Nos. 18A1170/18A1171

In the Supreme Court of the United States

MICHIGAN SENATE, ET AL., APPLICANTS

v.

LEAGUE OF WOMEN VOTERS OF MICHIGAN, ET AL.

LEE CHATFIELD, ET AL., APPLICANTS

v.

LEAGUE OF WOMEN VOTERS OF MICHIGAN, ET AL.

MICHIGAN SECRETARY OF STATE'S OPPOSITION TO INTERVENORS' EMERGENCY APPLICATIONS FOR A STAY

To the Honorable Sonia Sotomayor,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

INTRODUCTION

Several weeks ago, a three-judge district court in Michigan conducted a three-day trial and held that Michigan's 2011 district maps for the State House, State Senate, and federal Congressional districts were unconstitutionally gerrymandered to suppress and dilute the votes of the Intervenors' opposition party. More specifically, the unconstitutional 2011 plan, according to the unanimous three-judge panel, confers a "strong, systematic, and durable structural advantage" of "historically extreme" proportions on one political party while inflicting an "extremely grave" constitutional harm upon voters affiliated with the other political party. Consequently, the district court ordered the Michigan Legislature to redraw district

maps in time for the November 2020 election cycle, and set out a timeline on which to do so. Rather than comply with the district court's order, the Intervenors now seek to stay it on the assumption that this Court will overturn established precedent, exclaiming that they will be irreparably harmed if they cannot attend to their desired legislative "priorities."

The facts and circumstances of this case, however, do not warrant a stay. Intervenors have shown only that complying with the district court's order would be inconvenient, not that it would irreparably harm them in any way. To the contrary, granting a stay is likely to indelibly harm the public interest, as all interested parties—voters, candidates, political parties, and election administrators—would benefit from having as much time as possible to discern and implement the logistics of a new map. Having the maps in place sooner rather than later is critical to ensuring that candidates are able to comply with statutory filing deadlines, that ballots can be issued and elections administered in an orderly manner, and that votes can be counted accurately and expeditiously. As such, the Secretary of State respectfully opposes Intervenors' request for a stay in this case.

STATEMENT OF THE CASE

The League of Women Voters of Michigan, along with several League members and individual Democratic voters (collectively, Plaintiffs), brought this action in December 2017, challenging Michigan's 2011 state and federal legislative apportionment statutes (the Enacted Plan) as the result of unconstitutional partisan gerrymandering in violation of the First and Fourteenth Amendments. (ECF 1,

Compl.) In particular, Plaintiffs asserted that the 2011 Michigan Legislature, at the time controlled by the Republican Party, purposefully "packed" or "cracked" nine Congressional Districts, ten Michigan Senate Districts, and fifteen Michigan House Districts to favor Republican candidates by diluting Democratic votes (the challenged districts). (ECF 268, Op. & Order, Page ID 11622.)

Several members of Michigan's Republican Congressional Delegation moved to intervene shortly after the case commenced, on February 28, 2018 (ECF 21), and two members of Michigan's House of Representatives subsequently filed their intervention motion on July 12, 2018 (ECF 70). After both applications were initially denied and appealed, the House and Congressional Intervenors were ultimately granted intervention. (See U.S. Court of Appeals for the Sixth Circuit, Case Nos. 18-1437 and No. 18-2383; ECF 103; ECF 166.)

In the interim, the Plaintiffs, the Secretary of State, and Congressional Intervenors fully briefed and argued motions to dismiss and for summary judgment on various grounds, including standing and laches (e.g., ECF 11, 117, 119, 121). On November 30, 2018, the district court dismissed Plaintiffs' statewide claims for lack of standing (ECF 54), but concluded that Plaintiffs had standing to pursue their district-specific claims (see ECF 143, Op. on Summ. J., Page ID 5306–27). The district court also extensively considered the parties' arguments regarding justiciability and concluded that judicially manageable standards exist to analyze the Plaintiffs' First and Fourteenth Amendment claims (see *id.*, Page ID 5327–36).

