IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Ohio A. Philip Randolph Institute, *et al.*, Plaintiffs, vs. **Ryan Smith**, Speaker of the Ohio House of Representatives, *et al.*, Defendants.	Case No.: 1:18-cv-00357-TSB Judge Timothy S. Black Judge Karen Nelson Moore Judge Michael H. Watson Magistrate Judge Karen L. Litkovitz

REPLY IN FURTHER SUPPORT OF MOTION OF REPUBLICAN CONGRESSIONAL DELEGATION, OHIO VOTERS, AND REPUBLICAN PARTY ORGANIZATIONS TO INTERVENE

Intervenor Applicants' personal and organizational interests and rights will be directly impacted by the outcome of this case and they submit this reply brief in further support of their motion for intervention as a matter of right, or, in the alternative, for permissive intervention.

I. Intervenor Applicants' Motion is Timely

Plaintiffs address only two of the five timeliness factors, conceding the other three. First, presumably addressing the first factor—progress of the case—Plaintiffs misleadingly state that the two months from the case filing to the intervention motion represents over 20% of the case. But Intervenor Applicants filed their motion just nine days after Plaintiffs' Second Amended Complaint was filed on July 11, before any responses were due and before Defendants filed their motion to dismiss. (ECF Nos. 37, 42-43). Second, nowhere near 20% of discovery and trial preparation is complete. Discovery has just begun, no experts have been disclosed, and no depositions have been taken or even scheduled. Trial is still seven months away. And Intervenor Applicants are prepared to proceed on the current case schedule.

Second, in addressing the fifth factor, Plaintiffs claim that the expedited schedule here constitutes an unusual circumstance militating against intervention. But nearly all election cases, especially those involving redistricting, proceed on an expedited track.[1] This case is no different. Indeed, in the case of *League of Women Voters of Michigan v. Johnson*, relied upon extensively by Plaintiffs, eight members of Michigan's congressional delegation moved to intervene over two months after the complaint filing, and plaintiffs argued it was untimely. E.D. Mich. No. 17-cv-14148 (ECF Nos. 21 & 37). The three-judge panel disagreed and found the motion was timely. *Id*. at ECF No. 47. No different finding is warranted here.

II. Intervenor Applicants Meet The Legal Requirements For Intervention By Right

A. Intervenor Applicants have a substantial legal interest.

Plaintiffs argue that Intervenor Applicants do not have a substantial interest in this litigation because they do not have a "cognizable interest in the continued packing and cracking of Plaintiffs." (Mem. Opp. 4, ECF No. 55). But that is rhetoric masquerading as legal argument. The relevant question is whether Intervenor Applicants have an interest in the congressional districts challenged in this lawsuit. They do.

Plaintiffs seek a ruling identifying a judicially manageable legal standard to define their right to undiluted votes, holding the current districts unconstitutional under that standard, and adopting a new map compliant with that standard. What that standard is, how it is applied to Ohio's congressional districts, and what map is ultimately deemed compliant will undoubtedly impact Intervenor Applicants' electoral interests. True, that impact is broad, but the problem is of

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[1] Intervenor Applicants also note that two separate lawsuits challenging Pennsylvania's congressional districting plan went through discovery and trial in less than two months, so intervention five months before the discovery deadline and eight months before trial is certainly timely in an elections case.

Plaintiffs' own making. Plaintiffs subjected this political dispute—deciding the "fair" number of Democrats or Republicans to include in a particular congressional district—to judicial scrutiny. They cannot seriously contend that this is a private affair only between themselves and the government defendants they decided to name, seeking only to vindicate their private rights. They want this Court to adjudicate the proper allocation of all political interests of all Ohio voters. In claiming that they alone have an interest in the answer to that question, Plaintiffs are asking for special treatment. Plaintiffs' argument amounts to a claim that they have a legal right to win elections, and no one else has a legal right to get in their way.

The law of intervention favors Intervenor Applicants here. Plaintiffs do not contest that intervention is a right that exists when a non-party "stands to have its interests harmed" by the case, that it is "broadly construed in favor of potential intervenors," and that "close cases should be resolved in favor of recognizing an interest under Rule 24(a)."[2] (App. Mot. 5, ECF No. 43). These principles require that the motion be granted.

