No. _____

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., Petitioners

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MICHIGAN SENATE AND SENATORS' 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

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

This Court should grant a stay pending resolution of Applicants' appeal. Currently pending before this Court are two cases concerning whether partisan gerrymandering claims are justiciable and, if so, what administrable, legal, and factual standards exist for courts to resolve such claims. *Common Cause v. Rucho*, No. 18-422 (U.S. filed Oct. 1, 2018) and *Lamone v. Benisek*, No. 18-726 (U.S. filed Dec. 3, 2018). This Court heard argument in those cases on March 26, 2019, and the current term will likely end by late June.

Despite the foregoing, on April 25, 2019, the United States District Court for the Eastern District of Michigan issued an Order: (1) enjoining Michigan's use of many of its current legislative and congressional district maps as unconstitutional partisan gerrymanders; (2) requiring Michigan lawmakers to enact new maps by August 1, 2019, or have new maps drawn by the District Court; and (3) effectively amending Michigan's Constitution by reducing many senators' constitutionally mandated terms of office from four years to two years. The court not only declined to await this Court's resolution of *Rucho* and *Benisek*, but barely even acknowledged the existence of these pending cases.

The District Court grounded its decision in its belief that "[j]udges—and justices—must act in accordance with their obligation to vindicate the constitutional rights of those harmed by partisan gerrymandering." Op. at 5. But that puts the cart before the horse, because in *Gill v. Whitford* this Court unanimously stated that the justiciability of partisan gerrymandering claims is unresolved. 138 S. Ct. 1916, 1926

(2018). Petitioners do not presume to predict how this Court will resolve *Rucho* and *Benisek*, but the District Court's decision clearly contradicts this Court's consistently measured approach to partisan gerrymandering claims. Despite this Court's reluctance to find these claims justiciable or to articulate a standard for such claims, the District Court adopted and applied a new three-part standard that consists of discriminatory intent, effect, and causation. That standard provides an exceedingly low threshold for partisan gerrymandering claims, such that any political considerations would be unconstitutional, even though this Court has acknowledged that legislative districting is inherently political, and some amount of politics may be considered. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

This Court's intervention is imperative because the court's order is on the brink of throwing Michigan's political system into unnecessary chaos. In addition to imposing a remedy in violation of Michigan's Constitution, the District Court's demand that the Michigan Legislature create entirely new maps less than three months from now would put the Michigan Legislature in an impossible position. If left in effect, the court's order would require the Legislature and the Governor's Office to redirect all energy at the Capital away from addressing pressing and important policy decisions that benefit Michigan residents to redrawing maps. And that massive diversion of resources would be pointless, and unrecoverable, depending on how this Court resolves *Rucho* and *Benisek*. If this Court holds that partisan gerrymandering claims are not justiciable, new maps would be utterly unnecessary. Even if this Court were to identify some standard for assessing partisan-

gerrymandering claims, it is highly likely that the district court would have to redo its work and reassess its conclusions in light of this Court's holdings, which again would render the current mapmaking an exercise in futility. This Court granted stays in analogous circumstances in previous redistricting cases, and should do so again here. Accordingly, the District Court's decision should be stayed until this case is resolved.

OPINION BELOW

The three-judge District Court opinion enjoining the use of Michigan's legislative and congressional maps, ordering the Legislature to enact a new districting plan by August 1, 2019, and ordering a special Senate election in 2020 is attached at Appendix A.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1253. Because the underlying case is within this Court's mandatory and direct appeal jurisdiction pursuant to 28 U.S.C. § 1253, granting a stay pending the disposition of the case is a necessary aid to this Court's mandatory jurisdiction. *See* Sup. Ct. R. 20.1; 28 U.S.C. § 1651. Adequate relief cannot be obtained from any other court. Sup. Ct. R. 20.1.

STATEMENT OF THE CASE

A. FACTUAL/PROCEDURAL BACKGROUND OF THE CASE

On August 9, 2011, Michigan Governor Snyder signed into law Public Acts 128 and 129 of 2011. These Acts codified the boundaries of Michigan's 14 Congressional, 38 State Senate, and 110 State House districts (the "Current Apportionment Plan").

On December 22, 2017–over six years and three election cycles after the enactment of the Current Apportionment Plan–Plaintiffs, The League of Women Voters of Michigan, Roger J. Brdak, Frederick C. Durhal, Jr., Jack E. Ellis, Donna E. Farris, William "Bill" J. Grasha, Rasa L. Holliday, Diana L. Ketola, Jon "Jack" G. Lasalle, Richard "Dick" W. Long, Lorenzo Rivera, and Rashida H. Tlaib (collectively, "Plaintiffs"), filed a complaint seeking declaratory and injunctive relief, claiming that the Current Apportionment Plan is unconstitutional in that it constitutes an impermissible partisan gerrymander, violating Plaintiffs' rights as protected by the First Amendment and Equal Protection Clause. The Plaintiffs have narrowed the scope of their challenge to fewer districts, but the challenge still encompasses Congressional, House, and Senate Districts.

