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.

JOCELYN BENSON, 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

DEFENDANT'S RESPONSE IN OPPOSITION TO MICHIGAN SENATORS' MOTION TO INTERVENE

For the reasons set forth in the accompanying brief, Defendant Jocelyn Benson, in her official capacity as Michigan Secretary of State, by her counsel, Miller, Canfield, Paddock and Stone, P.L.C., respectfully requests that this Court deny the Michigan Senators' Motion to Intervene (ECF 206).

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: */s/Scott R. Eldridge*

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Dated: January 31, 2019

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No. 2:17-cv-14148

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DEFENDANT'S BRIEF IN OPPOSITION TO
MICHIGAN SENATORS' MOTION TO INTERVENE

STATEMENT OF QUESTION OR ISSUE PRESENTED

Where the Michigan Senators have waited until the eve of trial to seek to intervene in this matter after discovery has closed, witnesses have been identified, a consent decree has been proposed, and the Secretary has indicated that she will continue to oppose a special election remedy, should the Michigan Senators be allowed to intervene?

Plaintiffs' answer: no.

Defendant Secretary of State's answer: no.

Congressional and Legislative Defendant-Intervenors' answer: yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

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

Creusere v. Bd. of Educ. of City Sch. Dist. of City of Cincinnati, 88 F. App'x 813 (6th Cir. 2003)

Johnson v. City of Memphis, 73 F. App'x 123 (6th Cir. 2003)

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

Stupak-Thrall v. Glickman, 226 F.3d 467 (6th Cir. 2000)

INTRODUCTION

This case – which from its inception has included challenges to State Senate Districts – has been ongoing for more than a year. Motions to dismiss and for summary judgment have been filed and decided long ago. The Sixth Circuit has twice ruled on interlocutory intervention appeals. Discovery is closed, trial witnesses have been identified and deposed, and trial exhibits have been compiled and exchanged. Trial is now just days away, and a consent decree has been submitted by the Plaintiffs and the Secretary for this Court's consideration, objections to which are due concurrently with this response. What is more, the consent decree – if approved – would dismiss *all* of Plaintiffs' claims challenging the State Senate district maps at issue.

Yet the Michigan Senators have waited until this juncture to seek intervention, despite admitting in their motion that they have been contemplating intervention for several months. Any interest that the Michigan Senators may have in the outcome of this dispute is already adequately protected by the Secretary and by the Congressional and Legislative Defendant-Intervenors. The Michigan Senators' requested intervention is untimely, unnecessary, will add unnecessarily to the length of trial, and serves no purpose other than to delay resolution of this case; their motion to intervene should be denied.

BACKGROUND

Plaintiffs filed their Complaint in this case on December 22, 2017, challenging the 2011 redistricting maps for several of Michigan's state legislative and federal congressional voting districts as the result of unconstitutional partisan gerrymandering. *See generally* Compl., ECF 1. Through subsequent exposition, Plaintiffs have specifically identified the challenged districts as Michigan's Congressional Districts 1, 4, 5 and 7-12; Senate Districts 8, 10-12, 14, 18, 22, 27, 32, and 36; and House Districts 24, 32, 51, 52, 55, 60, 62, 63, 75, 76, 83, 91, 92, 94, and 95. The Republican Congressional Delegation moved to intervene shortly after the case commenced, on February 28, 2018 (ECF 21), and the individual Michigan Legislators subsequently filed their intervention motion on July 12, 2018 (ECF 70).

Both requests to intervene were initially denied (ECF 47, 91), and those denials then appealed (ECF 50, 96). On August 30, 2018, the Sixth Circuit found intervention by the Congressional Intervenors appropriate (Case No. 18-1437; ECF 103), and on December 20, 2018, the Sixth Circuit agreed that the individual legislators' intervention was likewise appropriate (Case No. 18-2383, ECF 166). While those interventions and appeals were pending, the parties engaged in extensive discovery prior to the August 24, 2018 discovery deadline. *See* ECF 53, Case Mgmt. Order No. 1, PageID.939. The Plaintiffs, the Secretary, and

Congressional Intervenors also fully briefed and argued motions to dismiss and for summary judgment (*e.g.*, ECF 11, 117, 119, 121) on various grounds, including standing and laches. Yet the Michigan Senators never sought to intervene.

