No. ________

IN THE
SUPREME COURT OF THE UNITED STATES

LEAGUE OF WOMEN VOTERS OF MICHIGAN, *et al.*,
Plaintiffs,
v.

JOCELYN BENSON,
in her official Capacity as Michigan Secretary of State,
Defendant,
and

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

CONGRESSIONAL AND STATE HOUSE INTERVENORS' EMERGENCY APPLICATION FOR STAY

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

Last term, the Supreme Court unanimously observed that partisan gerrymandering claims are "an unsettled kind of claim [that] this Court has not agreed upon, the contours and justiciability of which are unresolved." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Now, this Court is poised to provide additional orders and opinions concerning the justiciability and the contours of partisan gerrymandering claims. *See Rucho v. Common Cause*, No. 18-422 (U.S. March 26, 2019) (oral argument held); *Lamone v. Benisek*, No. 18-726 (U.S. March 26, 2019) (same).

Undeterred by the unsettled state of the law, and undaunted by this Court's decision to hear *Rucho* and *Benisek* on an expedited basis, a three-judge panel in the United States District Court for the Eastern District of Michigan ("District Court") marched forward with trial based upon *Rucho*'s and *Benisek*'s premises.[1] *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777, 804-807 (E.D. Mich. 2018) (three-judge court). When the District Court found liability, it premised this finding on the framework adopted in *Rucho* and *Benisek*. App. A at 58 (predominant intent); at 59 (effect); and 59-60 (First Amendment). The District Court knew this Court was reviewing these very decisions, including the underlying questions of standing and justiciability. *See Rucho*, No. 18-422 (U.S. Jan. 4, 2019) ("Further consideration of the question of jurisdiction is Postponed to the hearing of the case on the merits."); *Lamone*, No. 18-726 (U.S. Jan. 4, 2019) (same). Again, undaunted by the admittedly unsettled state of the law, the District Court directed Michigan's legislature to pass—and the Governor to sign—new redistricting legislation by August 1, 2019. App. A at 144. Consistent with its view that this Court has held that partisan

[1] Further proceedings below in *Rucho* and *Benisek* were stayed by the lower courts *Common Cause v. Rucho*, No. 16-1026 (M.D. N.C. Sept. 12, 2018) (three-judge court) (ECF 155); *Benisek v. Lamone*, No. 13-03233 (D. Md. Nov. 16, 2018) (ECF 230).

gerrymandering claims are justiciable, App. A at 56-57, and despite this Court's recent pronouncement that justiciability is still an open question, *Gill*, 138 S. Ct. at 1927, the District Court denied the requested stays pending appeal. App. C.

To comply with the District Court's August 1, 2019 deadline, the legislature is required to begin spending precious and limited resources now and prioritize redistricting legislation over other significant pending legislative matters. Under Michigan's Constitution, the legislature must consider legislation for at least ten days before final passage. Mich. Const. art. IV, § 26. The Michigan Constitution also provides the Governor fourteen calendar days to review legislation before signing it into law or vetoing it. Mich. Const. art. IV, § 33. This means the legislature must transmit legislation approved by both chambers to the Governor by July 18, 2019. To accomplish this, both chambers must amend their session calendars, one chamber must introduce a bill by July 8, 2019, pass the legislation by July 13, 2019, and then send it to the Governor by July 18, 2019. At this point, the legislature has only 59 days to introduce legislation, hold hearings and complete committee work on a bill or bills covering the congressional maps, state house maps, and state senate maps so that it can be presented to the Governor in time.

The District Court's deadline requires that the legislation be substantially completed by the time this Court's term ends on June 24. Of course, if this Court alters the *Rucho* and *Benisek* standards, this will require the legislature to reassess its legislation within three days because the legislature is currently scheduled to go into recess on June 27. Accordingly, under the legislature's current schedule, it has only 48 days to complete this task. This is only slightly longer than it takes *courts* to draw maps. *League of United Latin American Citizens* ("*LULAC*") *v. Perry*, 457 F. Supp. 2d 716 (E.D. Tex. 2006) (drawing a court ordered congressional district map in 37 days); *Adamson v. Clayton County Elections & Registration Bd.*, 876 F. Supp. 2d 1347 (N.D. Ga. 2012) (drawing

a court ordered remedial map in 36 days); *Larios v. Cox*, 314 F. Supp. 2d 1357, 1359, 1363-64 (N.D. Ga. 2012) (drawing a map in approximately three weeks). The legislature must accomplish this while also passing a budget, auto insurance legislation, and infrastructure legislation. *See infra* at 22-23. The legislature's time and resources were already strained. The District Court's order—touching upon the most sovereign of functions, *Miller v. Johnson*, 515 U.S. 900, 915 (1995)—may well cause gridlock in the legislature and prevent or delay action on some of the most pressing priorities for the people of Michigan.

Moreover, merely passing redistricting legislation that is consistent with the District Court's opinion is insufficient to comply with the three-judge court's order. The District Court also demanded that the Michigan legislature describe the process to craft, draft, and deliberate over redistricting legislation, including producing records of who the legislature consulted both formally and informally. App. A at 145. Additionally, the legislature must detail its mental processes, and identify any and all criteria, formal and informal, that it uses to develop redistricting maps. This includes providing a description of how partisan considerations were used in drawing districts, how political data factored into redistricting decisions, and every alternative map considered but not adopted. *Id*. The legislature must describe in detail why certain proposed remedial plans were rejected or proposed. *Id*. Finally, the District Court ordered the legislature to explain how the remedial plan it adopts—and the Michigan Governor signs—addresses its constitutional concerns. *Id*. And, all this information and analysis must be submitted only ten days after the August 1, 2019 deadline. The District Court's order requiring special Senate elections shortens the length of the term-limited Michigan Senators who were just elected in 2018 and, consequently, not up for reelection until 2022. Consequently, the District Court's order terminates

the service of Senators serving a second term two years early. This is because Michigan's Constitution limits its senators to two terms. Mich. Const. art. IV, § 54.

