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. RUTH JOHNSON, 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 **VOTERS' OPPOSITION TO MOTION TO INTERVENE BY REPUBLICAN LEGISLATORS**

Joseph H. Yeager, Jr. (IN 2083-49)
Harmony A. Mappes (IN 27237-49)
Jeffrey P. Justman (MN 390413)
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-0300
Fax: 317-237-1000
Jay.Yeager@FaegreBD.com
Harmony.Mappes@FaegreBD.com
Jeff.Justman@FaegreBD.com

Mark Brewer (P35661)
GOODMAN ACKER P.C.
17000 West Ten Mile, Second Floor
Southfield, MI 48075
Telephone: 248-483-5000
Fax: 248-483-3131
MBrewer@goodmanacker.com

Counsel for the Voters

Voters' Opposition to Motion to Intervene by Republican Legislators

The Republican Legislators' Motion to Intervene should be denied. This Court has already denied one motion to intervene brought by a different group of Michigan Republican lawmakers—a group of eight congressmen—and the stage to which this matter has advanced makes it all the more imperative that this second motion be denied.

The Legislators are not entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2) because their motion is untimely, they lack a substantial legal interest in the case that would support intervention, and the named Defendant, Secretary of State Ruth Johnson, is adequately representing any interests they might have in any event. Further, the Court should not exercise its discretion to permit the Legislators to intervene under Fed. R. Civ. P. 24(b) because the significant delay and prejudice to the existing parties that would result outweigh their insubstantial interest in intervention.

For these reasons, and for those set forth in the accompanying brief, the Voters respectfully request that the Legislators' motion be denied.

Respectfully submitted,

Date: July 26, 2018

/s/ Harmony Mappes

Mark Brewer (P35661)
GOODMAN ACKER P.C.
17000 West Ten Mile, Second Floor
Southfield, MI 48075
Telephone: 248-483-5000
Fax: 248-483-3131

MBrewer@goodmanacker.com

Joseph H. Yeager, Jr. (IN Bar No. 2083-49)
Harmony A. Mappes (IN Bar No. 27237-49)
Jeffrey P. Justman (MN Bar No. 390413)
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-0300
Fax: 317-237-1000
Jay.Yeager@FaegreBD.com
Harmony.Mappes@FaegreBD.com
Jeff.Justman@FaegreBD.com

Counsel for the Voters

Certificate of Service

I hereby certify that on July 26, 2018, I caused to have electronically filed the foregoing paper 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/ Harmony Mappes

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. RUTH JOHNSON, 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 **VOTERS' BRIEF IN OPPOSITION TO MOTION TO INTERVENE BY REPUBLICAN LEGISLATORS**

Joseph H. Yeager, Jr. (IN 2083-49)
Harmony A. Mappes (IN 27237-49)
Jeffrey P. Justman (MN 390413)
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-0300
Fax: 317-237-1000
Jay.Yeager@FaegreBD.com
Harmony.Mappes@FaegreBD.com
Jeff.Justman@FaegreBD.com

Mark Brewer (P35661)
GOODMAN ACKER P.C.
17000 West Ten Mile, Second Floor
Southfield, MI 48075
Telephone: 248-483-5000
Fax: 248-483-3131
MBrewer@goodmanacker.com

Counsel for the Voters

Issue Presented

Should this Court grant the motion of Michigan Representatives Lee Chatfield and Aaron Miller to intervene in this matter as of right pursuant to Fed. R. Civ. P. 24(a)(2) or exercise its discretion to permit Representatives Chatfield and Miller to intervene in this matter pursuant to Fed. R. Civ. P. 24(b)?