Shortly after the district court issued its opinion, on January 1, 2019, Michigan's newly elected Secretary of State, Jocelyn Benson, assumed office and subsequently entered into settlement negotiations to resolve this case through the entry of a consent decree, which would have resolved all but eleven of the State House Districts at issue. Intervenors declined to engage substantively in those negotiations. (See generally ECF 211, § I.) Instead, Intervenors filed a motion with the district court seeking to stay trial pending this Court's disposition of *Rucho* v. *Common Cause* (No. 18-422) and *Lamone* v. *Benisek* (No. 18-726). (ECF 183.) The Secretary and the Plaintiffs concurred with the relief sought by the Intervenors on the alternate grounds that an adjournment of the trial would give the parties time to work out a consent decree for approval by the district court.[1] (ECF 199, 200.)

In addition, the Michigan Senate and several individual Michigan Senators (collectively, the Senate Intervenors) moved to intervene in the case on the eve of trial (ECF 206, 208), which the district court granted. (ECF 237.)

After the district court indicated at a status conference on January 22, 2019, that it was inclined to deny the Intervenors' motion for stay, the Intervenors petitioned for a writ of mandamus from this Court directing the district court to stay the case, and also applied for a stay of all proceedings in the district court pending a determination of that writ. Both the district court and this Court denied the

[1] The district court rejected the proposed consent decree at the same time that it denied Intervenor's motions to stay the trial. (ECF 235.)

Intervenors' motions to stay (No. 18A769, Feb. 4, 2019 Order; ECF 238), and this case proceeded to a three-day trial on February 5, 2019.

Post-trial, the parties submitted hundreds of pages of proposed findings of fact and conclusions of law, in addition to thousands of pages of deposition transcripts, expert reports, and trial exhibits. (See generally ECF 268, n.4.)

The district court issued its opinion on April 25, 2019, concluding that all of the challenged districts were unconstitutional partisan gerrymanders. Specifically, the court adopted the standard articulated by the *Rucho* panel, 318 F. Supp. 3d at 380–88, and held that an electoral map constitutes partisan gerrymandering in violation of the Fourteenth Amendment's Equal Protection Clause where (1) "a legislative map drawer's predominant purpose in drawing the lines of a particular district was to subordinate adherents of one political party and entrench a rival party in power" (discriminatory intent) and (2) "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" (discriminatory intent). (ECF 268, Op. & Order, Page ID 11616–17 (internal quotation marks omitted).) The burden then shifts to the Intervenors to "prove that a legitimate state interest or other neutral factor justified such discrimination." (*Id.*, Page ID 11617.)

Similarly, to demonstrate a violation of voters' First Amendment associational rights with respect to partisan gerrymandering, the court adopted a hybrid test from *Rucho*, 318 F. Supp. 3d at 929, and *Shapiro* v. *McManus*, 203 F. Supp. 3d 579, 597

(D. Md. 2016), in holding that the Plaintiffs must show (1) that the challenged districting plan was intended to burden individuals that support a disfavored candidate or political party; (2) that the plan in fact burdened those individuals' political speech or associational rights; and (3) that a causal relationship existed between the discriminatory motive and the First Amendment burden. (*Id.*, Page ID 11617–18.)

After finding that the Plaintiffs had standing on a district-by-district basis, the court concluded that each of the challenged districts violated one or both of the substantive standards and consequently enjoined their use in future elections. (*Id.*, Page ID 11662–701.) As to the senate districts in particular, the court also concluded that a special election is an appropriate remedy under the circumstances, given the "particularly severe" nature of the violation. (*Id.*, Page ID 11699.)

The court consequently ordered the Michigan Legislature to draw a remedial map by August 1, 2019, with briefing on the process of formulating that map to follow. (*Id.*, Page ID 11702–04.)

