No. 18A1170

IN THE

SUPREME COURT OF THE UNITED STATES

League of Women Voters of Michigan, et al., Respondents,

v.

Jocelyn Benson, in Her Official Capacity as Michigan Secretary of State, Respondent; Lee Chatfield, in His Official Capacity as Speaker Pro Tempore of the Michigan House of Representatives, et al., Respondents; and the Michigan Senate, et al., Applicants.

MICHIGAN SENATE AND SENATORS' REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

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

Gary P. Gordon
Jason T. Hanselman
Courtney F. Kissel
Hilary L. Vigil
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933

Lisa S. Blatt
Counsel of Record
Sarah M. Harris
Matthew B. Nicholson
Whitney G. Woodward*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
lblatt@wc.com

Counsel for the Michigan Senate and Michigan Senators

* Admitted only in Illinois. Practice supervised by D.C. Bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Applicants Have Shown a Reasonable Probability That This Court Will Review this Case, and a Fair Prospect of Vacatur or Reversal 2

II. The District Court's Order Would Inflict Obvious Irreparable Harm 8

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Benisek v. Lamone, 348 F. Supp. 3d 493 (Md. 2018) .....*passim*

Bush v. Vera, 517 U.S. 952 (1996) 8

Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018) .....*passim*

Conkright v. Frommert, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers)..... 10

Connor v. Finch, 431 U.S. 407 (1977) 11

Davis v. Bandemer, 478 U.S. 109 (1986) 6

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

Ledbetter v. Baldwin, 479 U.S. 1309 (1986) (Powell, J., in chambers) 10

Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964) 11

Miller v. Johnson, 515 U.S. 900 (1995)..... 11

Renegotiation Bd. v. Bannerman Clothing Co., Inc., 415 U.S. 1 (1974)..... 10

Whitford v. Gill, No. 15-cv-421, 2017 WL 383360 (W.D. Wisc. Jan. 27, 2017)..... 8

OTHER AUTHORITIES

Order, *Benisek v. Lamone*, No. 17-333 (U.S. Dec. 8, 2017)..... 6

Order, *Lamone v. Benisek*, No. 18-726 (U.S. Jan. 4, 2019)..... 6

Order, *Gill v. Whitford*, No. 16-1161 (U.S. June 19, 2017) 3, 6

Order, *Rucho v. Common Cause*, No. 17-1295 (U.S. Jan. 18, 2018)..... 3, 13

Order, *Rucho v. Common Cause*, No. 18-422 (U.S. Jan. 4, 2019)..... 6

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT:

This Court is poised to address the viability of partisan gerrymandering claims within weeks. Respondents waited six years to challenge Michigan's maps as unconstitutional partisan gerrymanders—delay the District Court portrayed as necessary for lower-court decisions to begin moving in Respondents' direction. The District Court borrowed from those decisions wholesale in finding that Respondents have standing, that their claims are justiciable, and that there is some elusive way to separate the partisan gerrymandering wheat from the chaff without subjecting every single map to challenge. Indeed, the court invoked the district courts' rulings in *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), and *Benisek v. Lamone*, 348 F. Supp. 3d 493 (Md. 2018), nearly three dozen times.

Yet the District Court refused to await this Court's definitive word in those cases, or even to acknowledge that word is coming. Instead, the District Court rushed to jettison eight-year-old maps, ordered the Michigan Legislature to drop everything to draw new ones, and threw the Senate into chaos by halving many Senators' terms with the stroke of a pen. Time and again, this Court has granted stays when other district courts have invoked partisan gerrymandering to force legislatures to enact new maps. Michigan, no less than Wisconsin or North Carolina, deserves to avoid judicially inflicted political upheaval based on a theory this Court has repeatedly declined to adopt.

