RECORD NO. 18-1946

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF MICHIGAN; ROGER J. BRDAK; FREDERICK C. DURHAL, JR.; JACK E. ELLIS; DONNA E. FARRIS; WILLIAM "BILL" J. GRASHA; ROSA L. HOLLIDAY; DIANA L. KETOLA; JON "JACK" G. LASALLE; RICHARD "DICK" W. LONG; LORENZO RIVERA; RASHIDA H. TLIAB,

Plaintiffs-Appellees,

v.

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

Defendant,

and

REPRESENTATIVE LEE CHATFIELD, in his official capacity as Speaker Pro Tempore of the Michigan House of Representatives, and REPRESENTATIVE AARON MILLER, in his official capacity as Chairman of the Elections and Ethics Committee of the Michigan House of Representatives,

Proposed Intervenors-Appellants.

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

OPENING BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Appellants certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. Appellants are two individual legislators in the Michigan House of Representatives.

By: /s/ *Jason Torchinsky*
Attorney for Appellants
Aaron Miller and Lee Chatfield

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES and RULES

CONSTITUTIONS

STATEMENT REGARDING ORAL ARGUMENT

Proposed Legislative Intervenors-Appellants respectfully request oral argument because, in addition to the briefs and record on file, oral argument would assist this Court in reaching its determinations. Fed. R. App. P. 34(a).

JURISDICTIONAL STATEMENT

Plaintiffs' Complaint asserts violations of the First and Fourteenth Amendments to the U.S. Constitution. Therefore jurisdiction is proper pursuant to 28 U.S.C. § 1331; 28 U.S.C. §§ 1343(a)(3)-(4); 28 U.S.C. § 1357; 28 U.S.C. § 2284, and 42 U.S.C. § 1983. Since this is a challenge to both a statewide congressional and legislative apportionment, a three-judge court was empaneled pursuant to 28 U.S.C. § 2284(a). *See* Fed. R. App. P. 28(a)(4)(A).

This Court has jurisdiction over denials of intervention. *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1244 (6th Cir. 1997). In the alternative, this Court has jurisdiction under the *Purnell* exception to the collateral order doctrine. *See, e.g.*, *Purnell v. Akron*, 925 F.2d 941, 944 (6th Cir. 1991); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987). The three-judge district court below denied Proposed Legislative Intervenors' Motion to Intervene both as of right and permissively, which prevents the Legislators from entering the case in any respect. *See* Order Denying Intervention (ECF No. 91) (Page ID# 2059-65). Therefore, this Court has jurisdiction. *See* Fed. R. App. P. 28(a)(4)(B).

This appeal is timely. The Notice of Appeal was filed with the District Court on August 20, 2018, only six days after intervention was denied. *See* Fed. R. App. P. 4(a)(1)(A) (notice of appeal must be filed within 30 days of order appealed from); *see also* Fed. R. App. P. 28(a)(4)(C).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Under Federal Rule of Civil Procedure 24(a)(2), did the three-judge district court commit an error of law when it denied intervention as of right to the Proposed Legislative Intervenors?
2. Under Federal Rule of Civil Procedure 24(b), did the three-judge district court abuse its discretion when it denied permissive intervention to the Proposed Legislative Intervenors?

STATEMENT OF THE CASE

On December 22, 2017, the League of Women Voters, Roger J. Brdak, Frederick C. Durhal, Jr., Jack E. Ellis, Donna E. Farris, William "Bill" J. Grasha, Rasa L. Holliday, Diana L. Ketola, Jon "Jack" G. Lasalle, Richard "Dick" W. Long, Lorenzo Rivera and Rashida H. Tlaib filed a Complaint seeking declaratory and injunctive relief alleging that the current legislative and congressional apportionment plans are unconstitutional because there are too many Republicans in both delegations. Complaint for Declaratory and Injunctive Relief, Dec. 22, 2017 (ECF No. 1) (Page ID# 1-34).

Plaintiffs assert claims under 42 U.S.C. §§ 1983, 1988 and the First and Fourteenth Amendments to the United States Constitution. Specifically, Plaintiffs contend that by continuing to implement the current apportionment Plans, Defendant Secretary of State has impermissibly discriminated against Plaintiffs as "likely Democratic voters" in contravention of the Equal Protection Clause of the Fourteenth Amendment, and unreasonably burdened Plaintiffs' right to express their political views and associate with the political party of their choice in contravention of the First Amendment. Plaintiffs seek to enjoin the further use of the current district lines in the upcoming congressional and state legislative elections scheduled for 2020.