1. Voter Applicants[3] have a substantial legal interest in this case.

Plaintiffs demand that this Court increase their electoral influence by giving them a new district plan that they believe will make it easier for them to elect Democratic candidates. Because politics is a zero-sum game, they can only obtain additional influence by taking it away from others—and that means from the (Republican) Voter Applicants. The Voter Applicants have an interest in opposing that effort. As Plaintiffs concede, "Voter Applicants and Plaintiffs share 'the

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[2] Plaintiffs' cases, including *Kirsch v. Dean*, a case about a corporation seeking to intervene in a dispute between two fifty-percent shareholders, and *Providence Baptist Church*, a case about a committee trying to intervene in a case after the committee's purpose had expired, are factually inapplicable and, more importantly, do nothing to change these rules. (Mem. Op. 4).

[3] The term Voter Applicants includes Member Applicants, as each one is a voter in their own district which are challenged in this litigation.

same right' not to have their votes diluted" or concentrated simply because of their political preferences. (Mem. Op. 5). That should end the matter.

Plaintiffs quarrel that Voter Applicants have not "characterized"[4] their rights correctly and insist that "[e]xisting congressional districts will be altered only to the extent that Plaintiffs are able to prove constitutional violations." (*Id.* 4). But no litigant will admit that he is asking for more than the law allows, and, obviously, the need for adversarial proceedings is to provide competing views on *what the law is* because parties often argue for more than they are entitled to receive.

Besides, Intervenor Applicants have characterized Plaintiffs' claims correctly: they want more of their preferred candidates in office, and that means fewer candidates preferred by the Voter Applicants. Since all districts have equal population, Plaintiffs' dilution theory necessarily hinges on the assumed partisan proclivities of the population. Plaintiffs want the districts redrawn to "strengthen" and spread their votes (i.e., make it easier for their side to win), but they can do so only by reconfiguring the districts to weaken the number of votes for others. Whether Plaintiffs are legally entitled to such relief is irrelevant for purposes of this motion; what matters is that their efforts to obtain such relief will affect others, including Voter Applicants.

Finally, Plaintiffs argue that Voter Applicants have no interest different from the public at large. (Mem. Op. 6). If that is so, the Court should dismiss this case now, because it means Plaintiffs lack standing. Their argument is a concession that they have no particularized injury. But Voter Applicants do not have that burden. *See Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (noting that intervention by right under Rule 24(a) is less demanding than standing

[4] This is another reason why intervention is appropriate: without it the Court will be left with Plaintiffs' version of the story alone.

under Article III).[5] Moreover, Voter Applicants' interests are distinct and not subsumed by the public at large. Numerous cases approve voter intervention.[6]

2. Member Applicants have a substantial legal interest in this case.

A majority of courts have found that members of Congress have a personal interest in their district and a right to intervene in a lawsuit when the lines of their district or other aspects of their tenure are challenged. Plaintiffs cynically dismiss this interest as an attempt by members of congress to "dictat[e] the terms of their prospective reelection in 2020." (Mem. Op. 6). But the Member Applicants' interest in their home districts is plain and rooted in a fundamental democratic principle: it is their full time job to represent *all* the residents of their districts. None of the Defendants know and understand these districts better than the members of Congress representing them. Members of Congress expend substantial time, effort and money in order to better understand their constituents' needs and how to best represent them.[7] Members of Congress have ongoing and working relationships with these constituents, and constituent groups, who turn to members of Congress for a variety of needs from ministerial to substantive lobbying. Indeed, "[c]onstituent service encompasses a wide array of non-legislative activities undertaken by

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[5] *See also, e.g.*, *Grutter v. Bollinger*, 188 F.3d 394, 398-99 (6th Cir. 1999); *Blount-Hill v. Bd. of Educ.*, 195 Fed. Appx. 482, 485 (6th Cir. 2006) ("Notably, an intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing.") (internal quotation marks omitted) (quoting *Providence Baptist Church v. Hillandale Comm.*, 425 F.3d 309, 315 (6th Cir. 2006)).

[6] *League of Women Voters of Ohio v. Blackwell*, 235 F.R.D. 388 (N.D. Ohio 2005); *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004); *Sandusky Cty. Democratic Party v. Blackwell*, No. 04-cv-7582 (N.D. Ohio Oct. 7, 2004); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam).

