RECORD NO. 18-2383

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF MICHIGAN, ET AL.,

Plaintiffs-Appellees,

v.

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

Defendant,

and

LEE CHATFIELD; AARON MILLER,
Michigan State Representatives,

Proposed Intervenors-Appellants.

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

LEGISLATIVE INTERVENORS' MOTION TO EXPEDITE

Charles R. Spies
CLARK HILL
212 E. Cesar Chavez Ave.
Lansing, MI 48906
(517) 318-3100
Counsel for Appellants

Jason Brett Torchinsky
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY
45 N. Hill Drive
Suite 100
Warrenton, VA 20186
540-341-8808

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

MOTION TO EXPEDITE 1

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXPEDITE 2

BACKGROUND 3

JURISDICTION 8

STANDARD OF REVIEW 8

ARGUMENT 9

I. EXPEDITED APPEAL IS WARRANTED BECAUSE OF THE CONSTITUTIONAL ISSUES AT STAKE AND ONGOING THREE-JUDGE DISTRICT COURT LITIGATION 9

CONCLUSION 12

CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

CASES

Carey v. Wynn,
439 U.S. 8 (1978).....8

Daniel v. Waters,
515 F.2d 485 (6th Cir. 1975).....8

Feldman v. Arizona Sec'y of State,
840 F.3d 1057 (9th Cir. 2016).....10

Goldstein v. Cox,
396 U.S. 471 (1970).....8

Grubbs v. Norris,
870 F.2d 343 (6th Cir. 1989).....5

Jansen v. Cincinnati,
904 F.2d 336 (6th Cir. 1990).....5

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014).....10

League of Women Voters of Mich. v. Johnson,
902 F.3d 572 (6th Cir. 2018).....4

MTM, Inc. v. Baxley,
420 U.S. 799 (1975).....8

Martins v. Pidot,
663 Fed. Appx. 14 (2d Cir. 2016) 10

Michigan State AFL-CIO v. Miller,
103 F.3d 1240 (6th Cir. 1997).....6

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) 10

Purnell v. Akron,
925 F.2d 941 (6th Cir. 1991).....8

Stringfellow v. Concerned Neighbors in Action,
480 U.S. 370 (1987).....8

STATUTES & RULES

28 U.S.C. § 1291.....8
28 U.S.C. § 1657.....1, 9

Fed. R. App. P. 2.....1, 9
Fed. R. App. P. 27.....1, 9
Fed. R. Civ. P. 24(a).....2
Fed. R. Civ. P. 24(b).....2

6th Cir. R. 27(f).....1, 9

MOTION TO EXPEDITE

Pursuant to Fed. R. App. P. 2 and 27, 6th Cir. R. 27(f), and 28 U.S.C. § 1657, Appellants, Michigan Representatives Lee Chatfield and Aaron Miller ("Appellants" or "Legislative Intervenors"), move this Court for an order entering the expedited briefing schedule set forth below and to expedite its ruling in this appeal. Neither Legislative Intervenors nor Defendants request oral argument. As of the time of this filing, the Plaintiffs have yet to respond to our inquires on if they plan to request oral argument. If, however, the Court orders oral argument on this Motion, Legislative Intervenors respectfully request that it be heard at the Court's earliest possible date.

Legislative Intervenors have conferred with counsel for Defendants. Defendants consent to the relief requested in this Motion. Legislative Intervenors contacted Plaintiffs' counsel and have yet to receive a response.[1]

- Appellants-Legislative Intervenors' Opening Brief: Friday, December 7, 2018;
- Plaintiffs-Appellees' Opposition Brief: Friday, December 14, 2018, or seven days after Legislative Intervenors' file their opening brief, whichever comes first.
- Appellants-Legislative Intervenors' Reply Brief: Monday December 17, 2018, or three days after Plaintiffs-Appellees file their opposition brief, whichever comes first.

