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

OHIO A. PHILIP RANDOLPH INSTITUTE, *et al.* Plaintiffs, v. RYAN SMITH, Speaker of the Ohio House of Representatives, *et al.* Defendants.	No. 1:18-cv-00357-TSB-KNM-MHW Judge Timothy S. Black Judge Karen Nelson Moore Judge Michael H. Watson Magistrate Judge Karen L. Litkovitz

PLAINTIFFS' OPPOSITION TO MOTION OF REPUBLICAN CONGRESSIONAL DELEGATION, OHIO VOTERS, AND REPUBLICAN PARTY ORGANIZATIONS TO INTERVENE

Plaintiffs submit this memorandum in opposition to the motion of a collection of ten Republican members of Congress, two county Republican parties, and four individual Republican voters (respectively the "Elected Applicants," "Party Applicants," and "Voter Applicants", and collectively, "Applicants") to intervene in this matter pursuant to Federal Rule of Civil Procedure 24. Mot. to Intervene, Doc. No. 42.

Applicants do not have a right to intervene under Rule 24(a). Applicants mischaracterize the injury for which Plaintiffs seek redress. Only by describing that injury as a demand for "enhanced representation" are they able to insist that they have the same interests as Plaintiffs. None of the Applicants can claim a direct and substantial legal interest in this lawsuit that is distinct either from the generalized interest of the public or that of Defendants. The Elected Applicants' contentions are particularly improper. They allege a "personal" interest in being able to control the contours of their districts. That interest is not legally cognizable. Indeed, its

very assertion demonstrates why judicial review of congressional redistricting is so critical to our democracy.

Applicants also fail to demonstrate why Defendants' representation of their interests is wanting, especially when Defendants are zealously defending precisely the same status quo that Applicants seek to protect: Ohio's existing congressional districts. Applicants have failed to set forth any credible reason to believe that their interest in safeguarding the existing congressional districts will not be adequately represented by the Defendants in this case.

Applicants' arguments for permissive intervention are also unavailing. Intervention is not cost free. Recognizing the importance of resolving this dispute in time to apply a remedy for the 2020 election, the Court adopted an expedited case schedule. It provides for fact discovery to be largely completed by the end of December 2018 and a ten-day trial beginning on March 4, 2019. Intervention will burden that schedule with additional requests for production, additional interrogatories, additional witnesses, additional experts and, most likely, additional motions. And Applicants will consume precious trial time. Further, they will not contribute to a resolution of the merits given the vigorous advocacy of Defense counsel. But what they can achieve is the derailment of this case.

ARGUMENT

Applicants assert a right of intervention under Federal Rule of Civil Procedure 24(a). Alternatively, they seek permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). Neither of these bases for intervention is justified here.

I. Intervention as of Right Should Be Denied.

Federal Rule of Civil Procedure 24(a) provides for a right of intervention only where a party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the

movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Under the four-factor test adopted by the Sixth Circuit, a party asserting a right to intervene in a pending matter pursuant to Rule 24(a) bears the burden of establishing: (1) the motion to intervene is timely; (2) the applicant has a substantial legal interest in the subject matter of the case; (3) the applicant's ability to protect its interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the applicant's interest. *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007). The Applicants cannot meet this test.

While Plaintiffs recognize that the motion to intervene occurred near the pleading stage and during initial discovery, it must be noted that this case has far from an ordinary schedule. The two months that passed between the filing of this case and Applicants' Motion to Intervene represents over 20% of the total time from filing until completion of trial. The fifth factor under *United States v. Tennessee* for evaluating the timeliness factor is "the existence of unusual circumstances militating against or in favor of intervention." 260 F.3d 587, 592 (6th Cir. 2001). The expedited schedule here is such an "unusual circumstance[] militating against . . . intervention." But, regardless of the timing of the motion, Applicants have failed to satisfy the remaining three factors of the test. Neither the Voter nor Party Applicants have put forth the kind of "direct and substantial legal interest" that distinguishes them from the general public, while the Elected Applicants have failed to even put forth any legally cognizable interest. None of the Applicants demonstrate any impairment to their ability to protect their interest in the absence of intervention. Applicants have not shown, because they cannot show, that Defendants are unable to adequately represent their interests. They fail to overcome the presumption that the

State of Ohio can adequately represent itself and also pursue its shared objective with Applicants of preserving the existing congressional districts.