[7] Plaintiffs argue that this investment of time, effort and money is not a "legally cognizable interest" based on one case, issued in April this year in a District Court in Michigan and currently on appeal to the Sixth Circuit. For the reasons detailed in Intervenor Applicants' Memorandum in Support of their Motion to Intervene, this case is not persuasive or binding authority for this Court. (App. Mot. 10 n.2).

Members of Congress or congressional staff, and it is commonly considered a representational responsibility."[8]

Plaintiffs ask this Court to redraw the districts without considering these substantial interests. Plaintiffs insist that since they are not asking to invalidate the use of the 2011 Plan for the 2018 elections, but only the 2020 elections, they are not upsetting the settled interests of members in their districts. (Mem. Op. 9 n.2). Of course they are upsetting settled interests. Redrawing Ohio's congressional districts outside of the regular course, changing incumbent districts, possibly pairing some incumbents and leaving other districts devoid of an experienced incumbent, and summarily divorcing voters from those who have represented them, would break the critical and symbiotic relationship between representatives and the represented. And if Plaintiffs are granted the relief they seek, this relationship will be broken twice in the next four years: the current incumbents will not be elected by those they represent in 2020, based on this case, and those elected in 2020 would not be elected by those they represent in 2022, pursuant to the next redistricting cycle.

Contrary to Plaintiffs' assertions, Member Applicants are not asserting a "right to be re-elected." Rather, they have a substantial legal interest in the most basic of principles in a representative democracy: the ability for representatives to be elected by those they represent. At the very least, this interest is substantial and should be presented to this Court before it makes a decision to redraw any district lines.

Member Applicants also necessarily have a financial interest in the outcome of this

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[8] *See* Casework in a Congressional Office: Background, Rules, Laws and Resources (Jan. 3, 2017), available at https://fas.org/sgp/crs/misc/RL33209.pdf; and Constituent Services: Overview and Resources (Jan. 5, 2017), available at https://fas.org/sgp/crs/misc/R44726.pdf.

litigation. Doing their job well requires unrelenting fundraising efforts that begin the day they are elected to office and continue until they step down or are voted out. These fundraising efforts would be wasted if district lines were changed and a member was paired with another incumbent or moved from a favorable to unfavorable district. This economic interest is sufficient to meet the injury in fact requirements under Article III and therefore significant enough to warrant intervention. *See Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587-588 (5th Cir. 2006) (an injury in fact exists when a candidate's "election prospects and campaign coffers" are threatened.). If the maps are changed, Member Applicants will be required to expend funds to learn the new congressional boundaries and constituents in pursuit of re-election, after spending time and resources on their current districts. Economic injury is a quintessential form of injury. *Barlow v. Collins*, 397 U.S. 159, 163-64 (1970).

For reasons like these, courts have long recognized the "personal interest" a member of Congress has in their office and in any remedy that could adjust their district lines. *See, e.g., Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995) (finding Congresswoman entitled to intervention by right because she had a "direct, substantial, and legally protectable interest," reasoning that "[e]lected officials have personal interests in their office sufficient to give them standing when the district they represent is subject to a constitutional challenge.") (citing *League of United Latin Am. Citizens, Council No. 4434 v. Clements ("LULAC I")*, 884 F.2d 185, 188 (5th Cir.1989) (same as to substantial legal interest in personal capacity for elected official intervenor); *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1569–73 (N.D. Ill.1988) (same as to substantial legal interest in a personal and official capacity for elected official intervenors)). In contrast, two other congresspersons were denied intervention as their districts were not the subject of the challenge and therefore had no more than a generalized interest. *Id.* In this way, *Johnson*

reached the outcome dictated by precedent and supporting intervention here and presciently tracked the discussion of localized interests giving rise to injury in *Gill v. Whitford*, 138 S. Ct. 1929-1931 (2018).

The court in *LULAC I* permitted elected judges to intervene in the case because "[i]n an individual capacity, elected judges arguably have personal interests in their office or equitable interests in the remedy fashioned by the court," as well as "the 'ability to protect their continued tenure.'" 884 F.2d at 188–89 (citing *Williams*, 696 F. Supp. at 1572). The court recognized that any remedy could adjust boundary lines such that a member would be carved out of an incumbent district and placed in a new one, or otherwise cut short their tenure. Member Applicants are current office-holders who were duly elected for a term of office in districts drawn to last one decade. They have a personal interest in ensuring due process with respect to any remedy that could draw them out of their district prematurely.

