

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

Plaintiffs-Appellees,

v.

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

Defendant,

and

LEE CHATFIELD; AARON MILLER,

Proposed Intervenors-Appellants.

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

REPLY BRIEF OF APPELLANTS

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PROPOSED LEGISLATIVE INTERVENORS' REPLY
IN SUPPORT OF THEIR APPEAL

In the interest of an expeditious ruling on the merits, Legislators forgo a more robust reply brief. Instead, Appellants briefly address three issues in reply.¹ First, should this Court order intervention, it is imperative that the intervention order be specific as to the scope of Legislators' rights as parties upon issuance of the mandate to the district court. Second, Legislators did not contest Appellees' desire to preserve the current trial date of February 5, 2018 provided that the timing of this Court's decision does not further prejudice Legislators' ability to participate in and prepare for trial. Third, as a practical and legal matter, intervention is appropriate now, and any delay in granting intervention works manifest injustice on the parties and the people of Michigan.

ARGUMENT

I. SHOULD THIS COURT ORDER INTERVENTION, THE ORDER MUST BE SPECIFIC AS TO THE RELIEF AFFORDED.

The district court has had multiple opportunities to heed or, at the very least, acknowledge this Court's orders. Yet, the district court has improperly resisted intervention. It has refused to accommodate the schedule for newly admitted parties despite being ordered otherwise by this Court. The district court's continued refusal

¹ Legislators have fully briefed the merits of the issues in both this appeal and in their original appeal in this case.

to permit Legislators to intervene in this matter of great and meaningful importance should be rejected.

This Court has the power to grant additional relief “to enable [the] court to . . . vindicate its authority, and effectuate its decrees.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994) (unanimous decision). As such, Legislators request the following additional relief:

- (1) The right to file a Motion for Summary Judgment brief adopting the current Secretary of State’s arguments;
- (2) The right to produce an expert report in defense of the legislative maps;
- (3) The right to file a Motion *in Limine* adopting the current Secretary of State’s Motions as the Legislators’ own; and
- (4) The right to participate in all pre-trial procedures.

See Appellants’ Brief (Doc. No. 18 at 6-7). Each of these requests are properly before this Court should intervention be granted. A brief summation of the district court’s actions is necessary to give context to Legislators’ request.

First, the Court denied intervention for Congressional Intervenors, (ECF No. 47) (Page ID# 902-904). This Court overturned that denial. *See League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018) (hereinafter, *League of Women Voters I*). This Court, in *League of Women Voters I*, directed the district court to “adjust the discovery and dispositive motion deadlines currently in place”

in order to accommodate Congressional Intervenors' admission to the case. *League of Women Voters I*, 902 F.3d at 579.

Five days after this Court's Opinion and Order, *id.* (August 30, 2018), the district court entered an order disregarding this instruction and instead directing the Congressmen to comply with the existing Case Management Order No. 1. (ECF No. 108) (Page ID# 2188-2189) (September 4, 2018). Three days after this Order, the Congressmen moved, on an emergency basis, to alter Case Management Order No. 1 per the terms set forth in *League of Women Voters I*. (ECF No. 111) (Page ID# 2225-2246). The district court denied Congressmen's request for a 60-day stay in the case in order to review discovery and otherwise prepare to participate in the case.² Order "Granting in Part" Emergency Mot. to Alter (ECF No. 115) (Page ID# 2308-2310).

Although the district court captioned the Order as "Granting in Part," it merely allowed for the Congressmen to file a motion for leave to request the addition of an expert witness at the appropriate time.³ *Id.* The Congressmen then retained an expert

² Plaintiffs opposed a 60-day delay but agreed to a 20-day delay to the Summary Judgment deadlines to accommodate Congressional Intervenors. *See* (ECF No. 111) (Page ID# 2226).

³ The district court's Order allowed Congressmen 22-days from the date of this Court's order granting intervention, to receive and review all discovery and then file a Motion for Summary Judgment, which the Congressmen were able to do. Mot. Summ. J. (ECF No. 121) (Page ID# 2761-3209).

who commissioned an expert report. *See* Appendix A, Mot. to Alter Case Mgmt. Order No. 1 (ECF No. 137-2) (Page ID# 5154-5197). Upon completion of the report, the Congressmen, pursuant to the district court's Order "Granting in Part," moved for leave to modify discovery to allow their expert witness to participate. Mot. to Alter Case Mgmt. Order No. 1 (ECF No. 137) (Page ID# 5135-5152). It has been over 40-days since that motion was filed and the district court has yet to issue an order granting leave to introduce an expert.⁴ It appears that the district court has done little to accommodate this Court's direction as to the first set of intervenors.