Plaintiffs' claims under 42 U.S.C. §§ 1983, 1988, and the First and Fourteenth Amendments to the United States Constitution allege that by continuing to implement the Current Apportionment Plan, the Defendant Secretary of State impermissibly discriminated against Plaintiffs as "likely Democratic voters" in contravention of the Equal Protection Clause of the Fourteenth Amendment and unreasonably burdened Plaintiffs' right to express their political views and associate with the political party of their choice in contravention of the First Amendment. Plaintiffs sought to enjoin the further use of the current district lines in the upcoming congressional and state House elections scheduled for 2020. And, although Michigan's Constitution provides that state Senate elections are not to occur again until 2022—after the next constitutionally required redistricting—the District Court

denied motions to dismiss portions of the case related to the State Senate. See Order Denying Motion to Dismiss, No. 17-cv-14148 (E.D. Mich. Aug. 3, 2018) (ECF No. 88).

Ruth Johnson, who was the original named Defendant in her official capacity as Michigan Secretary of State, moved to dismiss the Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(1) on the basis that Plaintiffs lacked standing to pursue statewide claims. Motion to Dismiss, No. 17-cv-14148 (E.D. Mich. filed Jan 23, 2018) (ECF No. 11). On May 16, 2018, the District Court dismissed Plaintiffs' statewide claims but held that Plaintiffs had standing to pursue district-specific claims. *League of Women Voters of Mich. v. Johnson*, 2018 U.S. Dist. LEXIS 82067 (E.D. Mich. 2018).

On November 6, 2018, Michigan held its General Election and elected Democratic Party candidate Jocelyn Benson as Michigan's new Secretary of State. Until her term of office ended on December 31, 2018, former Secretary of State Ruth Johnson vigorously defended the Current Appointment Plan against Plaintiffs' claims. On January 1, 2019, Secretary of State Benson was sworn into office as former Secretary Johnson's successor and, under Fed. R. Civ. P. 25(d), was automatically substituted as a party in this case in her official capacity. Secretary of State Benson commenced negotiations with Plaintiffs seeking to have a number of districts declared unconstitutional. The negotiations resulted in Plaintiffs and the Secretary filing a Joint Consent Decree with the Court and moving for its approval. (Joint Mot. to Approve Consent Decree, ECF No. 211, PageID.7857, 7880; see also Def. Sec'y's Tr. Br., ECF No. 222, PageID.8188). The proposal did not call for a special

Senate election, but instead argued strongly against the prospect of one. (Br. in Supp. of Joint Mot. to Approve Consent Decree, ECF No. 211, PageID.7867).

Shortly after Secretary Benson was elected, the Michigan Senate (the "Senate") and Michigan State Senators Jim Stamas, Ken Horn, and Lana Theis (the "Michigan Senators") moved to intervene to fill the adversarial void left by the Secretary of State's changed position. (ECF No. 206 and 208). On February 1, 2019, the District Court: (1) denied the Motion to Approve Joint Consent Decree (Order Den. Joint Mot., ECF No. 235, PageID.8377); (2) granted the Senate Intervenors' Motions to Intervene (ECF No. 237); and (3) denied all motions for stay (ECF No. 238).

Although the District Court rejected the Consent Decree, Secretary Benson announced that she "d[id] not intend to defend the current apportionment plans at issue in this case." (Order Granting Pls.' Mot. For Determination of Privilege, ECF No. 216, PageID.8122 n.1). Despite this pronouncement, Secretary Benson took the position in both her counsel's opening statement and her Trial Brief that, "a special election for State Senate offices during the upcoming State House election cycle in 2020 is not an appropriate remedy under the circumstances, and would be a substantial disruption to the normal electoral process." (Def.'s Tr. Brief, ECF No. 222, PageID.8191).

Given the proximity to this Court's consideration of partisan gerrymandering claims in *Rucho* and *Benisek*, the Senate Intervenors supported the Congressional and House Intervenors' emergency application for stay to this Court. That

application was denied, and the trial in this case was held from February 5-7, 2019. (See Trial Tr. vols. 1-3, 2/5/19-2/7/19, ECF Nos. 248-250).