Indeed, the strength of these interests is sufficient for the higher bar of Article III standing. For example, in *City of Philadelphia v. Klutznick*,[9] a decennial apportionment case, the court determined that elected officials had Article III standing to bring suit based on their personal interests in their offices. 503 F. Supp. 663, 672 (E.D. Pa. 1980); *see also Martinez v. Bush*, 234 F. Supp. 2d 1275, 1287 (S.D. Fla. 2002) (permitting congressional representatives to intervene in mixed racial and political gerrymandering case).

Other cases cited by Plaintiffs do nothing to alter the fact that courts have long held, and

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[9] Plaintiffs characterize this case as holding that "[a] legislative representative suffers no cognizable injury, in a due process sense or otherwise, when the boundaries of his district are adjusted by reapportionment." Opp. 7. But Plaintiffs ignore the remainder of the opinion which unambiguously held that the "aforementioned elected officials" had "have alleged injury in fact sufficient to establish [Article III] standing" in their personal capacities.

continue to hold, that elected officials have a substantial interest, and right to intervene, in cases challenging the lines of their districts. *Ariz. State Legislature* is an Article III standing case and does not address the issue of intervention. 135 S. Ct. 2652, 2664–66 (2015). *Burks* only stands for the proposition that public office is not property. *Burks v. Perk*, 470 F.2d 163, 165 (6th Cir. 1972). Finally, *Corman* represents an outlier decision, not on intervention but on Article III standing, from a non-binding District Court in Pennsylvania and, tellingly, it cites to but does not overturn *Klutznick* which supports intervention here. *Corman v. Torres*, 287 F. Supp. 3d 558, 569 (M.D. Pa. 2018).

Raines found that Article III standing would be established where members were "deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*." *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (emphasis in original) (contrasting claims that would "necessarily damage[] all Members of Congress and both Houses of Congress equally"). Member Applicants here do not assert injuries affecting *all* members of Congress but, rather, seek to vindicate interests particular to their own work in the districts where they and their constituents live. Those interests are substantial legal interests that Member Applicants are entitled to defend in this case.

3. Party Applicants have a substantial legal interest in this case.

If Plaintiff Democrat political clubs, the Young Democrats and the College Democrats, have Article III standing, then certainly the local party organizations seeking to intervene have an even greater substantial interest in this case. Unlike political clubs, the Party Applicants are political party organizations that have statutory responsibilities around election administration, and are charged with assisting with the elections of candidates within their bailiwicks. Thus, not only would the Party Applicants be affected by any "packing" or "cracking" of their supporters as

sought by Plaintiffs, but they would be affected in their duties related to elections of candidates in districts that would be set to change twice in four years.

B. Intervenor Applicants' ability to protect their interest may be impaired in the absence of intervention.

Plaintiffs do not dispute that the standard for the impairment prong is minimal, and that Intervenor Applicants only need to show an "impairment of [their] substantial legal interest ***is possible*** if intervention is denied." *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (emphasis added); *see also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) (holding the burden on the impairment prong is minimal). A ruling in favor of Plaintiffs will likely upend the districts that Member Applicants have faithfully represented for over six years and three (possibly four) election cycles, that Party Applicants have invested substantial time and resources in, and that Voter Applicants have come to know, recognize, and rely upon.

Plaintiffs assert that Intervenor Applicants have mischaracterized their claims in this lawsuit as seeking to enhance their representational power, and that they merely seek a plan that complies with all legal requirements. But Plaintiffs ignore the reality that redistricting is a zero-sum game. Plaintiffs are not satisfied with the construction of the current map and the proportional number of seats held by the two major political parties. If successful, Plaintiffs will certainly seek a remedial map that is more likely to result in additional Democratic candidates being elected to Congress. That in turn has at least the possibility to impair Intervenor Applicants' contrasting interests of electing Republicans. *See Grutter*, 188 F.3d at 399-400 (impairment prong can be satisfied by showing that "to some extent" relief sought would diminish status quo position).