Controlling or Most Appropriate Authority

Rules:

Fed. R. Civ. P. 24(a)(2)

Fed. R. Civ. P. 24(b)

Cases:

Blount-Hill v. Zelman, 636 F.3d 278, 285 (6th Cir. 2011)

United States v. Michigan, 424 F.3d 438 (6th Cir. 2005)

Jansen v. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990)

Bradley v. Milliken, 828 F.2d 1186 (6th Cir. 1987)

Moore v. Johnson, No. 14-11903, 2014 WL 2171097 (E.D. Mich. May 23, 2014)

I. Introduction

This is the second attempt by a group of Michigan Republican lawmakers to intervene in this case. Eight Republican congressmen moved to intervene on February 28, 2018—at a far earlier stage of this case's development. The Court denied that motion, concluding that the congressmen had failed to demonstrate entitlement to intervene as of right and declining to exercise its discretion in favor of permissive intervention. (*See* ECF No. 47.)[1] In support of its ruling, the Court found that any legitimate interests the congressmen possessed were "generalized" in nature and adequately represented by the named Defendant, Secretary of State Ruth Johnson in her official capacity. (*Id.* at ¶¶ 4–6.) The Court explained that "[i]n light of the complex issues raised by the parties, the need for expeditious resolution of the case, and the massive number of citizens who share the [congressional] Delegation's interest in this litigation, granting the Delegation's motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties." (*Id.* at ¶ 7.)

Now, more than four months later and shortly before discovery is set to close, two Republican members of the Michigan House of Representatives (the "Legislators") have filed their own motion. Many of their arguments are just like those unsuccessfully asserted by the congressmen, and to the extent the interests claimed by the Legislators differ from those the Court has already rejected, those interests are illusory. The most significant change that has occurred, in fact, is the passage of time.

[1] This ruling is currently on appeal to the Sixth Circuit and scheduled to be argued on August 1.

The Legislators' arguments now are no more persuasive than were those of the would-be intervenors back in February, and the interests in avoiding undue delay and prejudice recognized by the Court then have only grown stronger.

The Legislators are not entitled to intervention as of right under Fed. R. Civ. P. 24(a). Their motion is untimely, and they have no separate, protectible interest in the suit; moreover, they have not overcome the presumption that the Secretary adequately represents any interest they may have. And because the Legislators have shown no good reason why justice requires them to participate in this suit, the Court should avoid undue disruption of this critically time-sensitive litigation and deny permissive intervention under Fed. R. Civ. P. 24(b).

II. The Legislators are not entitled to intervene as of right.

A. Standard of Review

The Legislators first seek intervention as of right under Fed. R. Civ. P. 24(a)(2), which provides that "[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." The Sixth Circuit has distilled the Rule 24(a)(2) standard into a four-part test: "(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." *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). The party seeking intervention must satisfy *each* of these criteria or intervention as of right will be denied. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000). The Legislators have satisfied no element of this four-part test.

B. The Legislators' motion is untimely.

The timeliness of a motion to intervene is a question committed to the district court's discretion. *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001). The Sixth Circuit has identified five relevant factors:

> (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.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990). Here, two of these considerations weigh most strongly against timeliness: the Legislators' lack of justification for their lengthy delay in seeking intervention, and the prejudicial impact intervention would cause in this time-sensitive case.

The Sixth Circuit has explained that a bid for intervention is timely only if the proposed intervenors apply to the court "promptly after discovering their interest" in the case. *Blount-Hill v. Zelman*, 636 F.3d 278, 285 (6th Cir. 2011). The Legislators'

suggestion that they have acted promptly here strains credulity. The Voters' impending lawsuit was the subject of considerable public attention even in the months before the Complaint was filed in December 2017.[2] *Cf. Johnson v. City of Memphis*, 73 Fed. App'x 123, 132–33 (6th Cir. 2003) (noting that "newspaper articles can serve as a basis for determining the date which proposed intervenors knew or should have known of their interest in the case") (citing *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 583 (6th Cir. 1982)). The Legislators' interest in this case—whatever that may be—undeniably was apparent in December 2017; indeed, it was apparent enough that a different group of Republican lawmakers, represented by the same counsel, had the information they thought they needed to intervene as early as February 2018. The Legislators have not attempted to justify their seven-month delay in seeking leave to intervene, and they do not contend that anything that has occurred since December 2017 has revealed to them an interest that was previously hidden. *Cf. Tennessee,* 260 F.3d at 594 ("An entity that is aware that its interests may be impaired by the outcome of the litigation is obligated to seek intervention as soon as it is reasonably apparent that it is entitled to intervene.").