B. DECISION UNDER REVIEW

On April 25, 2019, the District Court enjoined use of the Challenged Districts,[1] as defined in the District Court's Order, in any future election and ordered a special election for certain Senate seats in November 2020.[2] The District Court largely ignored that this Court will be imminently issuing a ruling in *Benisek* and *Rucho* and instead noted that this Court has not overturned *Davis v. Bandemer*, 478 U.S. 109 (1986), which found that a political gerrymandering claim was justiciable. The District Court applied a standard articulated by the three-judge panel in *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 800 (M.D.N.C. 2018), to Plaintiffs' Fourteenth Amendment vote-dilution claims and applied similar standards to their First Amendment claims on vote-dilution and associational theories. (ECF No. 268, PageID.11616-17).

The District Court found that all 34 Challenged Districts are unconstitutional partisan gerrymanders that violate Plaintiffs' First and Fourteenth Amendment rights by diluting the weight of Democratic votes and/or burdening associational

[1] Plaintiffs challenged the following districts: Congressional Districts 1, 4, 5, 7, 8, 9, 10, 11, and 12; Senate Districts 8, 10, 11, 12, 14, 18, 22, 27, 32, and 36; and House Districts 24, 32, 51, 52, 55, 60, 62, 63, 75, 76, 83, 91, 92, 94, and 95 (the "Challenged Districts").

[2] As explained below, the Order could require a special election for *all* of Michigan's 38 Senate districts—not just the 10 Senate districts included in the Challenged Districts—depending on how the new maps are drawn.

rights.[3] (ECF No. 268, PageID.11690). As a result, the District Court "enjoined the use of the Challenged Districts in future elections." (*Id.* at PageID.11702). The District Court then examined whether it should grant Plaintiffs' request to hold a special election with respect to the challenged Senate districts. Based on what it described as an "equitable weighing process," the District Court ordered a special election in 2020 for "the Senate districts that are included in the Challenged Districts, and for any Senate district affected by any remedial map approved by this Court." (ECF No. 268, PageID.11701-02). Such relief in a partisan gerrymandering case is unprecedented. The District Court allowed the Michigan Legislature and Governor until August 1, 2019 to enact remedial maps consistent with the Order. (*Id.* at PageID.11702). On May 3, 2019, the Senate Intervenors, along with the House and Congressional Intervenors, filed Motions for Stay Pending Appeal and Immediate Consideration (ECF Nos. 273-276) in the District Court pursuant to Fed. R. App. P. 8(a) and Sup. Ct. R. 23.3. On May 6, 2019, the District Court denied those motions, citing the reasons stated in the April 25, 2019 Order. ECF No. 277; Appendix A)

C. *RUCHO* AND *BENISEK*

This Court announced on January 4, 2019, that in March 2019 it would consider dispositive issues associated with partisan gerrymandering claims, including whether partisan gerrymandering claims are justiciable and what the

[3] The District Court found that Plaintiffs lacked standing to challenge Senate Districts 10, 22, and 32 and House Districts 52, 62, 76, and 92 on vote-dilution theories (ECF No. 268, PageID.11656-57), but found that they had standing to challenge all 34 districts on a First Amendment associational theory (ECF No. 268, PageID.11657).

standards are for such claims, in *Rucho,* No. 18-422 and *Benisek,* No. 18-726. The same dispositive issues were considered by the District Court during the trial in this case, held in February 2019, and decided by it in the Opinion and Order entered April 25, 2019. Oral argument in *Rucho* and *Benisek* took place on March 26, 2019. Those cases present the same dispositive gerrymandering issues as in this case.

REASONS FOR GRANTING THE APPLICATION

To obtain a stay pending appeal, an applicant must show: (1) a reasonable probability that the Court will consider the case on the merits; (2) a fair prospect that the Court will reverse the decision below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Those factors are satisfied here. This case's central issues are identical to those this Court is considering in *Rucho* and *Benisek*—whether partisan gerrymandering claims are justiciable and, if so, under what standard.

There also exists the requisite "fair prospect" that one or both of those cases will be resolved in a way that necessitates reversal or vacatur in this case. The District Court largely ignored that this Court has not found that partisan gerrymandering is unconstitutional or even that such a claim is justiciable. (4/25/19 Op. & Order, ECF No. 268, PageID.11561). To the contrary, this Court explicitly explained in *Gill* that the justiciability of claims alleging partisan gerrymandering is an open question:

> Our considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering. In particular, two threshold questions

> remain: what is necessary to show standing in a case of this sort, and *whether those claims are justiciable*. Here we do not decide the latter question . . . .

138 S. Ct. at 1929. In other words, because this Court has been unable to determine whether partisan gerrymandering claims are justiciable or what standard applies, the District Court took it upon itself to craft such a standard, even though this Court is in the middle of cases interpreting the same issue. This Court has made clear that, even if partisan gerrymandering claims are justiciable, it is not per se unconstitutional. Further, a special Senate election that would disrupt regular governmental operations by removing legislators from office and truncating four-year terms is not an appropriate remedy.