Put simply, all of the mandates of the District Court's order must be done under unsettled legal principles that this Court is currently reviewing in other cases. Because there is a reasonable probability that this Court will review this case and a fair prospect that this Court will vacate the District Court's decision, this Court should grant the requested stay.[2]

OPINION BELOW

Congressional and State House Intervenors appeal the final judgement and opinion from the three-judge court of the Eastern District of Michigan. The opinion is reproduced fully in the Appendix and is reported at *League of Women Voters of Mich*., *et al*. v. *Benson*, *et al.*, No. 17-14148, 2019 U.S. Dist. LEXIS 70167, __ F. Supp. 3d __, 2019 WL 1856625 (E.D. Mich. April 25, 2019) (three-judge court).

JURISDICTION

Plaintiffs-Appellees, the League of Women Voters of Michigan, *et al*., brought claims alleging that Michigan's congressional, state senate, and state house districts violated the United States Constitution. *See* App. A at 1. Plaintiffs requested that the District Court permanently enjoin 34 challenged districts. *Id*. at 2; *see also* 28 U.S.C. § 2284(a). After a four-day bench trial, and after receiving post-trial briefing, the District Court granted Plaintiffs-Appellees' requested relief and enjoined all of the challenged congressional and legislative districts. App. A at 144. The

[2] Congressional and State House Intervenors would have no objection to this Court construing this application as a jurisdictional statement and vacating or reversing the lower court opinion in this case when *Rucho* and *Benisek* are decided, unless those two cases are affirmed on every ground. Congressional and State House Intervenors otherwise intend to file their forthcoming jurisdictional statement no later than June 3, 2019.

Congressional and State House Intervenors filed their Notice of Appeal on April 30, 2019. App. B.[3] Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1253.

STATEMENT OF THE CASE

Nearly eight years ago, 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"). Subsequently, 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. They claimed that the Current Apportionment Plan is a partisan gerrymander that violates Plaintiffs' rights as protected by the First Amendment and Equal Protection Clause. Essentially, Plaintiffs contended that the Current Apportionment Plan impermissibly maximizes the number of state Republican congressional and legislative representatives, *i.e.*, that the Current Apportionment Plan is unconstitutional because there are too many Republicans in both delegations. *See, e.g.,* App. A at 7.

Ruth Johnson, in her official capacity as Michigan Secretary of State, was the original named Defendant, and 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. Defendant Secretary of State's Mot. to Dismiss, ECF No. 11. On May 16, 2018, the District Court dismissed Plaintiffs'

[3] The Senate Intervenors filed a separate Notice of Appeal. Senate Intervenors Notice of Appeal, ECF 270.

statewide claims but held that they had standing to pursue their district-specific claims. *League of Women Voters of Mich. v. Johnson*, 2018 U.S. Dist. LEXIS 82067 (E.D. Mich. 2018).

Representative Lee Chatfield, in his official capacity as Speaker Pro Tempore[4] of the Michigan House of Representatives, and Representative Aaron Miller, in his official capacity as a Member of the Michigan House of Representatives, and the Michigan Republican Congressional Delegation (collectively, "Congressional and State House Intervenors"), intervened in this matter. Although the district court initially denied intervention to both groups of intervenors, the Sixth Circuit twice reversed the district court and ordered intervention. App. A at 2 n.2.

The primary issues before the District Court have been justiciability, standing, and the lack of accepted manageable standards for such claims. The parties, including the Congressional and State House Intervenors, filed dispositive motions. Namely, on September 21, 2018, Plaintiffs moved for partial Summary Judgment with regard to the affirmative defense of laches, (ECF No. 117), Defendant Johnson filed a Motion to Dismiss and for Summary Judgment arguing, *inter alia*, that Plaintiffs' claims are non-justiciable, Motion for Summary Judgment and to Dismiss, (ECF No. 119), and the Congressional and State House Intervenors moved for summary judgment on the basis of standing, justiciability, and laches. (ECF No. 121).

On November 6, 2018, while summary judgment motions were pending, Michigan held its General Election and the Democratic Party candidate, Jocelyn Benson, was elected as the new Secretary of State of Michigan. Furthermore, in a *Bandemer*-esque turn of events, the Democratic Party received a net gain of five seats in the state house, five seats in the state senate, and two seats

[4] Representative Chatfield is now the Speaker of the Michigan House of Representatives. The Speaker, by vote of the House of Representatives, was granted the power to speak for the entire House in this litigation. *See* Mich. House Resolution N. 17 (2019).

in the congressional delegation even though Plaintiffs had alleged that the allocation of seats between the parties under the enacted plans were durable, and not subject to change in elections. App. A at 25, 31-32, 51. On November 30, 2018, the District Court denied all of the summary judgment motions. *League of Women Voters of Mich.*, 352 F. Supp. 3d 777.

The new Secretary of State assumed office on January 1, 2019. On January 15, 2019, Secretary of State Benson was automatically substituted as a party defendant. Order Substituting Party Defendant, ECF No. 194. Shortly thereafter, Secretary of State Benson declined to defend the state legislative and congressional maps. Instead the new Democratic Secretary of State limited her "defense" to only opposing special elections in the state senate. *See* Def. Secretary of State Proposed Findings of Fact and Conclusions of Law at ¶¶ 72, 81, 97, ECF No. 256. After Secretary of State Benson's election, the Michigan State Senate moved, and was quickly granted, intervention. Senate Intervenors' Mot. To Intervene, ECF Nos. 206, 208.