On May 3, 2019, Intervenors sought a stay from the district court and requested expedited consideration, demanding that the court rule by May 10, 2019. (ECF 273, 274, 275, 276.) The district court denied those motions on May 6, 2019 (ECF 277), and Intervenors subsequently filed the instant stay applications.[2]

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[2] Both the Resolution passed by the Michigan Senate to authorize intervention in this case as well as the Resolution passed by the Michigan House authorizing Speaker Chatfield, one of the House Intervenors, to speak on behalf of the entire House contain inaccurate statements about the Secretary's actions in this case. The Secretary did not "file[] a motion to stay the proceedings" in this case on January 17,

ARGUMENT

A stay is considered "extraordinary relief" for which the moving party bears a "heavy burden." *Winston-Salem/Forsyth Cty. Bd. of Ed.* v. *Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers). Denial of a stay application "is the norm," as "relief is granted only in 'extraordinary cases.' " *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). To show that a stay is warranted, the movant must show "a reasonable probability" that the Court will "consider the underlying issue sufficiently meritorious for . . . the notation of probable jurisdiction"; a "significant possibility" that this Court will reverse the lower court; and a likelihood of irreparable harm if that decision is not stayed. *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers).

A showing that all three criteria have been met is not necessarily sufficient for the issuance of a stay; rather, the Court may, in its "sound equitable discretion," deny the stay when the relative balance of harms to the applicant and respondent, as well as the interests of the public at large, does not support it. *Ind. State Police Pension Tr.* v. *Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam); *Barnes* v. *E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304–05 (1991) (Scalia, J., in chambers). Even where a stay is granted, the Court has discretion to tailor the scope of the requested stay to accommodate the equities of the case and the balance of

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2019, as the Resolutions state. (See ECF 208-4, Page ID 7823; MICH. HOUSE RESOLUTION 2019-17.) Rather, the Congressional and House Intervenors sought to stay *trial* in this case, pending the outcome of *Rucho* and *Benisek*. (ECF 183.) Plaintiffs and the Secretary concurred in that motion on grounds that additional time would be beneficial to working out a consent decree resolving the case, a process in which Intervenors ultimately declined to participate.

harms. *Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam).

The balance of equities here weighs against a stay in large part because, on balance, Intervenors will not suffer irreparable harm without a stay; by contrast, if this Court ultimately leaves the district court's decision undisturbed, granting the stay will likely have significant negative impact on the state's ability to prepare for the 2020 election cycle, including satisfying state election law deadlines. The worst-case scenario for the state Intervenors if this Court were to ultimately rule in their favor on the merits: the state Legislature simply stops re-drawing the maps. That is not irreparable harm.

I. There is a significant possibility that the Court will find partisan gerrymandering claims justiciable.

A. The district court's opinion properly enforces the commands of the federal Constitution.

States must execute their responsibilities in accordance with the commands of the federal Constitution. *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). As state actors, state legislatures are bound by the First and Fourteenth Amendments to the federal Constitution and may not enact laws that contravene these Constitutional mandates. See U.S. Const. amend. XIV; *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. Such enforcement is no invasion of State sovereignty. . . . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power.");

NAACP v. *Alabama*, 357 U.S. 449, 460–61 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.") Redistricting is no exception.

Contrary to Intervenors' insinuation, the enactment of an unconstitutional redistricting statute through a normal legislative process cannot insulate that law from compliance with the federal Constitution. See *Lucas* v. *Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 737 (1964). In other words, regardless of the political popularity of such a measure, state legislatures cannot invidiously discriminate against voters on the basis of partisanship. *Davis* v. *Bandemer*, 478 U.S. 109, 118–21 (1986). The district court's opinion is consistent with that structural limitation.

B. *Davis* v. *Bandemer* remains the controlling precedent, and its majority holding is clear that partisan gerrymandering claims are justiciable.

Intervenors focus their stay request on the merits of their underlying appeal, which is in turn premised on their predictions of how this Court will rule in *Rucho* and *Benisek*, and how that ruling will impact the district court's order in this case. (See House & Congressional Intervenors' Mot. for Stay at 9–19; Senate Intervenors' Mot. to Stay at 9–22.) Their position, however, depends upon the Supreme Court overruling *Bandemer* and holding that partisan gerrymandering claims are categorically nonjusticiable, which there is no guarantee this Court will do. See

Rucho, Oral Arg. Tr. at 6–7 (U.S. Mar. 26, 2019) ("If you decided it in our favor on justiciability grounds, I think you would have to overrule the *Bandemer* case.").

