Nos. 18A1170, 18A1171

In the Supreme Court of the United States

LEE CHATFIELD, ET AL., *Applicants*

v.

LEAGUE OF WOMEN VOTERS OF MICHIGAN ET AL., *Respondents*

MICHIGAN SENATE, ET AL., *Applicants*

v.

LEAGUE OF WOMEN VOTERS OF MICHIGAN, ET AL., *Respondents*

On Applicants' Emergency Applications for Stays Pending Resolution of Applicants' Direct Appeals to This Court

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MICHIGAN VOTERS' COMBINED RESPONSE IN OPPOSITION TO APPLICATIONS FOR STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the League of Women Voters of Michigan states that it is a private, independent 501(c)(4) corporation with no parent corporation. No publicly held company owns 10% or more of its stock.

May 20, 2019 */s/ Joseph H. Yeager, Jr.*

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

Just less than a month ago, a three-judge district court with over 75 years of collective judicial experience unanimously held that 34 challenged districts in Michigan's congressional, state house, and state senate maps violated the First and Fourteenth Amendments to the U.S. Constitution. Correctly applying this Court's precedents, including *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the district court found "overwhelming[]" evidence of an extreme partisan gerrymander in each of the challenged districts, and enjoined the use of those districts in future elections. (Opinion and Order, April 25, 2018 (the "Order") 24.) Equally consistent with redistricting precedents, it afforded the Michigan legislature a "reasonable opportunity . . . to meet constitutional requirements by adopting a substitute measure," *Wise v. Lipscomb*, 437 U.S. 535, 539–40 (1978), and invited the Legislature to propose a remedial map by August 10, 2019, to ensure that the 2020 election would proceed under constitutionally drawn districts. (Order 144-46.)

In two similar stay applications, Intervening Defendants from the Michigan Republican congressional delegation, the Michigan House of Representatives, and the Michigan Senate (collectively, "Applicants") ask this Court to stop that remedial process not just until this Court decides *Rucho v. Common Cause*, No. 18-422 ("*Rucho*") and *Lamone v. Benisek*, No. 18-726 ("*Benisek*"), but for the duration of their appeals in

this case.[1] The Court should deny both stay applications for any of three independently sufficient reasons.

First and most importantly, granting the requested stay would effectively deny Michigan voters the only relief they seek: the opportunity to cast their 2020 votes in constitutionally-drawn districts. If the district court's judgment is stayed but ultimately affirmed—and the League of Women Voters of Michigan and the other individual plaintiffs (collectively, the "Voters") believe it should ultimately be affirmed—that final disposition would not occur before 2020. By then, drawing new districts before statutory candidate-filing deadlines would be nearly impossible. *See* Mich. Comp. Laws §§ 168.534, 168.133, 168.163(1) (setting an August primary deadline, and candidate-filing deadlines of 15 weeks before that). This Court gives "due regard for the public interest in *orderly* elections," *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (emphasis added), but a months-long stay followed by an affirmance would inevitably lead to disorder, if not chaos.

Second, denying a stay would not irreparably injure Applicants, because the things they claim as injuries are variously illusory, reparable, or not harms at all. Applicants claim that one "harm" is judicial incursion into the legislature's role, but that "harm" is entirely illusory, because the Order *preserves* the legislature's role in

[1] *See* Congressional and State House Intervenors' Emergency Application for Stay ("House Application") and Michigan Senate and Senators' Emergency Application for a Stay Pending Resolution of Direct Appeal to this Court ("Senate Application").

redistricting by affording it the first opportunity at drawing constitutional maps. Only if the legislature declines to do so—or proposes unconstitutional maps again—would the district court draft its own maps. Applicants claim that legislative time and expense in drawing remedial maps is a harm, but that is exaggerated at best and reparable at worst. The legislature need not start drawing remedial maps from scratch. It could begin with any of the many hundreds of alternative maps that non-parties and experts have already drawn, either as part of the 2011 redistricting process or as part of this litigation. In any event, the time and money required to prepare a nonpartisan set of remedial maps could not outweigh the harm to the Voters that would occur if the Court granted the requested stay, freezing progress of a remedy for many months. *See Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) (citation omitted).

Third, Applicants have failed to show that there is a "fair prospect" of reversal. Although the Michigan Senate and Michigan Senators (collectively, "Senate Applicants")[2] claim the Court will "likely reverse" because of what might happen in *Rucho* and *Benisek* (Senate App. 17), only the Court knows how *Rucho* and *Benisek* will be decided. The Court's holding in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering claims are justiciable, remains intact, and in the last two years,

[2] Similarly, the Intervening Defendants from the Michigan Republican congressional delegation and the Michigan House of Representatives will hereinafter be referred to as "House Applicants".

all five three-judge district courts that decided partisan gerrymandering cases have entered judgments for voters. Alternatively, the Court could issue a narrow ruling without resolving the full spectrum of First Amendment and equal protection issues at stake in this case. If the Court stops short of holding that partisan gerrymandering claims are never justiciable, then Applicants will likely not have a fair prospect of prevailing in this appeal.

The Court should deny the two stay applications. In the alternative, and to the extent that Applicants' prospects of success turn on the outcomes in *Rucho* and *Benisek*, the Court should defer ruling on the stay applications until *Rucho and Benisek* are decided.