Representative Lee Chatfield, in his official capacity as Speaker Pro Tempore of the Michigan House of Representatives, and Representative Aaron Miller, in his official capacity as Chairman of the Elections and Ethics Committee of the Michigan House of Representatives, each a Member of the Michigan Legislature (collectively, "Legislators," "Legislative Intervenors," or "Appellants"), filed their Motion to Intervene on July 12, 2018, under well established Supreme Court and Sixth Circuit precedent. Legislators' Motion to Intervene (ECF No. 70) (Page ID# 1204-24).

The named Defendant below, Ruth Johnson, in her official capacity as the Michigan Secretary of State (or "Defendant"), concurred in the Legislators' Motion to Intervene.

On August 14, 2018, the three-judge district court panel denied Legislators' Motion to Intervene in a six page order, most of which was dedicated to an inexplicable separation of powers finding. Order Denying Intervention (ECF No. 91) (Page ID# 2059-65). Subsequent to that Denial, and Legislators' timely filed Notice of Appeal (ECF No. 96) (Page ID# 2079), eight congressmen were granted permissive intervention by this Court after it determined that the District Court abused its discretion in denying the congressmen's intervention. Legislators now appeal the District Court's denial of their Motion for Intervention as of right.

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's denial of Legislators' Motion to Intervene, just as it did for the intervening congressmen, because the Legislators must be granted intervention as of right or permissively. Legislators properly appeal the District Court's denial of intervention because it is an appeal from a collateral order. A denial of a motion to intervene as of right under Rule 24(a)(2) is immediately appealable.

The District Court erred in denying Legislators' Motion to Intervene because the motion met all elements to intervene as of right in this Circuit. The motion was timely as it was filed not long after the Answer and the Order Denying Legislative Privilege. The Legislators also have a substantial interest in the litigation because, as state legislative representatives, their unique financial, representational, and

constitutional rights are impacted. These interests are not, cannot, and will not be adequately represented by either the newly named congressional defendants or the Secretary of State.

Accordingly, the district court erred in denying Legislators' Motion to Intervene and Legislators respectfully request this Court enter a judgment allowing for immediate intervention as of right, or alternatively, to permit permissive intervention.

ARGUMENT

I. THIS APPEAL IS PROPERLY BROUGHT IN THIS COURT.

a. The Denial of Intervention is an Immediately Appealable Collateral Order.

The District Court's denial of Legislators' Motion to Intervene is properly before this Court.[1] "It is fairly well established that denial of a motion to intervene as of right, i.e. one based on Rule 24(a)(2), is an appealable order." *Purnell*, 925 F.2d at 944; *see also Neroni v. Hubbard*, 1990 U.S. App. LEXIS 21986 (6th Cir. 1990); *League of Women Voters of Mich.,* No. 18-1437, 2018 U.S. App. LEXIS

[1] This Court, rather than the United States Supreme Court, has jurisdiction since this is not an appeal from an order "denying interlocutory or permanent relief . . . where such order rests upon resolution of the merits of the constitutional claim . . . ." *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975); *League of Women Voters of Mich. v. Johnson,* No. 18-1437, 2018 U.S. App. LEXIS 24684, *6 (6th Cir. Aug. 30, 2018) (finding appellate jurisdiction in related case is proper in this Court and not the Supreme Court).

24684, *5-6 ("[a]n order completely denying intervention is immediately reviewable by way of an interlocutory appeal." (quoting *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989)). The collateral order exception to the final judgment rule "recognizes that a limited class of prejudgment orders is sufficiently separate from the underlying dispute that immediate appeal should be available." *Stringfellow*, 480 U.S. at 375. Therefore, "[t]he denial of a motion to intervene under Fed. R. Civ. P. 24(a) is immediately appealable as a collateral matter." *Midwest Realty Mgmt. v. City of Beavercreek*, 93 Fed. Appx. 782, 784 (6th Cir. 2004).

The District Court denied Legislators' Motion to Intervene as of right and permissively. Order Denying Mot. to Intervene, ECF No. 91 (Page ID# 2059-65). This Order prevented the Legislators from becoming a party in *any respect*. *See Stringfellow*, 480 U.S. at 377. Therefore, the district court's Order Denying Intervention is an immediately appealable order under the collateral order doctrine.