Finally, for the same reasons that this Court found the remaining stay factors satisfied when it granted stays in other partisan gerrymandering cases, those factors are satisfied here as well. Indeed, a grant of a stay here follows almost directly from the grant of a stay in *Gill* because it is likewise wasteful for a State to expend time and resources to comply with a constitutional theory that this Court may soon reject or modify. Accordingly, the Court should issue a stay to preserve the status quo pending appeal and ensure that Michigan will not be forced to draw and enact new legislative and congressional maps on an expedited basis.

A. There Is A Reasonable Probability That The Court Will Vacate Or Reverse The Decision Below.

This case plainly satisfies the first two factors in this Court's stay analysis, as there is both "a reasonable probability" that the Court will either hold this case or set it for consideration on the merits, and a "fair prospect" that the Court will vacate or

reverse the decision below. The threshold questions in this case are: (1) whether the plaintiffs have standing, (2) whether plaintiffs' claims are justiciable; and (3) if yes to these questions, what standard a court should apply when adjudicating those claims. Those are precisely the same threshold questions this Court is actively considering in *Rucho* and *Benisek*. And, if this Court concludes either that statewide partisan gerrymandering plaintiffs lack standing, that some or all forms of partisan gerrymandering claims are nonjusticiable, or establishes a standard for weighing partisan gerrymandering that is distinct from the District Court's Order, then the District Court's Order may well be nullified or require significant revision to address this Court's decision.

Accordingly, so long as there is a "fair prospect" that the defendants in either *Rucho* or *Benisek* will prevail on those issues, then there is a fair prospect that the defendants in this case will as well. There also is a fair prospect that this Court will reverse or vacate even if the plaintiffs in one or both of those pending cases prevail. Even assuming partisan gerrymandering claims are justiciable under one of the Plaintiffs' theories, this Court has never articulated an applicable standard for such claims. Accordingly, even if this Court concludes that partisan gerrymandering claims are justiciable, the Court may nonetheless vacate and remand for the District Court to reconsider the Plaintiffs' claims under the standard this Court articulates.

1. This Court Has Not Found Partisan Gerrymandering Claims to Be Justiciable or Provided a Standard by Which to Determine Constitutionality.

The District Court determined that partisan gerrymandering is categorically unconstitutional, which contradicts decades of Supreme Court precedent that analyzed the precise issue and refused to make such a finding. Far from holding that partisan gerrymandering is *unconstitutional*, this Court has repeatedly declined to decide whether such claims are even *justiciable*. Although the District Court is correct that, in *Davis v. Bandemer,* 478 U.S. 109 (1986), this Court determined that a partisan gerrymandering claim was justiciable, the Justices could not agree on a standard by which to judge whether the gerrymander was unconstitutional and have not agreed on one to date.

In fact, since *Bandemer*, this Court has stepped back from the position that partisan gerrymandering claims are justiciable. In *Vieth v. Jublirer*, this Court explicitly reconsidered its *Bandemer* holding. 541 U.S. 267, 272, 277; 124 S. Ct. 1769; 158 L. Ed. 2d 546 (2004). A plurality of the *Vieth* Court found that political gerrymandering challenges are nonjusticiable, with four justices deciding that no manageable standards exist for purely political gerrymandering cases. *Id.* at 281, 292. Then, in *Gill v. Whitford*, this Court unanimously acknowledged that it does not know "what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines." 138 S. Ct. at 1926. Allegations of unconstitutional political gerrymandering are, therefore, "an unsettled kind of claim

th[e] Court has not agreed upon, *the contours and justiciability of which are unresolved*." *Id.* at 1934 (emphasis added).

This Court has historically been wary of entertaining partisan gerrymandering claims because there are, as of yet, no judicially discoverable and manageable standards for resolving them. While several lower federal courts have adopted and applied standards, they have chosen those standards arbitrarily, without deciding the underlying question: How much politics is too much in the context of redistricting—an inherently political process? *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 844-52; *Benisek v. Lamone*, 348 F. Supp. 3d 493, 513 (D. Md. 2018); *Shapiro v. McManus*, 203 F. Supp 3d 579, 594 (D. Md. 2016). Indeed, in this case, the District Court spent only about four pages of its 146-page Order discussing justiciability and the substantive standard by which to judge partisan gerrymandering claims. (4/25/19 Op. & Order, ECF No. 268, PageID.11614 *et seq.*). Given that this Court has not defined the contours of partisan gerrymandering during the decades it has considered them, then surely one would anticipate the District Court's analysis would be robust. But instead, the District Court perfunctorily adopted a standard that effectively prohibits *any* partisan considerations in redistricting.