As the action in the District Court was ongoing, this Court announced on January 4, 2019, that it would consider dispositive issues associated with gerrymandering claims (as exists in the present case) in *Rucho*, No. 18-422 and *Benisek*, No. 18-726 in March 2019. On January 8, 2019, the Court ordered appellants' briefs on the merits to be filed on or before February 8, 2019, and appellees' briefs on the merits to be filed on or before March 4, 2019, in both *Rucho* and *Benisek*. The specific dispositive issues common to both *Rucho* and *Benisek*, standing and justiciability, are the same dispositive issues Congressional and State House Intervenors bring to this Court. In fact, to evaluate Plaintiffs' Fourteenth Amendment claims, the District Court here adopted *Rucho*'s standard. App. A at 58-59. Similarly, the District Court cobbled together elements of *Rucho*'s test and *Benisek*'s test to establish a partisan gerrymandering claim under the First Amendment. App. A at 59. The *Rucho* and *Benisek* standards are the very standards this Court is currently reviewing.

A ruling from this Court in *Rucho* and *Benisek*, unless those decisions are affirmed in all regards, will necessarily impact the continuing viability of the District Court's order here.

Congressional and State House Intervenors promptly moved for a stay due to the likely dispositive nature of *Rucho* and *Benisek* on January 11, 2019. The motion for stay, as well as a subsequent stay motion filed by Senate Intervenors, was denied by the District Court on February 1, 2019. The case then proceeded to a four-day trial in Detroit, Michigan from February 5, 2019, through February 8, 2019.[5]

In post-trial briefings, Congressional and State-House Intervenors, along with the Senate Intervenors, maintained that Plaintiffs' proposed judicially manageable standard was, in fact and in practice, non-justiciable and that Plaintiffs' lacked standing to pursue their claims. *See generally* Congressional and House Intervenors' Proposed Findings of Fact and Conclusions of Law, ECF No. 258; Senate Intervenors' Proposed Conclusions of Law, ECF No. 254. All Intervenors also maintained that Plaintiffs' claims are barred by laches and that Plaintiffs did not prove their claims. Congressional and House Intervenors' Proposed Findings of Fact and Conclusions of Law at 330-331, ECF No. 258; Senate Intervenors' Proposed Conclusions of Law at 43-49, ECF No. 254. Ultimately, however, the District Court held that Plaintiffs have standing, that their claims are justiciable, and that laches does not bar Plaintiffs' claims. App. A at 51-103.

REASONS FOR GRANTING THE APPLICATION

This Court can issue a stay where there is (1) "a reasonable probability" that this Court will review this case, (2) "a fair prospect" that the Court will then vacate or reverse the decision

[5] On January 25, 2019, the Congressional and State House Intervenors filed a Petition for Extraordinary Relief with this Court seeking to stay the trial that was ultimately denied. *See In Re Lee Chatfield, et al*., No. 18-973 (U.S. March 25, 2019) (denying emergency petition for writ of mandamus).

below, and (3) “a likelihood that irreparable harm [will] result from the denial of a stay.” *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers); *see also Lux v. Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers); *see also Hollingsworth v. Perry*, 558 U.S.183, 190 (2010) (per curiam). Congressional and State House Intervenors satisfy this standard.

First, the District Court expressly adopted the very same standards that this Court is currently reviewing in *Rucho* and *Benisek*. Accordingly, this Court’s ruling in *Rucho* and *Benisek* will necessarily impact the lower court’s ruling here with respect to the congressional, state house, and state senate maps. When the *Rucho* appellants first came to this Court, they presented the very same issues and this Court granted a stay. *See Rucho v. Common Cause*, No. 17A745 (U.S. Jan. 18, 2018) (granting stay); *see also* Rucho’s Br. at 11 (U.S. Jan. 12, 2018) (applicants requesting stay because “the resolution of *Gill* and *Benisek* will inevitably impact the resolution of this case, it is certainly ‘reasonably probable’ that the Court will hold this case pending their resolution.”).

Second, the issues in this appeal are similar to the issues at the heart of *Gill*, *Rucho*, and *Benisek*. Namely, the issues here are whether Plaintiffs have standing to bring their claims and whether Plaintiffs’ claims are justiciable. These are the very same issues that have confounded this Court for decades and, especially as to justiciability, remain open questions. *Gill*, 138 S. Ct. at 1929. This Court may rule that the challenged standard is non-justiciable, and remand with instructions to dismiss. This Court may also find partisan gerrymandering cases justiciable but reject Plaintiffs’ proposed standard and remand for consideration consistent with this Court’s decision. This Court may reject the District Court’s approach to establishing standing, *e.g.*, using social science metrics like the efficiency gap, or simulated maps drawn without any partisan

consideration and Plaintiffs' asserting that their elected representative is not fully responsive to them. Because of the unsettled state of the law, there is a reasonable probability that this Court will overturn the District Court's decision.

Third, the District Court's order that new districts be drawn, and new special elections be held, cutting short the terms of state constitutional officers, should be stayed because this Court may lack subject-matter jurisdiction. If the District Court lacked jurisdiction from the beginning either because Plaintiffs lacked a judicially manageable standard or because their claims were non-justiciable, then its order is of no effect. Additionally, the District Court's order should be stayed because this Court has never required special elections shortening the term of state officials to remedy allegations of partisan gerrymandering. The Michigan legislature should not be forced to spend its limited resources in an expedited manner and have its state constitutionally mandated terms cut short all in order to comply with an invasive decision that is not buttressed with jurisdictional support and for a claim that may not exist. To maintain the status quo pending appeal, this Court should grant the requested stay.

