IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,	:	
Plaintiffs,	:	Civil Action No. 17-cv-14148
v.	:	Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist
RUTH JOHNSON, in her official capacity as Michigan Secretary of State	:	
Defendant.	:	

REPLY IN FURTHER SUPPORT OF PROPOSED CONGRESSIONAL INTERVENORS' MOTION TO INTERVENE BY JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, MIKE BISHOP, PAUL MITCHELL, AND DAVID TROTT

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INTRODUCTION

In support of Plaintiffs argument that this Court should deny Proposed Congressional Intervenors ("Intervenors") intervention, Plaintiffs, unable to argue the law, instead resort to casting aspersions about Intervenors' motives. Intervenors file this brief to demonstrate that both the law and the facts warrant intervention.

Additionally, Intervenors' counsel will be present at the Monday, March 19 hearing. If permitted, counsel is prepared to argue this Motion and/or the Motion to Dismiss at Monday's hearing.

I. Intervenors May Intervene as of Right.

A. Congressional Intervenors' Motion Is Timely.

The Intervenors' Motion was filed timely. *See* Dkt. No. 20 at 4-5. The Motion to Intervene was filed prior to this Court ruling on any dispositive motion, before any discovery had been taken, and long before trial.

i. The Motion Is Timely.

The critical factor in the timeliness analysis is what events have occurred prior to intervention. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000). Accordingly, courts are wary about the timeliness of an intervention motion when "the motion arrives at a point in time that would" reopen discovery, delay trial, or otherwise cause prejudicial delay. *Shy v. Navistar Int'l*, 291 F.R.D. 128, 133 (S.D. Ohio 2013). Consequently, courts have permitted intervention years after a

complaint was filed because discovery had just barely commenced. *See Mountain Top Condo. Assoc. v. Dave Stabbert Master Builder, Inc*., 72 F.3d 361, 370 (3rd Cir. 1995) (four year delay did not prevent intervention); *Usery v. Brandel*, 87 F.R.D. 670, 675 (W.D. Mich. 1980) (ten-month delay did not prevent intervention).

When Intervenors filed their Motion to Intervene, slightly more than two months had elapsed since the Complaint was filed, *compare* Dkt. No. 1; *with* Dkt. No. 21, no discovery had commenced, the pre-trial discovery conference had not occurred, and the Court had not yet ruled on the Motions to Stay or Dismiss.

Plaintiffs contend that this litigation has progressed sufficiently to weigh against intervention. Dkt. 37 at 6-7. *Prior* to the filing of Intervenors' Motion, the parties had fully briefed the Motion to Stay and Dismiss and had held a discovery conference. This Court has already disposed of the Motion to Stay. But this is insufficient to declare a motion to intervene untimely. *See Jansen v. Cincinnati*, 904 F.2d 336, 340-41 (6th Cir. 1990) (holding that motion to intervene was timely despite the case progressing through six of twelve months of discovery). Furthermore, this Court has not ruled on the Motion to Dismiss, has not held a pre-trial conference, and there have been no discussions about stipulations. *Cf. Blount-Hill v. Zelman*, 636 F.3d 278, 285 (6th Cir. 2011). Furthermore, Congressional Intervenors agree with the discovery schedule. Dkt. No. 22.

ii. <u>A Litigation Hold Letter Does Not Impact this Intervention.</u>

Plaintiffs contend that the relevant date that Intervenors knew or should have known their rights were at issue is February 6, 2017. To Plaintiffs, this is sufficient to find Intervenors' Motion untimely. Dkt. No. 37 at 6. Of course, this is but one non-dispositive factor in the timeliness analysis. *See Blount-Hill*, 636 F.3d at 284. The mere passage of time is irrelevant. *Stupak-Thrall*, 226 F.3d at 475. Instead, timeliness is measured "under 'all of the circumstances' of [the] particular case." *See id*. Indeed this factor is relevant only if intervention brings about *undue* prejudice or disruption. *Usery*, 87 F.R.D. at 675 (permitting intervention despite intervenors knowledge about the case for a year as the case was "far from trial.").

Plaintiffs contend that intervention would cause them prejudice because they would be required to file a response to the Intervenors' Motion to Dismiss.[1] But Plaintiffs focus on the wrong issue. The prejudice inquiry is whether the failure to file intervention promptly has caused undue prejudice, not whether the intervention itself causes prejudice. *Blount-Hill*, 636 F.3d at 284; *United States v. Detroit*, 712 F.3d 925, 933 (6th Cir. 2013). Courts find prejudice due to untimely filings where the intervention happens after "the expense of discovery" or on the "eve of trial." *Shy*, 291 F.R.D. at 134. Thus, there is no prejudice as discovery is in its early stages,

[1] Plaintiffs claim that if intervention is allowed, Plaintiffs must file an additional opposition brief to Intervenors' Motion to Dismiss. Dkt. No. 37 at 6. But in the same brief, Plaintiffs assert that Intervenors' Motion to Dismiss is duplicative of Defendants. *See id*. at 7. Using Plaintiffs' logic, if the Motion to Dismiss is duplicative, they cannot be prejudiced. They can simply re-file their brief.

no depositions have been taken, and no dispositive motions have been resolved. In fact, trial is still approximately one year away. Dkt. No. 22 at 3-4 (Plaintiffs want trial no later than January of 2019 and Defendants want trial no earlier than April of 2019). Plaintiffs will not be required to duplicate or reopen discovery.