Respondents certainly offer no good reason for this Court to repudiate its past practice. Their stay oppositions are déjà vu all over again, recycling the same

arguments this Court rejected in granting prior stay applications. Respondents contend that there is an insufficient likelihood of this Court's review and of reversal or vacatur of the District Court's decision because this Court purportedly endorsed the justiciability of partisan gerrymandering claims and supposedly will do so again soon. That is what the *Gill* and *Rucho* plaintiffs claimed, too. Yet this Court rejected that assertion and granted stays in those cases even before *Gill v. Whitford*, 138 S. Ct. 1916 (2018), stressed that the viability of partisan gerrymandering claims remains dubious. Respondents likewise rehash the arguments that drawing new maps is little inconvenience to legislatures and that a stay would prevent voters from obtaining effective relief if they ultimately prevail. But this Court rejected similar contentions from the *Gill* and *Rucho* plaintiffs, and should be especially skeptical here given the unprecedented intrusiveness of the District Court's order and Respondents' questionable assumptions about timing.

I. Applicants Have Shown a Reasonable Probability That This Court Will Review this Case, and a Fair Prospect of Vacatur or Reversal

Respondents' claim that Applicants cannot show the requisite prospect of success assumes that this Court will imminently hold that partisan gerrymandering claims are justiciable, and that this Court has all but done so already. *See* Mich. Voters' Resp. 26-28; Sec. of State Resp. 9-11. But Respondents' confident predictions of success run headlong into this Court's repeated grants of stays in materially similar partisan gerrymandering cases. And Respondents' characterizations of this Court's precedents defy reality. Just last Term, this Court described partisan gerrymandering claims as "an unsettled kind of claim th[e] Court has not agreed

upon, the contours and justiciability of which are unresolved." *Gill*, 138 S. Ct. at 1934. This Court should reject Respondents' faulty premises once again.

A. Respondents cannot defeat the grounds for a stay by simply assuming that this time, their side will win. If that reasoning sufficed, this Court's previous stays in partisan gerrymandering cases would be inexplicable. *Rucho* involved a remarkably similar district court order and remarkably similar claims that the plaintiffs there should win under any standard this Court might adopt in the then-pending *Gill* and *Benisek* cases. Order, *Rucho v. Common Cause*, No. 17-1295 (U.S. Jan. 18, 2018); *see* Common Cause Resp. 18-22; League of Women Voters Resp. at 15-16. The *Gill* plaintiffs expressed similar optimism about the merits, to no avail. Order, *Gill v. Whitford*, No. 16-1161 (U.S. June 19, 2017); *see* Whitford Resp. 24-30. This case presents the same legal issues about the viability of partisan gerrymandering claims, and this Court should view their likelihood of success with similar skepticism.

Rejecting a stay in this case—especially after granting previous, similarly situated applicants' stays—would fuel rampant and destabilizing speculation about what the Court will decide in *Rucho* and *Benisek* in the coming weeks. Respondents' half-hearted alternative, that this Court delay issuing a stay until after deciding *Rucho* and *Benisek*, would run the same risk. This Court should avoid signaling that its calculus in partisan gerrymandering cases has changed and should treat this case like its predecessors by staying the District Court's order pending the resolution of Applicants' appeal.

B. Applicants have shown a reasonable probability of review and a fair prospect of reversal on two separate grounds that go to the heart of Respondents' claims: Respondents lack standing, and their claims are not justiciable.

1. Respondents' general theory of standing rests on the same shaky foundations currently at issue in *Rucho*. Respondents claim that individual voters are less excited about voting and more apathetic about the political process—but those are quintessential generalized grievances that would open the floodgates to standing for anyone professing a bare interest in political mobilization. *See Gill*, 138 S. Ct at 1930-31. Respondents also assert that their votes were diluted in particular districts. Critically, however, their claim rests on social-science metrics that purportedly show statewide partisan bias, as well as comparisons to the alternative computer-generated realities a college professor generated to show what might happen in a politics-free world. *See* App. A at 94 (citing *Rucho* for the proposition that "courts have relied on this exact type of expert evidence in finding that plaintiffs have established" standing). But *Gill* held that individual voters lack standing unless they can show "concrete and particularized injuries" through "evidence . . . tend[ing] to demonstrate a burden on their individual votes." 138 S. Ct. at 1934. *Gill* thus held that Respondents cannot just brandish calculations of partisan asymmetry to establish standing, because such metrics "do not address the effect that a gerrymander has on the votes of particular citizens." *Id.* at 1933.