The case also has not been idle in these seven months. The parties briefed, and the Court denied, the Secretary's motion to dismiss or stay the action. (ECF Nos. 11, 15, 20, 35.) Members of Michigan's Republican congressional delegation

[2] For example, the *Detroit Free Press* featured an article entitled "Democrats Challenge Gerrymandered Michigan Districts" on January 31, 2017. *See* https://www.freep.com/story/news/politics/2017/01/31/democrats-challenge-gerrymandered-michigan-districts/97254240/.

unsuccessfully sought to intervene. (ECF Nos. 21, 37, 40, 47.) Most significantly, discovery has progressed and now nears its close. (*See* Case Management Order, ECF No. 53.) Both parties have filed their expert reports, the Voters have served dozens of third-party subpoenas, and the parties have exchanged two rounds of discovery requests. Numerous depositions are scheduled within a matter of days.

The Legislators assert that their untimely intervention will impose no serious cost, because trial is "still over seven months away" and there are "two months left to conduct discovery." (ECF No. 70 at 11.) Their arithmetic is faulty. The August 24 deadline for the close of discovery was a mere 43 days away when the Legislators filed their motion, is less than a month away as of this filing, and will likely be at hand by the time the Legislators file a reply and the Court rules. In other words, it will be essentially impossible for the proposed intervenors to participate in any discovery within the timeframe set by the Court's Case Management Order. (*See* ECF No. 53.)

The Court has recognized that time is of the essence in this case. In denying the Secretary's motion to stay in March, the Court noted the need to avoid undue delay because if the Voters succeed on the merits, "a 2020 remedial plan must be in place by no later than March of 2020 to be effective for the November 2020 election." (ECF No. 35 at 2.) When it denied the Republican congressmen's motion to intervene in May, the Court again cited the need for "expeditious resolution" of this case in service of the public interest. (ECF No. 47 at ¶ 7.) What was true in the spring is all the more pressing in the summer, as the close of fact discovery rapidly

approaches: neither the parties nor the public can afford any further delay of an already-tight schedule. Permitting intervention now would be highly prejudicial. *See Blount-Hill*, 636 F.3d at 286–87 (concluding that the delay caused by intervention would be prejudicial where the existing parties and the public had an "interest in the expeditious and efficient disposition" of a lawsuit "seek[ing] to invalidate a significant state statutory scheme").

The Legislators' delay in seeking intervention is both unjustifiable and harmful, and their motion should be denied on that basis alone. *United States v. City of Detroit,* 280 F.R.D. 312, 323 (E.D. Mich. 2012) ("The timeliness of a motion to intervene is a threshold issue[.] . . . If untimely, intervention must be denied.") (citations and quotations omitted).

C. The Legislators do not have a "substantial, legal interest" in the subject of the case that would be impaired by an adverse ruling.

"The second prong of the Rule 24(a)(2) requirements is that the proposed intervenor must have a direct and substantial interest in the litigation. …The interest must be significantly protectable." *Grubbs v. Norris*, 870 F.2d 343, 346 (6th Cir. 1989) (citations omitted); *United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993) (explaining that a "direct, significant legally protectable interest" is required). "In cases like this one, where a group of plaintiffs challenge[s] state legislation, the court should evaluate requests to intervene with special care, lest the case be swamped by extraneous parties who would do little more than reprise the political debate that

produced the legislation in the first place." *One Wisc. Inst., Inc. v. Nichol,* 310 F.R.D. 394, 397 (W.D. Wisc. 2015). Rule 24(a)(2)'s third prong is closely related to the second: if proposed intervenors have a direct and substantial interest in the litigation, they must also show that this interest would be impaired by an adverse ruling. *Miller*, 103 F.3d at 1247.

Here, the Legislators claim to have four interests at stake: (1) their "official conduct" would be impacted by an order requiring the Legislature to draw new maps; (2) they would suffer "economic harm" from the "increasing costs of election and reelection" imposed by an unfavorable ruling; (3) their chances at reelection might be reduced; and (4) they will be "forced to expend significant public funds and resources" to fulfill any remedial orders. (ECF No. 70 at 12.) None of these qualifies.