A. Applicants' Proffered Interests Either Are Illegitimate or Are Indistinguishable from the Interests of the Defendants or Public.

Courts in this Circuit "generally require an applicant for intervention to have a direct and substantial interest in the litigation, such that it is a real party in interest in the transaction which is the subject of the proceeding." *Kirsch v. Dean*, No. 17-5650, 2018 WL 2068691, at *10 (6th Cir. May 3, 2018) (interal citations and quotation marks omitted); *see also Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005).

Applicants repeatedly mischaracterize Plaintiffs' alleged harm and the relief sought in order to shore up their interests in intervention. Applicants have no legally cognizable interest in the continued packing and cracking of Plaintiffs. Existing congressional districts will be altered only to the extent that Plaintiffs are able to prove constitutional violations. A new remedial map entered by the Court would not be constructed to produce "enhanced representation" for Plaintiffs, Applicant's Mem. in Supp. of Mot. to Intervene, Doc. No. 43 at PageID#381, but to remedy the particular harms caused by the current districting. And if such a violation is proven, none of the Applicant groups have a right to the composition of the districts as they are. Nor do Applicants have a distinct interest in a remedial map, as an interest in fair districts for all is a generalized interest shared by all citizens, and does not by itself confer the right to intervene.

Scrutiny of the interests alleged by each of the Applicant groups here—Voter, Elected and Party—reveals that they either are not cognizable or are indistinguishable from those of the Defendants and the general public.

1. Voter Applicants Have No "Direct and Substantial" Interest That Distinguishes Them from the Public at Large or Defendants.

Unable to articulate a "direct and substantial" interest for themselves that is distinguishable from the generalized interest shared by all citizens, Voter Applicants instead misrepresent Plaintiffs' claim in this case as seeking "a right to win" and assert that same right for themselves. Doc. No. 43 at PageID#387. But the "right to win" is neither Plaintiffs' theory of harm under the vote dilution theory, nor the legal interest Plaintiffs seek to vindicate in this lawsuit. Plaintiffs' claims instead relate to their placement in districts where their vote carries less weight or consequence than they would under a map that was not drawn to privilege partisan outcomes. *See* Second Am. Compl., Doc. No. 37 at ¶¶ 22–38, 91, 93, 95–97, 100, 103, 104, 109, 120, 163–64. While Voter Applicants and Plaintiffs do share "the same right" not to have their votes diluted, unlike Plaintiffs, Voter Applicants have not had that right violated. Therefore, they have no "direct and substantial" interest in this lawsuit just because the Plaintiffs do.

Moreover, the cases Applicants cite as supporting Voter Applicants' right to intervene are either not authoritative or involve fact patterns in which the voter intervenors were able, unlike those here, to articulate distinct interests from the Defendants and the public at large. *See* Doc. No. 43 at PageID#387–88. As an initial matter, *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam), offers scant support for Voter Applicants' claim of intervention as of right. In that matter, after the plaintiffs failed to file an opposition to the motion to intervene, the district court granted the motion in a summary, one-sentence order. *Sandusky Cty. Democratic Party v. Blackwell*, No. 04-cv-7582 (N.D. Ohio Oct. 7, 2004), ECF No. 12. Thereafter, intervention was not contested on appeal, with the Sixth Circuit issuing a *per curiam* decision merely noting in a footnote that intervention had been permitted below. *Sandusky Cty. Democratic Party*, 387 F.3d at 570 n.2.