After finding that Plaintiffs had standing to pursue their claims and had presented evidence sufficient to create triable disputes of fact with regard to several aspects of the 2011 redistricting process (ECF 143), this Court held a final pretrial conference on December 11, 2018, and directed the parties to submit a supplement to the proposed pretrial order with additional information on proposed trial procedures, including submission of exhibit books and presentation of witnesses. *See* ECF 159, Order to Supplement. On December 22, 2018, the parties submitted their proposed supplement, including revised witness and exhibit lists. ECF 172. In accordance with the Order to Supplement, the parties also provided copies of their trial exhibits to the Court. Yet the Michigan Senators never sought to intervene.

By Letter on January 16, 2019, this Court directed the parties to meet and confer regarding the format for trial and possible ways to streamline the presentation of evidence at trial. The parties appeared for a statue conference before the Court on January 22, 2019. Pursuant to the Court's Letter, the Plaintiffs, Secretary, and Congressional and Legislative Intervenors thereafter submitted a Stipulation setting out the parties' agreements and proposals for

objecting to trial exhibits; presenting live and deposition testimony of voter witnesses; presenting expert evidence; limiting the time to present each type of evidence; and waiving and limiting opening and closing statements. ECF 212.

In November 2018, Jocelyn Benson was duly elected as Michigan Secretary of State and Ruth Johnson's successor to the office. Secretary Benson was sworn in on January 1, 2019, and shortly thereafter began reviewing the briefing and merits, costs, and risks of this case with the Secretary's former counsel at Dickinson Wright and current counsel at Miller Canfield, appointed as Special Assistant Attorneys General. After completing that review, the Secretary recognized that the Plaintiffs have presented substantial evidence on the merits of this case and the significant risk of an unfavorable decision for the State if this case proceeds to trial, including possible extensive redrawing of Michigan's district maps. To ensure a fair and equitable outcome for the voters and to resolve this litigation through compromise with certainty and finality, the Secretary negotiated a proposed consent decree with the Plaintiffs. *See* Joint Mot. to Approve Consent Decree, ECF 211. Both the Secretary and the Plaintiffs openly advised the Court and the Intervenors that they were engaged in settlement discussions and invited the Intervenors' participation. *See, e.g.*, Secretary's Resp. to Mot. to Stay, ECF 199, PageID.7601.

The proposed consent decree agreed upon by the Secretary and the Plaintiffs would submit certain Michigan House districts—those House districts as to which the Plaintiffs have presented the strongest evidence regarding unconstitutional partisan gerrymandering—to the Legislature for redrawing for the 2020 House elections, while leaving untouched the federal Congressional and Michigan Senate districts. *See* Proposed Consent Decree, ECF 211-1. Contrary to the Michigan Senators' speculation, the proposed consent decree does *not* provide for any special election for the Michigan Senate, and the Secretary has repeatedly affirmed to the parties in this case and to the Court that she does not believe the facts of this case warrant a special election. Indeed, the Secretary strongly opposes any special election remedy in this case. *See* ECF 222, Secretary's Trial Br., PageID.8191–95.

Shortly before the Secretary and the Plaintiffs submitted that proposed consent decree to the Court (and based largely on groundless speculation as to its content), the Michigan Senators moved to intervene (ECF 206).

ARGUMENT

A. Legal Standard

Pursuant to Federal Rule 24, "[o]n *timely* motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its

interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a) (emphasis added). To meet this standard, the movant must show

> (1) timeliness of the application to intervene,
> (2) the applicant's substantial legal interest in the case,
> (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and
> (4) inadequate representation of that interest by parties already before the court.

Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997).

