No. 18A1171

IN THE

Supreme Court of the United States

LEE CHATFIELD,
in his official capacity as Speaker of the Michigan House of Representatives and Aaron Miller, *et al.*,
Applicants,

v.

LEAGUE OF WOMEN VOTERS OF MICHIGAN, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

This Court is at most weeks away from issuing its rulings in *Benisek* and *Rucho*. Yet instead of acknowledging that a stay is warranted, Plaintiffs below ("Democratic Voters") and the Michigan Secretary of State (collectively "Respondents") oppose relief principally on the basis that State House and Congressional Intervenors' ("Applicants") harms will be "inconvenient" but not irreparable. *See, e.g.,* Secretary of State Response at 2. Respondents and the District Court fail to appreciate the harm Applicants will suffer because they misapprehend the legislature's role in redistricting, which is "the most vital of local functions." *See Miller v. Johnson*, 515 U.S. 900, 915 (1995). This Court should reject Respondents' arguments and stay this case pending the outcome of the appeal.

I. The District Court's Remedy Is an Unprecedented Intrusion Into the Legislative Process.

Contrary to the Democratic Voters' contention that Applicants' will suffer no "meaningful" harms, the District Court's remedy represents an unprecedented intrusion into the legislative process in the context of redistricting cases. The District Court enjoined the use of the challenged districts and provided the opportunity for the Michigan legislature to pass, only with the Governor's signature,[1] a remedial plan on or before August 1, 2019—but not after. Applicants' Emergency Mot. Stay App. A at 144. However, the District Court did not stop there. It ordered that, within ten days of the passing of any remedial plans, Intervenors must file with the District Court the following:

> 1. A description of the process the Michigan legislature, and all constituent committees or members thereof, followed in drawing and enacting the proposed remedial plan, including, without limitation, the identity of all participants involved in the process, including any person, corporation, or organization formally or informally consulted by any committee, committee member, or legislator involved in the map-drawing process;

[1] This alone circumvents the normal process for legislative enactments in Michigan, which can pass with a gubernatorial override of two-thirds majorities in both houses. *See* Mich. Const. art. IV, § 33.

2. Any and all criteria, formal or informal, the Michigan legislature or its leadership, any constituent committee responsible for drawing the remedial plan, and all formal or informal consultants responsible for drawing the remedial plan, applied in drawing the proposed remedial plan, including, without limitation, all criteria related to partisanship, the use of political data, and the protection of incumbents, with a description of how the map-drawers used any such criteria;

3. All alternative plans considered by the Michigan legislature, any constituent committee responsible for drawing the remedial plan, or the leadership of the Michigan legislature or any such committee, including a detailed explanation of why such alternative remedial plan was not ultimately proposed by any committee or adopted by the Michigan legislature;

4. A map of each proposed remedial congressional, Senate, and House district—for the Challenged Districts and any other district(s) affected by the remedial plan—that depicts the boundaries of each proposed remedial district; and

5. A detailed explanation for why Intervenors believe that any enacted remedial plan remedies the constitutional harms identified above in each Challenged District.

Applicants' Emergency Mot. Stay App. A at 145.[2]

This incredibly broad order thus requires members of the Michigan Legislature to make public, or at the very least disclose to the District Court in a public filing, information protected by legislative and other privileges. For example, if a legislator meets with an individual constituent who discusses the redistricting process at all, under paragraph 1 of the District Court's remedy, the legislator must essentially record the details of the conversation, along with the name of the individual constituent. The same goes for communications between legislators and their staff. Under paragraphs 1 and 2 of the District Court's remedy, the details of those communications, as they relate to the court-ordered redistricting, also must be disclosed. Further still, the District Court's remedy requires the disclosure

[2] The District Court further ordered that the state conduct special elections in 2020 for the challenged State Senate Districts, which will cut short the terms of duly elected State Senators. Applicants' Emergency Mot. Stay App. A at 144.

of wholly internal processes, even those that are only mental. *See*, *e.g.*, Applicants' Emergency Mot. Stay App. A at 145 ¶ 5. In short, the District Court's remedial order would require recording nearly all legislative conduct and communication, both public and internal, pertaining to any aspect of redistricting. Such an overbroad remedy "diminishe[s] and frustrate[s]" the legislature, which is precisely what the legislative privilege is intended to protect against. *See Gravel v. United States*, 408 U.S. 606, 617 (1972) (internal quotation omitted); *see also*, *e.g.*, *Lindley v. Life Investors Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 64338 at *7-14 (N.D. Ill. 2009); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (citing *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979)); *ACORN v. County of Nassau*, 2009 U.S. Dist. LEXIS 82405 at *11-18 (E.D.N.Y. 2009).