The other cases cited in favor of Voter Applicants' right to intervene involved proposed intervenors who sought to address interests that were not subsumed by the interest of the parties to the lawsuit. In *League of Women Voters of Ohio v. Blackwell*, the court declined to consider whether intervention as of right was warranted. 235 F.R.D. 388, 389 n.1 (N.D. Ohio 2005). In allowing for permissive intervention, however, the court observed that the prospective intervenor alleged issues with in-person electronic voting machines, while plaintiffs' claims centered on absentee voting procedures. *Id.* at 390. And in *Miller v. Blackwell*, plaintiffs challenged the process governing pre-election challenges to voter registration. 348 F. Supp. 2d 916 (S.D. Ohio 2004). The defendants were the state officials who were to hold hearings regarding such challenges and sought to defend their procedures. *Id.* at 918. The intervenors, by contrast, "ha[d] filed pre-election voter eligibility challenges . . . and wish[ed] to see those challenges through to a resolution." *Id.* at 918–19 & n.3. The court determined that the proposed intervenors had shown a distinct interest based on their pending eligibility challenges. Unlike in these cases on which Applicants rely, Voter Applicants have failed to put forth either an interest that is distinct from the Defendants or the public. Their interest is in preserving the Ohio congressional map as it is. While they may have different personal motivations driving this interest, the actual underlying interest is plainly the same as Defendants.

2. Members of Congress Have No Cognizable Personal Interest in Preserving their Districts or their Office.

The Elected Applicants assert a personal interest in their office and "continued incumbency," apparently on the theory that—once elected—members of Congress enjoy a "direct and concrete interest" in dictating the terms of their prospective reelection in 2020. Doc. No. 43 at PageID#388. Relatedly, the Elected Applicants point to their past efforts to obtain the

support of voters in their existing districts to suggest that these "settled interests" would be disrupted by the present action. *Id.* at PageID#390. These are not legally cognizable interests.

The suggestion that elected officials enjoy a personal, legal interest in the composition of the districts that have not yet elected anyone to represent them flies in the face of fundamental democratic principles. Thus, the Supreme Court has repeatedly recognized that "the core principle of republican government [is] that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal citation and quotation marks omitted); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J., concurring). Indeed, far from affirming the right of elected officials in their personal interest in maintaining existing district boundaries, the Court has upheld efforts to "check legislators' ability to choose the district lines they run in." *Ariz. State Legislature*, 135 S. Ct. at 2675.

Not surprisingly, courts have also long rejected the view that elected officials enjoy a legal interest in reelection to public office. *See Taylor v. Beckham*, 178 U.S. 548, 577 (1900) ("The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such . . . In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."); *cf. Raines v. Byrd*, 521 U.S. 811, 821 (1997) (in considering Line Item Veto Act, that if someone sought to oust a member of Congress *during a duly elected term*, this could constitute an interest to which they are personally entitled); *see also Burks v. Perk*, 470 F.2d 163, 165 (6th Cir. 1972); *cf. City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) ("A legislative representative suffers no cognizable injury, in a due process sense or otherwise, when the boundaries of his district are adjusted by reapportionment.").

Under strikingly similar circumstances, another three-judge court in this Circuit very recently rejected an effort by members of Congress to intervene in opposition to a challenge to Michigan's congressional districts as an unconstitutional partisan gerrymander. Order Denying Mot. to Intervene, *League of Women Voters of Mich. v. Johnson* ("*LWV-Michigan*"), No. 17-cv-14148 (E.D. Mich. Apr. 4, 2018), ECF No. 47. In a footnote, Applicants note the existence of *LWV-Michigan* but attempt to diminish its persuasiveness. Doc. No. 43 at PageID#389 n.2. To be sure, since the applicants in *LWV-Michigan* did not include county political parties and individual voters, the precise holding in *LWV-Michigan* does not reach the Voter and Party Applicants here. But as to Elected Applicants, the court in *LWV-Michigan* specifically rejected the suggestion that members of Congress maintain a legal interest in retaining their office. *LWV-Michigan*, at 1–2.

