UNITED DISTRICT COURT EASTERN
DISTRICT OF MICHIGAN SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,
Plaintiffs,

v.

RUTH JOHNSON, in her official capacity as Michigan Secretary of State
Defendant.
_____/

Civil Action No. 17-cv-14148

Hon. Eric L. Clay
Hon. Denise Page Hood
Hon. Gordon J. Quist

INDIVIDUAL MICHIGAN LEGISLATORS REPLY IN SUPPORT OF THEIR MOTION TO INTERVENE

Plaintiffs (collectively "Democratic Voters") argue that Legislators have no right to intervene in this matter. Their arguments—much like their extensive out-of-circuit authority—are unpersuasive. Representative Lee Chatfield and Aaron Miller, in their official capacities (collectively, "Legislative Intervenors" or "Legislators"), should be allowed to intervene under this Court's precedents as their motion is timely and they meet all other factors for intervention as of right.

I. LEGISLATIVE INTERVENORS MUST BE ALLOWED TO INTERVENE AS A MATTER OF RIGHT

a. Legislative Intervenors' Motion to Intervene Is Timely

When assessing the timeliness of a motion to intervene the United States Court of Appeals for the Sixth Circuit has outlined five factors. *See Jansen v. Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990) (citing *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)). While Legislators readily meet all five factors, the timeliness element

of a motion to intervene is "evaluated in the context of all relevant circumstances." *Jansen v. Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990). Democratic Voters raise two equally flawed arguments against the timeliness of Legislator's motion. They argue both that intervention will prejudice plaintiffs and that Legislators lack a justification for any delay in seeking intervention. Neither of these arguments stand up to careful examination and each will be dealt with in turn.

i. Allowing Intervention Will Not Prejudice the Parties.

As a threshold matter, the timeliness of intervention is calculated from the time intervention was sought. *See Jansen,* 904 F.2d at 340-41. Democratic Voters list a number of reasons they believe weigh against intervention. The "most significant[]" reason being "discovery has progressed and now nears its close." ECF 78 at 5. This completely ignores that Legislators—and their constituent members—have been, and continue to be, the subject of those very discovery requests. ECFs 46, 52, 67, 76.

As Legislators have been subjected to numerous requests for production, allowing them to intervene at this stage will not cause any prejudice to the original parties. Furthermore, other than discovery, Democratic Voters cite no evidence or reasons as to why intervention would cause a delay. *See* ECF 78 at 5. Any potential delay is ameliorated by these facts: (1) Legislators are already subjected to discovery in this matter, ECF ECFs 46, 52, 67, 76; and (2) the Court may set reasonable limits

on intervenors in order to avoid any prejudice or delay, *see Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987). Furthermore, Legislators are prepared to work in any expedited schedule the Court may order to prevent any such prejudice. In short, there is no significant delay or prejudice that would result by allowing intervention.

ii. The Delay, if Any, in Requesting Intervention Was Justified.

Legislators did not unduly delay when bringing their Motion to Intervene. The pertinent question is contextual to "the stage of proceedings and the nature of the case." *See United States v. Detroit*, 712 F.3d 925, 931 (6th Cir. 2013). Even if there were a delay in seeking intervention, there exists significant and justifiable reasons for that delay. Specifically, there were multiple precipitating events that would make intervention necessary, which the Legislators were not aware of. *See Jansen,* 904 F.2d at 341.

First, Legislative Intervenors were unaware that they would not be afforded their previously long established constitutional right to legislative privilege. *See* Order ECF 58. When Legislators were subjected to extensive non-party discovery it made little sense at that point not to intervene. Therefore, Legislators promptly sought intervention less than two months after the May 23rd Order. *See* ECF 70.

Second, Legislators were, and continue to be, convinced of the Secretary's inadequate representation in part because the Secretary has yet to move for dismissal

or reconsideration of her Motion to Dismiss based on the recent Supreme Court decision in *Gill v. Whitford*. 138 S. Ct. 1916 (2018); ECF 70 at App. A ¶¶ 45, 66-67; *see also Jansen*, 904 F.2d at 341 ("From the outset of the litigation, the proposed intervenors knew their interest would be affected. They were not aware, however, that their interest was inadequately represented by the City *until* the City responded to the plaintiffs' summary judgment motion."). The Court in *Gill* held that a plaintiff may only challenge standing in the district in which they reside. *Gill,* 138 S. Ct. at 1931. Applying that holding to this case, it is quite clear that the current Plaintiffs do *not* have standing to challenge reapportionment on a statewide basis. *Id*.

b. Legislators Have a Substantial Legal Interest

Democratic Voters attempt to argue that the Legislators have no substantial legal interest in the current apportionment plan. ECF 78 at 6-11. However, it is the Legislative Intervenors who would be tasked with developing any remedial plan. Despite the Democratic Voters' quips to the contrary, Legislators do, in fact, "maintain that their interests are harmed by doing their jobs," ECF 78 at 8, when, as here, they may be compelled by the Court to repeat a job that is already done.