I. <u>There Is a Reasonable Probability that the Court Will Hold or Review this Case and a Fair Prospect that this Court Will Vacate the District Court's Ruling.</u>

The issues before this Court are whether Plaintiffs have standing, whether Plaintiffs' claims are justiciable, and, if those claims are justiciable, whether the standards adopted by the District Court are manageable. These are the same issues this Court is currently considering in *Rucho* and *Benisek*. *Rucho*, No. 18-422 (U.S. Feb. 8, 2019) (Appellants' Br. at 23-30, 47-55); *Benisek*, No. 18-726 (U.S. Feb. 8, 2019) (Appellants' Br. at 31-50). Accordingly, a ruling from this Court that Plaintiffs lack standing, Plaintiffs' claims are non-justiciable, or that the lower court's standards are unmanageable will require a reversal of the District Court's ruling below. As a result, there is

a reasonable probability that this Court will review this case, and a fair prospect that this Court will vacate or reverse the district court's holding in in light of its rulings in *Rucho* and *Benisek*.

a. <u>There Is a Reasonable Probability that this Court Will Review the District Court's Decision that Plaintiffs Have Standing and a Fair Prospect that the Court Will Vacate that Holding.</u>

The District Court purportedly applied *Gill*'s requirement that each individual voter must demonstrate "concrete and particularized injuries using evidence...that would tend to demonstrate a burden on their individual votes." *Gill*, 138 S. Ct. at 1934. But to establish standing, the district court used social science metrics including the efficiency gap, mean-median difference, and declination. App. A at 28-30, 39-42, 49, 51. The District Court also relied upon Dr. Chen's simulated maps and a Democratic state senate legislative staff member's testimony that the Enacted Districts were much more Republican than previous districts. App. A at 66. Finally, the District Court established standing by crediting testimony that individual voters are "frustrated" and "less enthusiastic" about voting and that their representative is "less responsive" to the individual voters' concerns. *See, e.g.,* App. A at 65. In light of *Gill*, this is insufficient to establish standing.

First, the social science metrics used to establish standing are dubious under controlling precedent. *Gill*, 138 S. Ct. at 1933; *LULAC*, 548 U.S. at 419-20 (rejecting a symmetry standard). This Court ruled that the difficulty with such social science metrics, including the efficiency gap "and similar measures of partisan symmetry," is that they are "average measures" and do not address the impact of an alleged gerrymandering on an individual voter. *Gill*, 138 S. Ct. at 1933. The social science metrics include the efficiency gap, mean-medium difference, and other measures of partisan asymmetry. *Id*; *see Gill v. Whitford*, No. 16-1161 (U.S. Aug. 28, 2017) (*Gill* Appellee Br. at 13 n.5, 14 n.7, 46 n.14). The District Court premised its standing analysis on these

very social science metrics that this Court has already questioned. App. A at 28-30, 39-42, 49, 51. This Court is again reviewing these very same social science metrics—as applied to *Gill*'s standing analysis—in *Rucho* and *Benisek*. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 817, 821 (M.D.N.C. 2018) (three-judge court); *see Rucho*, No. 18-422 (U.S. Feb. 8, 2019) (Br. of Appellants at 43-44) (questioning the efficiency gap's ability to demonstrate that a redistricting plan diluted the weight of an individual's vote).

Second, a plaintiff cannot satisfy standing on the basis that, as a voter, he or she is frustrated with a law, or is less enthusiastic about voting, or feels that his or her representative is less responsive to their needs. That is a generalized grievance. *Gill*, 138 S. Ct. at 1932; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-43 (2006) (denying standing to plaintiffs whose injury was depletion of tax revenues that disproportionately burdens them by requiring them to pay more). The asserted injury is one felt by many people. *See id*. at 344.[6] If all that is needed to open the doors of federal courts is the allegation—subsequently "proven" with plaintiffs' testimony—that an enacted map makes a voter frustrated with their government, less likely to vote, or that a legislator is not *fully* responding to constituent letters, then the federal judiciary will be transformed into "monitors of the wisdom and soundness" of both state and federal legislators. *Id*. at 346. This moves the judiciary far from the modest role Article III contemplates. *Id*.

Third, the District Court premised standing based on Dr. Chen's simulated maps that he claims were drawn without *any* partisan intent. Dr. Chen asserted that the simulated maps demonstrate that the enacted maps were allegedly partisan outliers. App. A at 66. But this very method of establishing standing, including the use of simulated maps drawn by the exact same

[6] Congress's approval rating is currently at 20 percent with a disapproval rating of 77 percent. *See* GALLUP, *Congress and the Public*, a https://news.gallup.com/poll/1600/congress-public.aspx (last visited May 2, 2019).

college professor, is pending before this Court in *Rucho*. *See, e.g., Common Cause*, 318 F. Supp. 3d at 822 (establishing standing where plaintiff alleged that she was "super packed" into her district and where 80% of Dr. Chen's simulations placed her in a district with fewer Democrats). In similar circumstances, this Court has expressed skepticism about invalidating a redistricting map as unconstitutional based upon a hypothetical state of affairs. *LULAC*, 548 U.S. at 420 (Kennedy, J.). Computer-simulated maps drawn without partisan input is about as detached from political reality as one can get. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

Additionally, a plaintiff cannot satisfy Article III standing for partisan gerrymandering if the voter is placed in a district that is within the range of simulated maps that were drawn *without* partisan intent. *See* App. A at 27. Dr. Chen's simulations and a chart produced by Dr. Christopher Warshaw, an additional expert witness for Plaintiffs, are problematic because they show that many Plaintiffs and Members live in challenged districts whose exact "partisanship" could well have resulted from what the Plaintiffs present as a non-partisan districting process. There are a large number of voters who live in a challenged district within the range of Chen's simulations as shown on the Warshaw Chart. *See* Pls' Opp.'n to Summ. J. at Ex. 37 (ECF No. at Page ID 3880-81, 3884) (showing that voters in CD1, CD5, CD 8, CD 10 are placed within Dr. Chen's simulations). Even taking partisanship into account, the voter was still placed in a district within the range of maps drawn without partisan considerations. Thus, there is a reasonable probability that this Court will hold or review the District Court's ruling that a person is injured when he or she is in the very same district that is drawn without partisan intent. *Gaffney*, 412 U.S. at 753. This is especially true since States must be afforded latitude "to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915.

