No. 18-2383

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" GRASHA; ROSA L. HOLIDAY; DIANA L. KETOLA; JON "JACK" G. LASALLE; RICHARD "DICK" W. LONG; LORENZO RIVERA; RASHIDA H. TLAIB,

Plaintiffs – Appellees,

v.

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

Defendant,

and

REPRESENTATIVE LEE CHATFIELD, in his official capacity as Speaker Pro Tempore of the Michigan House of Representatives, and REPRESENTATIVE AARON MILLER, in his official capacity as Chairman of the Elections and Ethics Committee of the Michigan House of Representatives,

Proposed Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN AT DETROIT
Civ. No. 17-cv-14148, Hon. Eric L. Clay, Denise Page Hood, Gordon J. Quist

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PLAINTIFFS/APPELLEES' RESPONSE IN OPPOSITION TO EMERGENCY MOTION TO STAY DISTRICT COURT PROCEEDINGS

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Plaintiffs/Appellees' Response To The Legislative Intervenors' Emergency Motion To Stay District Court Proceedings

The Court should deny the Legislator Intervenors' Emergency Motion To Stay District Court Proceedings (the "Motion to Stay") (Dkt. No. 17-1), for two reasons.

First, there is sufficient time for this Court to rule on the merits such that the Motion to Stay could be denied as moot. The merits briefing is already closed.[1] No party has requested oral argument, and all parties agree on an expedited resolution. Moreover, even setting aside disagreements about intervention under Rule 24, the parties agree that if the Court is so inclined, intervention may be granted and the case remanded for that purpose, as long as the trial date remains the same. (*See* Dkt. 18, at 7 (Legislative Intervenors' Brief); Dkt. 22, at 12-15 (the Voters' Brief).) Thus, however the Court rules on the merits, it may do so promptly such that a stay of district court proceedings pending the appeal could be denied as moot. Indeed, the Voters would not oppose the Court issuing an order with its decision even if an opinion explaining the order were to come later.

Second, if the Court decides to address the Motion to Stay on its merits, all governing factors *strongly* counsel against a stay here. A stay would greatly prejudice the Voters and the public interest, because it would delay proceedings indefinitely, making it impossible for the Voters to secure meaningful remedial relief sufficiently in

[1] The Legislative Intervenors filed their brief on December 10, 2018. The Voters filed their Appellate Brief in this case earlier today—December 19, 2018. The Legislative Intervenors filed their reply brief earlier today as well.

advance of the 2020 elections—the only elections for which they are seeking relief. Denying a stay, by contrast, will not harm the Legislative Intervenors, because other parties have been representing and continue to represent the Legislative Intervenors' interests in the district court, and because anything the Legislative Intervenors want can occur *without* a stay. The Legislative Intervenors' counsel has already been participating in pretrial proceedings, and the Legislative Intervenors have disclaimed any interest in wanting to file their own dispositive motions or other pretrial motions.[2] Thus, even if the Court grants them intervention in close proximity to trial—or even *after* trial—their interests can be protected simply by reopening the record and allowing them to present their nonduplicative defense of the Plans, if any, and the Voters' rebuttal thereto. Weighing the likely irreparable harm of a stay with the non-harm of not granting one thus counsels strongly against granting the Motion to Stay.

I. No Stay Is Necessary Because The Court Can Reach The Merits Of This Appeal And Deny The Stay As Moot.

The Court should deny the Motion to Stay, first, because it can expeditiously decide the merits of this entire appeal without a stay, and thus deny the Motion to Stay as moot.

[2] The Legislative Intervenors have said they want to file a motion for summary judgment adopting the Secretary's already-rejected arguments, in order to "preserve their appellate rights," but they acknowledge that no further action will be required and "no delay will result" from such an approach. (Dkt. 18, at 7 n.1.)

Two features make this a case in which the Court can reach the merits of the case without needing to decide on a stay: (1) the timing of appellate briefing; and (2) the content of the parties' positions. As for timing, the briefing on the merits is already closed. The case is now ready for decision, as no party has requested oral argument and all parties have requested an expedited decision. This Court agreed, expediting the briefing schedule. *See* RE 165-1, Page ID #7188.

As for content, the Voters do not oppose intervention for reasons they have more fully explained in their Appellate Brief, filed December 19, 2018 (earlier today). Although the Voters believe that the Legislative Intervenors' circumstances are different and distinguishable from the Congressional Intervenors' circumstances on the merits, as a practical matter the Voters no longer oppose intervention of these two parties so long as the trial date remains the same. (*See* Dkt. 22, at 12-15.) Avoiding delay, specifically any delay of the February 5, 2019 trial date, is critical to the Voters' ability to vindicate their rights and effect meaningful remedial relief in the underlying case should they prevail on the merits of their claims.

