RECORD NO. 18-1437

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF MICHIGAN; ROGER J. BRDAK; FREDERICK C. DURHAL, JR.; JACK E. ELLIS; DONNA E. FARRIS; WILLIAM "BILL" J. GRASHA; ROSA L. HOLLIDAY; DIANA L. KETOLA; JON "JACK" G. LASALLE; RICHARD "DICK" W. LONG; LORENZO RIVERA; RASHIDA H. TLIAB,

Plaintiffs-Appellees,

v.

RUTH JOHNSON,
in her official capacity as Michigan Secretary of State,

Defendant,

and

JACK BERGMAN; BILL HUIZENGA; JOHN MOOLENAAR; FRED UPTON; TIM WALBERG; MIKE BISHOP; PAUL MITCHELL; DAVID TROTT,
Republican Congressional Delegation,

Proposed Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
AT DETROIT

CONGRESSIONAL INTERVENORS' MOTION TO EXPEDITE

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MOTION TO EXPEDITE

Pursuant to Fed. R. App. P. 2 and 27, 6 Cir. R. 27(f), and 28 U.S.C. § 1657, Appellants, Congressmen Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott ("Appellants" or "Congressional Intervenors"), hereby file this Motion to Expedite.

Appellants, Congressional Intervenors, have consulted with counsel for Plaintiffs-Appellees and Defendants. Defendants have stated that they consent to this Motion. Plaintiffs-Appellees consent to the following expedited briefing schedule only.

- Proposed Congressional Intervenors' brief filed on Wednesday April 25, 2018;
- Plaintiffs-Appellees' brief is due Wednesday May 16, 2018; and
- Proposed Congressional Intervenors-Appellants' reply brief is due Wednesday May 23, 2018.

Additionally, Congressional Intervenors-Appellants respectfully request that this Court grant and hear oral argument on this appeal at the Court's earliest available date. Defendants consent to this request. Plaintiffs-Appellees do not object to this request.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXPEDITE

BACKGROUND[1]

Bereft of analysis and based upon a faulty premise, the three-judge district court issued a terse order denying proposed Congressional Intervenors' intervention as of right and permissive intervention as defendants under Fed. R. Civ. P. 24(a) and (b). *See Order Denying Motion To Intervene By Republican Congressional Delegation* (ECF 47, April 4, 2018) (Page ID # 902-904) (hereinafter "Order").

After waiting almost seven years and three election cycles, Plaintiffs, all Democratic voters and a membership organization with Democratic members, sued only the Secretary of State claiming that Michigan's 2011 redistricting plan violated the First and Fourteenth Amendments of the U.S. Constitution. Compl. ¶¶ 1, 68, 74-85 (ECF 1, Dec. 22, 2017) (Page ID ## 1, 27, 29-32). Plaintiffs challenge the constitutionality of the state redistricting plan. Plaintiffs also challenge Michigan's redistricting plan for congressional districts. Compl. ¶ 1 (Page ID # 1). Congressional Intervenors are some of the Congressmen who represent the challenged districts.

[1] What follows is a brief recitation of some of the arguments for reversal of the three-judge district court's order. A full development of the arguments will be in Congressional Intervenors' brief, which is to be filed by close of business on April 25, 2018.

Two months later, Congressional Intervenors—eight of the nine Republican U.S. Congressional Members for Michigan—filed their Motion to Intervene as Defendants. *Congressional Intervenors Motion to Intervene* (ECF 21, Feb. 28, 2018) (Page ID ## 209-225). Accompanying their Motion to Intervene was a Motion to Dismiss and Motion to Stay the case pending the U.S. Supreme Court's decision in *Gill v. Whitford*, No. 16-1161 (U.S. Oct. 3, 2017) (Oral argument heard). (ECF 21-2, 21-3) (Page ID ## 227-275). The Congressional Intervenors stated that intervention as of right was proper.

First, the Motion to Intervene was timely because when the Motion was filed, discovery had not commenced, the pre-trial discovery conference had not occurred, and the three-judge panel had not issued an order on Defendants' Motion to Dismiss. *See, e.g.*, Congressional Intervenors' Reply Br. (ECF 40, March 16, 2018) (Page ID # 657) (Hereinafter "Reply Br."). Furthermore, by the time the Motion to Intervene was fully briefed, discovery was still in its nascent stages and Plaintiffs seek relief prior to the 2020 elections. Accordingly, the three-judge panel found that Congressional Intervenors' Motion to Intervene was timely. Order (ECF 47) (Page ID # 902). This Court may reverse a ruling as to timeliness only if it finds the three-judge panel abused its discretion. *Jansen v. Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990).