Moreover, if Plaintiffs are successful and new districts are drawn, Member Applicants may be paired into a district with another current member of Congress, losing their incumbency. The new districts may impair the personal interests they have gained in their office. Moreover, any

redrawn districts ***could*** place Voter Applicants into a district where their political and policy views are not as well represented, purportedly diluting their vote just as Plaintiffs claim theirs have been diluted. Finally, new districts may impair Party Applicants organizational activities, placing a greater administrative burden on them by changing the districts twice in a span of four years.

Finally, the precedential effect of an adverse ruling certainly has the possibility to impair Intervenor Applicants' interests. As the Court in *Miller* stated, "elections will come and go" and therefore a "potential intervenor's interest dissipates with each passing day." *Id*. at 1247. If the current districts are found unconstitutional, Intervenor Applicants would lose the ability to litigate the constitutionality of the districts as currently constructed. There will be nowhere for Intervenor Applicants to turn for relief. Intervenor Applicants certainly have met the minimal burden of showing it is possible their interests could be impaired if intervention is denied.

C. Intervenor Applicants' interests are not adequately represented.

Plaintiffs assert that Intervenor Applicants are adequately represented by the Defendants in the case, (Mem. Op. at 11), but that is untrue for at least two reasons.

First, Plaintiffs incorrectly characterize Intervenor Applicants as sharing the same ultimate objective as Defendants. Intervenor Applicants' ultimate objective is to protect their constitutional rights (as the Court may eventually define them) and personal interests in electoral participation. The Defendants, all governmental officers, have as their ultimate objectives a map that protects the public interest as they understand it, and an institutional interest in retaining control over the state's authority to redistrict. That is not the same ultimate objective, even though those objectives happen to align superficially insofar as the Defendants believe the current map protects the public interest and the Intervenor Applicants believe it protects their personal and/or electoral interests. But those objectives are different, and no presumption of adequate representation should apply.

Second, even if Intervenor Applicants seek the same objectives as the Defendants, the burden to overcome a presumption of adequacy – a burden described as "not a particularly heavy one" – can be satisfied where "there is substantial doubt about whether [the intervenor's] interests are being adequately represented by an existing party." *Bds. of Trustees of the Ohio Laborers' Fringe Benefit Programs v. Ford Dev. Corp.*, No. 2:10-cv-0140, 2010 U.S. Dist. LEXIS 86492, at *9 (S.D. Ohio Aug. 20, 2010). As the Sixth Circuit stated in *Jansen*: "'[T]hat there is a slight difference in interests between the [proposed intervenors] and the supposed representative does not necessarily show inadequacy, if they both seek the same outcome. . . . However, interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate.'" *Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (quoting *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967)). "[I]t 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. Moreover, despite Plaintiffs' assertion otherwise, the Sixth Circuit has rejected the notion of an "amplified" presumption when a governmental body represents the interests of the proposed intervenor. *Grutter*, 188 F.3d at 400. Here, Intervenor Applicants' interests are substantially different and cannot be adequately represented.

Plaintiffs miss the substantial differences in interests between state governmental officeholders and Intervenor Applicants that overcome any presumption. Plaintiffs allege vote dilution and seek a new map that enhances their interests compared (at least) to the current map. Governmental defendants rarely if ever adequately represent proposed intervenors' interests in vote-dilution litigation because the governmental interest in a statute and a voter's or elected official's interests in their electoral participation are entirely unrelated.