In none of the non-binding authorities cited by Applicants to shore up elected members' "personal interest" in their office did a court hold that elected officials had a right of intervention thanks to a "personal interest" in their office. Doc. No. 43 at PageID#388–89. *League of United Latin American Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 188-89 (5th Cir. 1989), rests its reasoning as to this point on dicta in a Texas State Supreme Court case about a property interest in the face of a Takings Clause claim, and *Williams v. State Board of Elections*, 696 F. Supp. 1563, 1571–72 (N.D. Ill. 1988), considers enjoining an election for which candidates had already been nominated, declaring offices vacated mid-term, or truncating the terms of the sitting judges at issue.[1] Neither of these have persuasive force. Indeed, in *Clements*, 884 F.2d at 188-

[1] These are the cases on which *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995)—the other case cited by Applicants, Doc. No. 43 at PageID#388–89—rests its reasoning.

89, cited in Doc. No. 43 at PageID#389, the Fifth Circuit affirmed the denial of intervention as of right to elected judges hoping to intervene in their official capacity in a lawsuit challenging the method of electing judges.

And in addition to *LWV-Michigan*, more recent court cases have recognized that current case law "strongly suggests that a legislator has no legally cognizable interest in the composition of the district he or she represents." *Corman v. Torres*, 287 F. Supp. 3d 558, 569 (M.D. Pa. 2018). As such, the Elected Applicants have demonstrated no cognizable interests supporting their intervention in this action.

The "settled interests" that Elected Applicants have invented from the "considerable time and money" investments they have made in their districts are also not legally cognizable interests. Doc. No. 43 at PageID#390. In denying members of Congress's motion to intervene, the *LWV-Michigan* court rejected these same rationales on the ground that the interests are "not materially distinguishable from the generalized interest shared by all citizens." *LWV-Michigan* at 2. Indeed, one might consider the "settled interests" described by Elected Applicants to be apt descriptions of an elected official's job function, which includes "invest[ing] considerable time and money building coalitions of supporters in their districts, learning their districts, serving the needs of their constituents," and necessitates "raising and spending money on electioneering activities." Doc. No. 43 at PageID#390.[2] That members of Congress have done their job in the past does not give them a legally cognizable interest in seeing the borders of the district in which

[2] Elected Applicants assert that these "settled interests" would be "upset by a hasty reconfiguration of their district lines." Doc. No. 43 at PageID#390. Perhaps if Plaintiffs sought a remedy that interrupted an existing election cycle or sought to remove them from a term of office, this assertion might have more traction. Plaintiffs intentionally have not, so the Elected Applicants' own argument demonstrates its weakness applied to the facts at hand.

they might plan to run in future elections unchanged.[3] And neither does Elected Applicants' fear of a speculative remedial map that pairs two or more of them against each other in one district suffice as a legally cognizable interest. *Id*.

3. Party Applicants Have Asserted No Legally Cognizable Interests in Existing Districts.

The Party Applicants allege a range of "interests" that they contend warrant intervention, from their preference for Republican candidates to the inconvenience of having districts redrawn within a two-year period. Doc. No. 43 at PageID#390–91. Similar to the invented "interests" of Elected Applicants in reaping gains from the "investment" they have made in their districts, Party Applicants do not provide any legal authority that recognizes their interest in not having to "invest considerable time and expense learning and adapting to new congressional districts." Doc. No. 43 at PageID#391. And having to invest similar efforts for the new Ohio congressional map produced by the 2021 redistricting cycle, *id.*, certainly does not give Party Applicants any "direct and substantial" interest beyond those of the general public.

B. Applicants' Ability to Protect Their Interest is not Impaired Absent Intervention

Under this prong of the test, the Court asks whether a would-be intervenor can show that impairment of its substantial legal interest is possible if intervention is denied. Doc. No. 43 at PageID#391. Even if Applicants are right that the burden of proving this prong is "minimal," *id.* at PageID#392, they have not proved what they need to carry that burden. Applicants base their fears that their "asserted interests will be compromised" upon "possible" misuse of "this Court's

[3] Throughout, Elected Applicants talk of their interest as though their holding office is a continuing foregone conclusion, as opposed to something that is re-decided every two years by the electorate. That they hold office in their current two-year term does not mean that they have a continuing right to that same office in the future.

