No. 18A769

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

*League of Women Voters of Michigan, et. al. v. Jocelyn Benson, In Her Official Capacity as Michigan Secretary of State*

# APPLICANTS' REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY PENDING DISPOSITION OF APPLICANTS' EMERGENCY APPLICATION FOR A WRIT OF MANDAMUS

On Petition for a Writ of Mandamus to the United States District Court for the Eastern District of Michigan, Clay, Circuit Judge; Hood, Chief District Judge; Quist, District Judge presiding


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## INTRODUCTION

Contrary to the Respondents'/Plaintiffs' ("Respondents") claims, Applicants/Intervenor-Defendants ("Applicants") will undoubtedly suffer permanent and irreparable harm absent a stay from this Court. If this matter proceeds to trial on February 5, 2019, the harm caused by such a trial – given the facts, testimony, and evidence necessarily required– would be permanent, significant, and irreparable to the individual state legislators, the legislative staff, the state Legislature in general, the State of Michigan, and the public at large. This Court should not allow the Respondents to abuse the power of the judiciary by wasting significant resources, engaging in political grandstanding, violating legislative and First Amendment privileges, and attempting to embarrass political foes via a public trial in this matter.

The harm by such a trial is particularly heightened and irreparable given the possibility that this Court determines in *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 799 (M.D.N.C. 2018), *cert. granted*, 138 S. Ct. 923 (2018) (No. 18-422) and *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2018 U.S. Dist. LEXIS 190292 (D. Md. Nov. 7, 2018), *cert. granted*, 202 L.Ed.2d 510 (U.S. Jan. 4, 2019) (No. 18-726), that federal courts do not have subject matter jurisdiction over these partisan gerrymandering cases. Indeed, Respondents would simply be using the federal courts to engage in expensive, extensive and potentially improper discovery and violate privileged and confidential communications solely to obtain political advantage. This Court cannot allow such conduct, as it is completely violative of the very core of our judiciary and system of government as a whole.[1]

[1] It is important to note the incredible rush of the District Court in this case, as well as in United States District Court in the Southern District of Ohio *Ohio A. Philip Randolph Institute, et al. v. Ryan Smith, et al.* (S.D. Oh. July 17, 2018), to proceed to trial and judgment prior to this court's opinions in *Rucho* and *Lamone.* Aside from the obvious waste of judicial resources, unnecessary expenditures by parties and by third parties who have been forced to

Indeed, on February 1, 2019, the United States District Court for the Western District of Wisconsin determined that trial in the "political gerrymandering" case pending before it should be postponed to July of 2019 in light of *Rucho* and *Lamone*. *See* Order of February 1, 2019 (ECF No. 248) (filed February 1, 2019). On January 30, 2019, the United States District Court for the Southern District of Ohio established a briefing schedule in response to the Defendant's Motion to Stay with opposition briefs due on February 5, 2019 and reply briefs due February 7, 2019. (Notation Order, 1/29/2019). Unfortunately, that same week, the district court in this case determined that all motions for stays and continuances filed by Plaintiffs, Defendant and Intervenor-Defendants of the February 5, 2019 trial date were denied. (ECF No. 238) (Filed February 1, 2019).

## ARGUMENT

Irreparable harm is harm that cannot be undone through monetary remedies. *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1382 (6th Cir. 1995). Here, given the tremendous resources a trial of this magnitude would require, the history and purpose of legislative and First Amendment privileges, and the factual investigation and evidence that would necessarily be introduced into the record at trial, the harm is certainly significant and substantial if this case proceeds to trial. However, given that this Court will rule in the very near future (likely within the next 2 – 3 months) in *Rucho* and *Lamone* – that the outcomes of which will govern, instruct, and are potentially dispositive of the present case –the harm by proceeding to trial is heightened and is irreparable. Indeed, these cases specifically address whether there is

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produce evidence and defend privileges, the expenditures of a trial, the due process violations have been created by the Michigan Secretary of State's change of positions and the district court court's continuing rush to trial, all of these violations threaten to be made permanent if the Court does not decide the standing issue in *Bethune-Hill* (No. 18-281) in favor of appellants in that case. Applicants here filed an amici brief in that case. (No. 18-281, Jan. 4, 2019). The District Court has resisted even allowing Applicants into this case, and to get to this point required three trips to the United States Court of Appeals for the Sixth Circuit which twice reversed this District Court. If the Court does not grant the stay and writ the District Court will continue to apply the legal standards stated by the *Rucho* court, reach a decision on that basis, create a remedy on that basis, and thereby create difficult law of case issues that could make these violations of 'Applicants' rights permanent.

even subject matter jurisdiction in this matter, and the likely factual and legal standards the district court will be required to apply even if there is jurisdiction.

Ultimately, if federal district courts do not have subject matter jurisdiction over these types of cases (and there are more also in process to be completed before the Court's decision in *Rucho* and *Lamone*, including the case in Ohio previously identified in the Application in this matter), the harm occasioned by the cost, numerous privilege violations that will result from the witnesses, testimony, evidence, and discovery involved in trial is permanent, irreversible, and irreparable.