As the D.C. Circuit explained in *Cleveland Cty. Ass'n for Gov't by People v. Cleveland Cty. Bd. of Comm'rs*, the reason voters' (or representatives') interests in vote-dilution litigation do not align with the government's interest is that "intervenors [seek] to advance their own interests in achieving the greatest possible participation in the political process," whereas the government, "on the other hand, was required to balance a range of interests likely to diverge from those of the intervenors." 142 F.3d 468, 474 (D.C. Cir. 1998) (quoting *Meek v. Metro. Dade Cty., Fla.*, 985 F.2d 1471, 1478 (11th Cir. 1993)); *see also King v. Illinois State Bd. of Elections*, 410 F.3d 404, 409 (7th Cir. 2005) (awarding attorneys' fees to intervenors in vote-dilution case). In fact, the Eleventh Circuit went one step further in *Clark v. Putnam Cty.*, concluding that the interests of the government are directly "adverse" to proposed defendant intervenors in vote-dilution litigation because, "after all, both the plaintiffs and the proposed defendant-intervenor are Putnam County citizens. The commissioners cannot adequately represent the proposed defendants while simultaneously representing the plaintiffs' interests." 168 F.3d 458, 461 (11th Cir. 1999). Accordingly, "it is normal practice in reapportionment controversies to allow intervention of voters ... supporting a position that could theoretically be adequately represented by public officials." *Id.* at 462 n.3 (quoting *Nash v. Blunt*, 140 F.R.D. 400, 402 (W.D. Mo. 1992), summarily aff'd. sub nom. *African Am. Voting Rights Legal Defense Fund, Inc. v. Blunt*, 507 U.S. 1015 (1993)).

Plaintiffs ignore this entire body of precedent. They also ignore *Georgia v. Ashcroft*, where the Supreme Court had no trouble concluding that private minority voters could intervene as of right in a case brought by the Department of Justice under the Voting Rights Act involving allegations of racial vote dilution. 539 U.S. 461, 476 (2003). And that was so even though the DOJ and the U.S. Attorney General agreed with the intervenor that the challenged plan violated the VRA.

Plaintiffs therefore are wrong in contending that the governmental defendants are "charged by law with representing the interests of the absentee." (Mem Op. 1) (quotations omitted). To the contrary, the governmental defendants are not charged—and should not be charged—with assisting the Intervenor Applicants in maintaining any particular type or level of electoral participation. They represent "all citizens," and, even if they take a view in defense of the law, their representation of all Ohio citizens' competing electoral interests, including Plaintiffs', does not adequately represent Intervenor Applicants' particular interests. *Clark*, 168 F.3d at 461–62. Unsurprisingly, Plaintiffs cite *no* vote-dilution cases in their briefing, which therefore provides no insight into the unique dynamics presented in such cases.

Instead, Plaintiffs rely on cases like *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005) and *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015), which have nothing to do with vote dilution or redistricting. Instead, they involved a simple binary question. In *Michigan*, the question was whether tribes had rights to use areas under a treaty, and the proposed intervenor landowners' position was no different from the government on that binary question. 424 F.3d at 443-33. In *Nichol*, the binary question was whether a law would be upheld or struck down. 310 F.R.D. at 399. An alignment of interest between the government and defendant intervenors in a case involving a binary result suggests adequacy of representation.

The rule is different where a dispute is not binary, but rather involves a multiplicity of possible outcomes and competing personal interests among citizens. For example, in *Jansen*, a city and proposed intervenors, city employees and job applicants, all sought to defend the City's use of a racial quota in hiring practices. 904 F.2d at 343. But the shared goal of defending the affirmative action program did not render their interests duplicative because the City's interest was in protecting "its integrity as an employer" whereas the intervenors' interest was in taking personal

advantage of the affirmative-action program—i.e., getting and maintaining their jobs. *Id.* "These differences in interests pose more than a mere disagreement over litigation strategy." *Id.* The same reasoning drove the result in *Purnell v. City of Akron*, which drew a distinction between an estate administrator and its beneficiaries; whereas the administrator desired "to obtain a maximum recovery for the benefit of the *estate*," the beneficiaries wish[ed] to sue…for personal recovery," which—under the governing substantive laws—entailed a "competition" among beneficiaries. 925 F.2d 941, 950 (6th Cir. 1991).

Like the disputes in *Jansen* and *Purnell*, and unlike the dispute in *Michigan*, this vote-dilution case is not amenable to a simple, binary resolution—e.g., either the law will be upheld or it will be invalidated. A vote-dilution case, rather, is a multi-way tug-of war over a fixed set of representational assets: some voters will approve of their representatives, others will not. The case involves "*a range of interests*," *Cleveland Cnty. Ass'n*, 142 F.3d at 474 (quotations omitted), not a binary set of only two outcomes. And, in a *partisan-gerrymandering* dispute, this complexity increases exponentially. Ohio's congressional map, if it is invalidated, will be replaced by any one of a near-infinite number of remedial plans. And, more importantly, the law itself is a blank slate: it is "an unsettled kind of claim [the Supreme Court] has not agreed upon, the contours and justiciability of which are unresolved." *Gill*, 138 S. Ct. at 1934. Indeed, there are a near infinite number of possibilities of what the vote-dilution standard might be.