II. LEGISLATORS SHOULD BE GRANTED INTERVENTION AS OF RIGHT.

a. Legal Standard/Standard of Review.

Intervention as of right is required when an intervenor "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). "Rule 24 should be broadly construed in favor

of potential intervenors." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell*, 925 F.2d at 950); *see also Miller,* 103 F.3d at 1246. To effectuate this broad construction, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (quoting *Miller*, 103 F.3d at 1247). A proposed intervenor must establish the following four factors to be granted intervention as of right:

> (1) the application must be timely; (2) the applicant must have a substantial legal interest in the subject matter of the case; (3) the applicant's ability to protect their interest may be impaired absent intervention; and (4) no current party adequately protects the applicant's interest.

Coal. to Defend Affirmative Action v. Granholm, 501 F.3d 775, 779 (6th Cir. 2007) (quoting *Grutter*, 188 F.3d at 397-98)).

State legislators are permitted to intervene in reapportionment litigation as a matter of course. *See, e.g.*, *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) ("[T]he senate is an appropriate legal entity for the purpose of intervention and, as a consequence, of an appeal in a[n] [apportionment] case [as] is settled by our affirmance of *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964). ."); *Karcher v. May*, 484 U.S. 72, 81 (1987) (intervention and standing were appropriate for two presiding officers of the New Jersey Legislature in their official capacities until such time as they were no longer members of the legislature); *cf. Ohio A. Philip Randolph Inst., v. Smith*, No. 1:18-cv-357 (S.D. Ohio Aug. 16, 2018) (allowing intervention of incumbent members of congress).

On appeal, the timeliness is typically reviewed for an abuse of discretion. *See Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). However, when the district court fails to make any factual findings as to timeliness, it is reviewed *de novo*. *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) ("Although our consideration of the timeliness of an application to intervene is ordinarily tempered by deference to the district court, we have consistently applied a *de novo* standard to the issue where, as here, the district court failed to make any factual findings in this regard."). The other three factors of the intervention as of right analysis are reviewed *de novo*. *Grubbs,* 870 F.2d at 345; *see also Stringfellow*, 480 U.S. at 381-82, n.1 (Brennan, J., concurring)).

b. <u>Legislators' Motion to Intervene Was Timely.</u>

"The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001) (quoting *Jansen v. Cincinnati*, 904 F.2d 336, 340 6th Cir. 1990)). The Sixth Circuit has outlined five factors to determine if a motion to intervene is timely:

> (1) the stage of the proceeding; (2) the purpose of intervention; (3) the length of time between when the applicants knew or should have known of their interest and subsequently moved to intervene; (4) prejudice that any delay may have caused the parties; and (5) the reason for any delay.

Jansen, 904 F.2d at 340 (citing *Grubbs*, 870 F.2d at 345).

This Court reviews timeliness *de novo* since the District Court made no findings as to timeliness. *See, e.g.*, *Blount-Hill*, 636 F.3d at 283. In the context of all relevant circumstances, the Legislators satisfy all five timeliness factors.

(1) The Stage of the Proceeding[2].

When analyzing timeliness, "[t]he mere passage of time—even 30 years—is not particularly important . . . [i]nstead, the proper focus is on the stage of the proceedings and the nature of the case." *United States v. Detroit*, 712 F.3d 925, 931 (6th Cir. 2013).

Timeliness is calculated from the time intervention was sought. *See Jansen*, 904 F.2d at 340-41 (using as a benchmark the date the proposed intervenors filed their motion to intervene); *see also League of Women Voters of Mich.,* No. 18-1437, 2018 U.S. App. LEXIS 24684, *11 (6th Cir. Aug. 30, 2018) (using where "the case stood . . . when the [party] moved to intervene" as the basis for its permissive intervention analysis). "Although the point at which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive." *Mich. Ass'n.*

[2] This analysis assumes the case below is proceeding according to the May 9, 2018 Case Management Order. However, this Court's recent holding in a related appeal on behalf of eight members of Michigan's congressional delegation calls into question the continued validity of that Order. *See League of Women Voters of Michigan*, No. 18-1437, 2018 U.S. App. LEXIS 24684, *11-12 (6th Cir. Aug. 30, 2018) ("We fully recognize that allowing the Congressmen to intervene at this stage will *require* the district court to adjust the discovery and dispositive motion deadlines in place. And perhaps the trial, currently set for February 2019, will have to be pushed back as well.") (emphasis added).

for Retarded Citizens v. Smith, 657 F.2d 102, 105 (6th Cir. 1981) (quoting *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)).

