IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS
OF MICHIGAN, et al.,

Plaintiffs,

v.

RUTH JOHNSON, in her official capacity as Michigan Secretary of State

Defendant.
_____/

Civil Action No. 17-cv-14148

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

AMENDMENT REPLACING ATTACHMENT 2 TO MOTION TO INTERVENE BY REPUBLICAN CONGRESSIONAL DELEGATION FILED FEBRUARY 28, 2018

ATTACHMENT 2

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MOTION TO STAY BY JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, MIKE BISHOP, PAUL MITCHELL, AND DAVID TROTT AS INTERVENORS

Congressional Intervenors Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott, Members of Congress representing Michigan (collectively, "Congressional Intervenors"), file the present Motion to Stay. In support of their Motion, Congressional Intervenors rely upon their Brief in Support filed herewith.

Respectfully submitted,

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Date: March 7, 2018

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,

Plaintiffs,

v.

RUTH JOHNSON, in her official capacity as Michigan Secretary of State,

Defendant.
_____/

Civil Action No. 17-cv-14148

Hon. Eric L. Clay
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BRIEF IN SUPPORT OF JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, MIKE BISHOP, PAUL MITCHELL, AND DAVID TROTT AS INTERVENORS IN SUPPORT OF MOTION TO STAY

Congressional Intervenors, Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott, Members of Congress representing Michigan (collectively, "Congressional Intervenors") hereby respectfully submit this Brief in Support of their Motion to Stay.

CONCISE STATEMENT OF THE ISSUE PRESENTED

I. WHETHER THIS COURT SHOULD STAY THIS ACTION PENDING RESOLUTION OF THE U.S. SUPREME COURT'S DECISION IN *WHITFORD*.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Gray v. Bush, 628 F.3d 779 (6th Cir. 2010)

Gill v. Whitford, 137 S. Ct. 2289 (2017)

I. PRELIMINARY STATEMENT

The present action is filed challenging Michigan's 2011 Congressional redistricting plan (the "Current Apportionment Plan") as unconstitutional.

Plaintiffs do not attempt to distinguish their legal claims from the ones currently pending before the United States Supreme Court in *Gill v. Whitford*, No. 16-1161, 2017 U.S. LEXIS 4040 (U.S. June 19, 2017). Plaintiffs' constitutional claims *are identical* to the constitutional claims asserted in *Whitford*. Because the Supreme Court's resolution of those claims – including the critical issues of whether partisan gerrymandering claims, in any form, are non-justiciable political questions and, if they are justiciable, under what standard or test they should be evaluated – will dictate the entire course of the present action, it is appropriate and just for the Court to stay this case pending the Supreme Court's forthcoming decision in *Whitford*. Briefing is closed, and the U.S. Supreme Court heard oral argument in *Whitford* on October 3, 2017. The U.S. Supreme Court will issue its decision by June 30, 2018 at the latest, although, of course, the Supreme Court could issue its decision much earlier.

II. FACTUAL BACKGROUND

A. Plaintiffs' Present Action

On December 22, 2017, League of Women Voters of Michigan ("League"), Roger J. Brdak, Frederick C. Durhal, Jr., Jack E. Ellis, Donna E. Farris, William "Bill" J. Grasha, Rosa L. Holliday, Diana L. Ketola, Jon "Jack" G. LaSalle, Richard "Dick" W. Long, Lorenzo Rivera, and Rashida H. Tlaib (collectively, "Plaintiffs") filed a Complaint for Declaratory and Injunctive Relief, alleging Michigan's state legislative and congressional districts violate Plaintiffs' First Amendment free speech and association rights and Fourteenth Amendment equal protection rights. (Compl. ¶ 1.)

Plaintiffs here bring legal claims under 42 U.S.C. §§ 1983 and 1988, under the Equal Protection Clause of the Fourteenth Amendment and under the First Amendment of the United States Constitution, i.e. identical claims to those advanced in *Whitford*. (Compl. ¶¶ 1, 74-85).