1. Potential impact on the Legislators' "official conduct" does not support intervention.

The Legislators' first purported interest confuses the Michigan House of Representatives' interest with their own as individuals. They note, correctly, that the Michigan Legislature is responsible for regulating the time, place and manner of Michigan elections and for drawing the state's legislative and congressional districts. (*See id.* at 12–13.) It does not follow, however, that Aaron Miller and Lee Chatfield—no matter how important to the redistricting process the positions they currently hold may be—have a protectible interest in ensuring that the current scheme's constitutionality is upheld. In denying the Republican congressmen's motion to

intervene, the Court affirmed that "[e]lected office does not constitute a property interest." (ECF No. 47 at ¶ 2 (citing *Gamrat v. Allard,* No. 1:16-cv-1084, 2018 WL 1324467, at *5 (W.D. Mich. Mar. 15, 2018)).) Representatives Miller and Chatfield have no entitlement to the positions they currently occupy, even if they purport to intervene in their official capacities. For this reason, the sole case they cite in support of their asserted interest, *Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187 (1972), is distinguishable. In *Beens* and decisions like it, courts have sometimes permitted *legislative bodies* to intervene in suits affecting their purported interests. *See* 406 U.S. at 194 (permitting intervention by the Minnesota Senate); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 87 (D.D.C. 1998) (permitting intervention by the United States House of Representatives, as an entity, because "a legislative body has a judicially cognizable interest in matters affecting its composition"). These decisions provide no authority for these two *individuals'* claimed interest in intervention.

The Legislators also fail to explain how an unfavorable ruling would impair their purported interests as Speaker Pro Tempore and chair of the Elections and Ethics Committee, respectively. Assuming they still hold their current positions when any remedial order from this Court is issued, they can hardly maintain that their interests are harmed by being ordered to do their jobs. What they are really saying, of course, is that they favor the current Plans and would prefer they not be undermined. But an ideological rooting interest in legislation—even when asserted by those

responsible for enacting it—is insufficient to support intervention. *See One Wisconsin*, 310 F.R.D. at 397 ("Rule 24 is not designed to turn the courtroom into a forum for political actors who claim ownership of the laws they pass. The legislators' interest in defending laws they supported does not entitle them to intervene as of right.").

2. The Legislators' purported interests in avoiding the expense of campaigning in a new district or diminished reelection chances are illusory.

The Legislators contend that they have an economic stake in this lawsuit because if new districts are drawn, they will "necessarily need to expend additional funds to adapt and engage with new constituents." In a similar vein, they claim that their interests in securing reelection will be harmed if their district boundaries are redrawn in a more politically unfavorable manner. (ECF No. 70 at 14–15.)

But Representatives Chatfield and Miller are both term-limited; neither, assuming he is reelected in 2018, can run again in the 2020 elections. *See* Mich. Const. Art. IV, § 54.[3] Because the Voters seek a remedy in time for the 2020 election cycle, and have expressly disclaimed any relief related to the upcoming 2018 elections, (*See* Complaint (ECF No. 1) at ¶ 26; Pls.' Resp. to Mot. to Dismiss (ECF No. 15) at 16 ("[The voters] seek a remedy for the 2020 election, not the 2018 election.")), Chatfield and Miller have no interest in constituent relations or reelection prospects that could possibly be affected by the outcome of this suit.

[3] Both men were elected to their seats in 2014, meaning that their three allotted terms will expire in January 2021. *See* "Lee Chatfield, District 107," http://gophouse.org/representatives/northernmi/chatfield/; "Aaron Miller, District 59" http://gophouse.org/representatives/southwest/miller/.

The Legislators attempt to sidestep the emptiness of their asserted interests by representing that they speak on behalf of their potential successors as well as themselves. (ECF No. 70 at 14–15.) This hardly helps matters. Rule 24 does not protect remote, speculative interests. *See Ungar v. Arafat*, 634 F.3d 46, 51–52 (1st Cir. 2011) ("An interest that is too contingent or speculative . . . cannot furnish a basis for intervention as of right."); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* 308 F.R.D. 39, 47–49 (D. Mass. 2015) (ruling that potential future applicants lack a protectible interest in a college's admissions standards). In a functioning democracy, the future holders of the Legislators' seats or leadership positions might hold different views—they might even be Democrats. No matter their ideology, any successors will be, by definition, new. They will lack the type of settled expectations regarding constituent relations or electoral prospects that the current Legislators seek to protect. The twin interests the Legislators assert with respect to elections in 2020 and in the years to come are nonexistent.