This Court has not embraced such an approach despite numerous opportunities to do so. To the contrary, this Court has consistently stated that some amount of politicking in districting is permissible. *See, e.g.*, *Hunt v. Cromatie*, 526 U.S. 541, 551 (1999); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (ALITO, J., concurring in part and dissenting

in part); *Vieth*, 541 U.S. at 286 (plurality opinion). Because some political considerations may be taken into account, the District Court's adoption of a standard taken from racial gerrymandering cases—in which no amount of racial discrimination is permissible—was inapposite and unsupportable.

Political gerrymandering claims are dissimilar to other types of First and Fourteenth Amendment claims because districting is inherently political. The issue underlying partisan gerrymandering claims is the separation of powers. The United States Constitution entrusts districting to state legislatures through the Elections Clause[4] because elections are political and best left to legislatures to regulate. *See Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . . ."). Partisan gerrymandering is a nonjusticiable political question for this reason. As this Court noted in *Vieth*, "Sometimes . . . the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." 541 U.S. at 277. This case presents one such claim. Because this Court likely will rule that partisan gerrymandering claims are nonjusticiable, a stay is appropriate pending ultimate resolution of this case. *See also Merritt-Ruth v. Latta*, No. 14-cv-12858, 2015 U.S. Dist. LEXIS 104999, at *14 (E.D. Mich. Aug. 11, 2015) (granting a stay pending appeal in part because the issue at bar was "debatable amongst jurists of reason").

[4] Article I, section 4 of the U.S. Constitution states: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof . . . ."

2. The Senate Intervenors Are Also Likely to Succeed on the Merits of Their Laches and Standing Arguments Because No Senate Election Is Scheduled for 2020.

The District Court erred when it held that laches does not bar Plaintiffs' challenges against the Senate districts. The Michigan Constitution provides that Senate elections occur every four years. Art. IV, § 2. Senate elections occurred most recently in 2014 and 2018 and, pursuant to the Michigan Constitution, are not to occur again until 2022. In contrast, elections for the U.S. and Michigan Houses occur every two years. U.S. Const. art. I, § 2; Mich. Const. art. IV, § 3.

While the Challenged Districts would be used in 2020 for state and federal House elections if the District Court had not granted prospective injunctive relief, the challenged Senate districts will ***never*** be used again regardless of what happens in this case. The decennial census will take place in 2020, and all district lines will be redrawn by the Independent Citizens Redistricting Commission[5] in 2021 based on the new census data. The next Senate election in 2022 will use these new districts.

Plaintiffs asked the District Court "to declare the Challenged Districts unconstitutional and *enjoin their use in future elections* to prevent further harm to their constitutional rights." (4/25/19 Op. & Order, ECF No. 268, PageID.11611). As the District Court explained, laches cannot bar a plaintiff's claims for prospective injunctive relief from ongoing harms because any past dilatoriness by a plaintiff is "unrelated to a defendant's ongoing behavior that threatens future harm." (4/25/19

[5] In November 2018, Michigan voters approved Proposal 18-2 to amend the Michigan Constitution to "establish a commission of citizens with exclusive authority to adopt district boundaries for the Michigan Senate, Michigan House of Representatives and U.S. Congress, every 10 years."

Op. & Order, ECF No. 268, PageID.11561.) Laches does not apply, therefore, to prevent relief with respect to future elections that would violate Plaintiffs' constitutional rights. But, laches may bar claims for past harms.

For the Senate districts, the only alleged harm has already occurred: Senate elections happened in 2014 and 2018. No future election will use the challenged Senate districts; prospective relief as to such an election is not possible or needed. Laches may—and does—bar claims against the Senate districts because Plaintiffs delayed so long that prospective relief is not needed. Plaintiffs' unreasonable delay has prejudiced the Senate Intervenors because: (1) redrawing district boundaries using outdated census data from 2010 would violate the United States Constitution's mandate for districts of equal populations;[6] and (2) ordering a special election at this late hour would truncate Senators' four-year terms of office established by the Michigan Constitution, as discussed in detail below.

Plaintiffs lack standing to challenge Senate districts for the same reason that laches applies to Plaintiffs' claims against Senate districts: there is no regularly scheduled election for the Senate in 2020. Harm that may have occurred to Plaintiffs, if any, happened at the voting booth, during an election, which is the only time when districting may affect voters. Indeed, the District Court based its standing decision in part on the fact that "at least one Individual or League Plaintiff resides in the

[6] Redrawing districts using outdated census data from 2010 would violate the United States Constitution's mandate for districts of equal populations due to population shifts over the past nine years. As the Senate Intervenors have noted, the U.S. Census Bureau estimates that 27 Michigan counties have lost an aggregate population of 150,000 people, with about 70,000 of those having left Wayne County alone. (ECF No. 254, PageID.10385.)