**1. History and Purpose of Legislative and First Amendment Privileges**

The concept of legislative privilege goes back to the English common law and "emerged from the twin principles of freedom of speech and legislative immunity in parliamentary law, and both principles appear history in statutes dating as far back as 1512." *Edwards v. Vesilind*, 292 Va. 510, 523, 790 S.E.2d 469, 476 (Va. 2016). Indeed, legislative privilege "arose in the young American nation from the same underlying principles, combined with the uniquely American emphasis on separation of powers and representative government." *Id*. at 523 (citing *Tenney v. Brandhove*, 341 U.S. 367, 373, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)). Freedom of speech in the legislature "was deemed so essential for representatives of the people" that the federal Speech or Debate clause appeared first in the Articles of Confederation and then in the Constitution, with little change. *Id*. The principle of legislative privilege is seen as an "integral piece of the separation of powers framework." *Id*. at 524. In reviewing the Virginia Constitution's Speech and Debate Clause and "Immunities of legislators" (which essentially mirrors the legislative privilege concept), the Virginia Supreme Court has stated it is "one of the specific and significant bulwarks the Constitution erects to protect the legislature from improper interference by the executive branch and the judiciary." *Id*. Indeed, the "freedom of speech and

debate" is a "great and vital privilege…without which all other privileges would be comparatively unimportant or ineffectual." *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L.Ed. 377 (1881) (internal quotation marks omitted).

Thus, essentially the goal and purpose of legislative privilege (and eventually First Amendment privilege) was to avoid the executive and judicial branches of government from interfering with the work of the legislative branch. The privileges applicable to the legislature and First Amendment are thus held in high regard and typically sought to be protected. Applicants previously asserted these privileges in the district court action below, but the panel denied the application/assertion of these privileges, essentially overriding the legislative/First Amendment privileges and ordering sensitive political and legislative information, communications, and strategy to be disclosed at trial in this matter. Thus, if trial proceeds on February 5, 2019, such information/evidence will be made public, regardless of the fact that this Court could rule soon thereafter that the entire case essentially be dismissed because the district court lacks proper jurisdiction. The harm by the disclosure of such information would already have been done, and there would be no way to remedy it.

**2. The Factual Investigation, Witnesses, Testimony, and Evidence Disclosed at Trial Would Constitute Irreparable Harm**

As the Court is well-aware, a primary element that the Respondents assert they must prove to succeed on their claims in the below district court action is political/discriminatory intent.[2] The factual presentation that would thus occur in the trial would necessarily bring out information that is unnecessarily embarrassing, damning, and in violation of legislative and First Amendment privileges, particularly considering the significant jurisdictional question looming over this case (and soon to be resolved by this Court).

[2] Applicants have vigorously asserted that the proffered "intent and effects" test is not justiciable, but the Order Denying Summary Judgment dismissed this argument in favor of the formulation of the so-called "test" adopted by the District Court in Rucho. (ECF No. 119) (Citing to *Rucho* no less than fifty five times).

Indeed, amongst other witnesses who may appear at trial or whose documents many be introduced into the record include those involved in the map drawing or legislative process. These may include testimony or documents from individuals who spoke to legislators personally. This evidence, Respondents hope, will be a factor in their discriminatory intent and effect prongs of their proposed test. Clearly, if this Court determines that there is no subject matter jurisdiction, then such testimony is merely political grandstanding and abusive of the judiciary and constitutes irreparable harm because once the information is public. It cannot be made private again.

Additionally, Respondents intend to introduce at trial certain emails that constitute irreparable harm and are solely being used in an attempt to damage political reputation. Such emails include, *inter alia*, an email between Republican consultants and operatives, (Plaintiffs' Exhibit 359); an email from the state's House Republican Campaign Committee director (Plaintiffs' Exhibit 374); an email from a legislator, (Plaintiffs' Exhibit 234); an email from a GOP Consultant to a Congresswoman's Chief of Staff, (Plaintiffs' Exhibit 427); an email from a state senate staff member to a Republican consultant, (Plaintiffs' Exhibit 362); and emails between Republican legislative aides, (Plaintiffs' Exhibit 401).

The foregoing is just a sample of the types of otherwise private communications to be introduced at a trial in this matter. The introduction of these otherwise private discussions at trial – and their subsequent publicity and inclusion in the public court record – constitutes irreparable harm in the event that the district court does not have subject matter jurisdiction at all. It therefore stands to reason that Respondents are using (or, more accurately, abusing) the federal court system to further political means and goals and engage in political grandstanding. This notion is contrary to the American form of government in general and the purpose of the federal judiciary specifically. There would be harm even if the trial was private and the matter was not

subject to complete dismissal on jurisdictional grounds. However, the trial is public on a massive scale, has unsurprisingly received a massive amount of media attention, and is indeed subject to dismissal (or, at the very least, significant modification) on jurisdictional or other grounds that will be contemplated by this Court in *Rucho* and *Lamone*.

The harm thus caused to specific legislators, legislative aides, the state Legislature, the State of Michigan, and the public in general is thus significant, permanent, and irreparable.[3] The testimony and evidence at trial cannot be made private once disclosed – the toothpaste cannot be put back in the tube – even if this Court subsequently determines that there is no subject matter jurisdiction, or that other facts or legal analysis should be applied in these cases even if there is subject matter jurisdiction in the federal courts. The harm is already done.

## CONCLUSION

For the foregoing reasons, and those contained in Applicants' Application for Stay Pending Disposition of Applicants' Emergency Application for a Writ of Mandamus, Applicants respectfully request that this Court issue the stay of all proceedings before the three-judge panel in the U.S. District Court for the Eastern District of Michigan pending this Court's disposition of Applicants' Emergency Application for a Writ of Mandamus.

[3] Indeed, the same fact pattern is playing out in the other "political gerrymandering" cases heading directly for this Court. In the Southern District of Ohio matter, third parties have been forced to turn over otherwise private communications that they resisted disclosing on the basis of First Amendment privilege, and have been forced to sit for depositions over vigorous objections. See *Ohio A. Philip Randolph Institute, supra* at ECF 128.

Respectfully Submitted on this 4th day in February, 2019.

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