OPINION BELOW

The opinion below is reported as *League of Women Voters of Mich. et al. v. Benson, et al.*, No. 17-14148, --- F. Supp. 3d ----, 2019 WL 1856625 (E.D. Mich. Apr. 25, 2019). It is also reproduced as Appendix A to the House Application.

JURISDICTION

The League of Women Voters of Michigan and eleven individual Michigan citizens (collectively, "Voters") brought claims under 42 U.S.C. § 1983 alleging that Michigan's congressional, state house, and state senate districts violated the First and Fourteenth Amendments to the United States Constitution. A three-judge district court was appointed to hear the Voters' claims, *see* 28 U.S.C. § 2284(a), and after a four-day trial entered an opinion and order enjoining use of 34 challenged districts in

any future Michigan elections. Intervening defendants filed notices of appeal on April 30, 2019. This Court has jurisdiction under 28 U.S.C. § 1253.

STATEMENT OF THE CASE

Unlike parts of the Stay Applications, the following facts are taken from findings of fact and conclusions of law in the district court's Order.

A. In 2011, Republicans engaged in a concerted effort to redraw lines for congressional and state legislative districts to benefit themselves and disadvantage Democrats.

The release of 2010 census data required Michigan's congressional and state legislative districts to be redrawn. (Order 5.) Under the Michigan Constitution, the legislature was charged with that task, subject to a set of statutory standards. *See* Mich. Comp. Laws §§ 3.62, 4.261. The Republican party, which was then in control of both chambers of the legislature and the Governor's office, engaged in a concerted effort to redraw district lines to benefit Republican candidates while disadvantaging their opponents. (Order 5-23.)

The effort began with the Republican State Leadership Committee (the "RSLC"), which "engaged in a national effort to ensure that states redrew their congressional lines during the 2011 redistricting cycle to favor Republican candidates and disadvantage Democrats." (*Id.* at 6.) Following the 2010 census, the RSLC created an initiative known as the "REDistricting Majority Project," or "Project REDMAP." (*Id.*) The goal of Project REDMAP was simple: to draw new district lines in states with the most redistricting activity to "solidify conservative policymaking at the state

level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade." (*Id.*) State legislators in Michigan—including James Bolger, the Republican Speaker of the Michigan House of Representatives—actively worked toward this goal. (*Id.* at 6-7.)

Republican legislators engaged political operatives to draw all three maps "to favor Republicans and disadvantage Democrats." (*Id.* at 7.) They included:

- Robert LaBrant, the President of a Michigan organization formed to "defend Republican maps in litigation" (*id.* at 8 n.6);
- Jeffrey Timmer, the senior counsel at a Republican political consulting firm, the lead map-drawer for Republicans in prior election cycles, and the past Executive Director of the Michigan Republican Party (*id.* at 8);
- Terry Marquardt, the Political Director of the Michigan Republican Party during the 2001 redistricting cycle (*id.*); and
- Daniel McMaster, the Director of the House Republican Campaign Committee (*id.*).

These operatives engaged in a "calculated initiative" to "deliberately draw Michigan's legislative districts to maximize Republican advantage and, consequently, disadvantage Democratic voters." (*Id.* at 7.)

The Order includes eighteen pages of findings detailing the overwhelming evidence of partisan intent during the map-drawing process. (*Id.* at 5-23.) The district court held that the "evidence points to only one conclusion: partisan considerations played a central role in every aspect of the redistricting process." (*Id.* at 9.) The district court found, for example, that:

- Timmer used historical voter lists and election data to draw congressional maps that provided "maximum Republican advantage" (*id.* at 10);

- As to Senate maps, Marquardt drew districts that he "expected would produce better Republican outcomes compared to the existing map," altering the shape and contours of districts to favor Republicans (*id.* at 11); and

- As to House maps, McMaster drew districts using political "election numbers" from past elections, "double checked" to ensure Republican advantage (*id.* at 11-12).

Most notably, map drawers configured districts in all three maps "to secure a partisan advantage *even if doing so required violating the traditional non-partisan redistricting criteria*" enumerated in Michigan statutes. (*Id.* at 12 (emphasis added).)

Map drawers solicited the views of the Republican state legislators and U.S. House representatives whose districts they were configuring. (*Id.* at 15-18.) Timmer met with members and staffers for Michigan's congressional delegation in February 2011, showed them draft maps, and revised the districts to "accommodate the preferences expressed by the incumbent Republican congresspersons with whom he had met." (*Id.* at 18.) The chief of staff to one Republican Congressman proclaimed that revised census figures presented "'a glorious way that makes it easier to cram ALL of the Dem garbage in Wayne, Washtenaw, Oakland, and Macomb counties into only four districts.'" (*Id.* at 20 (citation omitted).) In separate emails, LaBrant assured a colleague that he had "'spent a lot of time providing options to ensure we have a solid 9-5 delegation in 2012 and beyond,'" meaning "a congressional delegation of nine Republicans and five Democrats." (*Id.* at 19 (citation omitted).) And in yet another

email, LaBrant told the chief of staff to a Republican congressman that they needed a "'good looking map that [does] not look like an obvious gerrymander.'" (*Id.* (citation omitted).)

Republican Map drawers and legislators next "concealed the contents of the redistricting plan and expedited its progression through the legislative process to prevent it from being subject to meaningful public scrutiny." (*Id.* at 22.) The House Elections Committee approved the plans along party lines, despite complaints about a lack of transparency and public involvement. (*Id.* at 23.)