Furthermore, even on their own terms, many of Respondents' allegations show that alleged vote dilution in various districts would have no effect on individual

citizens' votes. The District Court found standing in Congressional District 5, for instance, on the theory that this highly Democratic district might become "more competitive" under alternate configurations. App. A at 68. But the Democratic voter in District 5 would still secure the candidate of her choice in any hypothesized district. The only upshot of narrowing the Democratic margin of victory would be to redistribute Democratic votes elsewhere in the State—precisely the kind of "group political interest[ ]" in electing Democrats that *Gill* held cannot support standing. 138 S. Ct at 1933. This Court could decide in mere weeks whether materially similar claims of standing suffice. And if this Court deems these generic theories of standing deficient in *Rucho* or *Benisek*, Respondents also lack standing.

Respondents face a particularly steep climb to establish standing to challenge the Senate districts given that the Senate maps will never again be used and Michigan has no regularly scheduled 2020 Senate election. Respondents claim an injury based on voters' continued representation by Senators they allege were "elected under unconstitutional maps." Mich. Voters' Resp. 25. But the relevant harm traceable to partisan gerrymandering is the purported dilution of Respondents' votes at the ballot box. And the Senate map will never again inflict such an injury (if it ever did), because that map will never be used again.

2. As for justiciability, Respondents—like the District Court below—assume that the justiciability of partisan gerrymandering claims is settled, or at least on the brink of becoming reality. *See* Mich. Voters' Resp. 26-28; Sec. of State Resp. 9-11. Respondents cling to the Court's pronouncement about the justiciability of partisan

gerrymandering claims in *Davis v. Bandemer*, 478 U.S. 109 (1986), while ignoring three decades of judicial activity that undermines the vitality of that decision. Just last Term in *Gill*, the Court questioned if there are "any" enforceable Constitutional limits on gerrymandering and noted that the question is "unresolved." 138 S. Ct. at 1926, 1934. And in *Rucho*, *Benisek*, and *Gill*, the Court "postponed" the question of jurisdiction rather than noting "probable jurisdiction," signaling that justiciability remains unresolved. Order, *Rucho v. Common Cause*, No. 18-422 (U.S. Jan. 4, 2019); Order, *Lamone v. Benisek*, No. 18-726 (U.S. Jan. 4, 2019); Order, *Benisek v. Lamone*, No. 17-333 (U.S. Dec. 8, 2017); Order, *Gill v. Whitford*, No. 16-1161 (U.S. June 19, 2017). Even the District Court implicitly acknowledged the unfavorable legal landscape for Respondents by rejecting Applicants' laches defense in part because it felt time had to pass for "the law in this area [to] develop[ ] sufficiently to allow Plaintiffs to articulate and support their partisan gerrymandering claims." App. A at 55. In the three decades since *Bandemer*, plaintiffs have had every incentive to develop a reliable, judicially manageable test, but none has emerged—because none is possible.

C. Even if the Court in *Rucho* or *Benisek* identifies a standard for evaluating partisan gerrymandering claims, there is still a fair prospect (if not a likelihood) that a majority of the Court will reject the District Court's proposed test and remand the case for further proceedings. The Court has never "settle[d] on a standard for what constitutes an unconstitutional partisan gerrymander." *Gill*, 138 S. Ct. at 1927. The standard the District Court purported to identify is that legislators violate the Equal

Protection Clause and First Amendment by drawing districts with the predominant purpose or the specific intent to burden individuals who favor a political opponent; the resulting districts impose such a burden, as gauged by social-science metrics; and mapmakers' intent caused that burden. App. A. at 57-60. The District Court lifted that test from various district court decisions, including *Rucho* and *Benisek*, which, combined, it cited some 35 times without mentioning that those cases are now pending before this Court.