3. The Legislators have no interest in the potential expenditure of Michigan state funds.

Finally, the Legislators argue that if the Court grants the Voters relief, they will be required to "expend significant legislative funds and resources towards the extraordinary costs of developing apportionment plans" and will have to devote more of the legislative calendar to redistricting. (ECF No. 70 at 15–16.) They do not, of course, claim that they will be forced to pay these projected additional costs out of

their own pockets; nor do they assert that the offices of the Speaker Pro Tempore or the Chair of the House Elections and Ethics Committee will somehow bear individualized responsibility for any new costs. The "legislative funds" in question will no doubt come from the State's coffers, and any interest that Representatives Miller and Chatfield have in those funds is one they share with the rest of Michigan's taxpayers. The Court already noted in denying the previous motion to intervene that "generalized" interests do not warrant intervention, and the Legislators' purported interest in avoiding legislative waste is just such a generalized interest. (*See* ECF No. 47 at ¶ 4 (rejecting the proposed intervenors' interest as "not materially distinguishable from the generalized interest shared by all citizens").)

D. The Secretary adequately represents any interests the Legislators may have.

To secure intervention as of right, the Legislators must demonstrate that the existing parties to the litigation do not "adequately represent" their interests. *See Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). As discussed above, the Legislators have no legal interest in this case that stands in danger of being impaired if they are not permitted to intervene. But even if they did have such an interest, intervention is unwarranted here because any interest is adequately represented by the Secretary.

The Legislators argue first that the Secretary cannot adequate represent them because she has a different interest in defending the suit, plays a different constitutional role in the redistricting process, and may differ from them in legal

strategy. Additionally, they contend that intervention should be permitted because the Secretary's position might change hands in the future. The first argument fails because it ignores—and offer no grounds to rebut—the well-established presumption of adequacy that the Secretary enjoys. The second argument fails because it would require the Court to indulge in unwarranted speculation.

1. The Legislators fail to overcome the presumption that the Secretary adequately represents their interests.

The Sixth Circuit recognizes "the presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit . . . have the same *ultimate objective*." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (emphasis added; citation omitted); *see also United States v. Michigan*, 424 F.3d 438, 443–44 (6th Cir. 2005). This test is applied at a high level of generality: a proposed intervenor and existing party share the same "objective" as long as they seek the same relief. *See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012), *reversed on other grounds, Schuette v. Coal. to Defend Affirmative Action,* 134 S. Ct. 1623 (2014) (concluding that proposed intervenors and Michigan attorney general "share[d] the same ultimate objective: the validation of [the statute]"); *Moore v. Johnson*, No. 14-11903, 2014 WL 2171097, at *2 (E.D. Mich. May 23, 2014) (finding that because Secretary Johnson herself shared "the exact same objective in this litigation [as the proposed intervenors]—i.e., securing a holding from the Court that the [challenged state statute] is constitutional," the presumption of adequacy applied).

The presumption in favor of adequate representation is even more difficult to overcome when the existing party is a government official charged with defending a state's law as part of her official duties. "[W]hen a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government. It is after all the government that, through the democratic process, gains familiarity with the matters of public concern that lead to the statute's passage in the first place." *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013); *see also Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (holding, in the context of a challenge to a federal statute, that the "presumption of adequacy is nowhere more applicable" than where the government is defending a statute's constitutionality) (citation omitted).

The Secretary carries a presumption of adequacy here because she and the Legislators indisputably have the same objective: upholding the Plans against the Voters' constitutional challenge. *See Coal. to Defend Affirmative Action*, 701 F.3d at 491. The Sixth Circuit has held that, in the face of this presumption, a motion for intervention fails as long as "(1) no collusion is shown between the existing party and the opposition; (2) the existing party does not have any interests adverse to the intervener; and (3) the existing party has not failed in the fulfillment of its duty" to represent. *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000); *Bradley*, 828 F.2d at 1192.