Second, Congressional Intervenors stated that they had a substantial interest

because since 2011, Congressional Intervenors had developed a reliance interest. They cultivated relationships with constituents and constituents had developed bonds with their congressional representatives. Reply Br. (ECF 40) (Page ID ## 659-660). Additionally, Congressional Intervenors have spent substantial sums of time, money, and resources from 2011 to the present understanding the contours of the congressional districts, what issues are salient to the constituents in these districts, and developing strategies tailored to the constituents of these districts. Altering the districts, even in 2019, would harm Congressional Intervenors' interests because time, money, and resources spent on the current districts are irretrievably lost should the Court order new districts in time for the 2020 election. Reply Br. (ECF 40) (Page ID # 660).

Rather than focus on the claimed interest, the three-judge panel ruled that Congressional Intervenors did not have a "property interest" in the congressional districts they represent. Order (ECF 47) (Page ID ## 902). Of course, this was undisputed as Congressional Intervenors described Plaintiffs' argument on this point to be nothing more than cynical. Reply Br. (ECF 40) (Page ID # 659). The three-judge panel then held that the described interest was an interest generally shared by all citizens and therefore insufficient to be granted intervention as of

right. Order (ECF 47) (Page ID # 903).[2] This ruling is reviewed *de novo*. *Jansen*, 904 F.2d at 340.

Next, the three-judge court denied the intervention as of right because the Court thought that the Defendant, the Secretary of State, adequately represented the interests of Proposed Congressional Intervenors. Order (ECF 47) (Page ID # 903). The three-judge court ruled this way despite this Court' precedent in *Michigan State v. Miller*, 103 F.3d 1240, 1247-48 (6th Cir. 1997), which stands for the proposition that Congressional Intervenors need to prove only a possibility of inadequacy to satisfy this requirement. Given that the Secretary of State's interests are divergent from those of Congressional Intervenors, this Court should reverse this finding. This element is reviewed *de novo*. *Jansen*, 904 F.2d at 340.

Finally, the three-judge court denied permissive intervention. Order (ECF 47) (Page ID # 903). The three-judge court did so because permitting intervention would cause a likelihood of delay and prejudice to Plaintiffs. *Id.* But trial has not yet been scheduled and is unlikely to occur until December 2018 or January 2019. *See Joint Report From Rule 26(F) Conference And Discovery Plan* ("Proposed

[2] As noted in the Congressional Intervenors' Brief, the standing of the Plaintiffs to maintain this lawsuit does not differentiate the Plaintiffs from any other voter (including the Members of Congress who are seeking to intervene here), except that in many cases their preferred candidate did not prevail. If the Plaintiffs have standing because their preferred candidate did not win in a challenged district, then the Congressional Intervenors, who have won elections in the challenged districts, certainly have standing to defend the districts.

Discovery Plan") (ECF 22, March 2, 2018) (Page ID # 278). Accordingly, permitting intervention now cannot be prejudicial to Plaintiffs-Appellees.

JURISDICTION

Jurisdiction before this Court is proper under 28 U.S.C. § 1291 and the collateral order doctrine. The three-judge panel's denial of the Congressional Intervenors' Motion to Intervene is either a final order by preventing the movant from becoming a party, *see Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987), or falls within the collateral order doctrine exception. *Purnell v. Akron*, 925 F.2d 941, 944 (6th Cir. 1991). Either way, denials of intervention are immediately appealable. *See Purnell*, 925 F.2d at 944 ("It is fairly well established that denial of a motion to intervene as of right, i.e. one based on Rule 24(a)(2), is an appealable order."). Even though this is an appeal from a three-judge panel, the appeal is properly before this Court because the appeal is from an order that does not involve the grant or denial of an injunction concerning the merits of Plaintiffs' constitutional claims. *See MTM, Inc. v. Baxley*, 420 U.S. 799, 803 (1975); *Carey v. Wynn*, 439 U.S. 8, 8 (1978) (per curiam); *Goldstein v. Cox*, 396 U.S. 471, 478-79 (1970); *Daniel v. Waters*, 515 F.2d 485, 487-88 (6th Cir. 1975) (holding that appeal of three-judge panel order concerning abstention was properly before the Sixth Circuit and not before the U.S. Supreme Court). This appeal is properly before this Court.