But the District Court's test is profoundly unworkable. It says nothing about the *degree* of discriminatory partisan intent or partisan effects that plaintiffs must show to prevail. App. A at 57-58. This Court has time and again recognized that politics are inextricably intertwined with redistricting. *See* App. 14 (citing cases); Cong. & State House Intervenor's Stay App., No. 18A1171, at 18-19. And Respondents still lack any means of determining when legitimate partisan considerations cross the line into unconstitutionality, let alone how to police that line using a test that focuses heavily on divining mapmakers' purported intent.

Michigan's 2018 electoral results underscore the challenge. Respondents' social-science metrics portray Michigan's maps as extreme and durable gerrymanders, yet Democrats in the 2018 election netted five additional seats in each the state House and Senate, plus two additional members of the U.S. House of Representatives. Bizarrely, the District Court's order would, for instance, require relief in a Senate district that was purportedly gerrymandered for Republicans, but

which elected a Democrat in 2018—a result that would remove this Democratic Senator from office mid-term.

D. Even if this Court were to accept Respondents' test for identifying partisan gerrymanders and invalidate Michigan's maps, Applicants would still have established a fair prospect of reversal regarding the proper remedy. Before the decision below, no court had ever ordered a special election as a remedy for a purported partisan gerrymander. Not only that, the District Court's decision to impose that drastic remedy here would cut many Senators' terms in half and could conceivably bar some second-term senators from running again due to Michigan's term limits. The District Court's novel remedy would run roughshod over the Michigan Constitution and a host of traditional equitable factors. *See* App. 17-22. Respondents' rejoinder that courts have imposed special elections to remedy *racial* gerrymanders only underscores why the Court is unlikely to follow suit for partisan gerrymanders. Mich. Voters' Resp. 30. This Court has long condemned the use of race in redistricting as presumptively impermissible, while considering it unexceptionable that mapmakers might rely on political affiliation. *See Bush v. Vera*, 517 U.S. 952, 958-59, 964 (1996); App. 20 n.10.

II. The District Court's Order Would Inflict Obvious Irreparable Harm

The District Court's order dictates that the Michigan Legislature drop its current business, draw new maps that avoid too many partisan considerations, and painstakingly detail the entire mapmaking process by August. Respondents offer no persuasive explanation for why forcing legislators to draw maps that, in all likelihood, would never become law qualified as irreparable harm in *Gill* and *Rucho* but should

not here. Respondents' position is particularly untenable in light of *Gill*, where the Court stayed an order that afforded Wisconsin ten months (more than double the four months afforded Michigan here) to redraw its maps and, unlike here, provided that new maps would not become effective unless and until this Court affirmed. *See Whitford v. Gill*, No. 15-cv-421, 2017 WL 383360, at *3 (W.D. Wisc. Jan. 27, 2017). Nor do Respondents establish why their argument that a stay would effectively deny voters the opportunity to vote in non-gerrymandered districts should fare any better as applied to the 2020 election cycle than it did with respect to the 2018 electoral timetable at issue in prior cases.

A. There is no reason to rush to upend the existing maps, and every reason to think the exercise will needlessly squander legislative resources. This Court is on the verge of addressing the partisan gerrymandering claims in *Rucho* and *Benisek* in the coming weeks. If this Court holds that plaintiffs in those materially similar cases lack standing or that their claims are non-justiciable, Respondents' claims here will fall with them. Forcing Michigan's legislature to begin redrawing maps to satisfy the District Court's fast-approaching deadline will be an unconscionable waste of effort. Even if the Court holds that such claims are justiciable, it likely will adopt a different standard than the one applied by the District Court—in which case any new maps likely will need to be redrawn. In either event, enforcing the District Court's order now will only squander Michigan's stretched sovereign resources.[1]

[1] Indeed, the order not only requires the Michigan Legislature to redraw maps on an accelerated, four-month schedule; it also forces the Legislature to amass volumes of information—including logs of all persons "formally or informally" consulted, a list of

Respondents' main rejoinder—that "States have no legitimate interest in enforcing unconstitutional laws"—again assumes they are right on the merits. Mich. Voters' Resp. 15; *see* Sec. of State Resp. 17. But this Court has repeatedly rejected that argument in countless settings, including when granting the *Gill* and *Rucho* stays.

