheduled for Supreme Court oral argument that posed the same, unresolved question regarding the constitutionality of such marriage definitions. *Id.* Under those circumstances, highly similar to the circumstances of this case, the Supreme Court *denied* the application for stay. Only two justices dissented. Even though he supported a stay, Justice Thomas acknowledged that "a stay is not a matter of right" when courts declare state laws

unconstitutional and enjoin their enforcement. *Id.* In fact, Justice Thomas noted that, contrary to his own predilections, "[o]ver the past few months, the Court has repeatedly denied stays of lower court judgments enjoining the enforcement of state laws." *Id.* at 941. Unconstitutional state laws can be, and indeed often are, enjoined pending appeal.

Contrary to Defendants' statement, there is no "well-established practice" in the Sixth Circuit, much less any rule, that judgments are stayed pending appeal in any case where another case involving a similar issue is pending before a higher court. *See* Defendants' Motion, ECF No. 266 at 7. While Defendants were, unsurprisingly, able to locate examples where, on the facts and circumstances of those particular cases, stays were granted, not a single case cited refers to any such practice, rule, or even presumption. Indeed, Defendants neglected to cite the most relevant example of all: this Court's February 8 Order denying their earlier motion for stay. As this Court explained:

> Whether a stay is appropriate, and thus whether the proponent has met its burden, "requires examining 'the circumstances of the particular case.'" *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

Order Denying Motion to Stay Trial, ECF No. 213 at 1. As this Court recognized, there is no one-size-fits-all rule or practice.

C. There Is No Reasonable Likelihood that this Court's Decision Will Be Reversed on the Merits.

In the alternative, Defendants and Intervenors argue that they are likely to prevail on the merits of their legal argument that Plaintiffs' claims are nonjusticiable. This Court, however, in concert with its sister courts, has repeatedly considered and rejected this argument, most recently in its May 3, 2019 Opinion and Order. *See* Opinion and Order, ECF No. 262 at 139-49. While Defendants engage in tallying up the votes of Supreme Court justices on the basis of plurality

opinions, no such speculation is in fact required here. *See* Defendants' Motion, ECF No. 266 at 8-9. This Court's legal analysis has directly answered this question.

Defendants assert that this Court set forth a "vague, standardless 'test'" that is incapable of surviving appellate review. Defendants' Motion, ECF No. 266 at 10. This characterization is simply inaccurate.

First, this Court articulated clear tests for violation of the Fourteenth and First Amendments and why Ohio's congressional map violates Article I of the Constitution. The tests adopted by this Court are substantially similar to the tests adopted in sister courts around the country. For example, in determining whether an alleged partisan gerrymander violates the Equal Protection Clause of the Fourteenth Amendment, this Court articulated a clear, three-part test:

> Plaintiffs must prove (1) a discriminatory partisan intent in the drawing of each challenged district and (2) a discriminatory partisan effect on those allegedly gerrymandered districts' voters. *Bandemer*, 478 U.S. at 127 (plurality op.); *id.* at 161 (Powell, J., concurring and dissenting). Then, (3) the State has an opportunity to justify each district on other, legitimate legislative grounds. *See Rucho*, 318 F. Supp. 3d at 861 (citing *Bandemer*, 478 U.S. at 141–42) (plurality op.)); *Whitford*, 218 F. Supp. 3d at 910–27.

Opinion and Order, ECF No. 262 at 167. This Court further explained what is required, and conversely what is insufficient, to satisfy each prong. For example, this Court adopted "the predominant-purpose standard" for the partisan intent prong, *id.* at 170, and identified what types of "direct and indirect evidence" are relevant to this inquiry, *id.* at 172-73. The Court also provided a clear explanation of the legal standard for the effect prong, *see id.* at 173-75, noting that a plaintiff must show a "consistency of results" across various metrics and that it matters that the partisan effect is shown to be durable over time. *Id.* at 174; *see also id*. at 166. This Court similarly set forth the legal framework for evaluating the justification prong. *See id.* at 175-77.

No rational reader, nor reviewing court, could find this Court's test to be "standardless" or "vague."

D. Defendants' and Intervenors' Attempt to Delay a Remedy Based on Alleged Irreparable Injury to the Legislature Must Be Rejected.