The District Court had taken only minimal substantive actions by the time Legislators moved to intervene. *See Grubbs*, 870 F.2d at 346 (finding intervention during the remedial phase was timely); *cf. Tennessee*, 260 F.3d at 593-94 (holding that resolution of all substantive issues weighs strongly against intervention). Intervention was sought by Legislators only a month after the Answer was filed by Defendant, *see* Answer, filed May 30, 2018 (ECF No. 59) (Page ID# 1005-47), when there were still 43 days left in the discovery period, over two months before summary judgment motions were due, and over seven months left before trial. Case Mgt. Order (ECF No. 53) (Page ID# 939-41). Intervention was timely, since, at the time intervention was sought, this matter was still in its early stages.

The district court also recognized the potential for intervention *at a later time* by Legislators. In its Order denying intervention without prejudice, the court stated that Intervenors could "file a second motion to intervene if the executive abandons its participation in this matter." Order Denying Intervention (ECF No. 91) (Page ID# 2059-2065). Since the District Court implied that intervention would be timely at a later date, it stands to reason that Legislators' current Motion is timely now.

The District Court also stated that Legislators' intervention was "premature." Order (ECF No. 91) (Page ID# 2061). Although this was reasoned in the context of

the "inadequacy of representation" analysis, the simple fact remains that the Motion to Intervene cannot, on the one hand be premature, and on the other be untimely. While, as has been stated, the District Court made no findings as to timeliness, that court's assertion that the motion was "premature" finds backing neither in the record nor in fact.

(2) The Remaining Timeliness Factors: The Purpose of Intervention, When Legislators Knew Their Rights Were Impacted, The Prejudice that any Delay may have Caused the Parties, and the Reason for any such Delay.

"[T]he 'purposes of intervention' prong of the timeliness element normally examines *only* whether the lack of an earlier motion to intervene should be excused, given the proposed intervenor's purpose." *Stupak-Thrall*, 226 F.3d at 479 n.15 (emphasis in original). In their Motion, Legislators set forth several protectable interests that are impacted by this litigation. *See* discussion of interests *infra* at 13-20.

While Legislators knew their rights would be impacted when this lawsuit was filed, Legislators did not know their rights would not be adequately protected by the Secretary of State or the District Court until the District Court's order effectively waiving legislative privilege. Order Granting in Part and Denying in Part Non-Party Movant's Motion to Quash (ECF No. 58) (Page ID# 985-1004) (hereinafter, Legislative Privilege Order).

On May 23, 2018, just a week before Defendant's Answer was filed, the district court issued its Legislative Privilege Order. ECF No. 58 (Page ID# 985-1004). This Order completely obliterated the Legislators' long established and constitutionally protected right to legislative privilege. *Compare id.*; *with* Mich. Const. art. IV, § 11 (Senators and Representatives "shall not be questioned in any other place for any speech in either house."); Mich. Comp. Laws § 4.551 ("A member of the legislature of this state shall not be liable in a civil action for any act done by him or her pursuant to his or her duty as a legislator."); *United States v. Grillock*, 587 F.2d 284, 287 (6th Cir. 1978) ("[U]nder Rule 501 of the Rules of Evidence, defendant [state senator] has a speech or debate privilege with respect to, but only with respect to, *his legislative acts and motivation therefore*. . . ." (emphasis added))[3].

Intervention was made necessary once the state legislature was fully and improperly made subject to civil discovery. *See* Legislative Intervenors' Reply in Supp. of Intervention, ECF No. 85 (Page ID# 2034); *see also Jansen,* 904 F.2d at 341 (calculating timeliness from when an intervenor learns their interest may not be adequately protected).

[3] Nothing in *United States v. Gillock*, 445 U.S. 360 (1980) disturbs this reasoning in the *civil* context.