Both chambers of the Republican-controlled legislature passed bills enacting these maps ("the Enacted Plan") within two weeks (*Id.*) The governor signed the legislation into law in August 2011, with months to spare before the statutory deadline. (*Id.*)

B. The 2011 redistricting created a pervasive and effective gerrymander.

As intended, the Enacted Plan "proved tremendously successful in advantaging Republicans and disadvantaging Democrats throughout several election cycles." (*Id.*) District-by-district historical data and expert and voter eyewitness testimony, boasts of the REDMAP architects, and extensive expert testimony using multiple metrics to measure partisan bias of maps, all confirmed the extreme effects of the gerrymander. (*Id.* at 7, 25-50, 65-93.)

First, as detailed below at pages ___ through ___, the Court carefully examined the district level evidence showing packing and cracking, and concluded from that voter, map drawer, and expert evidence that 27 challenged districts were packed or cracked. (Order 65-99.)

Second, Republican leaders deemed Project REDMAP "wildly successful" in the Michigan redistricting. (*Id.* at 7.) In 2013 the RSCC wrote that the "'effectiveness of REDMAP is perhaps most clear in the state of Michigan [because] . . . while the Democrats substantially outvoted Republicans statewide . . . Republicans nonetheless maintained majorities in both chambers of the legislature and voters elected a 9-5 Republican majority to represent them in Congress.'" (*Id.* (citation omitted).)

Third, the testimony of more than 40 voters across 34 challenged districts confirmed district by district that the gerrymander worked to pack Democrats in some districts while "cracking" them and thus diluting their voting strength in others. (*Id.* at 65-93.) *See Gill*, 138 S. Ct. at 1923-24 (describing packing and cracking). Contrary to the description in the House Application, the Voters did not testify merely about "generalized grievances" or abstract complaints. Numerous voters testified that the Enacted Plan made it more difficult to "register voters, recruit candidates, mobilize and attract volunteers, raise money, and motivate people to vote." (Order 102.) In addition, numerous voters testified that they donate less because of the gerrymander. (*Id.* at 102-03.)

Finally, three experts each also confirmed the extreme statewide effects of the gerrymander. (*Id.* at 24-50.) As the district court found, this expert evidence "overwhelmingly supports" the conclusion that the Enacted Plan is an extreme partisan gerrymander. (*Id.* at 24.) Importantly, each expert "employed several different statistical analyses and metrics to evaluate the partisan outcomes resulting from the Enacted Plan," the combined effect of which demonstrates that the "Enacted Plan strongly and systematically advantages Republicans and disfavors Democrats." (*Id.* at 24-25.) Notably, the district court did "not rely primarily on any individual expert's testimony or on any particular statistical measure; rather, the Court reache[d] this determination after considering the totality of [the Voters'] wide-ranging and extensive expert evidence." (*Id.* at 25.)

The district court found that the "partisan advantage that Michigan lawmakers achieved through the Enacted Plan persists to this day." (*Id.* at 7.) Because it found violations of the First and Fourteenth Amendments it enjoined use of the Enacted Plan as to each of the challenged districts. (*Id.* at 144.)

The district court's factual findings were not close calls. There was little or no evidence contrary to any of those findings, or to the conclusion that Michigan Democratic voters have for four elections been targeted by their state merely for their political views, associations, and expressions. Given the proof of "extremely grave" constitutional violations (*id.* at 141), the district court realized it could not look the other way:

> Federal courts' failure to protect marginalized voters' constitutional rights will only increase the citizenry's growing disenchantment with, and disillusionment in, our democracy, further weaken our democratic institutions, and threaten the credibility of the judicial branch.

(*Id.* at 5.)

REASONS FOR DENYING THE APPLICATIONS

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). Certain "general principles" apply to a Circuit Justice's consideration of a stay application, including the "presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Bellotti v. Latino Political Action Committee*, 463 U.S. 1319, 1320 (1983) (Brennan, J., in chambers) (citing *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)). As a result, the burden on stay applicants is even higher where, as here, "the lower court [has] refused to stay its order pending appeal." *Graves*, 405 U.S. at 1203-04.

Consistent with its extraordinary nature, a stay should generally be granted only where: (1) there is "a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; (2) there is a fair prospect of reversal and, in cases presented on direct appeal, a likelihood that five Justices will "conclude that the case was erroneously decided below"; and (3) irreparable harm will result absent a stay. *Id.* at 1203; *see generally Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (addressing stay pending disposition of a petition for certiorari). Even then, "sound

equitable discretion will deny the stay" when "a decided balance of convenience does not support it." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-055 (1991) (Scalia, J., in chambers). To "balance the equities," the Court must "explore the relative harms to the applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (quoting *Rostker*, 448 U.S. at 1308).

I. The Requested Stay Will Irreparably Harm The Voters.

When considering a stay, the Court must "determine on which side the risk of irreparable injury weighs most heavily." *Holtzman v. Schlesinger,* 414 U.S. 1304, 1309 (1973) (Marshall, J., in chambers). Here, that side is undeniably the Voters'. To ensure that new maps for 34 of Michigan's legislative and congressional districts will be in place for orderly 2020 elections, the remedial process cannot be delayed to the end of this appeal:

1. The 2020 primaries will be held on August 4, 2020, Mich. Comp. Laws § 168.534;

2. The deadline for filing nominating petitions is April 21, 2020 for state house, state senate, and congressional candidates, *id.* at §§ 168.133; 168.163(1);

3. Potential candidates must have some reasonable time before the filing date to decide whether to run and to secure nominating petitions from voters in the new districts; and

4. The legislature will need some weeks or even months to prepare a remedial map, and the district court will need time to evaluate it.