Moreover, similar to *Gill*, some of the Plaintiffs reside in portions of the state that tend to vote overwhelmingly for Republican or Democratic candidates, reflecting the modern realities of political geography. This means that no matter how a map is drawn, some plaintiffs will be placed in districts that substantially consist of voters who tend to vote Democrat or Republican. *See, e.g.,* App. A at 65-66 (discussing Congressional Districts 1 and 4). As drawn, Congressional District 1 is actually more competitive than Dr. Chen's maps as some of Dr. Chen's maps are *more* favorable to Republicans. Pls' Opp.'n to Summ. J. at Ex. 37 (ECF No. at Page ID 3880). But it also demonstrates that Plaintiffs like Jon LaSalle in Congressional District 1, and Richard Long in Congressional District 11, will always live in a heavily Republican district. Similarly, Congressional District 12, which includes Ann Arbor, will always be heavily Democratic. *Id.* Hence, these Plaintiffs lack standing because they have not been injured by the enacted map. *Gill*, 138 S. Ct. at 1933.

Of course, Plaintiffs' unprecedented theory of standing is that individual voters have a legally protected interest in the partisan composition of their district and a legally protected interest in whether they are placed in a district with the appropriate number of Republicans or Democrats. This Court has never ruled that this interest is legally cognizable. *See Wittman v. Personhuballah*, No. 14-1504 (U.S. Feb. 3, 2016) (Br. for United States as Amicus Curiae at 16). This too makes it reasonably probable that this Court will review the District Court's ruling and there is a fair prospect that it will reverse or vacate that court's decision.

This Court granted a stay in *Rucho*, No. 17A745 where the same questions concerning justiciability and standing were raised. This was when *Benisek* and *Gill* were pending before the Court. If this Court found a fair prospect that it would vacate the *Gill* and *Benisek* three-judge court

rulings at that time based upon the standing issue then, it should find that Congressional and State House Intervenors have demonstrated the same here.

b. There Is a Reasonable Probability that this Court Will Review the District Court's Ruling that Plaintiffs' Claims are Justiciable and a Fair Prospect that the Court Will Vacate the District Court's Justiciability Holding.

First, the District Court held that partisan gerrymandering claims are justiciable because this Court has never reversed its holding in *Bandemer*. App. A at 57. However, this Court in *Gill* explicitly confined *Bandemer*'s justiciability holding to the case before it. *Gill*, 138 S. Ct. at 1927. This Court also stated that whether partisan gerrymandering claims are justiciable is an open question. *Id*. at 1929.

Second, building its justiciability foundations upon a faulty premise, the District Court then adopted the very standards that this Court is reviewing in *Rucho* and *Benisek*. App. A at 58-59. If this Court rules in *Rucho* and *Benisek* that partisan gerrymandering claims are not justiciable, or that although justiciable, the standards proposed are improper, it will require the District Court's order to be vacated or reversed. If the appellants in *Rucho* and *Benisek* demonstrate that partisan gerrymandering claims are not justiciable, or that the standards plaintiffs proposed are not justiciable, the District Court's order below must be reversed and vacated, possibly with direction to dismiss the complaint.

Furthermore, this Court granted a stay in *Rucho*, No. 17A745 where the same questions concerning justiciability and standing were raised. *See id.* (U.S. Jan. 12, 2018) (Applicants' Br. at 13-17). It should grant the stay here too.

Third, this Court should stay the case because, since *Bandemer,* 19 Justices of this Court have offered various standards by which to adjudicate partisan gerrymandering claims, but no proposed standard has yet to secure agreement among five justices. *Davis v. Bandemer*, 478 U.S.

109, 127-37 (1986) (plurality op.); *id*. at 161-62 (Powell, J., and Stevens, J., concurring in part and dissenting in part); *Vieth*, 541 U.S. at 292 (noting that four dissenters proposed three different standards); *see LULAC*, 548 U.S. at 414 (2006) (Kennedy, J., concurring) (acknowledging that disagreement still persists in articulating the standard to evaluate partisan gerrymandering claims but declining to address the justiciability issue); *see also id*. at 471-72 (Stevens, J., and Breyer, J., concurring in part and dissenting in part) (stating that plaintiffs proved partisan gerrymandering under proposed test); *id*. at 483 (Souter, J., and Ginsburg, J., concurring in part, dissenting in part); *Gill*, 138 S. Ct. at 1938-40 (Kagan, Ginsburg, Breyer, Sotomayor, J., concurring). Because the question of whether partisan gerrymandering claims are justiciable has eluded resolution by the Court for decades, *Gill*, 138 S. Ct. at 1929, there is a reasonable probability that this Court will review the District Court's justiciability holding and proposed standards and a fair prospect that this Court will vacate the district court's ruling.

c. There Is a Reasonable Probability that this Court Will Review the District Court's Adopted Standards and a Fair Prospect that this Court Will Vacate those Standards.

This Court should grant a stay because the standards the District Court adopted are standards this Court has previously rejected. The District Court held that plaintiffs must prove that the Michigan mapmakers drew the map with the "predominant purpose . . . to subordinate adherents of one political party and entrench a rival party in power." App. A 58. But the Supreme Court has already rejected this standard as non-justiciable. *See Vieth*, 541 U.S. at 285-86 (plurality op.); *id*. at 308 (Kennedy, J., concurring) (stating that the plurality "demonstrates the shortcomings of the other standards that have been considered to date...including the parties before us...."); *LULAC*, 548 U.S. at 417-18 (opinion of Kennedy, J.) (rejecting plaintiffs' proposed "sole intent" standard). Because this Court has previously rejected a predominant intent standard as "dubious

and severely unmanageable" *Vieth*, 541 U.S. at 286, there is a fair prospect that this Court will vacate the decision below.

