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 SENATE'S 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 Senate's Motion to Intervene (ECF 208).

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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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,

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Defendant.

No. 2:17-cv-14148

Hon. Eric L. Clay
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DEFENDANT'S BRIEF IN OPPOSITION TO MICHIGAN SENATE'S MOTION TO INTERVENE

STATEMENT OF QUESTION OR ISSUE PRESENTED

Where the Michigan Senate has 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 Senate 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 Senate has waited until this juncture to seek intervention, despite admitting in its motion that it has been contemplating intervention for several months. Any interest that the Michigan Senate 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 Senate's 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; the Senate's 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 Senate 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 Senate 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 Senate's 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 Senate moved to intervene (ECF 208).

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 Senate's 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 Senate delayed in filing its 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 Senate's 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 Senate's undue delay in filing its 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 Senate asserts that it "is prepared to fully participate both in trial and settlement discussions without the need to adjust the schedule or otherwise delay proceedings," ECF 208, PageID.7789, but offers no explanation as to how that

would be possible at this late date. The Michigan Senate has not identified any witnesses or exhibits for trial; moved to include its 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 the Senate would integrate its defense into the current trial schedule.[1] The Senate's intervention would therefore be prejudicial to the existing parties and trial schedule and should be denied.

3. The Michigan Senate has long been on notice of its potential interest in this litigation but has deliberately chosen not to act.

This undue delay is particularly significant given the length of time during which the Michigan Senate has been on notice that its interests might be implicated in this lawsuit. Contrary to its brief, the Michigan Senate did not suddenly discover its interest in this case "just several days ago." ECF 208, PageID.7789. Rather, as admitted in its motion, the Michigan Senate knew "last year" that the outcome of this case could impact Senate seats. *Id.*, PageID.7781. 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 Senate's co-legislators in the Michigan House sought to intervene more than six months ago,

[1] If the answer is that the Senate plans 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 Senate's interests and that intervention is unnecessary.

and the Congressional Intervenors 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 Senate. *See, e.g.*, ECF 26, Notice of Appearance of Gary Gordon o/b/o "Legislative Personnel." For unknown reasons, the Michigan Senate 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 208, PageID.7790. The Senate fails 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 Senate has been well aware of its possible interest in this litigation for many months but has inexplicably waited until the eleventh hour to attempt to intervene, and its motion should be denied.

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

The remaining factors to consider for mandatory intervention—the purpose of the intervention, the interest the Michigan Senate seeks to protect, its likely impairment, and the adequacy of the existing representation—similarly demonstrate why intervention would be inappropriate here. It should be noted that the Resolution passed by the Senate to authorize intervention contains misstatements about the Secretary's actions in this case and is based on unsubstantiated speculation about the content of the consent decree.[2] The Secretary did not "file[] a motion to stay the proceedings" in this case on January 17, 2019, as the Resolution states. *See* ECF 208-4, PageID.7823. Rather, the Congressional and Legislative Intervenors sought to stay *trial* in this case, pending the outcome of certain Supreme Court decisions (ECF 183). The Secretary concurred in that motion to stay trial on other grounds, hoping to focus on negotiating a mutually agreeable and complete resolution of the parties' disputes that serves the public interest of the State of Michigan; conserves public and judicial resources; mitigates the impact of any past impermissible partisan gerrymandering; and obviates the need for further proceedings in this case, including trial. ECF 199, PageID.7601. Moreover, the proposed consent decree

[2] It should also be noted that, despite the implications in the Senate's brief, the Resolution does not cast aspersions on the alleged negotiations between "Secretary Benson and her political mentor, Mark Brewer." *See* ECF 208, PageID.7783.

resulting from those negotiations completely omits 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 Senate in this case.

The Michigan Senate also repeatedly attempts to justify this eleventh-hour intervention with speculation that the Secretary has agreed or will accede to a remedial plan that includes a special election for the Michigan Senate in 2020. *See, e.g.*, ECF 208, Mot. to Intervene, PageID.7782 ("Based on media reports, such a special election is precisely what the parties intend."), PageID.7790 (stating that the Michigan Senate seeks to "protect its constitutionally established four-year terms of office, and to prevent a special election for the Senate in 2020"); ECF 208-4 (referring to possibility of special election). Instead, a special election is precisely what the Secretary *does not* intend in this case—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).

This case is consequently unlike *I.N.S. v. Chadha*, 462 U.S. 919, 939–40 (1983). In *Chadha*, the Court faced the question of whether there was a sufficient case or controversy to satisfy Article III where the respondent executive branch

agency wholly agreed with the petitioner that the statute at issue was unconstitutional. 462 U.S. at 939–40. After finding that the Article III requirements were met *prior to* Congress's intervention, the Court acknowledged the "prudential" concern of adjudicating a case "in the absence of any participant supporting the validity" of the statute—a concern mitigated by Congress's intervention. *Id.* at 940; *see also United States v. Windsor*, 570 U.S. 744, 759 (2013) (expounding *Chada*). In this case, the Secretary continues to staunchly oppose the special election relief the Michigan Senate fears; thus, there is no "prudential" concern as to the Secretary's ability to defend the case.

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 Senate. *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 Senate's interest in this litigation, and the Senate is 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 Senate's Intervention Would Unduly Prejudice the Parties and Delay Resolution of this Case.

Nor should the Michigan Senate be granted permission to intervene at this late date. As a preliminary matter, for the same reasons explained above, the Senate's 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 Senate has been on notice of its potential interest and defenses in this case for *months* but has 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 Senate's 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 Senate has not participated

in any of these trial preparation measures—or even requested to do so—nor has the Senate provided any indication as to what evidence it intends to present or how it suggests 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 Senate's recent motion to stay all proceedings in this case pending a determination of its 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 Senate districts.

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

CONCLUSION

For all of the foregoing reasons, the Secretary respectfully requests that the Court deny the Michigan Senate's Motion to Intervene (ECF 208).

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