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, et al., Defendants.	Case No. 2:17-cv-14148 Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist **VOTERS' RESPONSE IN OPPOSITION TO LEGISLATIVE INTERVENORS' EMERGENCY MOTION TO STAY PENDING APPEAL**

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Voters' Response In Opposition to Proposed Legislative Intervenors Lee Chatfield and Aaron Miller's Emergency Motion To Stay Pending Appeal

The Legislative Intervenors' Emergency Motion to Stay (the "Motion") should be denied because of the significant harm that would result from further delaying these proceedings so close to the trial scheduled to commence on February 5, 2019. For the reasons set out more fully in the accompanying brief, the Legislative Intervenors 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 halting the current pretrial schedule should compel the Court to deny the Motion.

Respectfully submitted,

Date: December 19, 2018

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Certificate of Service

I hereby certify that on December 19, 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.

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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).

Blount-Hill v. Zelman, 636 F.3d 278, 283 (6th Cir. 2011).

Voters' Response Brief

Almost seven months after this case was filed and only 43 days before the close of discovery, two putative intervenors—Lee Chatfield and Aaron Miller (together, the "Legislative Intervenors")—sought leave to intervene in this case "in their official capacities" as members of Michigan's legislature. Dkt. 70. The Court denied their motion. Dkt. 91.

Legislative Intervenors appealed to the Sixth Circuit, which remanded the case so that the so that this Court could "evaluate the Legislative Intervenors' now-unopposed motion in light of the standards articulated in *League of Women Voters I*." This Court did that, determined that the Legislative Intervenors did not satisfy the standards for intervention articulated in the Sixth Circuit's decision in *League of Women Voters I*, and thus held that "the same reasons for denying [their first motion to stay] apply with equal force to their current motion." Dkt. 144, Page ID #5439. Unable to derail the case from the inside, they again seek to do so from the outside—by again requesting that the Court indefinitely stay the entire lawsuit while they seek appellate relief from the Sixth Circuit. Dkt. 151.

The Legislative Intervenors' motion to stay should be denied. The Court's orders have emphasized and properly concluded that delays sought by the Legislative Intervenors would cause substantial harm and prejudice to the parties and the public. *See, e.g.*, Order Denying Motion to Intervene, Dkt. 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. 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 No. 1, Dkt. 53.

Four factors determine whether a stay should be granted pending appeal: (1) likelihood of success on the merits; (2) 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 cut against imposing a stay of the proceedings. As shown below, the Legislative Intervenors can get everything they seek without a stay, even if the Sixth Circuit ultimately allows them to intervene. Moreover, the harm to the existing parties and the public weigh so heavily against granting a stay that these factors require denial of the Legislative Intervenors' Emergency Motion.

A. The Legislative Intervenors will not be irreparably harmed absent a stay.

For numerous reasons, there is no likelihood that the Legislative Intervenors will be harmed, irreparably or otherwise, without a stay.

First, the Legislative Intervenors' interests are aligned with the interests of the current Defendants, who are vigorously defending the Plans. In particular, the Congressional Intervenors—represented by the same counsel as the Legislative Intervenors—are preparing witnesses and trial exhibits, filing pretrial motions, and negotiating stipulations of fact and law. As this Court correctly held, the Congressional Intervenors will remain as parties regardless of whether the incoming Secretary of State continues with the lawsuit, meaning that the interests of the Legislative Intervenors will be protected "regardless of what action is taken by the incoming Secretary of State." Dkt. 144, Page ID #5349, at n.4. Given the alignment of interests between the current Defendants and the Legislative Intervenors, there is *no* likelihood that the Legislative Intervenors will be harmed absent a stay.

Second, all of the harms the Legislative Intervenors say would befall them absent a stay are illusory. They say that they have been "forced to miss the remainder of discovery and the summary judgment proceedings," Dkt. 151, Page ID #6162, but they have also confirmed to Voters' counsel that if they are allowed to intervene, they intend to file no more than a joinder in the Defendants' prior motions for summary judgment. (*See* Declaration of Jeffrey P. Justman ("Justman Decl.") Ex. A.)

The Legislative Intervenors claim they will need time to digest discovery and prepare for trial. Dkt. 151, Page ID #6164-65. That statement is misleading. The Legislative Intervenors' counsel have been reviewing discovery and preparing for trial since September, because they also represent the *Congressional* Intervenors. They

received all discovery shortly after the Congressional Intervenors were allowed to intervene. The Legislative Intervenors' lawyers—the ones who would need to "comprehend discovery"—are already well immersed in the case and are up to speed.