Additionally, "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). In exercising that discretion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

B. The Michigan Senators' Attempted Intervention on the Eve of Trial is Untimely.

Timeliness is a threshold question that "depends primarily 'upon the readiness of the case for trial.'" *Piedmont Paper Prod., Inc. v. Am. Fin. Corp.*, 89 F.R.D. 41, 43 (S.D. Ohio 1980). Timeliness is evaluated "in the context of all relevant circumstances," such as

> (1) the point to which the suit has progressed;
> (2) the purpose for which intervention is sought;
> (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case;

(4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and
(5) the existence of unusual circumstances militating against or in favor of intervention.

Stupak-Thrall v. Glickman, 226 F.3d 467, 472–73 (6th Cir. 2000).

1. The advanced stage of this litigation weighs heavily against intervention.

As to the first factor, this suit has progressed to the eve of trial: despite being on notice for many months that Michigan Senate districts were among the challenged districts, the Michigan Senators delayed in filing their motion until a mere two weeks prior to trial. This first factor weighs particularly heavily against intervention in similar circumstances where granting the motion would "require reopening discovery, delaying trial, or some other prejudicial delay to the parties." *Shy v. Navistar Int'l Corp.*, 291 F.R.D. 128, 133 (S.D. Ohio 2013). Discovery in this case has been closed since August; expert reports were due in June and summary judgment motions in September; this Court has ruled on all dispositive motions; and the parties have completed their pretrial submissions, including identification of trial witnesses, exhibits, and procedures. *See* ECF 53, Case Mgmt. Order No. 1; ECF 143, Op. & Order on Dispositive Mots.; ECF 172, Proposed Supplement to Proposed Final Pretrial Order.

Courts have therefore regularly denied intervention at advanced stages of the case. *See, e.g.*, *Blount-Hill v. Zelman*, 636 F.3d 278, 285 (6th Cir. 2011) (finding

motion to intervene untimely where case had been extensively litigated, including through "1) decision granting in part Defendants' first motion to dismiss; 2) completion of a pretrial conference and issuance of a scheduling order; 3) additional discovery and discussions about stipulations of fact; 4) filing of a Third Amended Complaint; and 5) filing of a second motion to dismiss, to which Plaintiffs responded"); *Creusere v. Bd. of Educ. of City Sch. Dist. of City of Cincinnati*, 88 F. App'x 813, 825 (6th Cir. 2003) (finding motion to intervene untimely where case was "over three years old, discovery was long over, the deadline for dispositive motions had passed months before, and the trial was scheduled in about a month"); *Johnson v. City of Memphis*, 73 F. App'x 123, 132 (6th Cir. 2003) (finding intervention untimely where motion was filed more than a year after original complaint was filed, "a trial date had been scheduled … , all witnesses had been identified, expert witnesses had submitted their reports and testified in court, depositions had been taken, and Plaintiffs' motion for partial summary judgment had been granted"); *Scott v. Ameritech Pub., Inc.*, 938 F. Supp. 2d 702, 710–11 (E.D. Mich. 2013) (finding motion to intervene untimely where proposed intervenor's "interest was created the instant the dispute between Plaintiff and [Defendant] arose," and intervenor "should have known about its interest in this litigation" but failed to seek intervention until a month after case was remanded to arbitration); *Am. Nat. Prop. & Cas. Co. v. Stutte*, 298 F.R.D. 376,

380 (E.D. Tenn. 2014) (finding intervention untimely where "dispositive motion deadline had passed, approximately 30 days remained for completion of discovery, … the agreed pretrial order was due in 30 days," and motion to intervene was not made until after trial was continued).

In short, the Michigan Senators' motion is untimely and should be denied.