[1] Legislative Intervenors will notify this Court as to the Plaintiffs' position when, and if, it is received.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXPEDITE

INTRODUCTION

Appellants filed their Motion to Intervene in this matter more than six months before trial, nearly six weeks before discovery closed, and before the district court ruled on Defendant Secretary of State's second Motion to Dismiss. *See* Legislative Intervenors' Mot. to Intervene (ECF 70) (Page ID 1204-1239) (July 12, 2018); *see also* Case Management Order 1 (ECF 53) (Page ID 939-941) (May 9, 2018); Order Denying Second Motion to Dismiss (ECF 88) (Page ID 2046-2053) (Aug. 3, 2018). Despite Appellants' material interests in this litigation and the diligence they have exercised in seeking to intervene in this matter, on November 30, 2018, the district court denied Legislative Intervenors' Motion to Intervene. *See* Order Denying Legislative Intervenors' Motion to Intervene (ECF 91) (Page ID 2059-2065) (Aug. 14, 2018); *See* Order Denying Legislative Intervenors' Renewed Motion to Intervene (ECF 144) (Page ID 5346-5352) (Nov. 30, 2018).

Expedited consideration of Appellants' Motion to Intervene is necessary in light of the upcoming pretrial and trial dates in this matter. These deadlines include:

December 4, 2018:	Proposed Joint and Final Pretrial Order with detailed witness and number exhibit list
December 4, 2018:	Motions *in limine*
December 11, 2018:	Final pretrial conference

December 14, 2018: Responses to motions *in limine*

January 28, 2019: Trial briefs

February 5, 2019: Trial

Case Management Order #2. ECF 140 (Page ID 5224-5225)

Given these quickly approaching deadlines, every day that passes without an order granting intervention further prejudices Legislative Intervenors from meaningfully participating in this matter. Accordingly, Appellants respectfully seek expedited consideration of their Motion to Intervene from this Court.

BACKGROUND[2]

The first denial came on August 14, 2018. There, the three-judge district court issued an order denying proposed Legislative Intervenors intervention as of right and permissive intervention as defendants under Fed. R. Civ. P. 24(a)(2) and (b). *See* Order Denying Intervention, ECF No. 91 (Page ID 2064). Legislative Intervenors filed an appeal on August 20, 2018.[3] *See* Notice of Appeal (ECF 96) (Page ID 2079-2081). Three days later, Legislative Intervenors filed a motion to expedite that appeal, a motion that this Court granted. *See League of Women Voters, et al. v.*

[2] 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 Legislative Intervenors' appellate brief, to be filed in accordance with the proposed schedule.

[3] Given the upcoming pretrial deadlines and trial schedule to begin on February 5, 2018, Legislative Intervenors intend to file a Motion to Stay in the District Court and expects to file one in this Court should the District Court deny the motion.

Johnson, No. 18-1946 (6th Cir. Aug. 23, 2018); *id* (6th Cir. Aug. 28, 2018).

While Legislative Intervenors' initial appeal was pending, this Court issued its opinion in *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018). In that case, this Court concluded that the district court erred by refusing to allow several members of Michigan's congressional delegation to intervene in Plaintiffs' lawsuit. As a result, several members of Michigan's Republican congressional delegation were granted permissive intervention and are now party defendants.

In granting the Congressional Intervenors' permissive intervention, this Court determined that (1) the district court's opinion did not "provide enough of an explanation for its decision to enable [us] to conduct meaningful review." *Id*. at 577-78. (2) the issues in the case were not complex or novel; (3) intervention would not risk expeditious resolution of the case because the Congressional Intervenors' defenses overlap with the Secretary's; (4) the Congressional Intervenors' interest in the litigation, particularly their interest in protecting their relationship between constituent and representative, differed from the interest of the Secretary. *Id*. at 577-580.

In light of this ruling, Plaintiffs withdrew their opposition to intervention and requested that this Court remand the appeal to the district court. *See* Pls.' Mot. to Remand at 2 (Doc. 19) (6th Cir. Sept. 18, 2018).