Respondents further contend that forcing a legislature to spend sovereign resources is "not an irreparable injury" at all because expenditures of "money, time, and energy" are "not enough." Mich. Voters' Resp. 18 (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers). As Respondents' own authority makes clear, however, that general rule applies only where there is a "possibility that adequate compensatory or other corrective relief will be available at a later date." *Conkright*, 556 U.S. at 1403 (quoting *Sampson v. Murra*y, 415 U.S. 61, 90 (1974)). Here, it will be *impossible* for the Michigan Legislature to recoup the substantial time and money that it will cost to comply with the district court's order—making the harm irreparable. *See Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers).[2] That is presumably why this Court rejected this argument when the respondents in *Gill* pressed it. *See* Whitford Resp. at 14-15.

---

all "formal or informal" districting criteria, and a collection of all "alternative plans considered," along with a "detailed explanation" why each was not adopted. App. A at 145. Complying with this onerous order inevitably will divert legislative time and attention from matters of pressing public concern. *See* Cong. & State House Intervenor's Stay App., No. 18A1171, at 22-23.

[2] Respondents grossly mischaracterize *Renegotiation Board v. Bannerman Clothing Co., Inc.*, 415 U.S. 1, 24 (1974), which is limited to the proposition that unrecoupable *litigation expenses*—no matter how substantial—do not count as an irreparable injury. *Cf.* Mich. Voters' Resp. 18.

Respondents suggest that the Legislature could cut costs by adopting one of the "alternative maps" drawn by "non-parties in 2011" or by Respondents' expert witness "as part of this litigation." Mich. Voters' Resp. 18; *accord* Sec. of State Resp. 17-18. But "a state legislature is the institution that is by far the best situated to identify and then reconcile the traditional state policies within the constitutionally mandated framework." *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). Abdicating the legislature's "primary responsibility for legislative apportionment," *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964), in favor of algorithm-generated maps invented by an unelected professor is hardly a worthwhile trade, let alone one that would allow the Michigan Legislature to satisfy itself that Respondents' expert's maps actually satisfy Michigan's districting guidelines. And it would be especially irresponsible for the Legislature to defer to Respondents' expert's maps given that they rely on stale 2011 data that fails to reflect population shifts in various districts.

Respondents belittle the harm to the Michigan Legislature as mere "inconvenien[ce]." Sec. of State Resp. 2. But this Court has disagreed, recognizing that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). It is no answer to say that such intrusion is "illusory" merely because the District Court magnanimously affords the Michigan Legislature the "first opportunity" to redraw maps. Mich. Voters' Resp. 2-3. As the foregoing quotation makes clear, "federal-court *review* of districting legislation" is itself an intrusion on State sovereignty. *Miller*,

515 U.S. at 915 (emphasis added). And that intrusion is all the more severe where, as here, a federal court requires a state to redraw maps on an accelerated schedule and to submit volumes of information—all based on novel and untested theories of partisan gerrymandering. *See* App. A at 144-145.

Finally, Respondents claim that *Rucho* involved meaningfully different harm because the district court ordered the North Carolina Legislature to redraw its maps in less than three weeks. *See* Mich. Voters' Resp. 14; Sec. of State Resp. 19. But regardless of the particular deadlines, the same underlying injury in *Rucho* also is present here—namely, requiring a legislature to expend resources drawing maps that will likely never become law. Further, Respondents ignore that the Court granted a stay in *Gill* even though the district court there gave Wisconsin *ten months* to redraw its maps—over double the four months the District Court is willing to afford Michigan. App. A at 144. Because a stay was warranted in *Gill,* it follows *a fortiori* that one is warranted here.