Yet the extraordinary relief sought here—staying any drawing of remedial maps through final disposition of the merits appeal—would delay even starting the legislative redistricting process until 2020. Using the expedited schedule in *Rucho v. Common Cause,* No. 18-422, as an example, the Court's decision on the merits appeal should not be expected for at least eight months.[3]

This timetable leaves almost no possibility that the 34 unconstitutionally gerrymandered districts could be cured "*through an orderly process in advance of elections*" if a stay is granted. *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (emphasis added). To the contrary, a merits decision could easily leave one month or less to implement new maps—a feat already declared "impossible" by Applicants themselves. (Senate App. 2; *see also* House App. 2 (arguing that 48 days is not enough time to implement new maps).) This is not simply a matter of disrupting the election process by requiring "precipitate changes" if the district court is affirmed. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). This is the very definition of an irreparable harm: a stay would likely deprive the Voters of any possibility of vindicating their constitutional rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the denial of constitutional rights "for even minimal periods of time" constitutes irreparable harm).

[3] Extrapolating from the expedited timetable established in *Rucho*, if the Court were to grant a stay on May 21, 2019, an opinion would not be expected until, at the earliest, January 26, 2020. And that could easily be too late.

Senate Applicants fail even to address what would happen to the Voters' remedy if delayed through a decision on the merits. And while House Applicants say that the Voters' "concerns" could be alleviated by "speed[ing] the process" (House App. 25)—the schedule contemplated above *is* expedited. That a stay would risk preventing "appropriate action to insure that no further elections are conducted under the invalid plan" is beyond any plausible dispute. *Reynolds*, 377 U.S. at 585 (explaining that such inaction would rarely be justified).

Unbothered by the risk that Voters would lose their remedy, Applicants point to stays granted in *Rucho* and *Gill*. But both cases presented a different balance of equities. In *Rucho,* the legislature had just three weeks to redraw the challenged districts, imposing a hardship neither set of Applicants will suffer. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 944 (M.D.N.C. 2018). Nor, as here, did a stay threaten to preclude the only relief that plaintiffs sought. Rather, even a delayed remedy would allow the North Carolina or Wisconsin voters to cast ballots under a constitutional map in 2020. *See, e.g.*, *id.*; *Whitford v. Gill*, 2017 WL 383360, at *2 (W.D. Wis. Jan. 27, 2017) (ordering new maps to be in place by November 1, 2017). In contrast, this Court has generally refused to issue stays that would impede the orderly functioning of elections. In *Mahan v. Howell*, 404 U.S. 1201, 1203 (1971), for example, Justice Black declined to grant a stay that "might further postpone important elections." And in *Moore v. Brown*, 448 U.S. 1335 (1980), the Court not only found it "unacceptable" that a stay would interfere with an upcoming election, but it did so despite "serious

concerns" about whether the district court's decision was correct. *Id.* at 1338-41; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (denying a stay request that affected imminent elections).

Equity, in short, cannot support a stay that would leave the Voters without a remedy for violations of their constitutional rights. *See Elrod*, 427 U.S. at 373; *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998).

II. Denying A Stay Would Not Meaningfully, Let Alone Irreparably, Harm Applicants.

By contrast, denying a stay would cause Applicants no irreparable harm. "An applicant's likelihood of success on the merits need not [even] be considered . . . if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers).

A. Some of Applicants' anticipated harms are illusory.

The primary "harm" asserted by Applicants—the inability to enforce a state redistricting statute that has been found unconstitutional as to 34 legislative districts—is illusory. (*See* House App. 9, 19; Senate App. 22.) It is illusory because the *only* way the statute will not be enforced is if this Court affirms the Order enjoining its use as unconstitutional. States have no legitimate interest in enforcing unconstitutional laws. *Reynolds*, 377 U.S. at 566 (explaining that states are not insulated from judicial review when their "power is used as an instrument for circumventing a federally protected right."). That is one reason why only the "*unusual* case" will justify not "taking

appropriate action" to prevent future elections under an invalid districting plan. *Id.* at 585 (emphasis added).

By contrast, if the Order is reversed, preparations for elections under the Enacted Plan can go forward immediately.

Both Applicants cite *Maryland v. King* for the proposition that enjoining "a court from effectuating statutes enacted by representatives of its people" always causes irreparable injury. 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). But *King* differed fundamentally from this case. Absent a stay, the judgment in *King* would have stopped *ongoing* enforcement of Maryland's DNA-collection statute, resulting in "*ongoing and concrete harm* to [the state's] law enforcement and public safety interests." *Id.* at 3 (emphasis added). Denying the stay here would cause no such injury: if the Court ultimately reverses on the merits, all duly-enacted maps will immediately be "effectuated" through use in the 2020 election. Similarly, related alleged "harms" like a wrongful special senate election will never occur either.