STANDARD OF REVIEW

To expedite an appeal, the Congressional Intervenors must show good cause. *See* 6 Cir. R. 27(f). Good cause is shown "where a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." 28 U.S.C. § 1657.

ARGUMENT

I. EXPEDITED APPEAL IS WARRANTED BECAUSE OF THE CONSTITUTIONAL ISSUES AT STAKE AND ONGOING THREE-JUDGE DISTRICT COURT LITIGATION.

This Court should grant the Motion to Expedite for three reasons.

First, the Federal Rules of Appellate Procedure and this Court permit expediting appeals. Fed. R. App. P. 2; 6 Cir. R. 27(f). Challenges that involve constitutional rights constitute good cause for expediting appeals. 28 U.S.C. § 1657. Plaintiffs-Appellees claim that Michigan's Congressional Districts violate the Fourteenth Amendment's Equal Protection Clause and the First Amendment's Free Speech and Association clauses. Compl. ¶ 1 (Page ID # 1). Congressional Intervenors' represent eight of these districts and their interests, as more fully detailed *infra* at 8-9, are in jeopardy should the three-judge court declare Michigan's Congressional Districts unconstitutional.

Second, appellate courts, including this Court, frequently grant motions to

expedite appeals in election law cases. *Martins v. Pidot*, 663 Fed. Appx. 14 (2d Cir. 2016) (expediting appeal in an election law case where the notice of appeal was filed on August 30, 2016, briefs were filed on September 1, September 8, 2016, and September 12, 2016, and the Second Circuit heard oral argument on September 14, 2016 and issued its written opinion on September 16, 2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) (expediting appeal of election law case where district court issued its opinion on August 8, 2014, then the appellate court heard oral argument on September 25, 2014 and the appellate court issued its opinion on October 1, 2014); *see also, e.g.*, *Obama for Am. v. Husted*, No. 12-4055, 12-4076 (6th Cir. Sept. 10, 2012) (appeal docketed), 697 F.3d 423 (6th Cir. Oct. 5, 2012) (issuing opinion and order) (injunction in the district court granted on August 31, 2012 and decided by this Court on October 5, 2012); *Feldman v. Arizona Sec'y of State*, 840 F.3d 1057, 1065-66 (9th Cir. 2016) (granting motion to expedite where the appeal was docketed on September 23, 2016, parties were ordered to file simultaneous briefs on October 17, oral argument was heard on October 19, and the court issued its opinion on October 28, 2016).

Third, the Congressional Intervenors need to intervene as soon as possible to protect their rights. These rights are threefold: (1) their interest in representing their constituents and providing constituency services; (2) their economic interest in the time, money, and effort the Congressional Intervenors

have spent in understanding the contours of their districts and the needs of their constituents; (3) their interest in protecting their reelection chances.

Each passing day harms the Congressional Intervenors who wish to vigorously represent their interests before the three-judge court.[3] This includes producing expert reports that challenge Plaintiffs-Appellees' social science metrics. But Plaintiffs' proposed discovery calendar requires Defendants to disclose their experts on June 1, 2018. Proposed Discovery Plan (ECF 22) (Page ID # 278). Furthermore, Plaintiffs' proposed discovery calendar requires that Motions for Summary Judgment are due on August 1, 2018. *Id.*[4] To participate meaningfully in defending their interests, the Congressional Intervenors must be permitted to intervene as soon as is practicable.

To that end, Congressional Intervenors respectfully request that the Court Grant this Motion to Expedite and order briefing and argument subject to the dates agreed upon by the parties or otherwise order briefing at such time as this Court deems proper.

[3] Importantly, the district court has not stayed proceedings.
[4] The three-judge court has not issued its ruling on the proposed discovery schedule.

CONCLUSION

The Court should grant Congressional Intervenors' Motion to Expedite. The Appellees consent to the expedited briefing schedule. The underlying litigation involves a constitutional challenge to Michigan's congressional districts, a challenge that impacts Congressional Intervenors' interests. Finally, the expedition of the appeal is the only way Congressional Intervenors can preserve their ability to vigorously defend their interests.

Dated: April 25, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) (i) because the brief contains 1,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman style.