Next, the District Court held that to prove partisan effects, a plaintiff must prove that "the lines of a particular district have the effect of discriminating against—or subordinating—voters who support candidates of a disfavored party, if the district dilutes such voters' votes by virtue of cracking or packing." App. A at 59. But that assumes partisan affiliation is readily discernable and a non-mutable concept. *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287. Furthermore, the proposed test does not establish what level of vote dilution triggers constitutional scrutiny. *Vieth*, 541 U.S. at 296; *LULAC*, 548 U.S. at 420 (Kennedy, J.) (stating that plaintiffs' partisan asymmetry standard does not shed light on "how much partisan dominance is too much."). For example, in the one person, one vote context, the Supreme Court determined that minor population deviations are not, by themselves, constitutionally significant. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

Additionally, the social science metrics that Plaintiffs proffer and the District Court relied upon only show averages, not specific harm as to individual voters in individual districts. In fact, Dr. Mayer admitted as much. *See* Def. Secretary of State Mot. Summ. J. at Ex. 12 (ECF 119-17 at 7) ("An efficiency gap is not calculated for a single district."). Dr. Warshaw also stated that he did not demonstrate which districts were packed and cracked. *Id*. at Ex. 9 (ECF 119-14 at 27). Dr. Chen's analysis suffers from the same shortcomings, as he uses social science metrics to calculate statewide asymmetry. *See id*. at 44-45, 48-49, (ECF 119). None of these tests are a "well-accepted" measure of partisan-fairness and these measures are subject to "serious criticism by respected political scientists." *Id*. at 49.

Plaintiffs' First Amendment standard is equally dubious. Here, the District Court adopted a hybrid test proposed by the *Rucho* and *Benisek* courts. App. A at 59-60. To prove a First Amendment violation, it held that Plaintiffs must show that the:

> (1) districts were drawn with the specific intent to burden individuals or entities that support a disfavored candidate or political party...(2) that the Enacted Plan actually caused an injury and burdened the political speech or associational rights of such individuals or entities...and (3) causation, namely that absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

App. A at 59-60 (internal quotations and citations omitted).

First, if this Court has rejected a sole intent standard and a predominant intent standard, a specific intent standard is equally tenuous.

Second, and more fundamentally, this hybrid standard risks rendering "unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs." *Vieth*, 541 U.S. at 294 (plurality op.). Making partisan intent an element of the cause of action is contrary to this Court's recognition that legislators are permitted to take partisan considerations into account when drawing maps. *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). The third element especially would render unlawful nearly every map that a political body drafts because a plaintiff need only prove that some amount of partisan intent had some amount of partisan effect. This would convert partisan considerations, considerations this Court has recognized as acceptable traditional redistricting criteria, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015), and a valid defense to racial gerrymandering claims, *Hunt*, 526 U.S. at 551, to a constitutionally-suspect criterion. This is contrary to this Court's precedents holding that redistricting is intended to have, and does have, political consequences. *Gaffney*, 412 U.S. at 753. It is also contrary to the view of

those dissenting justices who have found partisan gerrymandering cases to be justiciable while recognizing that partisanship necessarily plays a substantial role in redistricting. *Vieth*, 541 U.S. at 344 (Souter, J., dissenting); *see also id*. at 360 (Breyer, J., dissenting).

Third, this test is a hybrid test drawn from two different district courts. App. A at 59-60 (citing *Shapiro*, 203 F. Supp. 3d at 597-98 (elements 1 and 3) and *Rucho*, 318 F. Supp. 3d at 929 (elements 1 and 2). This Court has never found a First Amendment cause of action. *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (describing a First Amendment partisan gerrymandering claim as a legal theory put forward by one Justice and uncontradicted by the precedents of the Supreme Court); *Gill*, 138 S. Ct. at 1938-40 (Kagan, J., concurring) (proposing a legal theory of associational harm that received three additional votes). Accordingly, a ruling from this Court on *Benisek* and *Rucho* will directly impact the viability of the District Court's proposed standards. This Court may adopt the *Rucho* standards wholesale, the *Benisek* standards wholesale, it may adopt a hybrid standard of its own, or it may reject both standards wholesale. But each variation will require this Court to vacate or reverse the District Court's order.

Because this Court has never approved a First Amendment-based partisan gerrymandering claim and because this Court is currently considering two cases with findings nearly identical to the District Court decision here, there is a fair prospect that this Court will vacate the judgment below.

II. Michigan And Its Citizens Will Suffer Irreparable Harm Absent A Stay.

The State of Michigan, its citizens, and Intervenors will all suffer numerous and imminent irreparable harms if a stay is not granted. "[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." *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). This injury is magnified in the

redistricting context because "[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 Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The District Court enjoined the use of congressional and legislative maps which have been in effect since 2012. In doing so, the District Court foregoes any semblance of respect for state sovereignty, the presumption of legislative good faith, foundational principles of federalism, and First Amendment rights. These are harms shared by both the people of Michigan and their elected representatives. Furthermore, there are significant costs to the Michigan Legislature and all candidates seeking state legislative or congressional office that, absent a stay, present irreparable harms in the context of the District Court's intrusive order.