The prejudice "analysis must be limited to the prejudice caused by the untimeliness, not the intervention itself." *See Detroit*, 712 F.3d at 933. As discussed *supra*, Legislators contend that there was no improper delay and therefore no prejudice. Legislators sought intervention only a month after the Answer was filed and just over a month after their legislative privilege was found inapplicable in the district court. Should this Court find that there was any delay, any such delay is fully justified for exactly the same reasons explained above. As such, Legislators' Motion was timely "in the context of all relevant circumstances". *Tennessee*, 260 F.3d at 592.

c. Legislators have a Sufficient Interest Which May be Impaired by the Disposition of this Case.

"To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Miller*, 103 F.3d at 1247. This factor is reviewed *de novo*. *Grubbs,* 870 F.2d at 345. The District Court briefly addressed only two intervention factors, one of which was its contention that the Legislators have no official interest in their elective offices. Order (ECF No. 91) (Page ID# 2062-63).

The Legislators have multiple significant protectable interests that will be impaired by the disposition of this case. These interests include: (1) the regulation of Legislators' official conduct; (2) the reduction in Legislators' or the successors'

reelection chances; (3) the economic harm to Legislators caused by increasing costs of election or reelection, constituent services, and mid-decade reapportionment; and (4) the vested power of Michigan's legislative branch under the United States Constitution over the apportionment of congressional districts.

(1) Regulation of Official Conduct.

Plaintiffs' alleged harm and the remedy they seek attempts to regulate Legislators' official conduct. It is indisputable that, should a new map be ordered, it will be the Michigan Legislature that is tasked with passing a new map in the first instance. U.S. Const. art. I, § IV (granting to the state legislatures the power to enact time, place, and manner restrictions in elections); Mich. Const. art. II, § 4 (same); *see also* Mich. Const. art. IV, § 1 (vesting the general legislative power with the Legislature); Mich. Comp. Laws § 4.261 ("[E]very 10 years . . . the legislature shall enact a redistricting plan for the senate and house of representatives . . . ."). Apportionment "is primarily a matter for legislative consideration and determination and . . . judicial relief becomes appropriate only when a legislature fails to reapportion . . . ." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

The Michigan Legislature, led in part by House Speaker Pro Tempore Lee Chatfield and House Elections and Ethics Committee Chairman Representative Aaron Miller, will be directly impacted by any order of the district court requiring a redrawing of the current legislative and congressional maps. *See Sixty-Seventh Minn.*

State Senate, 406 U.S. at 194 (recognizing intervention is appropriate for the Minnesota State Senate because that body would be directly impacted by the district court's orders). Just like in *Sixty-Seventh Minnesota State Senate*, the Legislators' conduct in this case will be directly impacted by any order of this court. Therefore, the Legislators' intervention is appropriate.

(2) Diminishment of Reelection Chances.

Legislators have a significant interest in their, or their successors', chances reelection. The district court asserts that "[t]his purported interest is grounded in either partisanship, notions of elective office as property, or both [and] [a]s such . . . is not cognizable." Order (ECF No. 91) (Page ID# 2062). This is a plain misinterpretation of Legislators' interests.

As an initial matter, partisanship is fundamental to Plaintiffs' cause of action. Plaintiffs bring claims of *partisan* gerrymandering. *See* Complaint (ECF No. 1) (Page ID# 1-34). In so far as partisan gerrymandering claims are justiciable at all, Plaintiffs must prove some amount of *partisanship* is too much. *See generally Vieth v. Jubelirer*, 541 U.S. 267 (2004). The remedy Plaintiffs seek necessarily means *less Republicans* and *more Democrats* in Michigan's legislative and congressional offices. Further, for the District Court to say that an interest "grounded in partisanship" is no interest at all is to effectively neuter Plaintiffs' standing. As the

district court has yet to dismiss this case for lack of standing, Legislators are left to assume that partisan interests are at least *some* interest.

The "partisan interest" issue aside, it is well established that diminishment of reelection chances is a cognizable interest. *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586, 587 n.4 (5th Cir. 2006). The District Court incorrectly asserts that Legislators' reelection interest is a property interest to the seat itself. Order (ECF No. 91) (Page ID# 2063). However, diminished reelection chances are a very different interest than a mere "property interest" in the seat. *Compare Gamrat v. Allard*, U.S. Dist. LEXIS 42535, *15 (W.D. Mich. March 15, 2018) (holding elected officials do not have a property interest *to the seat itself*); *with e.g., Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) ("A second basis for the [Texas Democratic Party's] direct standing is harm to its *election prospects*." (emphasis added)); *id*. at 587 n.4 (collecting cases); *Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 405, 423 (E.D. Mich. 2004) (diminishment of political power is, *inter alia*, sufficient for standing purposes); *Meese v. Keene*, 481 U.S. 465, 475 (1987) (detriment to reputation and political candidacy is sufficient for standing purposes).