Specifically, Plaintiffs allege that the Current Apportionment Plan "singles out the individual Plaintiffs and hundreds of thousands of other similarly-situated Michigan Democrats based on their political affiliation, and intentionally places them in voting districts that reduce or eliminate the power of their votes . . . inverts

the Constitutional order by allowing those in power to treat voters as pawns to be shuffled back and forth based on their political allegiances, manipulating the electoral process in order to preserve and enhance the controlling party's power . . . violates individual Plaintiffs' rights to associate and speak freely, and individual Plaintiffs' rights to equal protection." (*Id.* ¶ 1, 2.)

In Count I, Plaintiffs allege that the "Current Apportionment Plan violates the First Amendment because it intentionally diminishes and marginalizes the votes of the individual Plaintiffs, Democratic members of the League, and other voters based on partisan affiliation . . . burdens and penalizes Democratic voters because of their participation in the electoral process as Democrats, their voting history for Democratic candidates, their association with the Democratic Party and their expression of political views as Democrats . . . Plaintiffs have been discriminated against because of their views and the content of their expression" which "denies individual Plaintiffs and other Democratic voters in Michigan their rights to free association and freedom of expression guaranteed by the Constitution." (*Id.* ¶¶ 76-77.) In Count II, Plaintiffs allege that the Current Apportionment Plan "violates individual Plaintiffs' as well as Democratic League members' Fourteenth Amendment right to Equal Protection of the laws . . .

[because it] intentionally and materially packs and cracks Democratic voters, thus diluting their votes, even though non-gerrymandered maps could have been drawn instead." (*Id.* ¶ 83) Plaintiffs seek to have the Court "Declare Michigan's Current Apportionment Plan unconstitutional and invalid, and the maintenance of the Current Apportionment Plan for any primary, general, special, or recall election a violation of Plaintiffs' constitutional rights" and to "[e]njoin Defendant and her employees and agents from administering, preparing for, and in any way permitting the nomination or election of members of Michigan's Legislature and Michigan Members of Congress from the unconstitutional Current Apportionment Plan that now exists." (*Id.* at pg. 32, 33)

For all of the reasons detailed below, the Court should stay this action pending the U.S. Supreme Court's decision in *Whitford.*

III. ARGUMENT

A. A Stay of This Action is Warranted

A district court has "broad discretion to stay proceedings as an incident to its power to control its own docket." *DeJonghe v. Ocwen Loan Servicing*, LLC, No. 17-11488, 2017 U.S. Dist. LEXIS 209950, at *2 (E.D. Mich. Dec. 21, 2017) (citing *Clinton v. Jones*, 520 U.S. 681, 706, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997)).

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Gray v. Bush*, 628 F.3d 779, 785 (6th Cir. 2010) (citing *Landis v. North American Co*., 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936)); *see also Jordan v. City of Detroit*, 557 F. App'x 450, 456-57 (6th Cir. 2014) (citing *Gonzalez v. Ohio Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 70371, 2008 WL 4277258, at * 1 (E.D.Mich. Sept. 17, 2008) ("We also consider a court's inherent authority to 'control its docket in promoting economies of time and effort for the court, the parties, and the parties' counsel.'")).

Accordingly, a court may "find it . . . efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *DeJonghe v. Ocwen Loan Servicing, LLC*, No. 17-11488, 2017 U.S. Dist. LEXIS 209950, at *2-3 (E.D. Mich. Dec. 21, 2017) (citing *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979)). "A stay pending the [Court's] decision will also serve to conserve the resources of the parties and the Court while avoiding the wasted effort that may be involved in proceeding under an uncertain legal framework." *DeJonghe v. Ocwen Loan Servicing, LLC*, No. 17-11488, 2017 U.S. Dist. LEXIS 209950, at *3 (E.D. Mich. Dec. 21, 2017).

Decisions to stay "ordinarily rest[] with the sound discretion of the district court." *Ricketts v. Consumers Energy Co.*, No. 16-cv-13208, 2017 U.S. Dist. LEXIS 82501, at *5 (E.D. Mich. May 31, 2017) (citing *Ohio Envtl. Council v. U.S. Dist. Ct.*, 565 F.2d 393, 396 (6th Cir. 1977)). "The most important factor is the balance of the hardships, but the district court must also consider whether granting the stay will further the interest in economical use of judicial time and resources." *Id*. (citing *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 627-28 (6th Cir. 2014)).