By contrast, stare decisis, "a foundation stone of the rule of law," counsels strongly against presuming such a holding, in favor of "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *Michigan* v. *Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2036 (2014). If anything, the facts and circumstances that have developed since *Bandemer*—namely, the advances in mapdrawing technology that have made it easier to identify and define voters based on partisan affiliation with precision—have underscored the importance of preserving some right of review in partisan gerrymandering cases. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 312–13 (2004) (Kennedy, J., concurring). Justice Kennedy's foresight in that regard has come full circle. *Id*. ("On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties.").

Regardless, unless and until it is overruled, *Bandemer* remains the law of the land, with five Justices reaffirming its core holding in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 413–14 (2006): "In *Davis* v. *Bandemer*, the

Court held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, but there was disagreement over what substantive standard to apply." (citation omitted). Any holding short of a complete discarding of *Bandemer* will, based on the district court's findings of fact and conclusions of law, likely require *some* form of relief in this case. Thus, although Intervenors insist that the issue of justiciability is "unresolved," the only majority pronouncement on the subject from this Court resides in *Bandemer*. The doctrine of stare decisis, of course, makes overturning *Bandemer* unlikely.

In any event, this Court's review of the present case on the merits is not guaranteed. The first time the *Rucho* case came before the Court in *Rucho* v. *Common Cause*, No. 17-1295, presenting issues of standing and justiciability, this Court summarily vacated and remanded the case in light of its decision in *Gill* v. *Whitford*, 138 S. Ct. 1916, without considering the merits or noting jurisdiction. See Order List, 585 U.S. ___ (June 25, 2018). On Intervenors' theory, it is plausible the Court could do the same with this case in light of *Rucho* and *Benisek*.

II. Michigan voters are likely to be irreparably harmed if the district court's decision is not timely effectuated, and the public interest weighs strongly against a stay.

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am*. v. *Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Moreover, "[a] restriction on the fundamental right to vote . . . constitutes irreparable injury." *Id*. The three-judge district court in this case *unanimously* concluded that the Enacted Plan durably and systemically discriminates against Michigan voters on the

basis of partisanship and suppresses and dilutes a certain political group of voters' First Amendment rights. (ECF 268, Op. & Order, Page ID 11583.) Consequently, the panel ordered the Michigan Legislature to enact a remedial map and the Secretary to conduct a special election for the State Senate.

The Secretary is prepared to meet the obligations set out in the district court's order involved in implementing and administering new electoral maps and a special senate election in 2020.[3] Given the practical realities of administering an election cycle, however, particularly one where candidates will be running for major state and federal offices, the Secretary and the people she serves will benefit from having as much time as possible to implement the new maps required by the district court's order to "minimiz[e] confusion amongst the electorate," reduce the costs that "always come" with "[t]ransition periods," and facilitate the organized and efficient administration of the electoral system for all interested parties—including candidates, political parties, voters, and county clerks, just to name a few. (House &

[3] The Senate Intervenors are correct that the Secretary previously opposed a special Senate election as a remedy for the constitutional violations, on the grounds it would be a "substantial disruption to the normal electoral process." At that time, no Senate election was scheduled for 2020, and the Secretary did not know what the district court would order or on what timeline. The election will now be conducted alongside four other major elections, and could result in separate legal questions. Although this poses logistical challenges, the Secretary has never taken the position that conducting a special Senate election would not be possible. The district court determined that holding the special election is equitable and gave the Secretary sufficient time to organize and be prepared for it. The Secretary now seeks to preserve that time and with it the practical ability to comply with the district court's decision and order. If the district court had not ordered a special election for the impacted Senate districts, the Secretary would oppose Intervenors' stay request for the same reasons.

Congressional Intervenors' Emerg. Mot. to Stay at 26; Senate Intervenors' Emerg. Mot. to Stay at 21.)

The comparative harm, as described by the Intervenors, is dwarfed by the potential problems that could ensue if there is any substantial delay in the remedial map-drawing process. Indeed, with respect to the State Senate special election in particular, until the remedial plan is finalized and approved by the district court, there remains uncertainty as to which Senate districts will be at stake in 2020.

A. Determining district lines well in advance of an election cycle is critical to effectuating the public interest in an orderly electoral system.