2. Intervention at this late stage would unduly prejudice the parties who have been actively preparing for trial.

The Michigan Senators' undue delay in filing their motion to intervene would also prejudice the Secretary and the other parties, who have been actively litigating this case since its inception and continue to do so, including by preparing for next week's scheduled trial. *See City of Memphis*, 73 F. App'x at 133 (finding that original parties would be prejudiced by intervention "[g]iven that extensive litigation has occurred" and intervention would cause "undue delay" by reopening discovery and resetting the time for filing motions and responding to pleadings); *Blount-Hill*, 636 F.3d at 286–87 ("In view of the extensive litigation that has occurred in this case, including two motions to dismiss, numerous amended pleadings, and the denial and appeal of a motion to intervene, intervention at this late stage would cause prejudice in the form of undue delay."). The Michigan Senators assert that they "are prepared to fully participate both in trial and settlement discussions without the need to adjust the schedule or otherwise delay proceedings," ECF 206, PageID.7715, but they offer no explanation as to how that

would be possible at this late date. The Michigan Senators have not identified any witnesses or exhibits for trial; moved to include their evidence in the final pretrial order; contacted the existing parties about sharing or splitting the time allocated to various portions of the trial; or otherwise made any effort to explain how they would integrate their defense into the current trial schedule.[1] The Senators' intervention would therefore be prejudicial to the existing parties and trial schedule and should be denied.

3. The Michigan Senators have long been on notice of their potential interest in this litigation but have deliberately chosen not to act.

This undue delay is particularly significant given the length of time during which the Michigan Senators have been on notice that their interests might be implicated in this lawsuit. Contrary to their brief, the Michigan Senators did not suddenly discover their interest in this case "just several days ago." ECF 206, PageID.7715. Rather, as they admit in their motion, the Michigan Senators knew "last year" that the outcome of this case could impact their Senate seats. *Id.*, PageID.7707. Plaintiffs' Complaint is eminently clear that it challenges Michigan State Senate districts. *See, e.g.*, ECF 1, Compl., ¶¶ 4, 21, 26, 35, 38, 40, 42, 52, 63. The Michigan Senators' counterparts in the Michigan House sought to intervene

[1] If the answer is that the Senators plan to rely on the Congressional and Legislative Intervenors' witnesses, exhibits, and presentation of the evidence, that suggests that the Congressional and Legislative Intervenors are adequately situated to protect the Michigan Senators' interests and that intervention is unnecessary.

more than six months ago, and their Congressional counterparts nearly a year ago. A number of individuals deeply involved in the Legislature's 2011 redistricting process have been deposed and identified as trial witnesses, some of whom are represented by the same counsel as the Michigan Senators. *See, e.g.*, ECF 26, Notice of Appearance of Gary Gordon o/b/o "Legislative Personnel." For unknown reasons, the Michigan Senators made a strategic decision not to intervene during any of that time, apparently in deference to this Court's August 14, 2018, opinion regarding the Legislative Intervenors. *See* ECF 206, PageID.7715. The Michigan Senators fail to explain why the Sixth Circuit's August 30, 2018, decision allowing the Congressional Intervenors into the case, or October 25, 2018, order remanding the Legislative Intervenors' appeal for reconsideration did not change that calculus. *See Blount-Hill*, 636 F.3d at 285–86 (finding that proposed intervenors had "actual or constructive knowledge" of their interest in the litigation long prior to election day given the "controversial and public nature of the litigation" and their relationship to the other intervenors).

In short, the Michigan Senators have been well aware of their possible interest in this litigation for many months but have inexplicably waited until the eleventh hour to attempt to intervene, and their motion should be denied.

C. The Secretary Staunchly Opposes a Special Election, and the Michigan Senators' Interests are Adequately Protected.

The remaining factors to consider for mandatory intervention—the purpose of the intervention, the interest the Michigan Senators seek to protect, its likely impairment, and the adequacy of the existing representation—similarly demonstrate why intervention would be inappropriate here. As a threshold matter, Plaintiffs are not challenging Senator Theis's district, Senate District 42. Any relief in this case would not touch District 42 and would have no effect on Senator Theis; Senator Theis therefore has no "substantial legal interest" to protect in this case. *Mich. State AFL-CIO*, 103 F.3d at 1247. Moreover, the proposed consent decree omits entirely the challenged Senate districts from its list of Enjoined Districts to be redrawn. Approval of the proposed consent decree would therefore moot any interest of the Michigan Senators in this case.