Indeed, the ruling below stands in stark contrast to the remedy ordered in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated* 128 S. Ct. at 1929, 1934. There, the district court held that the Wisconsin Legislature's redistricting plan constituted an unconstitutional partisan gerrymander. In its ruling on the merits, the panel set forth what it found to be the nature of the constitutional violation at issue and the basis for its determination. *Whitford*, 218 F. Supp. 3d 837; *see also* Remedy Opinion and Order, *Whitford v. Gill*, No. 15-421 (W.D. Wis. filed Jan. 27, 2017) (ECF No. 182). The plaintiffs in that case urged the court to remove the opportunity for the legislature to craft a remedial plan, or to give it "[d]etailed [i]nstructions" in doing so, because they argued that the Wisconsin Legislature had compiled an objectionable record of defending its unconstitutional plan. Remedy Opinion and Order, *Whitford v. Gill*, No. 15-421 (W.D. Wis. filed Jan. 27, 2017). Instead, in establishing a remedy, the district court explained that so long as the legislature adhered to the framework set forth in the court's ruling on the merits, "it is the prerogative of the State to reapportion as it sees fit. It is neither necessary nor appropriate for us to embroil the Court in the Wisconsin Legislature's deliberations." *Id.* at 4. Yet the Court even stayed that far narrower ruling.

Even in racial gerrymandering cases, district courts have not intruded into the legislative process as severely as the District Court has in this case. For example, in *Bethune-Hill v. Virginia State Board of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018), a three-judge panel of the United States District Court for the Eastern District of Virginia held that eleven majority-minority Virginia House of Delegates districts were racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. In its remedy order, the court referred the matter of providing a redistricting plan to remedy the constitutional violations to the Virginia General Assembly for exercise of its primary jurisdiction. *Bethune-Hill v. Virginia State Board of Elections*, No. 14-852, Remedy Order (E.D. Va. filed June 26, 2018) (ECF No. 235).[3] The only conditions the court placed on the Virginia General Assembly were that it "should exercise this jurisdiction as expeditiously as possible, but not later than October 30, 2018, by adopting a new redistricting plan that eliminates the constitutional infirmity in the Challenged Districts and reconfigures any other Districts that need to be redrawn to remedy the constitutional infirmity in the Challenged Districts." *Id.* at 2; *see also Perez v. Abbott*, 274 F. Supp. 3d 624 (W.D. Tex. 2017) (only requiring the legislature to act within a certain timeframe); *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (same).

Simply put, the District Court's remedial order is a significant intrusion into Michigan's sovereign state functions and represents a strident departure from gerrymandering remedial norms. The District Court's order imposes irreparable harms upon the people of Michigan and their elected representatives and, therefore, should be stayed pending appeal.

[3] Two appeals from those decisions are pending with this Court, Docket Nos. 18-281 (oral argument held March 18, 2019) and 18-1134 (distributed for conference May 9, 2019).

II. Respondents' Arguments Highlight Why a Stay Should Issue.

a. The Pending Decisions in *Benisek* and *Rucho* Necessitate a Stay.

Because the District Court adopted what is essentially a hybrid of the *Benisek* and *Rucho* district court tests, it is likely to be reversed on appeal. At a bare minimum, the Court's impending decisions will require that the ruling below be vacated and remanded for further proceedings. In all events, the standard for a stay pending appeal is clearly satisfied. Respondents' attempts to argue otherwise all miss the mark.

i. Democratic Voters' Standing Arguments Highlight *Rucho's* Potential Impact on this Case.

Assuming this Court addresses the issue of standing in both pending cases, Democratic Voters argue that the District Court was correct in its standing analysis because the statewide evidence it considered is applicable to their First Amendment claim. *See* Democratic Voters' Response at 21-22. To borrow a phrase from Democratic Voters, this claim "is profoundly incorrect." *See id.* at 21. The *Gill* unanimous opinion does not distinguish between First and Fourteenth Amendment Claims and both claims were squarely before it. *See Gill v. Whitford*, 138 S. Ct. 1916, 1925 (2018). There is nothing in the *Gill* opinion that contradicts the fundamental standing principle in gerrymandering cases: a plaintiff's injury "results from the boundaries of the particular district in which he resides." *Id.* at 1930.

Regardless, this issue is squarely before the Court in *Rucho*. *See* Appellants' Brief, *Rucho v. Common Cause*, No. 18-422 at 14 (*filed* Feb. 8, 2019) (arguing the district court's use of statewide injuries for First Amendment claims was improper). Consequently, any decision by the Court in *Rucho* on the issue of First Amendment standing will necessarily require a reevaluation of the District Court's standing analysis.

b. Respondents' Timing Concerns Are Unfounded and Fundamentally a Problem of Democratic Voters' Own Making.

Respondents claim they will suffer irreparable harm if a stay is granted. *See*, *e.g.,* Democratic Voters' Resp. at 12-15. Respondents' concerns are unfounded because: (1) a stay is likely to be shorter than a full hearing on the merits; and (2) in any event, it was Democratic Voters' dilatory actions that are responsible for the current timing.