There are three overriding reasons why the Court should stay this matter: (1) the United States Supreme Court's forthcoming decision in *Whitford* will dictate if and how this litigation should proceed; (2) Plaintiffs will not be prejudiced by a temporary stay of this action; and (3) the balance of equities weighs in favor of granting a stay.

B. This Court Should Stay This Matter Pending the U.S. Supreme Court's Resolution of *Whitford*, Which Will Dictate If and How This Litigation Should Proceed

Critically, Plaintiffs in the present action do not attempt to distinguish their legal claims from the claims pending in *Whitford*. *Gill v. Whitford*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). Plaintiffs' constitutional claims *are identical* to the

constitutional claims asserted in *Whitford*.

First, Plaintiffs – as in *Whitford* – claim that their state's redistricting plan violates the First Amendment, "because it intentionally diminishes and marginalizes the votes of the individual Plaintiffs, Democratic members of the League, and other voters based on partisan affiliation. The Current Apportionment Plan burdens and penalizes Democratic voters because of their participation in the electoral process as Democrats, their voting history for Democratic candidates, their association with the Democratic Party and their expression of political views as Democrats." (Compl. ¶ 76; *compare with Whitford* Compl. ¶¶ 2, 91-94: alleging that Wisconsin's plan violates the First Amendment by intentionally and unreasonably burdening Democratic voters' rights of association and free speech on the basis of their voting choices, their political views, and their political affiliation).

Second, Plaintiffs here – like the plaintiffs in *Whitford* – claim that their state's redistricting plan violates the Equal Protection Clause of the Fourteenth Amendment, because it "uses political classifications . . . intentionally and materially packs and cracks Democratic voters, thus diluting their votes, even though non-gerrymandered maps could have been drawn instead." (Compl. ¶¶ 82-

83; *compare with Whitford v. Gill*, No. 15-0421 (W.D. Wis. July 8, 2015) (three-judge court) (Compl. ¶¶ 2, 31, 35, 82, 89) (ECF No. 1) ("*Whitford* Compl.") (alleging that Wisconsin's plan violates the Fourteenth Amendment's Equal Protection Clause by treating voters unequally and intentionally discriminating against Democratic voters).

And Plaintiffs here – like the plaintiffs in *Whitford* – allege that this discriminatory plan was effectuated by the "cracking" and "packing" of Democratic-affiliated voters, diluting the power of their vote and making it more likely to elect Republicans to Congress. (*See* Compl. ¶¶ 10, 16, 17, 28, 30, 32, 73, 83; *compare with Whitford* Compl. ¶¶ 15, 31, 35, 57-58, 82, 91-94) (alleging that Wisconsin's plan "packed" and "cracked" Democratic voters, "wasting" their votes in an effort to benefit Republicans and disadvantage Democrats)).

Because Plaintiffs' Equal Protection Clause and First Amendment claims are identical to the claims advanced in *Whitford*, the U.S. Supreme Court's decision in that case will directly determine if and how this litigation should proceed. If the U.S. Supreme Court rules that partisan gerrymandering claims under the Equal Protection Clause or the First Amendment are non-justiciable, that will be dispositive of both of Plaintiffs' claims. Moreover, if the U.S. Supreme Court

decides the merits of *Whitford*, then it will announce standards to adjudicate partisan gerrymandering claims that will determine how discovery and trial in this case should proceed. A stay of this matter pending the outcome of *Whitford* makes particularly good sense given that the *Whitford* appeal has already been fully briefed and argued and the Supreme Court may issue its ruling any day, and at the latest will do so by June 30, 2018.

C. This Case Should Be Stayed Because Plaintiffs Will Suffer No Prejudice

The 2020 congressional elections are distant enough to allow the resolution of *Whitford* before proceeding with this action (if necessary).