Challenged District . . . [and] intends to live in the district in 2020 . . . ." (4/25/19 Op. & Order, ECF No. 268, PageID.11623.) In this case, Plaintiffs seek prospective injunctive relief to prevent the Challenged Districts from being used in future elections. But there is no harm to prevent because no future Senate election will ever use the Challenged Districts; the remedy sought is gratuitous. Therefore, this Court will likely reverse the District Court's finding that Plaintiffs had standing as to their claims against Senate districts.

3. The Senate Intervenors Are Likely to Succeed on the Merits of Their Appeal Challenging the Special Election as a Remedy.

A stay is also warranted because this Court will likely reverse the District Court's Order requiring the Secretary to hold a special Senate election in 2020 because equitable considerations weigh heavily against it. Notably, no court has ever ordered a special election that would truncate the terms of legislators in contravention of a state constitution as a remedy for a partisan gerrymander.

Unable to find precedential support for truncating legislative terms in a partisan gerrymandering case, the District Court relied on *North Carolina v. Covington*, 137 S. Ct. 1624, 1625-26 (2017), a racial gerrymandering case,[7] weighing

[7] This case is distinguishable from *Covington* because racial gerrymandering is not legally analogous to partisan gerrymandering. This Court has explained that "[l]aws that explicitly distinguish between individuals on racial grounds fall within *the core* of [the Equal Protection Clause's] prohibition." *Shaw v. Reno*, 509 U.S. 630, 642; 113 S. Ct. 2816; 125 L. Ed. 2d 511 (1993) (emphasis added). In contrast, this Court has not determined whether the Equal Protection Clause (or First Amendment) similarly prohibits political gerrymandering. Indeed, in *Bush v. Vera*, this Court contrasted racial and political gerrymandering, subjecting the former to strict scrutiny, while allowing the latter:

Covington's equitable factors for and against a special election as a remedy. The District Court, however, improperly weighed the equitable factors. The District Court weighed the first factor—the nature and severity of the constitutional violation—in favor of a special election because, in its opinion, "the nature of the constitutional violation is extremely grave." (4/25/19 Op. & Order, ECF No. 268, PageID.11699). But, as discussed at length, this Court has not found partisan gerrymandering claims to be justiciable, let alone unconstitutional or "extremely grave." To the contrary, this Court has permitted political gerrymandering in the past. *See, e.g.*, *Vera*, 517 U.S. at 968; *Hunt*, 526 U.S. at 551; *Gaffney*, 412 U.S. at 753. As such, the District Court erred by weighing this factor in favor of a special election.

The District Court also found that the second factor—judicial restraint and state sovereignty—weighed in favor of ordering a special Senate election, reasoning that inconvenience to legislators and truncating senators' four-year terms is not an intrusion on state sovereignty. (4/25/19 Op. & Order, ECF No. 268, PageID.11700.)

> If the State's goal is otherwise constitutional political gerrymandering, it is free to use . . . political data . . . precinct general election voting patterns, precinct primary voting patterns, and legislators' experience—to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district. . . . But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.

517 U.S. 952, 968; 116 S. Ct. 1941; 135 L. Ed. 2d 248 (1996). Therefore, it is not at all clear that *Covington*'s equitable balancing test applies in the context of partisan gerrymandering claims, and even if it does, partisan gerrymandering is not a constitutional violation of the same severity as racial gerrymandering.

But "inconvenience" is not the interest to be weighed here. The State has a sovereign interest in: (1) controlling the integrity of its system of elections, free from interference by federal courts; (2) maintaining the reasonable, settled expectations of legislators and their constituents in the results of previous elections; (3) determining at the state level the most appropriate remedy for any constitutional infirmities in its districting plans;[8] and (4) preventing increased costs of elections and campaigns to taxpayers and candidates. Each of these state interests counsels against ordering a special Senate election.

On top of these interests, the State has an overarching interest in maintaining the system and parameters of government enshrined in its Constitution, adopted by vote of the people in 1962. The Michigan Constitution provides four-year terms for senators, running concurrently with the Governor's term. Mich. Const. art. IV, § 2. If conducted, the special election would truncate the terms of senators from certain districts to two years. While some legislators will be forced to run for reelection, others may be challenged based on Michigan's term limits.[9] A special Senate election that contravenes Michigan's Constitution would undoubtedly disrupt the ordinary operation of the Legislature by ousting a portion of its legislators from their

[8] The people of Michigan have determined and put in place an appropriate remedy for any alleged partisan gerrymandering by adopting a constitutional amendment during the November 2018 election that established the Independent Citizens Redistricting Commission. The Commission will draw Michigan's district lines based on nonpartisan considerations beginning with the 2020 census.