Respondents' concerns about an extended stay are unfounded. The most likely outcome of this case will be vacatur and remand based on the decisions in *Benisek* and *Rucho*. The *Rucho* timeline is instructive here. *Common Cause v. Rucho* was stayed for six months while the case went from final judgment to a vacatur. *See Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. January 9, 2018) (three-judge court); *Rucho v. Common Cause,* 138 S. Ct. 2679 (2018) (vacated and remanded on June 25, 2018, for review in light of *Gill*). In fact, the vacatur issued days after the *Gill* opinion was released. *See Gill,* 138 S. Ct. 1916 (decided June 18, 2019). Here, *Benisek* and *Rucho* are due out in the next six weeks, which indicates that any stay is likely to last a similar amount of time. When *Benisek* and *Rucho* are handed down, there are only four actions the Court could likely take: (1) vacatur and remand, (2) summary affirmance, (3) summary reversal, or (4) a full appeal on the merits (with jurisdiction either noted or postponed). There is only one scenario of the four where timing becomes an issue and then only if Respondents' are victorious on the merits.

In any event, any harm Respondents might suffer is attributable to Democratic Voters. The current apportionment plans were all passed in 2011 shortly after the decennial census figures for Michigan were released. Congressional Intervenors' Mot. Summ. J. at 19 (ECF No. 121 at 24). The League of Women Voters was aware of their concerns regarding the plans contemporaneously with their passage. *Id.* at 20-21 (ECF No. 121 at 24-25). Democratic Voters retained experts as early as 2015. *Id.* Yet, Democratic Voters waited until December of 2017 to bring their claims. *See* Complaint

(ECF No. 1) (filed on December 22, 2017). It strains credulity for Democratic Voters to wait seven years, until the last election under the current apportionment cycle, to bring their claims and then complain that any relief may be delayed by only a few months.

c. Democratic Voters' Misunderstanding of Michigan's Legislative Processes Demonstrates Why a Stay Is Appropriate Here.

Democratic Voters seem to minimize the burdens placed on the legislature by arguing that the 2011 reapportionment legislation "passed . . . within approximately two weeks of the first committee hearing" and, in any event, there are "hundreds of non-partisan alternative maps *already* in existence. . . ." *See* Democratic Voters' Resp. at 18. These assertions both misunderstand legislative procedures and, even more basically, misunderstand the nature of the legislature's alleged harms.

First, the Michigan Legislators' had months to prepare for the 2011 reapportionment due to the regularity of its occurrence. Arguing that an undertaking of the magnitude ordered by the District Court can be accomplished in "two weeks" or anything close to it is absurd. In addition to drafting maps for legislative consideration, mapmaking experts need to be hired, computers need to be purchased, and staff needs to be trained. This does not even factor in the normal give and take of the legislative process or the other burdensome requirements ordered by the District Court that need to be followed. Beginning this process now, when upcoming decisions in *Benisek* and *Lamone* will have an inevitable impact, would be injurious in terms of time, money, and materials, not to mention the other pressing legislative matters that would be delayed. *See, e.g.,* Applicants' Emergency Mot. Stay at 22-23.

Second, Democratic Voters' argument that the legislature should simply use one of the maps presented in this litigation or otherwise is a non-starter. *See* Democratic Voters' Resp. at 18. Democratic Voters' expert, Dr. Chen, presented 3,000 maps to allegedly prove injury—1,000 for each of the three challenged maps. *See id.* at 22. Dr. Chen spent nearly two and a half years working on his

analysis, and was not subject to the give and take of the legislative process nor the onerous documentation demands of the remedial order in this case. Setting aside the evidentiary flaws of the simulated maps,[4] reviewing these 3,000 simulation maps for remedial purposes would be an extraordinarily time-consuming undertaking under the best of circumstances. Without the staff, technical expertise, or equipment, it is simply infeasible for the legislature to accomplish an appropriate review of all 3,000 maps by August 1.

Finally, it is not just the issues concerning the manpower and expertise needed to undertake a complete legislative and congressional redistricting in the time allotted. It is also what the legislature ought to be doing in the meantime. *See* Applicants' Emergency Mot. Stay at 22-23. The legislature has significant work to do over the next month other than to engage in redistricting that, even under the most favorable of scenarios, will likely need to be redone in order to comply with this Court's opinions in *Rucho* and *Benisek*.

CONCLUSION

For the reasons set forth in this Reply, Applicants' Emergency Motion, and Senate Intervenors' Emergency Motion, Applicants respectfully request that this Court grant the requested stay.

[4] The fact that Dr. Chen's simulated maps were allowed into evidence at all will be a crucial issue on appeal. The evidentiary issues surrounding Dr. Chen's simulations are legion. *See* Mot. *In Limine* to Exclude Expert Report of Dr. Chen (ECF No. 147). Among other things, Dr. Chen deleted his source code which deprived Defendants' experts from assessing, *inter alia*, the reliability of the simulations. *See id.*; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995). Dr. Chen also failed to program Michigan's proper redistricting criteria. *See* Mot. *In Limine* to Exclude Expert Report of Dr. Chen at 16-18 (ECF No. 147).

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May 21, 2019