UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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, and RASHIDA H. TLAIB, Plaintiffs, v. RUTH JOHNSON, in her official Capacity as Michigan Secretary of State, Defendant.	No. 2:17-cv-14148 Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist PLAINTIFFS' RESPONSE TO PROPOSED LEGISLATIVE INTERVENORS LEE CHATFIELD AND AARON MILLER'S MOTION FOR STAY PENDING APPEAL

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Plaintiffs' Response to Proposed Legislative Intervenors Lee Chatfield and Aaron Miller's Motion for Stay Pending Appeal

The Representatives' Motion for Stay should be denied. For the reasons set out more fully in the accompanying brief, the Representatives cannot satisfy the factors that would justify a stay, and in all events the extreme harm to the Plaintiffs and the public that would result from a stay should compel the Court to deny the Motion.

Respectfully submitted,

Date: September 7, 2018

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Certificate of Service

I hereby certify that on September 7, 2018, I caused to have electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record in this matter.

Respectfully submitted,

/s/ Harmony Mappes

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Issue Presented

Whether the Court should stay the entire case while two putative intervenors seek appellate review of this Court's order denying them leave to intervene.

Controlling or Most Appropriate Authorities

Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 244 (6th Cir. 2006).

Plaintiffs' Brief in Support of Response to Proposed Legislative Intervenors Lee Chatfield And Aaron Miller's Motion for Stay Pending Appeal

Almost seven months after this case was filed and only 43 days before the close of discovery, two putative intervenors – Representatives Lee Chatfield and Aaron Miller (the "Representatives") – sought leave to intervene in this case "in their official capacities" as members of Michigan's legislature. Dkt. No. 70. The Court denied their motion. Dkt. No. 91. Unable to derail the case from the inside, they now seek to do so from the outside—by requesting that the Court indefinitely stay the entire lawsuit while they seek appellate relief from the Sixth Circuit. Dkt. No. 98.

The Representatives' motion for stay should be denied. The request flies in the face of this Court's orders, several of which implicitly and at times explicitly emphasize the harm that any delay would cause to the Plaintiffs. *See, e.g.*, Order Denying Mot. to Intervene, Dkt. No. 91 at 5 ("Granting Applicants' motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties."); Order Denying Defendant's Request to Stay Proceedings Pending Resolution of *Whitford* and *Benisek*, Dkt. No. 35 at 2 ("Defendant's arguments fail because there exists a fair possibility that a stay would prejudice Plaintiffs as well as the public interest."); Case Management Order, Dkt. No. 53.

The Court considers four factors to determine whether a stay should be granted pending appeal: (1) likelihood of success on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) harm to others, and (4) the public

interest. *See, e.g.*, *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). These factors are not a checklist but instead are all balanced together. *Id.*; *see also Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) ("[I]n order to justify a stay of the district court's ruling, the [movant] must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted."). Here, all factors weigh in favor of denying a stay, and in any case, the harm to the existing parties and the public interest weigh so heavily against granting a stay that these factors, on balance, are outcome determinative.

A. The Representatives will not be irreparably harmed absent a stay.

There is no likelihood that the Representatives will be irreparably harmed absent a stay. It is disingenuous for the Representatives to suggest they will face "irreparable harm" if this case moves forward while their appeal is pending in the Sixth Circuit.

First, the Representatives' interests are in relevant part aligned with the Defendant Secretary. She is adequately representing their interests. *See, e.g.*, Order Denying Mot. to Intervene, Dkt. No. 91 at 5 ("To the extent that Applicants have any legitimate official interest in this litigation … such interest belongs to the state and is adequately represented by the executive."). Indeed, a significant part of the Representatives' argument is premised on what happens *after* Secretary Johnson is no longer in office. *See, e.g.*, Mot. for Stay, Dkt. No. 98 at 9 ("The current Secretary of

State is term limited and will not be the Secretary of State at the time of trial.").[1] That will not occur until January.

Second, eight Congressional Intervenors were just allowed to intervene in the case by order of the Court of Appeals. Those Congressional Intervenors are represented by the very same counsel representing the Representatives, further decreasing the likelihood that the Representatives will be irreparably harmed absent a stay in the case.

Third, several Michigan legislators have participated in the case, particularly throughout the discovery process, as witnesses and recipients of third party subpoenas, including significant briefing over legislative privilege. *See, e.g.*, Dkt. Nos. 27, 41, 42, 46, 49, 52, 58.

Given the alignment of interests among these active participants in the case, there is *no* likelihood that the Representatives will be *irreparably* harmed absent a stay.

The Representatives claim they will be harmed by the potential inability to file a summary judgment motion. *See* Mot. for Stay, Dkt. No. 98, at 18. Uncertainty about whether Representatives may be able to file a summary judgment motion is certainly not "irreparable." Their Sixth Circuit appeal is on an expedited briefing schedule with

[1] Ironically, the Representatives are in a similar position. They are both up for reelection this November. There is no guarantee either will be in office at the time this case goes to trial. Moreover, they claim to be proceeding in their "official capacities" as Speaker Pro Tempore of the Michigan House of Representatives and as Chairman of the Elections and Ethics Committee of the Michigan House of Representatives, but there is no guarantee either will retain this position come 2019. Indeed, those positions could be held by Democrats. These facts further emphasize that the claimed irreparable harm is entirely illusory.

briefing set to be complete on October 3, 2018. It is impossible to predict how quickly the Court of Appeals may rule. In the event the Representatives are ultimately allowed to intervene *after* the summary judgment deadline, this Court can exercise its discretion to determine whether they should be allowed to file such a motion at that time, and the Representatives would presumably participate at trial and can present whatever arguments and positions they wish to present then.[2] These circumstances do not equate to irreparable harm.