By: /s/*Jason Brett Torchinsky*
Attorney for Appellant
Congressional Intervenors

CERTIFICATE OF SERVICE

On April 25, 2018, I certify that I filed the foregoing with the Clerk of the Court using the CM/ECF system, which then sent a notification of electronic filing to all counsel of record.

/s/ Jason Torchinsky

Jason Torchinsky

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

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al., Plaintiffs, v. RUTH JOHNSON, in her official capacity as Michigan Secretary of State Defendant.	:	Civil Action No. 17-cv-14148

PROPOSED CONGRESSIONAL INTERVENORS JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, MIKE BISHOP, PAUL MITCHELL, AND DAVID TROTT'S AMENDED NOTICE OF APPEAL

Pursuant to 28 U.S.C. § 1291, and pursuant to the collateral order exception under the *Cohen* doctrine, *see, e.g., Purnell v. Akron*, 925 F.2d 941, 944 (6th Cir. 1991), Proposed Congressional Intervenors Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott, appeal to the United States Court of Appeals for the Sixth Circuit this Court's ruling on April 4, 2018 (Dkt. No. 47) denying intervention.

Dated: April 17, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 17, 2018, I certify that I filed the foregoing with the Clerk of the Court using the CM/ECF system, which then sent a notification of electronic filing to all counsel of record.

/s/ *Phillip Gordon*

Phillip Gordon

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,	)	
Plaintiffs,	)	
v.	)	No. 2:17-cv-14148
RUTH JOHNSON, in her official capacity as Michigan Secretary of State,	)	ORDER
Defendant.	)	

ORDER DENYING MOTION TO INTERVENE
BY REPUBLICAN CONGRESSIONAL DELEGATION

Before the Court is a Motion to Intervene By Republican Congressional Delegation (the "Delegation"). [Dkt. No. 21.] The Delegation seeks to intervene pursuant to Rule 24(a)(2) and Rule 24(b) of the Federal Rules of Civil Procedure. The Delegation also attempts to file two motions as a group of intervenor-defendants. [Dkt. Nos. 21-2, 21-3.] We DENY the Delegation's motion to intervene and DENY AS MOOT the Delegation's attendant motions to dismiss [Dkt. No. 21-2] and to stay [Dkt. No. 21-3].

FINDINGS

1. The Delegation's motion to intervene is timely.

2. Elected office does not constitute a property interest. *See Gamrat v. Allard*, No. 1:16-CV-1094, 2018 WL 1324467, at *5 (W.D. Mich. Mar. 15, 2018) (citing *Attorney Gen. v. Jochim*, 99 Mich. 358, 367, 58 N.W. 611, 613 (1894)).

3. All citizens of Michigan share a generalized interest in this litigation insofar as they have the right to vote, run for office, and otherwise participate in the 2020 election.

4. The Delegation's "two-fold" interest of (1) protecting "relationships between constituents and their elective representatives," and (2) not "be[ing] required to expend funds to learn the new congressional boundaries and constituents, after spending time and resources on their current districts," [R. 40 at PageID #659–60], is not materially distinguishable from the generalized interest shared by all citizens, as referenced *supra* in ¶ 3.

5. To the extent that the Delegation seeks to vindicate an interest that, as it explains, stands in "contrast" to Defendant's interest of "provid[ing] fair and smooth administration of elections," [R. 40 at PageID #661], the Delegation's interest is neither legitimate nor substantial.

6. The Delegation's legitimate, generalized interest in this litigation will be adequately represented by Defendant's interest in protecting the current apportionment plan and other governmental actions from charges of unconstitutionality.

7. In light of the complex issues raised by the parties, the need for expeditious resolution of the case, and the massive number of citizens who share the Delegation's interest in this litigation, granting the Delegation's motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties.

8. For the above-stated reasons, the Delegation does not satisfy the requirements to intervene under Rule 24(a)(2) or Rule 24(b) of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED that:

A. The Motion to Intervene By Republican Congressional Delegation [Dkt. No. 21] is DENIED.

B. The Delegation's motion to dismiss [Dkt. No. 21-2] is DENIED AS MOOT.

C. The Delegation's motion to stay [Dkt. No. 21-3] is DENIED AS MOOT.

ENTERED: April 4, 2018

Signed for and on behalf of the panel:

HONORABLE ERIC L. CLAY
United States Circuit Judge

HONORABLE DENISE PAGE HOOD
United States District Judge

HONORABLE GORDON J. QUIST
United States District Judge