B. Respondents argue that Michigan voters would suffer greater harm because a stay supposedly would leave them without any remedy. *See* Mich. Voters' Resp. 12-14; Sec. of State Resp. 14-17. Specifically, Respondents contend that, if this Court affirms the judgment, it likely will not issue its decision "before 2020." *See* Mich. Voters' Resp. 2. By that point, Respondents assert, it will be practically impossible to implement a new map in time for the 2020 elections. *See* Sec. of State Resp. 14.

Even if this problem were real, it would be one of Respondents' own making. Respondents chose to wait over six years to challenge the current districting plan,

knowing full well that the vicissitudes of litigation could prompt delays that would push resolution of this suit beyond 2020. Nor is there any compelling reason to rush a decision to meet Respondents' timetable for the 2020 elections. Rather than forcing the North Carolina Legislature to ready new maps in time for the 2018 elections, this Court granted a stay in *Rucho* on the eve of the opening of the filing period for the 2018 elections. Order, *Rucho v. Common Cause*, No. 17-1295 (U.S. Jan. 18, 2018); *see* Rucho Stay App. 10 (filing period opened February 12, 2018).

In any event, Respondents' hypothesized timetable for a decision fails on its own terms. Respondents extrapolate a decision from this Court no earlier than 2020 based on the seven-to-eight month briefing schedules in *Rucho* and *Benisek*. *See* Mich. Voters' Resp. 13; Sec. of State Resp. 15. But this Court's decisions in those cases may well resolve many, if not all, of the issues presented here, facilitating swift resolution of this appeal. For example, if the Court holds that partisan gerrymandering claims are non-justiciable, then it can summarily reverse the judgment below in short order. If the Court holds that such claims are justiciable, but adopts different legal standards than those applied by the district court, then it can simply vacate the judgment and remand for further consideration. And if the Court were to adopt the same standards as the District Court, it could summarily affirm the decision below or order an expedited briefing schedule to address any remaining issues. In sum, most outcomes would produce resolution before 2020.

The Secretary of State now asserts that staying the District Court's order will cause voter confusion and frustrate administration of the electoral system. *See* Sec.

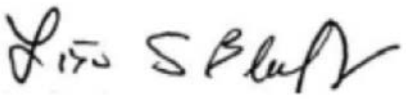
of State Resp. 12-13. But those dire projections are hard to credit given that the Secretary previously took the *opposite* position in the district court, arguing that requiring special Senate elections in 2020 "would be a significant disruption to the normal electoral process" and "would have the effect of removing legislators from office and forcing them to seek re-election after only two years into a constitutionally-mandated four-year term." *See* Def.'s Tr. Br., ECF No. 222, PageID.8191-8192.

Regardless, the Secretary's arguments only highlight the need for a stay. It would surely exacerbate voter confusion, as well as costs, to require the Michigan Legislature to enact a new districting plan that is unlikely to endure. Depending on the rulings in *Rucho* and *Benisek*, the legislature would likely need to repeal its new redistricting plan and either reinstate the prior one or potentially enact a third. A stay would avoid the public confusion from that chaotic state of affairs.

CONCLUSION

For the above reasons, Applicants respectfully ask that this Court grant this emergency application for a stay of the District Court's order pending resolution of Applicants' direct appeal of that order.

Respectfully submitted,



Lisa S. Blatt
Counsel of Record
Sarah M. Harris
Matthew B. Nicholson
Whitney G. Woodward*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
lblatt@wc.com

Gary P. Gordon
Jason T. Hanselman
Courtney F. Kissel
Hilary L. Vigil
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933

Counsel for the Michigan Senate and Michigan Senators

* Admitted only in Illinois. Practice supervised by D.C. Bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

May 21, 2019