More than a month later, and after merits briefing was completed, this Court granted Plaintiffs-Appellees' Motion to Remand. *See League of Women Voters, et al.*, No. 18-1946 (6th Cir. Oct. 25, 2018) (Doc. 32-1). This Court noted that remand was necessary because the district court's denial of Legislative Intervenors' Motion to Intervene was issued without the benefit of this Court's opinion granting Congressional Intervenors' Motion. *See id*. at 2. As a result, this Court ordered that, "a remand is appropriate so that the district court panel may evaluate the Legislative Intervenors' now-unopposed motion in light of the standards articulated in *League of Women Voters I*." *Id*.

Less than a week later, Legislative Intervenors filed a Renewed Motion to Intervene. This motion was unopposed. (ECF 136) (Page ID 5083-5134) (Nov. 1, 2018). Nearly a month later, the district court denied Legislative Intervenors' Motion to Intervene for a second time. (ECF 144) (Page ID 5346-5352) (Nov. 30, 2018).

First, two judges ruled that the motion was untimely. (Page ID 5347). The district court, however, failed to explain, contrary to this Court's precedents, how the timing of Legislative Intervenors' Motion prejudiced the Plaintiffs, particularly when the Motion was unopposed.[4]

[4] As this Court's precedents demonstrate, it is insufficient, standing alone, to show the mere passage of time justifies denial of intervention. Rather, it must be shown that the passage of time causes the parties prejudice. *See, e.g., Grubbs v. Norris*, 870 F.2d 343, 345-46 (6th Cir. 1989); *Jansen v. Cincinnati*, 904 F.2d 336, 339-40 (6th

Second, the district court denied intervention as of right on the same incorrect ground as it did in Legislative Intervenors' original motion – because, in the district court's view, Legislative Intervenors' asserted interest is "a component of the state's overall interest and is exclusively represented by the executive." *Id*.

Third, the district court denied intervention because even though the incoming Secretary of State has been publicly critical of the enacted maps and has spoken at events sponsored by the League of Women Voters, the Motion, according to the district court, is still premature. *See id*. The district court characterized Legislative Intervenors' argument—also contrary to this Court's precedents—that the incoming Secretary is inadequate to represent their interests as speculation.[5] *Id*.

The district court further supported its decision by finding that there is no property interest in maintaining elected office. Legislative Intervenors never raised this argument. Rather, Legislative Intervenors asserted that they had an interest in the litigation due to their relationship with their constituents, a relationship this Court previously found sufficient to permit intervention. *See* Renewed Mot. to Intervene

---

Cir. 1990) (permitting intervention six months into discovery where discovery period was 12 months long and trial was eight months away).

[5] This is contrary to this Court's precedent that requires proving that inadequacy of representation is only a "possibility" not a certainty. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247-48 (6th Cir. 1997). Furthermore, despite the district court's insistence that the Secretary and Legislative Intervenors share the same interest, *id.* at 3 (Page ID 5348), this Court previously ruled that legislators and the Secretary do not share the same interests. *Id*. at 579-80.

at 11-12 (Page ID 5098-5099); *League of Women Voters, I*, 902 F.3d at 579.

Judge Quist dissented from the panel's decision. Judge Quist determined that both the lack of opposition from the Plaintiffs and the election of a Democratic party member as Secretary State favored granting Legislative Intervenors intervention. (Page ID 5351) (Quist, J., dissenting). Judge Quist succinctly stated "it is difficult to imagine that the new Democratic Secretary will continue to defend a Republican-adopted redistricting plan that is alleged to discriminate against Democrats and the Democratic Party." *Id*.