As a threshold matter, "it is always in the public interest to prevent violation of a party's constitutional rights.' " *Deja Vu of Nashville, Inc.* v. *Metro. Gov't of Nashville & Davidson Cty., Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001); *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Determining district lines as far as possible in advance of an election is crucial to effectuating those constitutional rights of Michigan voters under the district court's order. It is also critical to the efficient and effective administration of candidate applications and registrations, campaign finance disclosures, contribution limits, regulation of electioneering practices and advertisement, and voter engagement and registration overall. The longer that district lines remain unresolved, the more likely it becomes that voters in the affected districts will become confused by or disengaged from the political process, since they do not know for which candidates they will be

voting and consequently which candidates will be vying to represent them. These concerns gain particular salience in light of the special election ordered by the district court, since the Secretary's office will be administering and monitoring State House, State Senate, Congressional, and Presidential races within the State in 2020. Michigan voters will likewise be splitting their attention among those key races, in addition to the other measures on the ballot.

B. Waiting months to begin the redistricting process would cause irremediable harm to Michigan voters, as it risks creating chaos in the 2020 electoral system or, alternatively, making substantive relief impossible.

Consequently, it is *Michigan voters* who are likely to be irreparably harmed if the district court's decision is stayed in the interest of Intervenors' convenience. As the time until the next election cycle decreases, the cost and burden of implementing a new electoral map inversely increase. At some point, once the election cycle has begun in earnest, it becomes, as a practical matter, impossible to implement a new map in time for the 2020 elections. In that way, this case is distinguishable from *Rucho* and *Benisek*.

The parties in those cases consented to the entry of a stay in the district court on the express premise that Supreme Court briefing and argument would be completed in time for any remedial plan to be effectuated by the 2020 elections. (See Plaintiffs' Statement of Conditional Consent to a Discretionary Stay Pending Appeal, *Benisek* v. *Lamone*, No. 13-cv-3233 (D. Md. Nov. 15, 2018), ECF 227; Response of the

Common Cause Plaintiffs to the Court's Order of September 4, 2018, *Common Cause* v. *Rucho*, No. 1:16-CV-1164-WO-JEP (M.D.N.C. Sept. 5, 2018), ECF 152.)

The same arrangement would not be feasible in this case. Assuming a briefing schedule similar to *Benisek*—where there were approximately seven and a half months between the issuance of the opinion and the end of the Supreme Court's term—a decision would be unlikely to issue before the end of the calendar year. And, again, assuming that the district court's opinion remains wholly in place without any further proceedings necessary, the order provides the Michigan Legislature with effectively four months after that date to draw and enact a compliant map and brief the merits for the court. (ECF 268, Op. & Order, Page ID 11702–04.) That timeline would create the actual electoral chaos that Intervenors speculate will result from the district court's order.

By statute, Michigan's primary election will be held on Tuesday, August 4, 2020. See Mich. Comp. Laws §§ 168.132, 168.534. Candidates for the Michigan House, Michigan Senate, and U.S. House must be nominated for that primary by the fifteenth Tuesday prior to that date: Tuesday, April 21, 2020. See Mich. Comp. Laws §§ 168.133, 168.163. To be placed on the ballot for that primary election, each Congressional candidate must submit a nominating petition signed by at least 1,000 voters from the congressional district. See Mich. Comp. Laws §§ 168.133, 168.544f. And, as the House and Congressional Intervenors astutely summarize, for candidates to even consider running for one of those primary nominations, they must know the boundaries of their district:

> 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 is all reliant on knowing what the composition of the political districts are.

(House & Congressional Intervenors' Emerg. Mot. to Stay at 24–25.)

What is more, once those lines have been drawn and candidates identified, local election clerks need sufficient time to ensure ballots can be printed, delivered to military members serving overseas, and issued to absentee voters, and to confirm that assigned ballot tabulators are capable of recognizing and accurately counting ballots, particularly in districts with precinct splits. An expeditious determination of district lines is also important to voters circulating, and election officials administering, statewide ballot question petitions under Article 2, Section 9 of Michigan's constitution (e.g., initiatives and referenda), which are (recently) subject to signature limitations *by congressional district*. See 2018 Public Act 608 (Mich. Comp. Laws § 168.471).[4]

In addition, Michigan's 2020 Democratic presidential primary is scheduled for March 10, 2020.[5] All precinct boundaries must be finalized 60 days prior to that election (or January 10, 2020) to allow sufficient time for clerks to program and test ballots, order adequate quantities of ballots, and issue absent voter ballots. The results of this primary are also certified on a district-by-district basis for use by the

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[4] Michigan's Election Law also establishes deadlines by which ballot question petitions are to be filed with the Secretary of State for canvassing, which is as early as the May before the statewide November election. Mich. Comp. Laws § 168.471.