The district court's treatment of Congressional Intervenors is both past and prelude to Legislators' current intervention struggles. Legislators originally moved to intervene over five months ago, on July 12, 2018. (ECF No. 70) (Page ID# 1204-1239). This was over a month and a half before this Court's order granting the Congressmen's intervention and before the expiration of discovery. As this Court is well aware, Legislators were already before this Court on an expedited appeal once before. *League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir.) (Appellant Brief filed Sept. 5, 2018). However, due to both the Plaintiff-Appellees' lack of continued opposition and this Court's intervening opinion and order in

⁴ This is all the more perplexing since the original Proposed Joint Pre-trial Order was due December 4, 2018 and the district court's recently issued Order requiring a supplemental pretrial order is due on December 24, 2018. Order to Supplement Proposed Joint and Final Pretrial Order (ECF No. 159) (Page ID# 6335-6341).

League of Women Voters I, the appeal was remanded to the district court. Order Granting Remand, *League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir. October 25, 2018) (Doc. No. 32-1).

This Court, in its order on remand, directed the district court to “evaluate the Legislative Intervenors’ now-unopposed motion in light of the standards articulated in *League of Women Voters I*.”⁵ *Id.* at 2. This was a directive the district court decidedly did not follow, Order Denying Legislators’ Renewed Motion to Intervene (ECF No. 144) (Page ID# 5346-5352), and this new appeal followed. *League of Women Voters of Mich. v. Johnson*, No. 18-2382) (6th Cir. December 10, 2018).

Both Congressional and Proposed Legislative Intervenors have had numerous obstacles seeking intervention before the district court. When Congressional Intervenors were granted intervention, they have been denied the ability to fully and meaningfully participate in the case.

Given these struggles and the likelihood that Legislators will face similar scheduling difficulties should they be granted intervention, Legislators respectfully requested the following additional relief:

The right to file a Motion for Summary Judgment brief adopting . . . the current Secretary of State’s arguments; The right to introduce an expert report on behalf of Legislators in defense of the maps; and The right to file a Motion

⁵ “The Legislative Intervenors oppose[d] an unqualified remand.” Order Granting Remand, *League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir. October 25, 2018) (Doc. No. 32-1 at 2).

in Limine adopting the current Secretary of State’s Motions as the Legislators’ own; The right to participate in all pre-trial procedures.

Appellants’ Brief (Doc. No. 18 at 6-7).

Each of these requests are reasonable and, in fact, are far less than what Legislators would be due in a typical intervention. *See e.g., League of Women Voters I*, 902 F.3d at 579 (using where the case stood when intervention was requested in the district court as the operative timeframe). Legislators are requesting only two items that require the district court to change *any* deadline in this case.⁶ First, Legislators request that they be permitted to produce an expert report as it relates to Michigan’s legislative maps.⁷ Second, a modification of the Joint Proposed Pretrial Order deadline to allow for Legislators participation in the proposed pretrial order. Both of these requests are well within this Court’s power to “vindicate its authority, and effectuate its decrees.” *See Kokkonen*, 511 U.S. at 379-80.

⁶ The Legislators Motion to Stay the District Court’s proceedings pending this appeal remains outstanding with this Court. Trial is set to start in a matter of weeks, and, if a few weeks are needed for resolution of this appeal, this appeal could be mooted when the trial concludes and an order is issued before this Court rules on intervention.

⁷ The Legislators plan to utilize the same expert as Congressional Intervenors. The difference will be that the expert will produce a report on Michigan’s State Senate and House districts while the Congressmen’s report regards only the congressional districts. The expert will, however, need some time to gather the data and modify his report to be applicable to legislative districts, since he was initially engaged only to examine congressional districts, and even to this point, his admission as an expert has not yet been granted by the district court.

II. THE LEGISLATORS CONCUR WITH APPELLEES THAT THE CURRENT TRIAL DATE SHOULD BE MAINTAINED.

Appellees' Response Brief states that they do not oppose intervention "as long as the trial date remains the same." Appellees' Response (Doc. 22 at 13-15).

As an initial matter, Appellees' position regarding intervention is brazenly self-interested and without regard for Legislators' due process rights. Appellees assert on one hand that Legislators should be permitted intervention and, on the other hand, claim that intervention should not be granted if the trial date is impacted. Appellees' position is particularly disingenuous and prejudicial given that they have been preparing for trial for years and condition their concurrence on Legislators being given mere weeks to prepare.