Both the nature and effect of the District Court's order imposes severe burdens on state sovereignty which, if left unchecked, constitute irreparable injury. The District Court, through its remedial plan, anoints itself as a super-legislature by requiring the Michigan State Legislature, upon passage of a remedial plan, to provide it with the following: (1) the description of the process used and the identity of the participants consulted in drafting the remedial plan[7]; (2) all criteria used in drawing a plan; (3) a list of all alternative plans considered; (4) and an explanation for why the Legislature believes that enacted plan is constitutional. App. A at 145 ¶¶ 1-3, 5. The District Court further mandates that the map be passed by the legislature and signed by the Governor[8] by

[7] The order requires that the Michigan Legislature identify *every* participant involved or consulted both formally and informally in the legislative process. *See* (ECF No. 268 at 145 ¶1). Evidently, legislators' dinner table discussions with children, spouses, and neighbors about a piece of pending legislation are now subject to Orwellian judicial oversight. *Cf., Chemetron Corp. v. Jones*, 72 F.3d 341, 348 (3rd Cir. 1995). At bare minimum, this order represents an intrusion into the First Amendment rights of the Michigan State Legislature by seeking to suppress the free exchange of ideas. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (compelled speech is only justifiable when the regulation is "unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

[8] The Governor's signature requirement is contrary to Michigan law should the legislature have the votes necessary to override a gubernatorial veto. *See* Mich. Const. art. IV, § 33. No explanation is given by the District Court as to why a redistricting bill, which is a law like any other, cannot simply pass via the ordinary state legislative process.

August 1, 2019, or it will implement its own plan. These requirements completely ignore the "broad mandate" granted legislatures in this area, which "is as much at the core of state sovereignty as any other." *Bush v. Vera*, 517 U.S. 952, 1012 n.9 (1996).[9] Put simply, the order operates as a "serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. While the District Court has the power to declare laws unconstitutional, it does not have the power to make the Michigan Legislature its vassal. *See Vieth*, 541 U.S. at 278 (plurality op.). To dictate otherwise would fuse "the atom of sovereignty" and result in an explosion of federal and judicial power as yet unforeseen. *See United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring).

Absent a stay, the District Court's remedial process also eviscerates any presumption of "legislative good faith." *See Abbott*, 138 S. Ct. at 2324. "Whenever a challenger[10] claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." *Id*. Most importantly here, "a finding of past discrimination" does not, "in the manner of original sin, condemn governmental action that is not itself unlawful." *Id*. The District Court has not only flipped the presumption of good faith, it has fashioned a process that presumes *bad faith* on the part of the Michigan Legislature. There is no other way to view an order that requires, *inter alia*, "[a] detailed explanation for why Intervenors believe that any enacted remedial plan remedies the constitutional harms identified . . . in each Challenged District." App. A at 145. "The judicial power created by Article III, § 1, of the Constitution is not *whatever* judges choose to do."

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[9] These conditions also preemptively eviscerate any and all privileges the legislators enjoy including legislative, attorney-client, attorney work product, and First Amendment privileges. *See, e.g.,* Mich. Const. art. IV, § 11 (Senators and Representatives "shall not be questioned in any other place for any speech in either house").

[10] The use of "challenger" as opposed to "plaintiff" or "party" in *Abbott* seems to indicate that the universe of individuals or entities encompassed is to be broadly construed.

Vieth, 541 U.S. at 278 (emphasis in original). This Court should stay the order below to prevent this heretofore unprecedented incursion into Michigan's sovereign state functions.

The State will also be harmed by the opportunity costs associated with the disruption of the legislative process and the potential postponement of priority legislation. Under the best of circumstances, redistricting is a long and drawn out process. *See French v. Boner*, 771 F. Supp. 896, 903 (M.D. Tenn. 1991) ("Fairly apportioning [political] districts pursuant to the many constitutional requirements is a time-consuming and sensitive process. It should not be unduly rushed at the risk of imprudent decision-making.") *aff'd in part and vacated in part*, 940 F.2d 659 (6th Cir. 1991). Typically, state legislatures have months or even years to plan and prepare for the reapportionment process. Any time spent on redistricting legislation is time separate and apart from that needed for other legislative priorities as redistricting legislation is not the only matter—or even the only court-mandated matter—pending before the Michigan Legislature.

Michigan must pass a budget by October 1, 2019. *See* Lindsay VanHulle, *A deal to fix Michigan's roads looks to roll into summer, at least*, GRAND HAVEN TRIBUNE & BRIDGE MAGAZINE (Apr. 13, 2019).[11] Without a budget, the State risks a shutdown of all but the most essential services for its citizens, including payments for state government employees, contractors, and other financial assistance. The legislature must also, due to a threatened veto by the Governor, consider passing the highest gas tax in the nation that is purportedly aimed at defraying the costs of infrastructure repairs to the State of Michigan's roads. *See id*; *see also* Jonathan Oosting,

[11] https://www.grandhaventribune.com/State/2019/04/13/A-deal-to-fix-Michigan-s-roads-looks-to-roll-into-summer-at-least.

Whitmer threatens veto as Senate GOP strips gas tax hike from roads budget, THE DETROIT NEWS (Apr. 23, 2019)[12].

Additionally, the legislature must act on no-fault auto insurance or risk a different federal court imposing new limits on Michigan, which already suffers the highest automobile insurance rates in the country. *See* Jonathan Oosting, *Whitmer: Road funding, auto insurance deal could be 'win-win'*, THE DETROIT NEWS (Apr. 15, 2019).[13] The legislature also plans to address the issue of water quality in Michigan, which is the subject of much bi-partisan support. Jonathan Oosting, *5 Years Into Flint Water Crisis and It's Still Not Over*, TRIBUNE NEWS SERVICE & GOVERNING (Apr. 26, 2019).[14] In any event, there are many important issues the Michigan Legislature should be focused on other than legislation that will inevitably be impacted by the forthcoming decisions in *Benisek* and *Rucho*.