[5] See https://projects.fivethirtyeight.com/2020-primaries/democratic/michigan/.

national party in allocating delegates at its presidential nominating convention. See Congressional Research Service, THE PRESIDENTIAL NOMINATING PROCESS AND THE NATIONAL PARTY CONVENTIONS, 2016 at 11 (Dec. 30, 2015). Changing districts midstream would be impractical at best, as would the implementation of any relief ordered by the district court if delay occurs. Waiting to even start drawing remedial maps, as the Intervenors encourage, will thus make meeting important election deadlines too difficult, if not impossible.

C. Intervenors have not shown that they would suffer any irreparable harm by beginning the process of drawing constitutional maps in the interim.

Conversely, the State has no legitimate interest in enforcing a law that is unconstitutional. *Hispanic Interest Coal. of Ala.* v. *Governor of Alabama*, 691 F.3d 1236, 1249 (11th Cir. 2012). Preventing a state from enforcing an unconstitutional law in fact advances the public interest. See *Giovani Carandola, Ltd.* v. *Bason*, 303 F.3d 507, 521 (4th Cir. 2002). Further, Intervenors have not actually adduced any evidence of the costs, burdens, and timing of redistricting but simply conjecture that it will require "thousands of person hours to collect data, draw maps, seek public input, hold legislative hearings, vote on legislation, and present it to the Governor."[6] (Mich. Senate Intervenors' Emerg. Mot. to Stay at 25.) Nor do they account for the numerous alternative district maps drawn by Republican legislative staff and

[6] As the Congressional Intervenors do not vote on the district maps and otherwise play no formal role in the redistricting process, it is unclear in that regard how the district court's opinion and order would cause them any harm warranting relief at this point, let alone irreparable harm.

consultants during the 2011 redistricting, or the 1,000+ alternative maps produced by Plaintiffs' expert Jowei Chen, Ph.D.

In 2011, it took the Michigan Legislature three months to draw districts that the district court deemed unconstitutional, and Intervenors have not explained why they cannot remedy that violation on the same timeline. (See ECF 250, Test. of Jeffrey Timmer, Feb. 7 Trial Tr. at 157, Page ID 9344 (testifying that Legislature received 2010 census data in March 2011).)[7] Moreover, if this Court were ultimately to find the district court's order improper, the only harm to Intervenors is the opportunity cost of time and effort spent on redistricting. In other words, if this Court rules in their favor in the interim, Intervenors can simply *stop* working on the maps. By contrast, a prolonged delay of the district court's order in this case would exacerbate the practical difficulties of *starting* work on the maps in the first instance. The comparative balance of harms, consequently, weighs against a stay.

Intervenors also point to this Court's decision to stay the district court's *first* opinion in *Rucho* pending the state's appeal in that case. (House & Congressional Intervenors' Mot. to Stay at 9, 15.) But "the propriety of a stay is dependent upon the circumstances of the particular case," as the "traditional stay factors contemplate individualized judgments in each case." *Ind. State Police Pension Tr.* v. *Chrysler LLC*,

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[7] The Enacted Plan was passed by the Michigan Legislature and signed by the Governor in June 2011.
http://www.legislature.mi.gov/(S(ddwuiqc5ct2wp4hy3xf5p4tq))/mileg.aspx?page=getObject&objectName=2011-HB-4780;
http://www.legislature.mi.gov/(S(ddwuiqc5ct2wp4hy3xf5p4tq))/mileg.aspx?page=getObject&objectName=2011-SB-0498.