The Legislators neither acknowledge nor attempt to overcome this presumption. They do not argue that the Secretary, a fellow Republican, is colluding

with the Voters' challenge to the statute she is charged with administering. The Legislators do claim that they have interests that differ from those of the Secretary, in that she is charged with defending the Plans' constitutionality by virtue of her office, while they (unlike the Secretary) would be involved in implementing a remedy if the Court orders one. (ECF No. 70 at 17.) But they do not, and cannot, properly contend these interests are adverse or deny that they share a common "ultimate objective" with the Secretary. *Cf. Coal. to Defend Affirmative Action*, 701 F.3d at 491. The Legislators' and the Secretary's ultimate objective is the same—to uphold the Plans against the Voters' constitutional challenges.

Finally, the Legislators do not attempt to show that the Secretary has failed to pursue that shared objective diligently or that she has taken any actions inconsistent with its achievement. This is not a case where the existing defendant's litigation conduct signals divergent goals or a desire to pursue a half-hearted defense. *Cf. Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 788 (6th Cir. 2007) (concluding that inadequate representation existed where the "procedural history" indicated that the defendants' and intervenors' divergent approaches "could significantly alter the enforcement and ultimately the interpretation" of the constitutional provision); *Ne. Ohio Coal. for Homeless & SEIU, Local 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (holding that intervenor had shown inadequate representation where defendant had stated its desire not to appeal an unfavorable ruling).

The closest the Legislators come to questioning the diligence of the Secretary's defense is to insist that they, unlike she, would assert the non-justiciability of the constitutional claims as an affirmative defense. (ECF No. 70 at 18–19 (citing Proposed Answer Aff. Def. ¶ 7).) There are two problems with this argument. First, the distinction the Legislators seek to draw is largely meaningless, because the Secretary has not forgone an argument that the Voters' claims are non-justiciable. Her motion to dismiss asserted only lack of standing under Rule 12(b)(1), and nothing prevents her from asserting non-justiciability in a subsequent dispositive motion—unsuccessful though the Voters believe that argument would be. Second, such differences in "litigation strategy" do not demonstrate inadequate representation anyway. *See Ark Encounter, LLC v. Stewart,* 311 F.R.D. 414, 425 (E.D. Ky. 2015) ("A mere disagreement over litigation strategy . . . does not, in and of itself, establish inadequacy of representation.") (quoting *Bradley*, 828 F.2d at 1192).

2. The Legislators' speculation regarding a future Secretary's adequacy of representation is unavailing.

The Legislators also assert that the Secretary is an inadequate representative of their interests because a future secretary of state might disagree with her. "There also exists a significant possibility," they say, "that the newly elected Secretary of State would be less inclined to defend the 2011 apportionment" than the current Secretary. (ECF No. 70 at 18.)

Basing a claim for intervention on such speculation is directly counter to the Sixth Circuit's teaching. In *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005), the Sixth Circuit reiterated that the adequate-representation inquiry must focus on the *present* rather than hinging on proposed intervenors' worries about issues that may arise in the future. The Court explained:

> Rather than identifying any weakness in the state's representation in the current phase of the proceedings, the proposed intervenors seem more concerned about what will transpire *in the future* . . . . While the proposed intervenors may be legitimately concerned about these future issues, they are not now, and possibly never will be, before the district court.

424 F.3d at 444 (emphasis in original). The same limiting principle applies here. The Legislators have shown no defect in the Secretary's pursuit of their shared objective of upholding the constitutionality of the Plans, and speculation about future Secretaries is no substitute. *See id.* at 445.

The Legislators cite three cases in support of their assertion that they should be permitted to intervene just in case a future secretary of state declines to defend the Plans. None actually stands for the proposition they now advance. In *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016), the Supreme Court noted that the Arizona attorney general took a different position on the constitutionality of that state's redistricting commission on appeal than his predecessor had before the district court. *Brat v. Personhuballah*, 883 F.3d 475, 478 (4th Cir. 2018), is similar. There, Virginia official-capacity defendants declined to appeal a district court decision striking down a congressional district as a racial gerrymander, leaving a group of

Republican defendant-intervenors to continue the fight (unsuccessfully). Finally, Chief Justice Roberts noted, in conjunction with a denial of certiorari, that newly elected state officials had moved to dismiss a certiorari petition that the previous regime had filed. *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

The Legislators extract the wrong lesson from these cases. Courts have recognized that when an existing defendant *does* in fact become adverse to the interest of proposed intervenors, intervention *may* be warranted, subject to other facts in the record and the other Rule 24 factors.[4] But the fact that intervention may be warranted when party shifts actually do occur only buttresses the conclusion that there is no right of intervention here and now.