equitable powers." *Id.* at PageID#391. Once again, Applicants mischaracterize Plaintiffs' claims in this lawsuit as seeking to "enhance Plaintiffs' representational power at the expense of others' power." *Id*. Not so. Plaintiffs seek "a congressional districting plan that complies with the United States Constitution and all federal and state legal requirements." Doc. No. 37 at PageID#338 ¶ F. For this Court to order a remedial map that achieves "partisan gerrymandering in [Plaintiffs'] favor," Doc. No. 43 at PageID#391, producing "enhanced representation" for Plaintiffs, *id*. at PageID#381, and giving "voters of a certain party . . . *greater* interest than [] others in obtaining judicial recourse for federal constitutional privileges," *id*. at PageID#395, would go against the very theory of liability this Court has to find in order to be in the position of ordering remedial maps at all.

C. Defendants More Than Adequately Represent Any Interests Applicants May Have in this Action.

To intervene as of right, Applicants must demonstrate that "the parties already before the court cannot adequately protect the [applicants'] interest." *Granholm*, 501 F.3d at 779. Thus, even assuming Applicants possess cognizable and distinct legal interests, those interests are more than adequately represented by Defendants in this case.

1. Applicants Have Not Refuted the Presumption of Adequacy of Representation Given the Identity of Objectives Shared by the Applicants and the Governmental Defendants.

"[A]pplicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit." *United States v. Michigan*, 424 F.3d 438, 443–44 (6th Cir. 2005). In that case, the State of Michigan sought a declaration that certain Tribes no longer had rights to use certain areas under a treaty. Private property owners, who also opposed the Tribes' use, sought to intervene, contending that the state was unable to properly advocate for their distinct interests. The Sixth Circuit found that "[t]he

relief requested by the proposed intervenors and the State of Michigan in their respective pleadings is nearly identical" and denied intervention. *Id.* at 443–44. *See also Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN) v. Regents of Univ. of Michigan*, 701 F.3d 466, 490–1 (6th Cir. 2012) (dismissing intervenor from case after intervenor's interests became aligned with those of the Defendant because intervenor could no longer overcome the presumption of adequacy of representation), *rev'd sub nom. on other grounds Schuette v. BAMN*, 572 U.S. 291 (2014); *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) ("Nor is their objective in this case any different from that of the attorney general: both want to see Wisconsin's election law upheld.").

Indeed, such a presumption is "amplified" where, as here, "the representative is a governmental body or officer charged by law with representing the interests of the absentee . . . . Where official policies and practices are challenged, it seems unlikely that anyone could be better suited to defend than the government department involved and its officers." *Blount-Hill v. Zelman*, No. 3:04-cv-197, 2009 WL 10679607, at *3 (S.D. Ohio June 30, 2009) (citing *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3rd Cir. 1976)).[4] *See also Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013) ("[W]hen a statute comes under attack, it is difficult to conceive of an

[4] Outside of contexts where the proposed intervenor seeks the same objective as a governmental representative party to the action, the applicant must still meet his burden of demonstrating inadequate representation by showing (1) "collusion between the representatives and an opposing party," (2) "pursuit by the representative of an interest adverse to the interests of the proposed intervenor," or (3) "a representative's failure in the fulfillment of his duty." *Reliastar Life Ins. Co. v. MKP Investments*, 565 F. App'x 369, 373 (6th Cir. 2014) (internal citations, quotation marks, ellipses omitted). Applicants have made no such showing in seeking to intervene in this action.

entity better situated to defend it than the government."); *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007). In such circumstances, the government representative "is presumed to adequately represent [the proposed intervenors'] interests unless there is a showing of gross negligence or bad faith." *Ligas*, 478 F.3d at 774.

Here, Applicants share the same ultimate objective as each of the Defendants. Applicants request intervention in order to "oppose the relief that Plaintiffs seek," Doc. No. 43 at PageID#393, an objective identical to that which Defendants are actively and fervently pursuing. *See, e.g.*, Mot. to Dismiss, Doc No. 46 at PageID#448 ("All of plaintiffs' claims should be dismissed with prejudice."). The Court need look no further: Defendants adequately represent Applicants' interests, and therefore, Applicants have no right to intervention.