The Legislative Intervenors also contend that they "will be unable to participate in a trial" if a stay is not granted and they are ultimately allowed to intervene, Dkt. 151, Page ID #6162, but that is incorrect. The Sixth Circuit has ordered expedited briefing on their appeal, with all briefs due by the end of the day tomorrow. (Justman Decl. Ex. B.) All parties participating in the appeal have agreed the Sixth Circuit should decide the case on an expedited basis, without oral argument. It is therefore very likely that the appeal will be resolved before trial commences.

In any event, even if the Legislative Intervenors are ultimately allowed to intervene in close proximity to trial—or, for that matter, even *after* trial—the Court may simply hold the trial open to allow them to present any additional, noncumulative evidence in defense of the Plans (along with the Voters' rebuttal to that additional evidence). It is inconceivable that the trial would have to restart from the beginning, and the Legislative Intervenors do not point to any circumstances that would even come close to showing irreparable harm.

B. A stay would expose the Voters to extreme prejudice, would harm the public interest, and would waste judicial resources.

In sharp contrast to the illusory harm Legislative Intervenors claim to face, a stay will inflict real and genuinely irreparable harm on the Voters and the public.

As previously outlined in the parties' Rule 26(F) report and other submissions, the Voters seek a remedial map for the 2020 election cycle. *See, e.g.*, Dkt. 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. 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."). The Voters have undertaken substantial discovery and have obtained strong evidence in support of their claims, as the Court has seen in the Voters' voluminous summary-judgment submissions. The Court has concluded that there is sufficient evidence for the Voters' claims to be decided at trial. Dkt. 143. A stay at this stage, fewer than sixty days before the first day of the trial, would significantly increase the likelihood that Voters will be unable to obtain any remedial maps for the 2020 election cycle. *See* Dkt. 35, at 3 ("[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*, 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.").

The Legislative Intervenors claim that a stay would only be "brief" and thus would only have "minimal effect" on the trial date. Dkt. 151, Page ID #6162. They are not clairvoyant, of course, and they ignore that a change in trial date is not as

simple as finding a rescheduled date on one judge's calendar. The Court is a panel of three busy judges. A stay at this stage would surely require rescheduling of the trial date. And given the dockets of the panel—not to mention the schedules of the lawyers and witnesses—it is wishful thinking to say that there will only be a "minimal effect" on the trial date if it has to be rescheduled because of a stay. The Legislative Intervenors *claim* that even if the trial date is rescheduled there "will still be sufficient time to bring appeals and implement any remedial map," *id.*, but that is just unconvincing guesswork.

The Legislative Intervenors claim that a stay would "preserve judicial resources," Dkt. 151, Page ID #6164, but no, a stay would actually *waste* them. The Court has already held the final pretrial conference and has issued a detailed order requiring the parties to supplement their joint and final pretrial order by December 24. *See* Dkt. 159. At the final pretrial conference, the Court explained what its trial schedule would be, showing that it intends to devote seventeen trial days beginning on February 5, 2019. As the Voters file this response, the parties are working to diligently prepare a supplemental pretrial order. A stay would waste, not conserve, much of the time and effort the parties and the Court have already spent.

C. The Legislative Intervenors are unlikely to succeed on the merits.

Finally, the Legislative Intervenors also cannot make the requisite showing that they are likely to succeed on the merits. For the reasons set out in the Court's orders denying their attempts to intervene, Dkts. 91, 144, Legislative Intervenors are unlikely

to succeed.[1] (*See also* Dkt. 79, setting forth the Voters' prior position on the merits of the Legislative Intervenors' requests to intervene.)

As but one example of why the Legislative Intervenors are unlikely to succeed, this Court held that their motion was untimely. Dkt. 144, at Page ID #5347. That is a distinct ground for denying them intervention, and it is reviewed on appeal only for an abuse of discretion. *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). If the Sixth Circuit concludes that the motion to intervene was untimely, that ends the Legislative Intervenors' appeal.

The Legislative Intervenors waited almost seven months after the Complaint's filing to seek leave to intervene—far longer than the Congressional Intervenors waited, even though they have the same counsel. Thus, the timeliness factor alone distinguishes this case from *League of Women Voters I*. In all events, the Legislative Intervenors should not be rewarded for their tardiness. Granting a stay would in all likelihood destroy every opportunity Voters have to obtain a full and final constitutional review of the current Plans and to implement fair and legal districts in time for the 2020 elections.

Conclusion

The Court should deny the motion for stay.

[1] The Voters disagree with the Legislative Intervenors' analysis of the intervention issue under Rule 24, but need not explain yet again every disagreement here for the Court to deny the stay.

Date: December 19, 2018

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