Applicants' claims that the district court has overstepped its remedial authority are equally illusory. As described by Applicants, the Order commands the legislature to draw maps in an "unprecedented incursion on Michigan's sovereign state functions." (House App. 22; *see also* Senate App. 21.) But the Order does nothing of the kind. Following decades of redistricting precedent, the Order preserves a "local" districting function by giving the legislature the first opportunity to right its own

constitutional wrongs. (Order 144-46.) *See Reynolds*, 377 U.S. at 586; *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Far from creating "Orwellian judicial oversight" (House App. 20 n.7), the district court merely follows decades of this Court's precedent in offering legislators an *opportunity* to adopt "substitute measure[s.]" *Wise*, 437 U.S. at 540.

Nor, finally, can irreparable harm arise from the district court's remedial requirement that the Michigan legislature provide information about the formation of any proposed remedial plan. Citing *Abbott v. Perez*, --- U.S. ----, 138 S. Ct. 2305 (2018), House Applicants object that these disclosures "eviscerate[] any presumption of 'legislative good faith.'" (House App. 21). Applicants misread *Abbott*, but the district court did not. *Abbott* rejected the notion that bad intent of a prior legislature created a presumption of bad faith in a successor legislature, but the Order makes no such presumption. 138 S. Ct. at 2325. *Abbott* instructed that the intent of the successor legislature must be judged instead on "all the relevant evidence," including "direct and circumstantial evidence of that Legislature's intent." *Id.* at 2327. The evidence weighed can even include the bad intent of the prior legislature. *Id.* The Order prepares the district court to follow *Abbott* faithfully—it identifies the evidence it will need from the Michigan legislature to evaluate its remedial intent based not on past intent, but instead on "all the relevant evidence," precisely as *Abbott* commands.

B. Expenditure of legislative resources is not an irreparable harm

The remainder of Applicants' "irreparable harm" argument rests largely on claims that "massive" or "precious and limited" resources must be expended to complete a remedial districting plan by the August 1 deadline. (Senate App. 23; House App. 22-23.) But expenditure of legislative resources is not an irreparable injury, because "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Conkright*, 556 U.S. at 1403 (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)); *see generally Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) (even "substantial and unrecoupable cost does not constitute irreparable injury.").

Applicants also exaggerate their predicted costs. In describing the "massive resources" that they argue proper redistricting will require, Applicants parade anticipated expenditures covering everything from "map drawers, lawyers, experts, and other staff" to appropriate software. (Senate App. 23.) They offer no reason why they cannot meet the Court's schedule. They also wholly ignore the hundreds of non-partisan alternative maps *already* in existence and before them, either from non-parties in 2011 or as part of this litigation. (*See, e.g.*, Order 25.) If it is concerned about time or money, the legislature could start with an existing map and modify it accordingly.

The legislature should not be heard to complain that it cannot draw non-gerrymandered maps in the over three months the Order allows. It passed the Enacted Plan into law "within approximately two weeks" of the first committee

hearing. (Order 23.) At best, then, Applicants have described the harm of interference with other legislative priorities as a mere possibility. *See Nken v. Holder*, 556 U.S. 418, at 434-35 (2009) (finding mere possibilities insufficient to show irreparable harm).

C. None of Applicants' other claimed harms are irreparable.

The remaining "harms" that Applicants posit do not justify bringing the court-ordered remedial process to an immediate halt. House Applicants contend, for example, that passing an acceptable remedial plan would moot their entire case. (House App. 24.) As a matter of law, however, reversal on the merits would invalidate whatever remedial plan the legislature passes. If enacting a remedial plan mooted pending redistricting appeals, stays would be granted in every redistricting case—but that is not the decades-long practice of this Court. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006); *Moore*, 448 U.S. at 1341.

Senate Applicants argue that redistricting would violate the one-person, one-vote standard because it would be based on old census data. (Senate App. 24.) This argument ignores that nearly *every* 2020 state and legislative election in the United States will likewise be held in districts based on the 2010 census. This Court has already held that "[d]ecennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth." *Reynolds*, 377 U.S. at 583.

Finally, the contention that enacting redistricting legislation by August 1 would be impossible (House App. 24) fails because it is based on the false assumption that

every element of the process will take the longest possible amount of time. In contrast, the Enacted Plan was passed "[w]ithin approximately two weeks." (Order 23.) By that measure, the district court's August 1 deadline will give the legislature four more session days than was used to pass the Enacted Plan, even if the Governor takes the maximum 14 days to review the legislation. This is hardly an impossibility. This Court has denied stays in cases where courts have allotted less time to remedy unconstitutional districts. *See McCrory v. Harris*, 136 S. Ct. 1001 (2016) (Roberts, C.J., in chambers) (denying a stay where the district court allotted two weeks to redraw the maps); *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (Roberts, C.J., in chambers).

In sum, Applicants' assertion of illusory, reparable, and unfounded harms cannot support a stay, let alone outweigh the Voters' interest in vindicating their right to vote. The balance of equities favors the Voters.

III. Applicants Do Not Demonstrate A Fair Prospect That The Court Will Vacate The District Court's Order.

Applicants also fail to demonstrate a "fair prospect" that the Order will be vacated or reversed. *See Graves*, 405 U.S. at 1203 (explaining that in cases "presented on direct appeal—where [the Court] lack[s] the discretionary power to refuse to decide the merits," it is of equal importance "whether five Justices are likely to conclude that the case was erroneously decided below.").