Defendants and Intervenors assert that the Ohio Legislature's opportunity to remedy its own constitutional violations will cause it irreparable injury absent a stay pending the *Rucho* and *Benisek* rulings. Defendants' Motion, ECF No. 266 at 11-12; Intervenors' Motion, ECF No. 268-1 at 9. Defendants and Intervenors thus perversely seek to turn the *opportunity* that this Court extended to the Ohio Legislature into an *argument* for further delay.

But if the process of enacting a new districting plan would itself be injurious, or the Legislature simply has other priorities, the Legislature can avoid the task altogether. Contrary to Defendants' assertion, this Court did not "command that the General Assembly pass a new map." Defendants' Motion, ECF No. 266 at 11. Rather, this Court *offered* the Legislature a timeframe in which it could do so, while also setting out a procedure should the Legislature fail (or decline) to do so. Opinion and Order, ECF No. 262 at 295-96. The Legislature has not been ordered, enjoined, or "command[ed]" to undertake any action. It has been given a period in which it may cure its own previous unconstitutional actions. This opportunity is not an injury. And it is not the basis to delay a remedy of the very real unconstitutional injury inflicted on the citizens of Ohio by the Legislature.

E. Plaintiffs, and the Voters of Ohio, Will Be Irreparably Harmed by a Stay and the Public Interest Is Instead Best Served by the Expeditious Resolution of this Case.

This Court's February 8 Order stated that if Plaintiffs' allegations were proven at trial, "then a new map will need to be drawn quickly," as "a stay could pose a potentially severe hardship for the Plaintiffs (and Ohio voters generally)—that is, an unremedied constitutional

violation." Order Denying Motion to Stay Trial, ECF No. 213 at 3-4. The Court also noted that as the deadline for enacting a new map for the 2020 election draws nearer, "the risk of confusion and uncertainty increases" for voters if a new map is not in place. *Id*. at 4 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)).

Plaintiffs' allegations were indeed proven at trial. *See* Opinion and Order, ECF No. 262. The time has now come for a new map to be "drawn quickly." What was true in February is even more true now in May: "a stay could pose a potentially severe hardship for the Plaintiffs (and Ohio voters generally)—that is, an unremedied constitutional violation." Order Denying Motion to Stay Trial, ECF No. 213 at 4.

Both Defendants and Intervenors suggest that there is "ample" time to address the remedy after the Supreme Court rules on *Rucho* and *Benisek*. *See* Intervenors' Motion, ECF No. 268-1 at 10; Defendants' Motion, ECF No. 266 at 12. But they offer no assurance that any remedy will in fact be implemented in time to protect voters' constitutional rights in the next election if the *process* for enacting such a remedy only begins after the end of the Supreme Court's current term.

Defendants and Intervenors are conspicuously silent as to just how they will assure that there is sufficient time to implement a constitutional districting map for the 2020 elections. Are they waiving any objections to a proposed remedial map drawn by a Special Master, should that be required? Do they intend to waive their right to an appeal on the merits? Are they waiving any arguments under *Purcell* and related cases about the need to provide the Secretary of State with ample time to administer a new map? *See Purcell*, 549 U.S. at 4-5. Are they waiving their purported September 20, 2019 deadline? *See* Order Denying Motion to Stay Trial, ECF No. 213 at 4. On the contrary, it can only be assumed that Defendants and Intervenors, consistent with

their practice to this point, will engage in all of these delay tactics, even as they seek to assure the Court that there is "ample time" to enact a new, constitutional districting plan.

It is self-evident that the public interest is best served by the most expeditious enactment of a constitutional districting plan. Seeking to take advantage of the unconstitutional status quo they created, Defendants instead argue that Ohio's voters will be harmed by this remedy, because any new congressional map may produce confusion. Defendants' Motion, ECF No. 266 at 13. Defendants' complaint is misdirected and their solution is misguided. Any confusion that stems from having multiple congressional districting plans in a single decade is the product of Defendants' own intentional unconstitutional acts. Moreover, elongating this period of uncertainty will only exacerbate the problem.

This Court has set forth a schedule that will serve the public interest in bringing about the end of the Ohio's unconstitutional congressional districting plan, and there is no reason to delay.

III. CONCLUSION

For the foregoing reasons, Defendants' and Intervenors' motions for a stay pending appeal should be denied.

May 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert Fram, hereby certify that the foregoing document was served upon all counsel of record in this case via ECF.

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