Applicants rely on a single case, *Northeast Ohio Coalition for the Homeless v. Blackwell* ("*NEOCH*"), 467 F.3d 999 (6th Cir. 2006), to support its assertion that "adequacy of representation cannot be presumed simply because the proposed intervenor seeks the same ultimate result as an existing defendant." Doc. No. 43 at PageID#392. Unlike the Applicants and Defendants here, however, the parties in *NEOCH* plainly did "not have 'the same ultimate objective'" as the prospective intervenors: defendant Secretary of State's "primary interest is in ensuring the smooth administration of [] election[s]," while the intervenor "State and General Assembly have an independent interest in defending the validity of Ohio's laws and ensuring that those laws are enforced." *NEOCH*, 467 F.3d at 1008. The divergent interests in *NEOCH* were particularly stark given that defendant Secretary of State did not want to appeal a Court order while the intervenor—the Attorney General—did. *Id*.

A case decided by this Court where intervention was granted, notably not cited by Applicants, further illustrates the kind of difference in ultimate objectives that gives rise to a

right to intervene. In *In re. 2016 Primary Election*, the Court granted intervention to local Boards of Elections after it ordered the defendant Secretary of State to keep polling locations open later than scheduled on Election Day due to the fact that the Boards specifically had responsibilities for implementing the Court's order. No. 1:16-mc-5, 2016 WL 1392498, at *1–2 (S.D. Ohio Apr. 8, 2016) (Black, J.).[5] The Boards were chiefly responsible for "the more practical concerns about implementation and costs" of election administration, found the order "difficult or impossible to implement," and planned to argue on appeal that similar federal court orders should be issued only in rare circumstances. *Id*. The Boards also had to bear any "financial burden" of the order and take the "blame" from "confused or unhappy voters." *Id*. at *2. These "substantial legal interests" were "distinct from the Secretary of State's interests" in the "smooth and fair administration of the election across the state." *Id*. Such distinct interests, however, are absent here. The implementation of any remedial order in this case will fall on Defendants, not Applicants. Moreover, Applicants have not identified a single objective of the Defendants that diverges from Applicants' objectives. Applicants share the same ultimate objective as Defendants in this case because they both seek to preserve the current boundaries defining congressional districts in Ohio, thus locking in an unconstitutional partisan gerrymander. Because they have failed to rebut the presumption, their interests are therefore adequately represented in the present action.

[5] In addition, this intervention was sought in a case seeking an emergency order on Election Day. Unlike the instant case, there were no other litigating parties who were even going to reply, much less be prejudiced, by the intervention granted weeks after the emergency relief. *In re. 2016 Primary Election*, No. 1:16-mc-5, 2016 WL 1392498, at *1–2 (S.D. Ohio Apr. 8, 2016) (Black, J.).

2. Defendants Are Zealously Litigating This Case.

Applicants have not alleged that Defendants are litigating this case inadequately. Nor could they. Defendants have lined up the combined forces of the Attorney General's office and the Ogletree, Deakins, Nash, Smoak & Stewart P.C. law firm (which has litigated numerous voting rights cases for Republican parties). As Ohio's Chief Elections Officer, per Ohio Rev. Code § 3501.04, Defendant Secretary of State Jon Husted has a history of strongly defending Ohio's election laws. *See, e.g.*, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018); *NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) (same); *Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014).

Defendants are litigating this case with vigor. They have brought a motion to dismiss on the grounds of standing, justiciability, and laches. *See* Doc. No. 46. They have asserted their desire to depose every Plaintiff, thereby pursuing at least twenty-five depositions. They have served numerous document requests, including seeking to discover the source of all funding for this lawsuit, served substantially more interrogatories than have Plaintiffs, and variously objected to Plaintiffs' discovery requests, including on relevance grounds.