A. Applicants have not shown a fair prospect of a reversal based on standing.

The district court's careful analysis faithfully applies the district-by-district standing requirements of *Gill*, 138 S. Ct. at 1929-30, and its detailed findings establish that each Plaintiff suffered an injury in fact that is both traceable to the Enacted Plan and capable of being redressed through remedial maps. *See* U.S. Const. Art. III, § 2.[4]

1. None of the House Applicants' standing arguments show a fair prospect of reversal.

House Applicants' standing arguments badly misapprehend the Order—in some cases contradicting the court's findings, and in others attacking the standing of voters who did not even testify at trial, and on whose standing no part of the Order is based.

House Applicants repeatedly claim that in violation of *Gill*, the district court relied on various statewide metrics such as the efficiency gap to establish standing. (*Id.* at 9, 11-12). These claims are profoundly incorrect. The district court complied fully with *Gill* by requiring district-level standing evidence for each vote-dilution claim, including all the equal protection claims and the non-associational First Amendment

[4] House Applicants claim incorrectly that "a ruling from this Court [in *Rucho* and/or *Benisek*] that Plaintiffs lack standing . . . will require a reversal of the District Court's ruling below." (House App. 10.) The Court could hold that some defect in a voter's testimony in *Rucho* or *Benisek* precludes standing in those cases, even if the defect is absent here. To obviate that possibility, if the Court chooses not to deny the applications in their entirety, the Voters request that the Court defer ruling until after *Rucho* and *Benisek* are decided.

claims. (Order 62-99.) The standing section as to dilution claims evaluates district-by-district detail for 37 pages with no mention whatsoever of the efficiency gap. (*Id.*)[5]

The Order uses statewide evidence to evaluate the Voters' standing only as to non-dilutional First Amendment claims. (*Id.* at 99-103.) This in no way violates *Gill,* in which the majority expressly declined to reach the First Amendment claims. *Gill*, 138 S.Ct. at 1931, 1934, 1938-40.

Far from "dubious," the Voters' expert evidence "clearly demonstrates that the Enacted Plan strongly and systematically advantages Republicans and disfavors Democrats." (Order 24-51.) This evidence was both statewide and district-level. One expert, Dr. Jowei Chen, applied an algorithm to create 1,000 randomly-generated and apolitical districting plans each for the congressional, Senate and House maps. (*Id.* 25.) Using three different and well-accepted political science measurements, Dr. Chen concluded that the House, Senate, and Congressional maps were partisan outliers that produced durable, pro-Republican outcomes. (*Id.* at 26-39.) Independently of Dr. Chen, Dr. Christopher Warshaw applied three political-science metrics each of which showed how the Enacted Plan "strongly advantages Republicans and disadvantages Democrats." (*Id.* at 43.) Both witnesses also evaluated the individual districts in which

[5] House Applicants cite other passages of the Order in an attempt to support their false narrative of a *Gill* violation. (House App. 9, 11-12 (citing Order 28-30, 39-42, 49, 51).) Those passages contain no standing analysis, but instead are from the fact section of the Order.

the Voters live and vote, supporting the district court's conclusion that 27 of those districts are packed and cracked. (*Id.* at 34-35, 42.)

The district court considered far more evidence of injury than testimony by experts. Over 40 voters, living in 34 challenged districts, testified about the specific harms they suffered because of the Enacted Plan. (*Id.* at 65-93.) Contrary to the House Application, this testimony was not merely about "generalized grievance[s]" or abstract frustrations. (House App. 12.) Many voters testified that the Enacted Plan made it more difficult to "register voters, recruit candidates, mobilize and attract volunteers, raise money, and motivate people to vote." (Order 102.) For many of the districts the court also relied on the testimony of the Senate staffer, Michael Vatter, who testified at length regarding the impacts of the changes of the configurations in each district. (Order 65-86.)

The district court found, in dozens of pages of analysis, abundant proof that the Voters suffered the very sorts of district-by-district "packing" and "cracking" and/or first amendment association harms that this Court has required. *See Gill*, 138 S. Ct. at 1929-30. (*See also* Order 63-99.)

Though House Applicants would liken this case to *Gill*, the problem in *Gill* was that plaintiffs did *not* offer, and the district court did *not* find, district-specific evidence of harm to support standing. *Gill*, 138 S. Ct. at 1931-33. *Gill* rejected various partisan-symmetry metrics as a substitute for district-specific evidence, noting that the "difficulty for standing purposes is that these calculations are an average measure.

They do not address the effect that a gerrymander has on the votes of particular citizens." *Id.* at 1933.[6] Here, by contrast, the district court considered detailed district-specific evidence from Voters about "the effect that [the Enacted Plan] has on" their votes.

House Applicants' contention that voters who live in districts anywhere within the partisan range of Dr. Chen's simulated districts lack standing—*i.e.*, that only voters in districts more partisan than all 1,000 alternatives have standing—is also incorrect, precisely as the district court found. (House App. 13; Order 96.) These voters' votes are diluted compared to nearly every alternative district. (*Id.*)

House Applicants also argue that some Voters lack standing because any map would place them in overwhelmingly Democratic or Republican districts. (House App. 14.) In the Order, however, the district court addressed and accounted for thisissue: it found vote-dilution standing *only* for those voters who could demonstrate that an alternative map would not crack or pack them. (Order 64-65.) Multiple voters failed this standard, showing that the district court's analysis hews to *Gill*, rather than strays from it. (*Id.* at 77-78, 81-83, 88-91.) Strangely, House Applicants point to voters Jon LaSalle and Richard Long (House App. 14), but LaSalle and Long did not testify,

[6] *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2008), cited by House Applicants (House App. 11), is also inapposite. There, the Court analyzed whether a proposed symmetry standard would be a manageable standard to analyze partisan gerrymandering claims *on the merits*—not whether such a standard could be used to support standing.

were granted no relief, and thus their standing is not at issue. Different voters testified in Districts 1 and 11, and those voters established standing. (*See* Order 65-66, 74-75.)