The Representatives also claim they will need time to digest discovery and prepare for trial. Mot. for Stay, Dkt. No. 98, at 17 & 20. This is a gross overstatement. Again, counsel for the Representatives is the same counsel for the Congressional Intervenors who this Court just ordered to comply with the existing Case Management Order. Order Directing the Republican Congressional Delegation to Comply with Case Management Order No. 1, Dkt. No. 108. As a practical matter, it is the lawyers who need the most time to get up to speed and who will do the document review, and these lawyers will be well immersed in short order.

[2] Somewhat bizarrely, Representatives argue that because the Court denied intervention the trial date will almost certainly have to be moved, but Representatives also suggest that the February trial date may well hold if a stay is granted. It is difficult to reconcile these positions. *Compare* Mot. for Stay at 17 (itemizing the "plethora of harms" flowing from the Court's denial of intervention including that "they will necessarily need to seek extensions of time to prepare for trial and offer up their own expert discovery") *with id.* at 18 (arguing in support of a stay that "[t]here is sufficient time within the current schedule that a short delay pending this appeal would have minimal, if any, effect on the February 5, 2019 trial date in this case" and characterizing a move of the trial date as "unlikely").

In light of the above, the Representatives cannot demonstrate *irreparable* harm absent a stay.

B. A stay would expose Plaintiffs to extreme prejudice and would harm the public interest.

In sharp contrast to the illusory harm Representatives face absent a stay, a stay of the case will inflict real and genuinely irreparable harm on Plaintiffs and the public. As previously outlined in the parties' Rule 26(F) report and other submissions, Plaintiffs seek a remedial map for the 2020 election cycle. *See, e.g.*, Dkt. No. 22. Maintaining the schedule set by the Case Management Order is critical to that objective. *See* Order Denying Request to Stay Proceedings Pending Resolution of *Whitford* and *Benisek*, Dkt. No. 35 at 2 ("Defendant's arguments fail because there exists a fair possibility that a stay would prejudice Plaintiffs as well as the public interest."); *see also* Report from Rule 26(F) Conference and Discovery Plan, Dkt. No. 22 at 3-4; Dkt. No. 15 at 20 (explaining why a stay of the case would impose extreme hardship on Plaintiffs and other Michigan voters). Plaintiffs have undertaken substantial discovery and have obtained strong evidence in support of their claims.[3] A stay at this stage would significantly increase the likelihood that Plaintiffs will be unable to obtain relief even if they prevail on the merits. *See* Order Denying Request to Stay Proceedings Pending Resolution of *Whitford* and *Benisek*, Dkt. No. 35 at 3

[3] *See* Plaintiffs' Second Supplemental Response to Defendant's Interrogatory No. 1, served on August 31, 2018, and attached hereto as Exhibit A.

("[T]here is a risk that this case will not be resolved by March 2020 even in the absence of a stay"); *see also, e.g.*, *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018) (concluding after ruling the maps unconstitutional "that there is insufficient time for this Court to approve a new districting plan and for the State to conduct an election using that plan prior to the seating of the new Congress in January 2019.").

This extreme harm to Plaintiffs and the public – the potential to thwart the entire purpose of the case – outweighs any other factor.

C. The Representatives are unlikely to succeed on the merits.

Finally, the Representatives also cannot make the requisite showing that they are likely to succeed on the merits. For the reasons set out in the Court's order denying intervention, Dkt. No. 91, and the arguments set forth in Plaintiffs' brief on the merits of the motion to intervene, Dkt. No. 79, the Representatives are unlikely to succeed.

Moreover, for purposes of the intervention analysis, the Representatives' circumstances are meaningfully different from the Congressional Intervenors who were recently allowed to intervene. For example, unlike Congressional Intervenors, the Representatives are members of the Michigan legislature and have sought to intervene in their official capacities.[4] These circumstances implicate the separation of

[4] Notably, Representative Miller represents District 59. Plaintiffs are not challenging State House District 59. *See* Exhibit A.

powers concerns this Court highlighted in its ruling and that were absent from the Congressional Intervenors' appeal. *See* Order Denying Mot. to Intervene, Dkt. No. 91 at 2 ("Applicants' interest is a component of the state's overall interest and is exclusively represented by the executive."). In addition, Representatives waited almost seven months after the Complaint's filing to seek leave to intervene—far longer than did the Congressional Intervenors. Thus, the timeliness factor alone distinguishes and is fatal to their case. And in all events, the Representatives should not be rewarded for their tardiness and be allowed to thwart Plaintiffs' efforts to obtain any relief whatsoever by leveraging their appeal to obtain a stay of the case.

Conclusion

The Court should deny the motion for stay.

Date: September 7, 2018

/s/ Harmony Mappes

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