The Michigan Senators also repeatedly attempt to justify this eleventh-hour intervention with speculation that the Secretary will accede to a remedial plan that includes a special election for the Michigan Senate in 2020. *See, e.g.*, ECF 206, Mot. to Intervene, PageID.7708 (referring to unspecified "media reports" that settlement would require 2020 special election), PageID.7716 (stating that the Michigan Senators seek to "protect their constitutionally established four-year terms of office, and to prevent a special election for the Senate in 2020"), PageID.7721 (raising special election concern). But this is precisely the interest

the Secretary has made abundantly clear she will protect—the proposed consent decree does not impact the Michigan Senate districts, and if this case proceeds to trial, the Secretary has unequivocally stated that she does not believe a special election is appropriate in this case and that she will oppose any such remedy. *See* ECF 222, Secretary's Trial Br., PageID.8191–95 (explaining why special election is not warranted). In addition, the Congressional and Legislative Intervenors intervened specifically for the purpose of defending the maps at issue in this case and are therefore fully competent and prepared to protect any remaining interest asserted by the Michigan Senators. *See* ECF 21, Mot. to Intervene, PageID.219–21 (describing Congressional Intervenors' "substantial interest in defending the Current Apportionment Plan"); ECF 70, Mot. to Intervene, PageID.1214–17 (analyzing Legislative Intervenors' in maintaining the current maps and avoiding redrawing districts). In short, the Secretary and the Congressional and Legislative Intervenors are clearly willing, prepared, and able to defend the Michigan Senators' interest in this litigation, and the Senators are therefore not entitled to intervene. *See Coal. to Defend Affirmative Action v. Granholm*, 240 F.R.D. 368, 376 (E.D. Mich. 2006), a*ff'd sub nom.*, 501 F.3d 775 (6th Cir. 2007) (finding proposed intervenor's interests adequately represented where existing parties to suit opposed constitutional amendment at issue for same reasons as proposed intervenor).

D. Permitting the Michigan Senators' Intervention Would Unduly Prejudice the Parties and Delay Resolution of this Case.

Nor should the Michigan Senators be granted permission to intervene at this late date. As a preliminary matter, for the same reasons explained above, the Senators' request is untimely: this case is scheduled for trial in a matter of days; discovery, including exchange of expert disclosures, concluded months ago; the parties have identified witnesses, exhibits, and procedures for trial; and the Michigan Senators have been on notice of their potential interest and defenses in this case for *months* but have declined to take any action until the last possible minute. *See* Fed. R. Civ. P. 24(b)(1); *Blount-Hill*, 636 F.3d at 287–88.

The Michigan Senators' eleventh-hour intervention would also significantly prejudice the existing parties to this lawsuit and delay adjudication of the parties' rights. *See* Fed. R. Civ. P. 24(b)(3). The parties have been preparing for trial for weeks, including by making arrangements for depositions of numerous voter witnesses across Michigan to be taken concurrently with the trial; meeting and conferring on the trial format and procedures, including allocation of time among the parties; and submitting trial briefs. The Michigan Senators have not participated in any of these trial preparation measures—or even requested to do so—nor have they provided any indication as to what evidence they intend to present or how they suggest integrating that presentation into the parties' agreed-

upon trial procedures. *See United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005).

The resulting delay and prejudice becomes even more acute in light of the Michigan Senators' recent motion to stay all proceedings in this case pending a determination of their intervention request (ECF 220), particularly given that there is a consent decree pending before the Court that would resolve all remaining claims in this dispute and would have no impact on the Michigan Senators' districts.

In sum, the Michigan Senators' proposed intervention is untimely and would unduly delay resolution of these proceedings and significantly prejudice the existing parties; the Senators' request should therefore be denied.

CONCLUSION

For all of the foregoing reasons, the Secretary respectfully requests that the Court deny the Michigan Senators' Motion to Intervene (ECF 206).

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: */s/Scott R. Eldridge*

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Dated: January 31, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2019, I electronically filed the foregoing document 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/ Scott R. Eldridge