House Applicants conclude their standing attack with a distortion. They attribute to the Voters a theory 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." (House App. 14.) This refers to proportionality, which has never been Voters' claim. As found in the Order, the Voters have established standing under *Gill* without ever claiming the right to proportional representation. (Order 95-96.)

2. Senate Applicants show no fair prospect of reversal on standing.

Senate Applicants also fail to show a fair prospect of reversal because their standing argument, made in a single paragraph (Senate App. 16-17), confuses standing with the scope of available remedies.

Senate Applicants argue that the Voters lack standing because they will suffer no harm in the 2020 election, which includes "no regularly scheduled election for the Senate[.]" (*Id.* at 16.) The district court found that voters in each of the challenged Senate districts proved harm under First and/or Fourteenth Amendment theories. (Order 65-99.) The district court found that ongoing representation by Senators elected under unconstitutional maps works a harm that can be remedied in 2020. (*Id.* at 136-43.)

B. Applicants have not shown a fair prospect of reversal on justiciability.

Applicants also fail to show a fair prospect they will prevail on the issue of justiciability (House App. 15-16; Senate App. 12-14). Partisan gerrymandering claims have been justiciable for over 30 years.

The justiciability of partisan gerrymandering claims derives from the justiciability of one-person, one-vote and racial gerrymandering cases. As established in *Baker v. Carr*, an issue poses a political question only if, among other things, there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. 186, 217 (1962). Applying this framework, *Baker* held that one-person, one-vote apportionment claims are justiciable because, in part, "it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Id.* at 226.

In *Davis v. Bandemer*, the Court expressly applied *Baker*'s justiciability framework to partisan gerrymandering claims, holding that such claims do not raise nonjusticiable political questions. 478 U.S. 109, 123 (1986) (plurality op.); *id.* at 161-65 (Powell, J., concurring in part and dissenting in part). Writing for a plurality, Justice White emphasized that the Court had previously concluded that one-person, one-vote and racial gerrymandering claims were justiciable, thereby establishing that apportionment claims implicating "issue[s] . . . of representation" are justiciable. *Id.* at 124.

Nearly 35 years later, *Bandemer*'s central holding remains the law of the land. (*See* Order 57; *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring) (expressly rejecting "the plurality's conclusions as to nonjusticiability."); *id.* at 317 (Stevens, J., dissenting) ("The central question presented by this case is whether political gerrymandering claims are justiciable. . . . [F]ive Members of the Court are convinced that the plurality's answer to that question is erroneous."); *Perry*, 548 U.S. at 414 (refusing to reconsider *Bandemer*'s central holding); *Gill*, 138 S. Ct. at 1927-29 (reviewing post-*Bandemer* cases and declining to reach issue of justiciability).)

Nor do Applicants support their claim that the Court "will likely rule" in *Rucho* and *Benisek* that political gerrymandering claims are nonjusticiable and, in effect, overrule *Bandemer*. (Senate App. 14.) As Justice Kennedy correctly observed in *Vieth*, the Court's "willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering." 541 U.S. at 310 (Kennedy, J., concurring in the judgment). Indeed, the Court "made it clear in *Baker* that nothing in the language of [Article I] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964); *see Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (citing *Wesberry*, 376 U.S. at 6–7); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995).

Applicants' conjecture that this Court will take the unusual step of overruling a decades-old precedent is just that: conjecture. It cannot establish a likelihood that the district court's application of *Bandemer* and other precedents will be reversed. *See Graves*, 405 U.S. at 1203 (explaining standard for cases presented on direct appeal considers "whether five Justices are likely to conclude that the case was erroneously decided below.").

C. Applicants have not shown a fair prospect of reversal on the issue of a judicially manageable standard.

Applicants' arguments relating to a judicially manageable standard, closely related to the broader issue of justiciability, are equally unpersuasive. First, to the extent Applicants maintain that a ruling of nonjusticiability is "likely" because there is no judicially manageable standard for partisan gerrymandering claims, this argument was not just rejected by *Bandemer*; it has been rebutted by the five three-judge federal district court panels that have applied such standards. *See Ohio A. Philip Randolph Inst. v. Householder*, --- F. Supp. 3d ---, 2019 WL 1969585, at *68 (S.D. Ohio May 4, 2019) ("The federal courts that have recently adjudicated partisan-gerrymandering claims have converged considerably on common ground both in establishing standards for assessing a redistricting plan's constitutionality and for evaluating partisan effect."); *Rucho*, 318 F. Supp. 3d at 860-68, 929, appeal docketed No. 18-422, 139 S. Ct. 782 (Jan. 4, 2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016), *vacated and*

remanded on other grounds, 138 S. Ct. 1916 (2018); *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596–97 (D. Md. 2016).