III. The Legislators should not be granted permissive intervention.

In the alternative, the Legislators urge the Court to exercise its discretion to permit intervention under Fed. R. Civ. P. 24(b). Their argument for permissive intervention likewise fails because intervention will cause undue delay and prejudice the existing parties without serving any legitimate, countervailing interest.

[4] In such cases, intervention is considered timely if sought promptly after the intervenor knows or reasonably should know of "significant" obstacles to the adequacy of existing representation. *See Clarke v. Baptist Mem'l Healthcare Corp.*, 427 Fed. App'x 431, 434–35 (6th Cir. 2011). In *Jansen v. City of Cincinnati*, for instance, a timely motion to intervene was filed after the existing defendant's arguments in response to summary judgment "alerted the proposed intervenors that their interest was not being adequately protected." 904 F.2d 336, 341 (6th Cir. 1990).

The starting point in the permissive-intervention analysis is Rule 24(b)(1)(B), which states that a court "may" permit anyone with a "claim or defense that shares with the main action a common question of law or fact" to intervene. Even for putative intervenors who share common claims or defenses, permissive intervention is discretionary, and the Rule requires that a court "exercise[e] its discretion" by "consider[ing] whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *Bradley,* 828 F.2d at 1193.

The Legislators' request for permissive intervention merely reprises the arguments they raised in support of their claim for intervention as of right, and it fails for the same reasons. First and most crucially, the Secretary adequately represents whatever interest the Legislators have in this case. The Court denied the Republican congressmen permissive intervention on that basis, and it should exercise its discretion to do so again. *See NAACP v. New York*, 413 U.S. 345, 368 (1973) (affirming order denying permissive intervention in part because the proposed intervenors' claim of inadequate representation was "unsubstantiated"); *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 759 (6th Cir. 2018) (affirming order denying permissive intervention in part because the putative intervenor's position was "being represented" and thus "counsel[ed] against granting permissive intervention"); *Coalition To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007) (affirming order denying permissive intervention in part because proposed intervenors were adequately represented by existing parties).

The Court also noted when it denied the Republican congressmen's request for permissive intervention in May that adding new defendants "could create a significant likelihood of undue delay and prejudice to the original parties." (ECF No. 47 at ¶ 7.) Now, after the parties have exchanged expert reports and less than a month from the close of discovery, the threat of prejudice and undue delay has only grown. This suit involves a matter of grave public importance—one that cannot be resolved unless it proceeds to trial in a timely fashion. (*See* ECF No. 35 at 3 (noting, in denial of Secretary's motion to stay, the "risk that this case will not be resolved" in time if it is unduly delayed).) The Court is well within its discretion under Rule 24(b) to deny permissive intervention to avoid this type of prejudice to the named parties' interests. *See Vassalle v. Midland Funding, LLC*, 708 F.3d 747, 760 (6th Cir. 2013) (affirming order denying permissive intervention, even though claims were common with the original parties, because intervention "would unduly delay the adjudication of the original parties' rights"); *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889, 891 (6th Cir. 1978) (per curiam) (affirming order denying permissive intervention because it was not an abuse of discretion to conclude that intervention would "unduly delay" the proceedings).

IV. Conclusion

For the reasons set forth above, the Legislators' motion to intervene should be denied.

Respectfully submitted,

Date: July 26, 2018

/s/ Harmony Mappes

Mark Brewer (P35661)
GOODMAN ACKER P.C.
17000 West Ten Mile, Second Floor
Southfield, MI 48075
Telephone: 248-483-5000
Fax: 248-483-3131
MBrewer@goodmanacker.com

Joseph H. Yeager, Jr. (IN Bar No. 2083-49)
Harmony A. Mappes (IN Bar No. 27237-49)
Jeffrey P. Justman (MN Bar No. 390413)
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-0300
Fax: 317-237-1000
Jay.Yeager@FaegreBD.com
Harmony.Mappes@FaegreBD.com
Jeff.Justman@FaegreBD.com

Counsel for the Voters

Certificate of Service

I hereby certify that on July 26, 2018, I caused to have electronically filed the foregoing paper 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/ Harmony Mappes