In addition to the grave institutional and constitutional harms that will result from the District Court's order, there are several practical irreparable harms that are likely to occur without a stay. An irreparable harm common to all Intervenors is that, without a stay, this case may become moot before appellate review in this Court is possible. The possibility of mooting a case during the pendency of an appeal is irreparable harm. *See*, *e.g.*, *Wise v. Lipscomb*, 434 U.S. 1329 (1977) (Powell, J. in chambers), *cert. granted,* 434 U.S. 1008 (1978); *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J. in chambers), *cert. granted,* 449 U.S. 898 (1980); *see also Barefoot v. Estelle*, 463 U.S. 880, 1983) ("[A] court of appeals, where necessary to prevent the case from

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[12] https://www.detroitnews.com/story/news/politics/2019/04/23/michigan-senate-strips-whitmer-gas-tax-hike-roads-budget/3550463002/.

[13] https://www.detroitnews.com/story/news/local/michigan/2019/04/15/whitmer-road-funding-auto-insurance-deal-win-win/3476191002/.

[14] https://www.governing.com/topics/transportation-infrastructure/tns-flint-water-crisis-continues.html.

becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal . . ."); *Weingarten Nostat, Inc. v. Serv. Merch. Co.,* 396 F.3d 737, 740 (6th Cir. 2005) (noting the possibility of irreparable harm without a stay due to a statutory mootness provision of the bankruptcy code). As this Court noted: "It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. No court can make time stand still while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review." *See Nken v. Holder,* 556 U.S. 418, 421 (2009).

The Legislature must have a bill ready to review by July 8, 2019, to be presented to the Governor and enacted by the District Court's mandated August 1, 2019, deadline. Under the most charitable of scenarios, it is unlikely that the Court will have time to review this case on the merits before the August 1 deadline. *See, e.g., Lamone,* No. 18-726 (three-judge panel decision on November 7, 2018, merits briefing complete on March 15, 2019, oral argument held on March 26, 2019). If the legislature passes a remedial law by the deadline, either the new law or a court ordered plan will be implemented thus mooting the case because it is certain that "the alleged wrongful behavior could not be expected to recur." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000); *see also National Advertising Company v. City of Miami,* 402 F.3d 1329, 1333-34 (11th Cir. 2005) ("[T]he cases are legion from this and other courts where the repeal of an allegedly unconstitutional statute was sufficient to moot litigation challenging the statute.").

The Michigan election apparatus is also not immune from harm by the District Court's decision. The District Court ordered the State to pass a law with absolutely no certainty if that law will even be "permitted" to be implemented. *See* App. A at 144-146. Planning for election campaigns takes time. Candidates must plan and organize ballot access efforts, raise funds sufficient to conduct campaigns, and make difficult decisions on whether and how to run for office.

Further, the parties and political organizations must conduct candidate recruitment. But this all depends on knowing what the geographic boundaries of the districts are. In fact, candidates have already begun running for office.[15] Candidates will be forced to expend funds in portions of districts, or entire districts, that they will no longer represent if the District Court is overruled. Given various state and federal fundraising requirements, the loss of these funds is by definition an irreparable harm. *See Democratic Party v. Benkiser*, 459 F.3d 582, 586-88 (5th Cir. 2006) (an injury exists when "campaign coffers" are "threatened"). Finally, constituent services and engagement are significant and important aspects of the work of all elected officials. *See McCormick v. United States*, 500 U.S. 257, 272 (1991) ("Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator."). Throwing every house, senate, and congressional district into disarray while an appeal is pending will cause untold harms upon the candidates and the people of Michigan.

A grant of a stay here will not "substantially injure" Plaintiffs or the Secretary Defendant. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Even given the length of time to appeal, *see supra* at 24, a decision of this Court will allow enough time for primary elections under a remedial plan in the unlikely event one is even necessary. Plaintiffs' concern about having districts in place by March 2020, Joint Discovery Plan at 2, ECF No. 22, permits ten months for an appeal and ruling. Expedited briefing can speed the process to alleviate any of Plaintiffs' concerns. As long as there is sufficient time to implement a remedy, if one should have to be enacted, there can be

[15] For example, Representatives Huizenga and Upton have already filed their "Statement of Candidacy" for 2020 with the Federal Election Commission. *See, e.g.,* http://docquery.fec.gov/cgi-bin/forms/H6MI04113/1291750/ (Congressman Upton statement of candidacy filed November 20, 2018); http://docquery.fec.gov/cgi-bin/forms/H0MI02094/1301099/ (Congressman Huizenga statement of candidacy filed December 13, 2018).

no possible harm to the other parties—especially when Plaintiffs waited over seven years to bring this lawsuit.

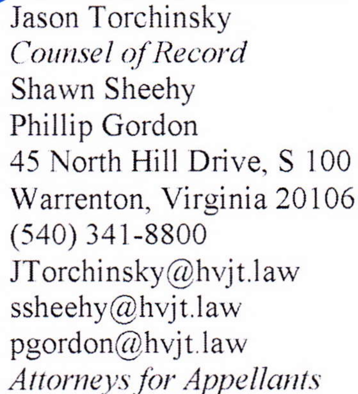
For reasons related to the irreparable harm the State will suffer absent a stay, a stay of the District Court's order pending appeal is in the public interest. *See Nken*, 556 U.S. at 435 (noting that the irreparable harm and public interest "merge" when the government is a party). The public interest will be further served by minimizing confusion amongst the electorate. A new districting map will displace voters from a district in which they have voted for the past eight years. This interest is amplified by the risk that the process will begin in the legislature, only to grind to a halt should *Rucho* and *Benisek* alter the applicable standards. This outcome will waste precious taxpayer resources and legislative time, which counsels in favor of granting a stay. *See, e.g.*, *LULAC*, 548 U.S. at 448 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part) ("[T]he interests in orderly campaigning and voting, as well as in maintaining communication between representatives and their constituents" weighs against mid-decade redistricting).

CONCLUSION

For the foregoing reasons, Appellant House and Congressional Intervenors respectfully request that this Court grant this emergency application for stay of the District Court's order pending resolution of Intervenors' appeal.

Respectfully Submitted this 10th day of May 2019,

Holtzman Vogel Josefiak Torchinsky PLLC



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