Further, Applicants' attacks on standards adopted by the district court suggest no basis, let alone a fair prospect, for reversal. Attacking the court's "predominant purpose" standard—applied to Equal Protection claims under the Fourteenth Amendment—Applicants ignore this Court's use of that very standard in racial gerrymandering cases and its recent statement analogizing those cases to partisan gerrymandering cases. *See Gill*, 138 S. Ct. at 1930. And to attack the district court's standard for evaluating First Amendment claims, Applicants do little more than call it a hybrid. The standard must be improper, they say, because the court assembled it from two different district court formulations. (House App. 19.) But even House Applicants concede that "a hybrid standard" (rather than the *Rucho* or *Benisek* standards wholesale) is precisely what this Court may adopt. (*Id.*)

This leaves Applicants, once again, with conjecture that this Court will overrule its precedents. And once again, conjecture cannot meet their burden. *See Graves*, 405 U.S. at 1201 (explaining elevated burden in cases presented on direct appeal).

D. Senate Applicants have not shown a fair prospect of reversal on laches.

Only Senate Applicants claim that the equitable doctrine of laches creates a fair prospect of reversal (Senate App. 15-16), and they do so only by making the same flawed arguments offered to attack the Voters' standing. Their gist is that the Voters

"delayed so long [in filing this action] that prospective relief" is not needed. (*See id.* at 16). This claim runs headlong into Senate Applicants' admission that laches "does not prevent plaintiff[s] from obtaining injunctive relief or post-filing damages." (Senate App. 15-16 ("[L]aches cannot bar a plaintiff's claims for prospective injunctive relief from ongoing harms."); *see also* (Order 52-53 (citation and internal quotation marks omitted).) In other words, Senate Applicants admit that laches does not apply to the relief the Voters seek. No prospect of reversal is established by this peculiar claim.

E. Senate Applicants have not shown a fair prospect of reversal on the special Senate election remedy.

Senate Applicants are equally unlikely to succeed in challenging the district court's special elections remedy as beyond the court's authority. (Senate App. 17-22.) Contrary to their premise, there is nothing unprecedented or novel about special elections that "truncate the terms" of unconstitutionally-elected legislators. Courts confronted with districting that violates the Constitution have not hesitated to order special elections as a remedy. *See, e.g.*, *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (allowing special elections as a remedy for unconstitutional racial gerrymanders).[7] This Court has recognized the need to adapt remedial techniques to

[7] *See also Smith v. Cherry*, 489 F.2d 1098, 1103 (7th Cir. 1973) (directing district court to order "new primary and general elections" should the district court find that an election was tainted by a sham candidacy); *Ketchum v. City Council of City of Chi., Ill.*, 630 F. Supp. 551, 565 (N.D. Ill. 1985) ("Federal courts have often ordered special elections to remedy violations of voting rights."); *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) ("If the district court finds a constitutional violation, it will have authority to order a special election" regarding state senate district); *Arbor Hill*

"the circumstances of the challenged apportionment and a variety of local conditions." *See Reynolds*, 377 U.S. at 585.

Neither are Senate Applicants likely to succeed in their argument that the district court "improperly weighed the equitable factors" that guide courts in awarding this relief. To determine whether a special election is an appropriate remedy, courts must ordinarily engage in an "equitable weighing process" based on three factors: (1) "the severity and nature of the particular constitutional violation"; (2) "the extent of the likely disruption to the ordinary processes of governance if early elections are imposed"; and (3) "the need to act with proper judicial restraint when intruding on state sovereignty." *North Carolina*, 137 S. Ct. at 1625–26. Here, the record establishes that the district court did just that. Carefully considering evidence spanning "thousands of pages of underlying deposition testimony, expert reports and exhibits" (Order 2 n.4), the court found that each factor favored special elections, reasoning:

- Partisan gerrymandering of the Senate map "strongly advantaged Republicans and disadvantaged Democrats *for eight years*" (*id.* at 141 (emphasis added)) and prevented Democratic Voters from competing for control of the Michigan Senate even in a year with historic turnout (*id.* at 24). The district court also found that this

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Concerned Citizens Neighborhood Ass'n v. Cty. of Albany, 357 F.3d 260, 262 (2d Cir. 2004) (reversing district court's order that refused to hold special election and requiring county to hold special election after district court invalidated electoral maps as violative of the Voting Rights Act); *Pope v. Cty. of Albany*, 687 F.3d 565, 569 (2d Cir. 2012) (explaining that federal courts possess the "power to order special elections" to redress constitutional violations).

remains "historically extreme" behavior inflicted an "extremely grave" constitutional violation. (*Id.* at 141.)

- A special election will impose no additional burden as "voters would simply cast their votes for one additional office on [an existing] election day (both in the primary and in the general election)" (*Id.* at 143.) The district court found that a special senate election concurrent with other elections will amount to a minimal disruption to the ordinary processes of government. (*Id.* at 142-43.)

- Because "sovereignty emanates from the people," a special election is the only way to prevent the Republican Party of Michigan from continuing to subvert people's will. (*Id.* at 142 (*citing Thornton*, 514 U.S. at 793-94).)

Preventing an unconstitutionally elected Senate from controlling processes of government, incurring the minimal costs of constitutional elections, and not protecting the terms of unconstitutionally elected state senators are not intrusions on state sovereignty; to the contrary, they reflect that sovereignty "emanates" from the voters as the district court observed. (Order 138-141.) *See Thornton*, 514 U.S. at 793-94.

CONCLUSION

The Court should deny Applicants' emergency applications for a stay. If the stay is not denied, the Court should alternatively defer ruling on the stay applications until *Rucho* and *Benisek* are decided.

Respectfully submitted,

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