3. Applicants' Purported Distinct Motivation Does Not Demonstrate Inadequate Representation by Defendants.

Like the private property owners in *Michigan*, 424 F.3d 438, Applicants claim that they have an "independent interest" from the Defendants such that the presumption that Applicants' interests are already represented does not apply. Doc. No. 43 at PageID#393. This assertion distills to the contention that Applicants possess different motivations than the Defendants in preventing Plaintiffs from prevailing on the merits. Applicants, they allege, are motivated by the fact that their personal political goals are advanced by the current map, whereas the Defendants are motivated by their obligations as public officials to defend the map. They incorrectly claim

such differences in personal motivations demonstrate that they do not "share the same ultimate objective" as the Defendants. *Michigan*, 424 F.3d at 443–44.

As noted above, where proposed intervenors and defendants share the same objective and seek the same relief, intervention should be denied. Even where a difference in motivation may lead to a difference in litigation strategy, intervention has been denied where a party and the proposed intervenors share a common objective and seek the same relief. Thus, in *Ohio v. Environmental Protection Agency* ("*EPA*"), the court denied intervention to the Michigan Farm Bureau, which sought to intervene in a suit initiated by the States of Ohio, Michigan, and Tennessee against the Environmental Protection Agency. 313 F.R.D. 65 (S.D. Ohio 2016). The court explained that "even if the Court accepts that Plaintiffs oppose the Clean Water Rule primarily 'for reasons of state sovereignty and federalism' and that the Farm Bureau's interests 'are unique to Michigan's extensive farming industry,' the Farm Bureau and the existing Plaintiffs still share the same ultimate goal of enjoining the Clean Water Rule's application." *Id*. at 69–70 (internal citations and alterations omitted). The court held, "[i]n sum, the distinctions between Plaintiffs and the Farm Bureau resemble a dispute over litigation strategy, not a difference in interests capable of casting substantial doubt on the adequacy of Plaintiffs' representation." *Id*. at 70. *See also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation."). In this case, Applicants do not even

attempt to argue that their legal arguments or strategies diverge from that of the Defendants. Their position is therefore even weaker than that of the proposed intervenors in *EPA* or *Milliken*.[6]

4. Speculation Regarding the Actions of Potential Future Defendants is Insufficient to Rebut the Presumption that Applicants' Interests are Adequately Represented.

Apparently conceding that their asserted interests are sufficiently represented by the Defendants, Applicants argue instead that, by the time the trial is held, new defendants could be substituted into the case, and those defendants might have interests that diverge from Applicants' interests. Specifically, Applicants assert that the "composition, leadership, priorities, and interest(s) of the Secretary of State in office in 2019, and those of the Houses of the General Assembly as it will be constituted in 2019, are unknowable." Doc. No. 43 at PageID#394.[7] These "unknowable" circumstances, Applicants argue, might, one day, justify intervention.

Applicants' argument about these "unknowable" circumstances is entirely foreclosed by *Michigan*, 424 F.3d 483. In *Michigan*, 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

[6] The absence of divergent interests is apparent on the face the Applicant's brief supporting their motion to intervene, which mirrors the arguments presented by Defendants' in their motion to dismiss. *Compare* Doc. No. 43 at PageID#387 ("No malapportionment claim has been asserted here . . . Plaintiffs' claim boils down to a claim of a right to representation by congressional representatives who share their policy and political views."), *with* Doc. No. 46 at PageID#466 ("This is not a malapportionment case . . . [it is not enough that] plaintiffs here have been unable to vindicate their partisan preference."). For Plaintiffs' response to these arguments, see Plaintiffs' Opposition to the Motion to Dismiss, Doc. No. 54.

[7] Notably, this argument is equally applicable to the interests pressed by Elected Applicants: whether the Elected Applicants' particular purported interests in this litigation will persist beyond the 2018 elections is simply "unknowable" (unless, of course, they believe that the gerrymandered map guarantees the outcome of the 2018 elections).

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). Such are the circumstances here, proving the asserted grounds for intervention unavailing.

Having failed to overcome the presumption that their interests are adequately represented by Defendants, who have demonstrated every intention of zealously defending Ohio's currently districting scheme, Applicants have not shown that they may intervene as of right in this action.