Furthermore, this is not a case of Legislators merely attempting to intervene to defend a law they support. *See* ECF 78 at 8-9. Instead, this is a case of intervention being sought for conduct that directly impacts the Legislators. The calculus is quite simple; Democratic Voters bring claims of partisan gerrymandering because they

fundamentally believe there are too many Republicans in the State Legislature. What Plaintiffs are really asking for are *less Republican* legislators, which means less people like and including Legislative Intervenors.

c. The Secretary Does Not Adequately Represent Legislators.

Legislators bear the burden of establishing the "adequate representation" factor. *Miller*, 103 F.3d at 1247. This "burden is minimal because it is sufficient that the movant prove that representation *may be* inadequate." *Id*. (emphasis added) (internal quotations and alterations omitted). Democratic Voters claim adequate representation exists because the Legislators and the Secretary of State hold the same "ultimate objective" in defending the 2011 plan. The Democratic Voters, however, either mislead this Court or misread the relevant law. Democratic Voters list three elements to prove inadequacy when the *elements* are actually a list of non-exhaustive individual *factors*. *See e.g., Reliastar Life Ins. Co. v. MKP Invs.,* 565 Fed. Appx. 369, 373 (6th Cir. 2014); *Purnell v. Akron*, 925 F.2d 941, 949-50 (6th Cir. 1991) (describing the *Bradley* list as non-exhaustive factors that can be considered in determining inadequacy). Legislators' reading makes sense in the greater context of this Circuit's jurisprudence. The *Bradley* list, if thought of as elements, would only allow intervention that is *in fact* inadequate and not allow it when there is only the "*potential* for inadequate representation." *See Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (emphasis added). As Legislators have shown, the Secretary of

State's representation is both *in fact* inadequate and certainly has the *potential* to be.

There are several substantive differences between the arguments and strategies of Legislators and the Secretary. First, the Secretary has not challenged the justiciability of partisan gerrymandering claims while the Legislators intend to do so. ECF 70 at App. A ¶ 7. Second, the Secretary has yet to make the Court aware of the Democratic Voters' lack of standing as shown in the Supreme Court's recent decision in *Gill*. 138 S. Ct. at 1916. This Circuit's precedents state that "it may be enough to show that the existing party who purports to seek the same outcome *will not make all of the prospective intervenor's arguments.*" *Miller*, 103 F.3d at 1247 (emphasis added) (citing *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489-99 (9th Cir. 1995)). Democratic Voters instead rely on non-binding precedent from a district court in Kentucky. *See* ECF 78 at 15. This Court should ignore this distraction.

Furthermore, there can be no doubt that even if representation is adequate today, which it is not, it certainly is *potentially* inadequate in the near future. Due to term limits, the current Secretary will no longer be the Secretary at the time of trial. ECF 79 at 2-3. Whether the new Secretary is the Republican candidate or the Democratic candidate is immaterial. The Democratic Voters also rely on distinguishable precedent. In *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005), the operative question was the inadequacy of representation in the merits

phase of a *bifurcated* trial where the proposed intervenor raised issues on remedy. Here the potential for harm is in both phases of a non-bifurcated trial. Therefore, Legislators *are not* and *may not* be adequately represented by the Secretary.

II. ALTERNATIVE RELIEF

If this Court concludes that intervention as of right is not warranted under Rule 24(a) then Legislators should be permitted to participate permissively. Fed. R. Civ. P. 24(b). Also, in fairness and the interest of justice, if the Court concludes that intervention is not warranted in any respect, Legislators should be permitted to participate as Amicus Curiae.

CONCLUSION

For the foregoing reasons, the Motion to Intervene should be granted.

Date: Aug. 2, 2018

Holtzman Vogel Josefiak Torchinsky PLLC
/s/ Phillip M. Gordon
Phillip M. Gordon
Jason Torchinsky
Shawn Sheehy
45 North Hill Drive, S 100
Warrenton, Virginia 20106
P: (540) 341-8800
E: PGordon@hvjt.law
JTorchinsky@hvjt.law
SSheehy@hvjt.law

Clark Hill PLC
/s/ Charles R. Spies
Charles R. Spies
Brian D. Shekell (P75327)
212 E Cesar Chavez Ave.
Lansing, Michigan 48906
P: (517) 3183100
cspies@clarkhill.com
bshekell@clarkhill.com

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all of the parties of record.

Holtzman Vogel Josefiak Torchinsky PLLC

/s/ *Phillip M. Gordon*

Dated: August 2, 2018