[9] The Michigan Constitution provides, "No person shall be elected to the office of state senate more than two times." Mich. Const. art. IV, § 54. Whether this provision would permit second-term senators to run for reelection if their terms are truncated by this Court is a question that is already generating debate among constitutional scholars in Michigan.

representative seats. Thus, this Court's Order interferes with Michigan's sovereignty, even though the challenged Senate districts will never be used again in a Michigan election.

While courts have equitable power to craft appropriate remedies, that power is not without limit. This Court has stated that, "[i]n the reapportionment context, it is the duty of a court seeking to remedy an unconstitutional apportionment to right the constitutional wrong *while minimizing disturbance of legitimate state policies.*" *Sixty-Seventh Minn. State S. v. Beens*, 406 U.S. 187, 202, 92 S. Ct. 1477, 1486 (1972) (emphasis added). This Court has also noted that "a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable . . . demands on a State in adjusting to the requirements of the court's decree." *Reynolds v. Sims*, 377 U.S. 533, 585; 84 S. Ct. 1362 (1964). The Sixth Circuit has counseled against truncating a state elected official's term of office to meet constitutional requirements.[10] *French v. Boner*, 963 F.2d 890, 891-92 (6th Cir. 1992) (refusing to order new elections before terms

[10] While other courts have ordered special elections that truncate terms of office, they have never done so to remedy a partisan gerrymandering claim in a way that contradicts a state constitution. Courts have only truncated terms of office to remedy racial gerrymandering and malapportioned districts of unequal populations. *See, e.g.*, *Covington*, 137 S. Ct. at 1625-26 (examining equitable factors when deciding whether to truncate existing legislators' terms by ordering a special election as a remedy for racial gerrymandering); *Travia v. Lomenzo*, 381 U.S. 431; 85 S. Ct. 1582; 14 L. Ed. 2d 480 (1965) (discussing three-judge panel's order providing for truncated one-year terms after unequally populated districts were found to violate the Equal Protection Clause); *In re Apportionment Law Appearing As Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1046 (Fla. 1982) (finding that "the courts have both the power and the duty to truncate the terms of legislators elected from malapportioned districts which violate the 'one-person one-vote' command of the equal protection clause" in part because the Florida Constitution explicitly provided for truncated terms after redistricting).

expired, noting that such a decision would "increase the costs of elections for taxpayers and candidates . . . [and] undermine the settled expectations that both voters and elected officials hold as a result of the [previous] election."). Thus, courts recognize that disruption of a state's ordinary electoral and legislative processes through a special election is an extraordinary remedy and that states have an interest in protecting the terms of elected officials.[11] This interest weighs against ordering a special election.

Finally, the District Court also found that the third factor—disruption to the ordinary processes of government—weighed in favor of ordering a special election. As to this factor, too, the District Court erred. The District Court only considered that the *timing* of a special election would not cause substantial disruption because congressional and state House elections are already scheduled in 2020. It did not consider the myriad other elements of Michigan's ordinary government processes that would be upset. These considerations, previously discussed, include the upheaval caused by the special Senate election and campaigns, truncation of senators' constitutionally established four-year terms, and the potential impact of term limits on second-term senators. Transition periods always come with costs, and unexpectedly transitioning between legislators in the middle of a term would be even

[11] Furthermore, Secretary Benson agrees with the Senate Intervenors that the ordered special election will "disrupt the election system in Michigan." (Trial Tr. vol. 1, 2/5/19 ECF No. 248, PageID.8736.) As Michigan's chief elections officer, Secretary Benson is in a better position than the District Court to determine what remedy would or would not disrupt the election system, and the District Court's disregard for her position on the issue evidences its intrusion on state sovereignty. In this case, both judicial restraint and Michigan's sovereign interests weigh against ordering a special election.

more extreme. Disruption of government from a special election would be inevitable. The District Court erred when it failed to take these considerations into account and should have weighed this factor against ordering a special election, as well. Overall, all three equitable *Covington* factors counsel against the District Court's Order for a special election, and the Order likely will be reversed.