Legislators are not asserting any *right* to their seats or, unlike what Plaintiffs are requesting, an increased number of seats for their party. What the Legislators are asserting is their right to defend themselves from a judicial decree that potentially harms their chances for reelection. While these interests may be related, they are

certainly not the same. And, as has been stated numerous times in this litigation, there is a wealth of authority for the proposition that the diminishment of election chances is an injury.[4] *See, e.g.*, *Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); *Smith v. Boyle*, 144 F.3d 1060, 1061-63 (7th Cir. 1998); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (Conservative Party official had standing to challenge the ballot position of a party opponent's candidates); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (holding that the "potential loss of an election" is an injury in fact); *Democratic Party of the U.S. v. Nat'l Conservative Political Action Comm.*, 578 F. Supp. 797, 810 (E.D. Pa. 1983) (three-judge panel), *aff'd in part and rev'd in part on other grounds sub nom. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 489-90 (1985).

(3) Economic Interest.

An economic injury is sufficient for intervention. *Benkiser*, 459 F.3d at 586. In fact, "economic injury is a quintessential injury upon which to base standing." *Id.*

[4] The District Court takes issue with Legislators' reliance on *Wittman v. Personhuballah*. *See* Order (ECF No. 91) (Page ID# 2063). It is true that in *Wittman* the individual legislators were denied standing. *See Wittman,* 136 S. Ct. at 1732. However, standing was denied due to the lack of *record evidence* of injury and not because diminishment of election chances was an insufficient injury. *See id.* (assuming without deciding that impairment of reelection prospects can constitute injury sufficient for standing purposes). The procedural posture of *Wittman* was also far more advanced than the simple intervention inquiry before the district court. Finally, in addition to *Wittman*, Legislators have continuously cited to significant additional authority to show that diminishment of reelection chances is a cognizable injury.

(citing *Barlow v. Collins*, 397 U.S. 159, 163-64 (1970)). Legislators are economically harmed in their official capacities as candidates and members in three distinct ways: (1) the increased costs of running for reelection in new or altered districts; (2) the increased costs of engaging and serving new constituents, and; (3) the costs associated with a mid-decade court-ordered reapportionment.

Should a new map be ordered, it nearly goes without saying that the Legislators will have to expend additional funds becoming familiar with new areas within Michigan and forming relationships with new constituents and voters. This expenditure of funds is but for the fact that the Legislators are public servants and candidates for public office.

Legislators also "serve constituents and support legislation that will benefit the district and individuals and groups therein." *See League of Women Voters of Michigan*, 2018 U.S. App. LEXIS 24684, *13 (quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991) (internal alterations omitted)). Assisting constituents in "navigating public-benefits bureaucracies" is the day-to-day task of legislators. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). Engaging with new voters and new constituents in new districts will necessarily require the expenditure of additional public and private funds.

Finally, even under the best of circumstances, reapportionment is an expensive proposition. If a special session of the legislature is required, an already

expensive process would become even more so. *See Terrazas v. Ramirez,* 829 S.W.2d 712, 727 (Tex. 1991) (noting the added expense of special legislative sessions). The District Court, instead of acknowledging this increased expense, pivots to casting this expense as "belong[ing] to the state." However, it is a fundamental principle of republican governance and Michigan law that the power of the purse belongs to the legislature. *See* Mich. Const. art. IV, § 31; Mich. Const. art. IX, § 17 ("No money shall be paid out of the state treasury except in pursuance of appropriations made by law.").

(4) Federal Constitutional Interest.

Legislators also have a federal constitutional interest in their constitutionally prescribed power to reapportion. The Elections Clause of the U.S. Constitution states that "[t]he times, places and manner of holding elections . . . shall be prescribed in each state by the legislature thereof . . . ." U.S. Const. art. I, § IV. The drawing of congressional districts "involves lawmaking in its essential features and most important aspect." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2667 (2015). This unique interest is not shared with any other governmental body in the State of Michigan and is specifically unique to state legislatures. And, as noted *infra*, the district court's refusal to allow Legislators' intervention discards fundamental principles of federalism. Legislators have shown multiple significant interests and should be allowed to intervene.

d. No Current Party Adequately Represents the Legislators' Interests.