"The most important factor" in a Motion for Stay "is the balance of the hardships." *FTC v. E.M.A. Nationwide Inc.,* 767 F.3d 611 (6th Cir. 2014); *see Ricketts*, No. 16-cv-13208, 2017 U.S. Dist. LEXIS 82501, at *5. There can certainly be no hardship shown by Plaintiffs by being forced to wait a mere four months for a decision in *Whitford* when the 2020 elections are over two *years* away. *See Ricketts*, No. 16-cv-13208, 2017 U.S. Dist. LEXIS 82501, at *6 (noting a brief stay is less likely to result in hardship).

Suppose for a moment that the Court does grant this stay and the Supreme Court's decision in *Whitford* does nothing to change the landscape of this case. Plaintiffs will still have sufficient time (approximately a year) to pursue this claim. When you factor in the costs of litigation and discovery, there is simply no comparing the hardship defendants and proposed intervenors will suffer due to needlessly pursuing a matter before the Supreme Court has spoken on imminently similar issues. *See* Pls' Resp. to Mot. to Dismiss, at 11 ("[B]oth *Whitford* and *Benisek* . . . involve issues that may overlap with issues here."). Furthermore, proceeding with this case now will be an imminently inefficient use of the parties' time and resources. *See IBEW, Local Union No. 2020 v. AT&T Network Sys.*, 879 F.2d 864, at *23-24 (6th Cir. 1989) ("[T]he district court must also consider whether granting the stay will further the interest in economical use of judicial time and resources.").

Should controlling precedent – including a finding that partisan gerrymandering claims are non-justiciable – be handed down in *Whitford*, any proceedings conducted in this case, including motion practice and discovery, may need to be completely redone. Duplicative actions within the same proceeding

hardly further judicial economy. Simply put, there is no demonstrable reason to *not* stay these proceedings pending a result in *Whitford.* The Plaintiffs will suffer no prejudice and, absent a delay, the litigants will be forced to enter into what will duplicative proceedings.

D. The Balance of the Equities Weighs In Favor of Granting a Stay

A denial of this stay *will* necessarily cause harm to Congressional Intervenors. Denying the stay will require Congressional Intervenors to expend taxpayer dollars conducting extensive discovery. Furthermore, proceeding with this case – which asserts identical claims to those presently being considered by the U.S. Supreme Court – makes little sense. If the U.S. Supreme Court rules that partisan gerrymandering claims are non-justiciable, then taxpayer resources will have been completely wasted. Alternatively, if the Supreme Court promulgates a new standard, then briefing and discovery governed by those new standards will be needed. Therefore, to preserve both taxpayer and judicial resources, this Court should grant a stay until the Supreme Court issues its ruling in *Whitford*.

Plaintiffs cannot show any harm if they are required to wait a mere few months for the U.S. Supreme Court to rule in *Whitford*. They already let six years and three elections pass before filing this lawsuit. By choosing to sit on

their alleged rights *for years*, any need for urgency is of Plaintiffs' own making, and should not be credited by this Court in considering this Motion. *See Nexteer Auto. Corp. v. Korea Delphi Auto. Sys. Corp.*, No. 13-CV-15189, 2014 U.S. Dist. LEXIS 18250, at *26-27 (E.D. Mich. Feb. 13, 2014) (stating "delay of over one-year prior to seeking injunctive relief weighs against a finding of irreparable harm.") (citing *Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg.*, 511 F. App'x 398, 405 (6th Cir. 2013)).

This Court should therefore find that the balance of the equities tips in Congressional Intervenors' favor and grant the stay.

CONCLUSION

In the event that the Court does not dismiss Plaintiffs' Complaint in its entirety for all of the reasons set forth in Congressional Intervenors' separately filed Motion to Dismiss and Brief in Support, Congressional Intervenors respectfully request that the Court stay from hearing this case until identical claims are decided by the U.S. Supreme Court.

Respectfully submitted,

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Date: March 7, 2018

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Hon. Gordon J. Quist

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018 I electronically filed the following *Amendment Replacing Attachment 2 to Motion to Intervene by Republican Congressional Delegation filed February 28, 2018* with the Clerk of the Court using the ECF system which will send notification of such filing to all of the parties of record.

/s/Brian D. Shekell
Brian D. Shekell (P75327)

Date: March 7, 2018