B. The State And Its Citizens Will Suffer Irreparable Harm Absent A Stay, And The Balance Of Equities Favors A Stay.

The Senate Intervenors will be irreparably harmed if the Court does not issue a stay pending appeal. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012). That injury is exacerbated in the redistricting context, as "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915; *see also*, *e.g.*, *id.* at 934-35 (Ginsburg, J., dissenting) ("federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions"). Accordingly, that the District Court has not only enjoined the use of the Current Appointment Plan for the House and Congress, but also mandated that recently elected Senators run for a shortened term in 2020 constitutes irreparable injury to warrant a stay—as is the District Court's demand that the Legislature and Governor approve a new redistricting plan by August 1, 2019 or "the [District] Court will draw remedial maps itself."

The injury that will be incurred in the absence of a stay here is abundantly clear. The District Court has taken the extraordinary and unprecedented step of

ordering a special Senate election, as well as giving the Michigan Legislature only until August 1, 2019 to pass "remedial" maps and have them signed by the Governor. Absent a stay, both remedies in this case will cause irreparable harm to the Michigan electorate, the electoral process, and to the impacted senators who may see their four-year terms under the Michigan Constitution truncated.

To draw remedial maps prior to August 1, 2019, the Michigan Legislature will be forced to devote massive resources—including hiring map-drawers, lawyers, experts, and other staff, purchasing appropriate software, and expending untold thousands of hours reviewing and revising any proposed plans—to ensure compliance with Michigan's statutory redistricting standards and the District Court's decision. The financial cost to accomplish such efforts would be substantial, to say the least, and will be borne by taxpayers. To start the process while this Court is considering the Senate Intervenors' direct appeal—and the *Rucho* and *Benisek* cases—will cause confusion for the electorate and be financially costly (not to mention requiring elected officials to devote unnecessary time and resources to the districting process that would be otherwise spent on issues that will help Michigan residents). Moreover, all of the time and taxpayer money necessary to draw new maps will have been spent on only one election, as the Independent Citizens Redistricting Commission will draw new maps for 2022 and beyond.

With respect to the special election, Secretary Benson previously acknowledged in briefing to the District Court that it "is not an appropriate remedy under the circumstances, and would be a substantial disruption to the normal

electoral process." (Def.'s Tr. Brief, ECF No. 222, PageID.8191) (Emphasis added.). The impact of this remedy is severe and irreparable. As discussed above, special elections interfere with the integrity of the election system and state sovereignty. Moreover, the 2010 census data is outdated, so districts created using that data would very likely contain unequal populations that violate the Equal Protection Clause's one-person, one-vote standard.

The practical result of ordering special elections in Senate districts is a violation of Mich. Const. art. IV, § 2, which mandates four-year Senate terms. A remedy that contravenes the Michigan Constitution irreparably harms the Senate Intervenors and impugns Michigan's right as a sovereign to govern without federal interference. Constitutional violations are routinely recognized as triggering irreparable harm. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 996 (S.D. Ohio 2013) (citing *Elrod v. Burns*, 427 U.S. 247, 373 (1976)). If "a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). In other words, the threatened violation of a constitutional right is irreparable harm per se. Granting a stay would avoid such irreparable harm.

The propriety of a stay here is further supported in light of the stay granted in *Gill*. There, the district court issued its remedial order more than a year before the 2018 election cycle was set to commence, and gave the State nine months to draw a new map. Moreover, the court specifically emphasized that the Wisconsin mapdrawers had "produced many alternate maps, some of which may conform to

constitutional standards," which it thought would "significantly assuage the task now before them." *Whitford v. Gill*, No. 15-cv-421-bbc, 2017 WL 383360, at *2 (W.D. Wisc. Jan. 27, 2017).

Not only have the Michigan Legislature and Governor not produced any maps in nearly a decade, because of Michigan's term limits, only a handful of legislators were even in office during Michigan's last redistricting process. The task of redistricting is herculean, involving thousands of person hours to collect data, draw maps, seek public input, hold legislative hearings, vote on legislation, and present it to the Governor for review and approval. Giving Michigan only a few months for such a complex process is insufficient. Furthermore, the disruption such an undertaking will have on Michigan's other legislative priorities likely results in irreparable injuries to untold numbers of citizens.

A stay pending appeal is also in the public interest. The public is always well-served by stability and certainty and always disserved when the state legislature is forced to devote considerable resources to empty gestures. And the public interest will further be served by preserving this Court's ability to consider the merits of this case before the District Court's order inflicts irreparable harm on a sovereign State. This Court should therefore follow its "ordinary practice" and prevent the District Court's order "from taking effect pending appellate review." *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (THOMAS, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (KENNEDY, J., in chambers))

CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court grant this emergency application for a stay of the District Court's order pending resolution of Applicants' appeal. Given the August 1, 2019 deadline the District Court has imposed for Michigan's Legislature and Governor to enact new maps, the Senate Intervenors further request that, if possible, the Court rule on this application by May 17, 2019.

Respectfully Submitted on this 10th day in May, 2019.

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