Because the Court is already poised to address the appeal on its merits, the Court may deny the Motion to Stay as moot. *See Stein v. Thomas*, 672 F. App'x 565, 567 (6th Cir. 2016) (affirming issuance of TRO and granting a motion to intervene in the appeal while at the same time denying the intervenor's "separate motions to stay the district court's order AS MOOT"); *Groper v. Taff*, 717 F.2d 1415, 1417, 1418 n.2 (D.C. Cir. 1983) (addressing merits of appeal rather than motion to stay, and noting:

"Having assumed jurisdiction, we have before us Groper's appeal and her motion for injunctive relief pendente lite. Because we, on our own motion, decide this appeal on an expedited basis, we dismiss as moot the motion for stay."); *Town of Burlington v. Dep't of Ed. Of Com. Of Mass.*, 655 F.2d 428, 431 n.3 (1st Cir. 1981) ("Since we rule on the merits of this issue in . . . this opinion, the question of stay is now moot").

II. The Court Should Deny The Motion To Stay Because The Governing Factors All Counsel Strongly Against A Stay.

The Court should also deny the Motion to Stay because a stay would significantly prejudice the Voters and the public interest, while the Legislative Intervenors will not be irreparably harmed in the absence of a stay.

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, the harms to the Voters and to the public interest weigh heavily against granting a stay, while there are no factors favoring a stay.

A. A Stay Would Seriously Prejudice Voters And The Public.

The factors that most strongly counsel against a stay are prejudice to the Voters and to the public interest: a stay of the case will irreparably harm the Voters' ability to secure meaningful relief, even if they ultimately prevail on the merits of their claims.

The district court denied a stay of the litigation earlier in the case precisely for this reason. Its reasoning is below, and it applies more forcefully now that many months have passed, summary judgment has been denied, the parties have held the final pretrial conference, and are preparing for trial that starts on February 5, 2019:

> Defendant's argument fails because **there exists a fair possibility that a stay would prejudice Plaintiffs as well as the public interest**. The parties are operating under the reasonable assumption that, if Plaintiffs succeed on the merits, 'a 2020 remedial plan must be in place by no later than March of 2020 to be effective for the November 2020 election.' [RE 22 at Page ID #279.] **Voting rights litigation is notoriously protracted**. *See, e.g., McCain v. Lybrand,* 465 U.S. 236, 243 (1984) (discussing litigation delays as an impetus for Voting Rights Act of 1965). **Indeed, Congress took extraordinary measures—providing for this Court to sit as a three-judge panel and for any appeal to be taken directly to the Supreme Court—precisely so that voting rights cases could be decided more quickly**. *See Swift & Co. v. Wickham,* 382 U.S. 111, 124 (1965) ("The purpose of the three-judge scheme was in major part to expedite important litigation."). Based on this history of voting rights litigation, **there is a risk that this case will not be resolved by March 2020 even in the absence of a stay**. Defendant's argument incorrectly minimizes the possible duration of this case as well as the prejudice to Plaintiffs and the public interest that would arise if this case were to persist through three election cycles. A stay of the case will irreparably harm the Voters and the public.

(Order Denying Defendant's Motion To Stay, RE 35, Page ID #613-14) (emphases

added). Maintaining the February 2019 trial date and related deadlines is critical to the Voters' ability to secure meaningful relief in time for it to be implemented and any appeals exhausted. *See also* Voters' Response to Motion to Dismiss, RE 15 at 20 (explaining why a stay of the case would impose extreme hardship on the Voters).

The progression of the recent *Gill v. Whitford* case from the Western District of Wisconsin is instructive on this point. That case was filed in July 2015 and went to trial on May 24, 2016. *Whitford v. Nichol*, No. 3:15-cv-00421-bbc, ECF No. 1 (July 8, 2015), ECF No. 141 (May 24, 2016). The court decided the case on November 21, 2016, and an amended judgment was entered on February 22, 2017, ordering the Wisconsin defendants to put a "remedial redistricting plan" in place for the "November 2018 election." *Id.*, ECF No. 166 (Nov. 21, 2016), ECF No. 190 (Feb. 22, 2017). The defendants appealed directly to the Supreme Court, where the case was argued in October 2017. A decision was issued in June 2018, and the Supreme Court remanded the case for further proceedings. *See Gill v. Whitford*, 585 U.S. __ (2018).