B. Intervenors Have A Significant Interest In this Litigation.

Courts routinely permit legislators to intervene in redistricting challenges. *See e.g. Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972); *Agre v. Wolf*, No. 17-4392 (E.D. Pa. Oct. 10, 2017) (three-judge court) (ECF 20) (granting intervention as of right to state legislators). This case is no different.

Plaintiffs do not contest the notion that intervention will streamline judicial resources and minimize third-party discovery. Dkt. No. 21 at 6. Instead, Plaintiffs contend that Intervenors' interest is a cynical possessory interest in their congressional districts. Dkt. No. 37 at 2.

Intervenors' interest is two-fold. Plaintiffs seek a mid-decade redistricting. Dkt. No. 1 at 33 ¶ (c). First, because this remedy means new congressional boundaries will be drawn, relationships between constituents and their elected representative will be broken. This harms the constituents requiring them to seek services from a new representative. This also harms the Intervenors requiring them to cultivate new relationships within new boundaries.

Second, for re-election the Intervenors will be required to expend funds to

learn the new congressional boundaries and constituents, after spending time and resources on their current districts pending a decision by this Court. Under federal campaign finance rules, contribution limits are not reset if districts are redrawn. The time the Intervenors spend in 2019 maintaining and expanding contacts in the existing districts can never be recovered. Intervenors will have campaigned for four election cycles in these districts, developing strong bonds within the community. Plaintiffs seek to uproot those bonds. Intervention is appropriate precisely because voters have elected Intervenors to represent them. Plaintiffs cannot be allowed to seek an order that breaks this relationship without the Intervenors' input.

Finally, Plaintiffs contend that Intervenors' 2020 candidacies are entirely speculative. Plaintiffs' contention would require Intervenors to wait until the 2020 filing deadline before intervening in this case—a deadline that has not yet even passed for the 2018 elections. Then Plaintiffs could argue that the Motion to Intervene is untimely.

C. Defendants Do Not Adequately Represent Intervenors.

Because the Defendants and the Intervenors seek the same outcome—dismissal of the Plaintiffs case or, ultimately, upholding the 2012 map—the appropriate inquiry is whether the Defendants' interest is something more than slightly different than Intervenors' interest. *See Jansen*, 904 F.2d at 343. "[I]t may be enough to show that the existing party who purports to seek the same outcome

will not make all of the prospective intervenor's arguments" *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). Consequently, because Intervenors are merely required to show that representation *may* be inadequate, the burden at this step is "minimal." *Id*.

Intervenors stated that any slight modification in these congressional districts will directly impact Intervenors since they both campaign in these districts—persuading voters to vote for them—as well as provide constituency service in these districts. *See* Dkt. No. 21 at 8-9. Intervenors will want to appeal given the reliance Intervenors have cultivated in these districts for three elections.

By contrast, the Secretary is statutorily required to provide the fair and smooth administration of elections. *See* MCLS § 168.21. If Plaintiffs prevail on the merits before this Court, the Secretary may wish to proceed with the elections under a new map rather than appeal. Furthermore, if the 2012 enacted map is declared unconstitutional the Secretary will not suffer any harm, unlike Intervenors. *See* Dkt. No. 21 at 7. This is an interest sufficiently different to find that the Defendants provide inadequate representation to Intervenors. *Michigan State AFL-CIO*, 103 F.3d at 1247 (permitting a Chamber of Commerce to intervene as of right in a campaign finance case challenged by unions despite both Michigan's Secretary of State—a Republican—and the Chamber agreeing that a challenged statute should be upheld albeit for different reasons). Accordingly, the fact that Defendants are

represented by seasoned redistricting attorneys (Dkt. No. 37 at 4-5) is immaterial to the adequacy of representation analysis. What is critical is the interest of the party.

II. Alternatively, Permissive Intervention Is Appropriate.

If this Court denies Intervenors intervention as of right, Intervenors are fine with some of the limitations Plaintiffs request. Intervenors will agree to abide by the discovery plan now in effect; will produce documents within a short period of time, preferably within fourteen days of the Court's order granting intervention; that the Motion for Stay will not be filed but that the portions of the Intervenors' Motion to Dismiss that do not address standing be filed and addressed.

Finally, Intervenors cannot agree to not file duplicative briefs and confer with Defendants' prior to filing any briefs. Although Intervenors will endeavor to avoid duplicative filings, Intervenors must also preserve their appellate rights.

CONCLUSION

For these foregoing additional reasons this Court should grant the Motion.

Dated: March 16, 2018

Respectfully submitted,

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Certificate Of Service

I hereby certify that on March 16, 2018 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all of the parties of record.

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