It is unlikely that the governmental defendants will propose the same standard as Intervenor Applicants. Like the governmental parties in *Jansen*, the governmental defendants here have no obligation to adopt an interpretation of the law that will favor the Intervenor Applicants' interests. And, like the estate administrator in *Purnell*, the governmental defendants have no obligation to maximize the representational interests of Intervenor Applicants' in the necessary tug of war

involved in a vote-dilution case. *See WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996–97 (10th Cir. 2009) ("the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation"). As in *Georgia v. U.S. Army Corps of Engineers*, the legislature's and executive branch's interest "to protect its decision making process," is distinct from the intervenors' interests "in the use" of the electoral system. 302 F.3d 1242, 1259 (11th Cir. 2002).

In addition, the governmental defendants "are undisputedly elected officials, and like all elected officials they have an interest in "remain[ing] politically popular and effective leaders." *Clark*, 168 F.3d at 462 (quoting *Meek*, 985 F.2d at 1478). This means (1) a concern of "the expense of defending the current plan out of [government] coffers," (2) the possibility of a change of heart depending on the political implications of the redistricting litigation, and (3) the possibility of a shift after a new election. *See id.*; *accord Cleveland Cty.*, 142 F.3d at 474. In response, Plaintiffs again cite the entirely irrelevant *Michigan* case that involved none of the political implications inherent in redistricting litigation. The certainty that political actors will behave politically and that this may entail changes in position is not about "unknowable" circumstances. It is a long-recognized facet of redistricting litigation. *See, e.g.*, Robert G. Dixon, Jr., Democratic Representation, Reapportionment in Law and Politics 152–53 (1968) (describing the "breakdown of [the] adversary method in some apportionment cases" resulting from political differences inherent in redistricting). And, at least one, and possibly all three of the remaining governmental defendant officeholders may change before trial in this matter. There is no guarantee that a new elected official will continue to defendant the current map. Indeed, in *League of Women Voters of Pennsylvania v. Commonwealth*, both the Governor and Lt. Governor—both named Defendants—

sided with the petitioners in advocating against the constitutionality of the congressional districting plan. 178 A.3d 737, 790 (Pa. 2018). Intervenor Applicants need not show these scenarios are likely to occur, only that they are possible. *Miller*, 103 F.3d at 1247 (sufficient if representation may be inadequate).

III. Intervenor Applicants Meet The Legal Requirements For Permissive Intervention

Plaintiffs do not dispute that Intervenor Applicants have a "claim or defense that shares with the main action a common question of law or fact." (App. Mot. 5). Nor could they. Rather, Plaintiffs argue that Intervenor Applicants' entry into this case will prejudice its expedited resolution and that Intervenor Applicants' can participate as *amici curiae* instead.

A. Intervention will not prejudice the parties or delay these proceedings.

For many of the same reasons Intervenor Applicants' motion to intervene is timely, allowing intervention will not prejudice the original parties to this case or cause delay. Plaintiffs' assertion that the ordered case management schedule does not leave room for the addition of 16 parties is self-servingly false. The parties have nearly five months to complete written discovery, document production and depositions. Intervenor Applicants have already indicated they plan to abide by the current case schedule and will work to ensure that any discovery they seek of Plaintiffs will not duplicate that of other Defendants.

Similarly, even with Intervenor Applicants' participation, a ten-day trial is more than adequate. Pre-trial motions can be made jointly, and expert witnesses can often be shared. Evidence and witness testimony can be presented through declarations and/or deposition transcripts, and questing of necessary live witnesses, including experts, can be coordinated. Moreover, this Panel can control both the discovery process and structure of trial, including elimination of cumulative evidence to ensure the case proceeds on a timely track.