Over three years passed from the filing of the complaint to a decision in the Supreme Court, and the Wisconsin plaintiffs' claims are still unresolved. No new map was implemented for the November 2018 election, even though that is what the district court ordered. In that election, Democrats won 53% of the vote in state

assembly races but, because of the gerrymander, still captured only 36% of the seats.[3] If a similar sequence of events happens in this case, too much time will have passed for any remedial maps to be implemented before 2020, the last elections to which they could apply. The Court should not risk that outcome by granting a stay.

The Supreme Court's and this Court's authorities are decidedly *against* granting stays where, as here, doing so would risk affecting statutory or administrative timetables. In *Landis v. North American Co.*, for example, the Supreme Court held that the party asking for the stay "must make out a clear case of hardship or inequity in being required to go forward," as there is a "fair possibility that the stay for which he prays will work damage to someone else." 299 U.S. 248, 254-55 (1936). This Court has thus explained that, under *Landis*, courts must "tread carefully in granting a stay of proceedings, since a party has a right to a determination of its rights and liabilities without undue delay." *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977). The "burden is on the party seeking the stay to show that there is a pressing need for delay, and *that neither the other party nor the public will suffer harm from entry of the order*." *Id.* (emphasis added). Tellingly, the Legislative Intervenors do not even cite *Landis* or *Ohio Environmental Council*.

[3] *See* Astead W. Herndon and Jonathan Martin, *With Power Grabs in the Midwest G.O.P. Risks a 2020 Backlash*, https://www.nytimes.com/2018/12/10/us/politics/michigan-wisconsin-republicans-midwest.html (last visited December 16, 2018).

This Court should follow its prior guidance in *Ohio Environmental Council*, and refuse to allow a stay where, as here, to do so would disrupt the Voters' ability to secure meaningful remedial relief if they prevail on the merits. *See id.* at 396 (reversing stay as abuse of discretion, and noting that courts should be "particularly hesitant" to issue a stay when doing so "will disrupt a statutory or administrative timetable"); *cf. Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018) (after ruling gerrymandered maps unconstitutional, concluding "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," an outcome which could happen here if a stay is granted).

The Legislative Intervenors claim that a stay would not prejudice the Voters, because they are not seeking a change in the trial date, and thus that the trial date would not need to be changed. (Motion to Stay, at 23.) But a stay would stop all pretrial proceedings and would effectively require a change in the trial date because the parties' ongoing pretrial preparation efforts and pretrial motion practice would grind to a halt.

The Legislative Intervenors claim that if the trial date must be moved, there would "still be more than sufficient time to bring appeals and implement any remedial map." (*Id.*) They are incorrect. A change in trial date is not as simple as finding a rescheduled date on one calendar. The district court is a panel of three judges, each of which has a busy schedule of other cases to decide. Given the dockets of the district

court's panel—not to mention the schedules of the lawyers and witnesses who will be required to try the case—even moving the trial date could require a significant delay in resolution of the Voters' claims. In light of the timing in *Gill*, it is at best disingenuous guesswork to suggest that a delay of the trial date would still "be more than sufficient time to bring appeals and implement any remedial map."

B. Legislative Intervenors Will Not Be Irreparably Harmed.

In significant contrast to the significant harm to the Voters and the public interest, there is no likelihood that the interests of the Legislative Intervenors will be irreparably harmed absent a stay, for numerous reasons.

First, the Legislative Intervenors' interests are aligned with the interests of the current Defendants. The Plans are being vigorously defended by the Defendants. 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 the district court correctly noted, 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." RE 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. For this reason, the Legislative Intervenors' argument that the Legislature's "constitutional

interest" in drawing legislative and congressional districts will be left unprotected absent a stay (Motion to Stay, at 22), lacks merit.[4]

Second, all of the harms the Legislative Intervenors say would befall them absent a stay are illusory. They complained to the district court that absent a stay they would not be able to participate in discovery or dispositive motion practice, but they did not make those arguments on appeal and thus have abandoned them. *See Enertech Elec. Inc. v. Mahoning County Com'rs*, 85 F.3d 257, 259 (6th Cir. 1996) (holding that, where appellant did not articulate on appeal arguments it had raised at the district court, this Court "will therefore consider these issues abandoned"), and citing *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989), for a similar proposition). Even had they made that argument, their admissions in the district court that they will not file new summary judgment motions, and their ongoing work with the Voters to narrow other evidentiary issues, entirely undercut that argument. *See* RE 165-1, Page ID #7181.