On the same day that the district court denied intervention, Legislative Intervenors filed their notice of appeal. Notice of Appeal (ECF 145) (Page ID 5353-5355).[6]

As set forth above, there are significant pretrial and trial dates that are quickly approaching. *See* Case Management Order #2. ECF 140 (Page ID 5224-5225). For Legislative Intervenors to adequately and meaningfully represent their interests at trial, Legislative Intervenors respectfully request that this Court resolve this appeal on an expedited basis. Accordingly, this Court should grant Legislative Intervenors' Motion to Expedite.

[6] Legislative Intervenors intend to file their opening merits brief this Friday, December 7. On Tuesday, December 4, Legislative Intervenors will file a motion to stay the case pending appeal with the district court. On Thursday, December 6, Legislative Intervenors intend to file a motion to stay the case with this Court.

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 Legislative 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). Under both outcomes, 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, Legislative 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.

The Federal Rules of Appellate Procedure and this Court permit expediting appeals. Fed. R. App. P. 2; 6th Cir. R. 27(f). Challenges that involve constitutional rights constitute good cause for expediting appeals. 28 U.S.C. § 1657. In this case, Plaintiffs-Appellees challenge the constitutionality of the state redistricting plan. Compl. ¶ 1, ECF No. 1. Legislative Intervenors have shown good cause for granting their request for an expedited appeal because of their substantial legal interest in the outcome of this case. Primarily, that they are the party who would be tasked with developing any remedial relief ordered in this action.

Courts of Appeals, including this Court in this same litigation, frequently grant motions to expedite in election law cases. *League of Women Voters of Michigan, et al. v. Johnson, et al.*, No. 18-1437 (6th Cir. April 26, 2018) (Dkt. No. 8-1) (granting Proposed Congressional Intervenors' consented motion to expedite); *See League of Women*

Voters, et al. v. Johnson, No. 18-1946 (6th Cir. Aug. 28, 2018) (granting Proposed Legislative Intervenors motion to expedite); s*ee also, e.g., 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, 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); *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).

The same result should apply here given Legislative Intervenors' need to protect their rights and their significant particularized interests.

These interests include: (1) Legislative Intervenors' official conduct, which is what Plaintiffs seek a court order to regulate; (2) that Legislative Intervenors stand to be economically harmed due to resulting increased costs of election or reelection; (3) their reelection or their successors' chances of election may be reduced as a result of redrawing the Current Apportionment Plan;[7] (4) their relationship with constituents which could be severed in the event the district court orders a remedial map drawn; and (5) they will be forced to expend significant public funds and resources to have the Legislature engage the necessary processes to comply with any remedial order.

Each passing day harms Legislative Intervenors who wish to vigorously represent their interests before the three-judge court. Those court proceedings have not been stayed pending this appeal. This includes pre-trial motions *in limine*, the pre-trial conference, and the filing of trial briefs.

[7] In its Opinion and Order denying the parties' motions for summary judgment, the district court noted that "remedial special elections may be required to remedy the constitutional harms that Plaintiffs allege." ECF No. 143 at fn. 10 (Page ID 5305-5306).

To participate meaningfully in defending their interests, Legislative Intervenors should be permitted to intervene as soon as is practicable. To that end, Legislative Intervenors respectfully request that the Court Grant this Motion to Expedite and order briefing subject to the dates outlined herein or otherwise order briefing at such time as this Court deems proper.

CONCLUSION

The Court should grant Legislative Intervenors Motion to Expedite. The underlying litigation involves a constitutional challenge to Michigan's districts and the expedition of the appeal is the only way Legislative Intervenors can preserve their ability to vigorously defend their interests.

Dated: December 4, 2018

Respectfully submitted,

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky

Jason B. Torchinsky
Shawn T. Sheehy
Phillip M. Gordon
Dennis W. Polio
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Email: JTorchinsky@hvjt.law

CLARK HILL PLC

/s/ Charles R. Spies

Charles R. Spies
Brian D. Shekell
212 E. Cesar Chavez Ave.
Lansing, Michigan 48906
P: (517) 318-3100
E: cspies@clarkhill.com

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 2,673 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 December 4, 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