II. Permissive Intervention is Inappropriate.

Applicants also request permissive intervention under Rule 24(b). The court has discretion to allow intervention if the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). And in exercising this discretion, the "court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id*. § (b)(3). In making determinations regarding permissive intervention, the court "balance[s] undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *Michigan*, 424 F.3d at 445. Plaintiffs oppose Applicants' intervention under Rule 24(b) for all the reasons set out above, and for two additional reasons.

A. Adding 16 Additional Parties Will Prejudice the Expeditious Resolution of this Case

Adding 16 additional parties—who will only echo the positions held by Defendants—will prejudice the orderly litigation of this case. The court has placed this case on an expedited schedule, critical to Plaintiffs' relief, and while Applicants claim they are willing to abide by that schedule, the entry of 16 additional parties into this case will substantially increase the likelihood of delay. Because of the parties' need for expedition, the ordered case management schedule does not leave room for the addition of 16 parties, who will propound their own discovery

requests, own experts, take depositions, and need to be deposed. And 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.

In addition, the court has directed that the trial last no longer than ten days, which will require coordinated efforts among the parties already involved to be highly selective and condense the presentation of evidence.[8] Sixteen additional parties—making motions, raising objections, offering arguments, questioning witnesses, and seeking to enter their own evidence and testimony—will undoubtedly require a trial longer than 10 days.

Under similar circumstances, courts have routinely declined to permit intervention. *See, e.g.*, *Fletcher v. Lamone*, No. RWT 11CV3220, 2011 WL 6097770, at *3 (D. Md. Dec. 5, 2011) (in an apportionment case, "[a]llowing [prospective intervenors,] whose claims are already adequately represented by Plaintiffs to intervene would likely delay proceedings that must be conducted expeditiously"); *see also Michigan*, 424 F.3d at 445 (affirming denial of Rule 24(b) intervention where the district court "had already established a schedule for discovery and trial" and believed intervention would delay that schedule and therefore prejudice the original parties).

B. Applicants Could Less Intrusively Participate as *Amici*

Additionally, Plaintiffs oppose permissive intervention because Applicants can sufficiently participate in this case as *amici curiae*. As the Voter Applicants "wish to participate in this lawsuit to assist this court in properly interpreting the applicable law," Doc. No. 43 at

[8] *See* July 20, 2018 Hr'g Tr. at 9:19–23, Doc. No. 44 (The court explained that "at the end of the tenth day we're going to adjourn . . . We'll be able to spend a bunch of time coordinating how we're going to get the evidence in in those days, perhaps even with a timed trial presentation of some sort.").

PageID#387–88, this is a role well suit to *amici*. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 471, 477 (6th Cir. 2000) (finding "right to participate as amici curiae is both meaningful and adequate" for applicants with same "ultimate goal" as party but who intend to make distinct arguments). If this court eventually determines that Applicants need "a venue to raise any unique arguments that they develop," this could be appropriate. *EPA*, 313 F.R.D. at 72. And it would avert "the complications and delay associated with adding" 16 parties to this case. *Id.*

Courts in this Circuit in similar circumstances have adopted this approach. *See EPA*, 313 F.R.D. at 72 (S.D. Ohio 2016) (denying intervention to three applicants); *see also Milliken*, 828 F.2d at 1194 (6th Cir. 1987) (affirming the denial of Rule 24(a) and 24(b) in part because "the district court has already taken steps to protect the proposed intervenors' interests by inviting [their counsel] to appear as amicus curiae in the case"); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975) (affirming the denial of a motion for permissive intervention, noting that if the proposed intervenor "accepts the District Court's invitation to participate in the litigation as an amicus curiae," it would afford the organization "ample opportunity to give the court the benefit of its expertise").

CONCLUSION

Applicants have failed to meet their burden of demonstrating that their participation in this action is necessary to protect a cognizable legal interest warranting intervention as of right, and permissive intervention is inappropriate. Accordingly, Applicants' motion should be denied.

August 3, 2018

Respectfully submitted,

/s/ Freda J. Levenson, trial attorney

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CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that Plaintiffs' Opposition to the Motion to Intervene was served upon all counsel of record in this case via ECF.

/s/ Freda J. Levenson
Trial Attorney for Plaintiffs