This is by far not the first or last case, including redistricting cases, involving numerous parties proceeding under an expedited track. For example, in *Agre v. Wolf*, No. 17-4392[10], a case challenging Pennsylvania's congressional districts went from filing through a ***5-day*** trial in just over 60 days. During that extremely expedited timeframe, the parties (over 25 plaintiffs and 5 different defendants) conducted all fact discovery, including written discovery, document productions and privilege logs, and over 20 depositions, as well as discovery related to seven different experts. They also prepared all pre-trial statements, disclosures, and briefing. With five months additional time before trial begins, and an entire extra week for trial, the parties here can certainly work together to present this case in a concise fashion without requiring Plaintiffs to be "highly selective" in their presentation of evidence. (Mem. Op. 19).

The cases relied upon by Plaintiffs declining to permit intervention are inapposite. In *Fletcher v. Lamone*, a group of additional *plaintiffs* sought to intervene in a racial gerrymandering challenge to Maryland's congressional districting plan. No. 11-cv-3220, 2011 U.S. Dist. LEXIS 139306 (D. Md. Dec. 2, 2011). The motion to intervene was filed on December 1, 2011, the same day the Court issued an order setting a bench trial ***less than three weeks*** later on December 20, 2011. *Id*. at *3-4. Permitting intervention less than three weeks before trial is a far cry from the seven months before trial here. In *Michigan*, the trial court denied permissive intervention after finding that proposed intervenors "would need prolonged discovery on the regulatory issues raised," and the Sixth Circuit held that finding was not an abuse of discretion. 424 F.3d at 445. Here, Applicants will not need any prolonged discovery and have indicated they will comply with

[10] Applicants' counsel represented the Speaker of the Pennsylvania House of Representatives in *Agre*. While counsel does not concede that the court provided ample time for discovery and trial in that case, the schedule here does provide adequate time even with Intervenor Applicants' participation.

the discovery deadline.

Finally, if Plaintiffs are concerned about obtaining the relief they seek in time for the 2020 elections, they have nobody to blame but themselves. The challenged districts have been in place since early 2012 and for three election cycles. For reasons only known to Plaintiffs (or their lawyers), they chose not to file this lawsuit until May 2018. Yet Plaintiffs now complain that intervention will delay these proceedings and disrupt the case schedule, even though Intervenor Applicants have indicated no such intention. Intervenor Applicants' interests in participating actively in this lawsuit should not be forestalled because of Plaintiffs' long and inexcusable delay in filing their claims. Plaintiffs' SAC reveals they have at least 13 attorneys working on this case from the ACLU and an American Lawyer Top 100 law firm – nearly one attorney for each proposed intervenor. They can hardly claim they lack the time or resources to prosecute this case with Intervenor Applicants' participation. Intervenor Applicants' substantial interests in the outcome of this case outweigh any minimal prejudice their intervention might cause Plaintiffs.[11]

B. Participating as *amici curiae* will not protect Intervenor Applicants' Interests.

Intervenor Applicants cannot participate adequately in this case as amici curiae. Intervenor Applicants do not seek to participate merely to assist this court in properly interpreting applicable law, but to protect their substantial interests, some of which are the same as those the Plaintiffs seek to purportedly vindicate in this case. Intervenor Applicants may seek to present or develop

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[11] Plaintiffs also mistakenly state that "to the extent Applicants insist that they will not require additional discovery or expert testimony, they make all the more clear that their interests are the same as Defendants." (Mem. Op. 19). Under Rule 24(b), Applicants need not show that their interests are distinct from Defendants. Plaintiffs conflate the requirements of intervention of right, where such a showing is required, with permissive intervention, where Applicants must show a ***common question*** of law or fact.

additional evidence protecting their unique interests that cannot be done as *amici*. For example, it would be patently unfair to allow Plaintiff political clubs to participate fully in this case to present evidence, but to relegate political party organizations to that of *amici* that can only advance legal arguments. Similar unfairness applies to Voter Applicants and Member Applicants, both of whom have interests just as substantial as those of Plaintiffs. And, Member Applicants have a wealth of experience actually running for congressional office and understanding the drivers of voter behavior that are directly pertinent to this litigation, and may well result in a factual presentation distinguishable from that of other parties in this case. Intervenor Applicants should be entitled to participate fully in this case, especially given that this case is still in its infancy.

CONCLUSION

For the foregoing reasons, the Court should grant the Intervenor Applicants' Motion to Intervene as a matter of right and, in the alternative, as permissive intervenors.

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Respectfully submitted,

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Counsel for Intervenor Applicants

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

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