The Legislative Intervenors now contend that their appeal will "either be meaningless or will create substantial prejudice if this Court reverses the district court and orders intervention after the trial is completed" (Motion to Stay, at 22) but that is incorrect. Even assuming that the Legislative Intervenors are ultimately allowed to

[4] The Legislative Intervenors also did not make the "constitutional interest" argument in their motion to stay in the district court, so that argument is waived on appeal. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below," because such a rule is "essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence").

intervene in close proximity to or after trial, the district court may simply reopen the record to allow the Legislative Intervenors to present any additional, noncumulative evidence in defense of the Plans (along with the Voters' rebuttal to that additional evidence). *See, e.g.*, *State Industries, Inc. v. Mor-Flo Industries, Inc.*, 948 F.2d 1573, 1577, 1579 (Fed. Cir. 1991) (finding that district court did not err in reopening the record on remand following bench trial and partial vacation of judgment). Their counsel *will already be participating at trial,* representing the eight Congressmen this Court previously allowed to intervene. Given that their lawyers will already be participating and that the district court can simply reopen the record to allow nonduplicative testimony, there can be no harm, irreparable or otherwise, to allowing intervention even after trial. A stay is thus entirely unwarranted.

The Legislative Intervenors also contend that a stay would be the "best use of judicial resources" (Motion to Stay, at 24), but no, a stay would actually *waste* them. The district 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* RE 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 diligently to prepare a supplemental joint pretrial order. A stay and a concomitant extension of the trial date would waste, not conserve, much of the time and effort the parties and the district court have already spent.

The Legislative Intervenors argue that if they are allowed to intervene too late, it will risk "wasting all of the Parties' resources because a ruling allowing intervention may require the district court to reopen the trial record." (Motion to Stay, at 24.) They say this would be a "terrible waste of judicial resources" (*id.*), but as explained above, the opposite is true: even if the Legislative Intervenors are ultimately allowed to intervene *after* the trial is over, reopening the record to allow presentation of their defense (and the Voters' response) would be entirely *efficient*. Notably, the Motion to Stay does not explain how allowing them to present their case on a reopened record, even after trial, would be such a "terrible waste of judicial resources."

C. The Legislative Intervenors Are Not Likely 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, REs 91, 144, Legislative Intervenors are unlikely to succeed.[5] Given that the other stay factors weigh so strongly against them, the Voters do not address every one of the Legislative Intervenors' arguments on the merits here. *See also* RE 79 (explaining the Voters' position on the merits of intervention under Rule 24, if the Court chooses to address that issue).

[5] The Voters disagree with the Legislative Intervenors' analysis of the intervention issue under Rule 24 (*see* Dkt. 22, at 15-42), but need not explain every disagreement here for the Court to deny the stay.

As but one example of why the Legislative Intervenors are unlikely to succeed, the district court held that their motion was untimely. RE 144, at Page ID #5347. Such a decision is reviewed on appeal only for an abuse of discretion. *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). If this Court concludes that the motion to intervene was untimely, that ends the Legislative Intervenors' appeal.

There is ample record support for the district court's conclusion. The Legislative Intervenors 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 this case from *League of Women Voters v. Johnson*, 902 F.3d 572 (6th Cir. 2018), the prior intervention appeal. The Legislative Intervenors say that untimeliness must *cause* prejudice for intervention to be denied on untimeliness grounds, but there can be no greater prejudice than what they are asking for here—a stay that would in all likelihood delay the case so as to effectively prevent the Voters from securing the relief they seek. The Legislative Intervenors should not be rewarded for their tardiness and be allowed to thwart Voters' efforts to obtain any relief whatsoever by leveraging their appeal to obtain a stay of the case.

CONCLUSION

The Court should deny the motion to stay, either because it can address the merits of the appeal first, or because a stay would greatly prejudice Voters' and the public's interest in resolving this dispute before the 2020 election cycle, while denying the stay will not cause Legislative Intervenors any harm, irreparable or otherwise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2018, the Plaintiffs-Appellees' Response in Opposition To the Legislative Intervenors' Emergency Motion To Stay was electronically filed with the United States Court of Appeals for the Sixth Circuit, using the Court's CM/ECF system.

/s/ Jeffrey P. Justman
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CERTIFICATE OF COMPLIANCE WITH RULE 27

This response complies with the length limits of Fed. R. App. P. 27(d)(2)(A) because it contains 3,646 words, excluding the parts exempted by Rule 27(a)(2)(B).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in 14-point Garamond font. *See* Fed. R. App. P. 27(d)(1)(E).

Respectfully submitted,

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