556 U.S. 960, 961 (2009) (citing *Nken* v. *Holder*, 556 U.S. 418, 433 (2009)) (internal quotation marks omitted).

In *Rucho*, the district court struck down North Carolina's congressional redistricting plan as a partisan gerrymander in violation of the Equal Protection Clause, First Amendment, and Elections Clause. See generally *Common Cause* v. *Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). The court issued its opinion on January 9, 2018, and required the Legislature to enact a remedial redistricting plan by January 24, 2018—a mere *two weeks* later. *Id*. at 691; *Rucho* v. *Common Cause*, No. 17A745, Emerg. App. for Stay at 3–4, 10 (Jan. 12, 2018). In their stay application, the state defendants in *Rucho* emphasized the irreparable harm likely to result from the extremely short deadline for drawing new maps and the effective impossibility of implementing a new map prior to the commencement of the state's impending voter assignment and candidate filing period on February 12, 2018. See *Rucho*, Emerg. App. for Stay at 19–22. The deadlines in this case are not so pressing.

Further, given the timing of the case, *Rucho* potentially involved relief for two election cycles (2018 and 2020). Thus, even with a stay of the district court's January 9, 2018 order, *Rucho* retains the possibility of implementing a remedial map in time for the 2020 election cycle. Indeed, the *Rucho* parties' current consent stay in the district court is premised on this possibility. See *Rucho*, ECF 152, Case No. 1:16-cv-01026-WO-JEP (M.D.N.C. Sept. 5, 2018). As explained above, the same is not true here: if the final resolution of this case remains pending into 2020, there is a

substantial probability that implementing a remedial map would no longer be feasible.

To the extent that Intervenors are concerned about adding redistricting to the legislative agenda, Michigan's full-time Legislature always retains the option to modify its current session schedule, which currently provides for convening three days per week, with a summer recess scheduled for the majority of the months of July and August. See *Session Calendar 2019*, MICH. SENATE, https://www.senate.michigan.gov/maincalendar.html; *2019 Session Schedule*, MICH. HOUSE OF REPRESENTATIVES, available at http://house.michigan.gov/calendar.asp. "[T]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams* v. *Illinois*, 399 U.S. 235, 245 (1970). Thus, Intervenors' argument that they have other, more important legislative priorities—aside from correcting the constitutional harms at issue here—is not reflected in their current summer calendar schedule.[8] Redistricting, in other words, need not take away from currently scheduled legislative sessions, for which the full-time Legislature could continue to reserve its other "priorities."

In short, Intervenors have failed to demonstrate that they will be irreparably harmed by the district court's order. Rather, the public interest and balance of harms strongly favor denying a stay in this case.

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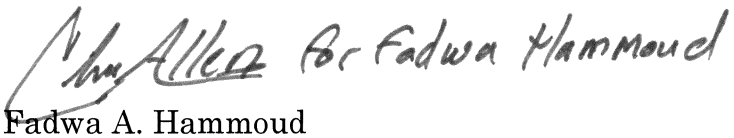
[8] As the House and Congressional Intervenors noted in the district court, "the next opportunity for training on the redistricting process for legislative staff is . . . a currently scheduled National Conference of State Legislatures (NSCL) seminar that begins on June 20, 2019 in Providence, Rhode Island." (ECF 273, Mot. for Expedited Briefing, Page ID 11724.)

CONCLUSION

For all of the foregoing reasons, the Secretary opposes the Congressional and State House Intervenors' Emergency Application for Stay (No. 18A1171) and the Michigan Senate and Senators' Emergency Application for a Stay Pending Resolution of Direct Appeal to this Court (No. 18A1170) and respectfully requests that this Court deny the applications for stay.

Respectfully submitted,

Dana Nessel
Michigan Attorney General



Fadwa A. Hammoud
Solicitor General
Counsel of Record

Scott R. Eldridge
Erika L. Giroux
Michael J. Hodge
Special Assistant Attorneys General

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
(517) 487-2070

B. Eric Restuccia
Deputy Solicitor General
Christopher M. Allen
Assistant Solicitor General
Department of Attorney General
P.O. Box 30212
Lansing, Michigan 48909
hammoudf1@michigan.gov
restucciae@michigan.gov
allenc28@michigan.gov
(517) 335-7628

Counsel for Respondent
Michigan Secretary of State

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