That notwithstanding, Legislators are agreeable to maintaining the February 5, 2019 trial date if doing so does not further prejudice Legislators. Appellants' Brief (Doc No. 18 at 7). The differences of the parties are therefore dependent on the speed with which this Court can issue an intervention order. Legislators, in deference to this Court's time and docket, acknowledge that the trial date should be moved only if this Court feels it is unable to render a decision in time to allow Legislators to meaningfully prepare for trial.⁸ The Appellees, on the other hand, oppose

⁸ Keeping in mind some additional time before trial will be needed for Legislators' expert to do the requisite analysis and produce a report.

intervention if this Court should need that additional time. Appellees' Response (Doc. 22 at 13-15). In order to insure that all sides and arguments are heard at trial, Legislators respectfully request this Court grant intervention as swiftly as their time and docket allows or enter an order adjourning the trial date until this issue is resolved.

III. ANY DELAY TO LEGISLATORS' INTERVENTION WILL WORK MANIFEST INJUSTICE ON THE PARTIES.⁹

Intervention is appropriate now, while we wait to see when the Secretary-elect takes any specific action contrary to the Legislators' interests and therefore creates manifest injustice and prejudice upon all parties and the people of Michigan. The district court asks Legislators to wait for the Secretary-elect to do something that she now, knowing the district court's stance, has no incentive to do: make her intentions clear as to where she stands on defense of these maps.¹⁰ The Secretary-elect has every incentive to lay in wait, as those before her have done, in order to gain a strategic advantage at trial and further prejudice both Congressional and Legislative Intervenors. *See generally, e.g.,* Transcript of Trial Day 3: Afternoon, *Agre v. Wolf*,

⁹ Legislators still maintain that it was improper for the district court to make any ruling on timeliness when it failed to make any such ruling in its Original Order. *See* Appellants' Brief (Doc. No. 18 at 9-14).

¹⁰ Appellees imply that the Secretary-elect may be *forced* to not abandon participation in this case. *See* Appellee' Brief (Doc. No. 22 at 23 n. 8). In fact, there is nothing in any pending legislation that would do such a thing with regard to this lawsuit.

No. 17-cv-04392, 39:15-23 (E.D. Pa. Dec. 7, 2017) (“co-defendant” Pennsylvania Democratic Governor taking no substantive actions on the trial record until closing argument where he vociferously sided with plaintiffs in arguing that the map was a partisan gerrymander); *id.* at 55:12-16 (In rebuttal “I thought they were on our side of the V. That was quite a speech by the Governor’s counsel, who basically just utterly abandoned the state’s duly enacted law”); *see also generally* Order Denying Renewed Mot. Intervene (ECF No. 144-1) (Page ID# 5351-5352) (Quist, J. dissenting) (“[The political landscape changes with the November 6 election—a Democrat was elected Michigan Secretary of State”).

No party, no court, and no citizen will benefit from a scenario in which the Secretary-elect “surprises” the parties with an eleventh hour “change” in position.¹¹ The people of the State of Michigan can only be served with a full and robust trial on the issues from all sides. Ignoring political reality and hoping the Secretary-elect acts in a way that is manifestly antithetical to her and her political parties’ interests benefit no one.

¹¹ It is important to reiterate that the standard for intervention is that the existing party *may* not adequately represent a party’s interest. *See Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

CONCLUSION

For the aforementioned reasons, Legislators respectfully request that this Court permit their intervention and grant any other relief this Court deems appropriate.

Respectfully submitted this 19th day of December 2018,

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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)(ii) because the brief contains 2282 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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Reply Brief of Appellants was electronically filed with the Sixth Circuit Court of Appeals on December 19, 2018. The Reply Brief of Appellants was served by ECF on December 19, 2018, on counsel for Appellees. The address for Counsel for the Appellee:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

ECF No. 47	Order Denying Congressmen's Intervention	Page ID# 902-904
ECF No. 70	Legislators' Motion to Intervene	Page ID# 1204-1239
ECF No. 108	Order Directing Congressional Intervenors to Comply with Case Mgmt. Order No. 1	Page ID# 2188-2189
ECF No. 111	Congressional Intervenors' Emergency Motion to Alter Case Mgmt. Order No. 1	Page ID# 2225-2245
ECF No. 115	Order "Granting in Part" Emergency Motion to Alter Case Mgmt. Order No. 1	Page ID# 2308-2310
ECF No. 121 through 121-17	Congressional Intervenors' Motion for Summary Judgment (with Exhibits)	Page ID# 2761-3209
ECF No. 137	Congressional Intervenors' Motion	Page ID# 5203-5216
ECF No. 137-2	Expert Report of Dr. Hood	Page ID# 5154-5197
ECF No. 144	Order Denying Legislators' Renewed Motion to Intervene	Page ID# 5346-5352
ECF No. 159	Order to Supplement Proposed Joint and Final Pretrial Order	Page ID# 6335-6341