The burden for showing inadequacy of representation is *minimal*. *Miller*, 103 F.3d at 1247. "The burden has been described as minimal because it need only be shown that there is a *potential* for inadequate representation.[5] *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005) (emphasis added); *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972).

No current party to this litigation adequately represents the Legislators' unique interests. The Legislators seek to defend a validly enacted law that impacts legislators directly in multiple ways. On the other hand, "[t]he contours of Michigan's maps do not affect [the Secretary] directly—she just ensures the maps are administered fairly and accurately." *League of Women Voters of Michigan*, No. 18-1437, 2018 U.S. App. LEXIS 24684, *11. The Secretary of State has no interest or motivation to ensure that the Legislators' multiple cognizable and distinct interests are protected and represented. At the very least, the Secretary has not and "will not make all of the prospective intervenor's arguments." *Miller*, 103 F.3d at 1247.

[5] The recent intervention of eight individual congressmen does not change the reasoning herein. The Congressional Intervenors share significantly different interests and purposes for intervention than the Legislators. As such, the Congressional Intervenors cannot adequately represent the interests of Legislators any more than the Secretary can.

Even if there is a party that represents Legislators' interests, there is certainly the possibility that their interests *may not* be represented. Secretary Johnson is term limited and will no longer be the Secretary of State at the time of trial.[6]

In the related appeal by Congressional Intervenors in this case, this Court noted that *future* inadequacy is insufficient in the "inadequacy of representation" analysis. *See League of Women Voters of Michigan*, 2018 U.S. App. LEXIS 24684, *14-15 (This Court does "not typically allow intervention based upon 'what will transpire in the future.'" (quoting *Michigan*, 424 F.3d at 444)). However, this is a reading of the *Michigan* case that cannot be squared with *Michigan* itself or with the precedent set in *Miller* and *Grutter*. *See Miller*, 103 F.3d at 1247 (The "burden is minimal because it is sufficient that the movant prove that representation *may be* inadequate." (emphasis added)); *Michigan*, 424 F.3d at 443 ("[I]t need only be shown that there is *a potential* for inadequate representation." (emphasis added) (quoting *Grutter*, 18 F.3d at 400).

[6] At oral argument before this Court, Plaintiffs' counsel all but admitted that, in the event the Secretary abandons her defense, the Legislators would be an appropriate party. *See League of Women Voters of Michigan et al. v. Johnson et al.,* No. 18-1437 (6th Cir. Aug. 1, 2018) (oral argument at approx. 30:00) (The "Michigan Legislature. . . would be either closer to and have a more direct interest akin to the chamber of commerce in *Miller*. The Michigan Legislature obviously participated in the passing of this law . . . .") (discussing hypothetical circumstance of Secretary of State no longer defending the map).

The key distinguishing feature of *Michigan* is the tension between that court's factual findings and the subsequent possibility of remedial harm to the intervenors. *See Michigan*, 424 F.3d at 444-45. In *Michigan*, the Michigan United Conservation Clubs ("MUCC") sought intervention. *Id*. at 440. The MUCC's interests were absolutely dependent upon how that court resolved the declaratory portion of the case. *See id.* at 440-41, 444-45. This is not the same issue that is before this court. At issue here is if the Secretary will, of her own accord, adequately represent all of Legislators' interests in either phase of the proceeding. In other words, the only precipitating event in the "potentially inadequate" analysis here are the actions of the Secretary herself and *not* any precipitating finding by the Court. This is the only reading of *Michigan* that gives full effect to the future tense language used in the "adequate representation" context. *See Michigan*, 424 F.3d at 443 ("[I]t need only be shown that there is a potential for inadequate representation.") (quoting *Grutter*, 18 F.3d at 400); *see also Miller*, 103 F.3d at 1247 (The "burden is minimal because it is sufficient that the movant prove that representation may be inadequate.").

Legislators uniquely stand to have their official conduct regulated, their reelection efforts hindered, and their legislative actions made costlier. In sum, the interests of Legislators in the adjudication and disposition of this matter are both unique and sufficient for intervention. Therefore, Legislators should be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2).

III. LEGISLATORS SHOULD BE GRANTED PERMISSIVE INTERVENTION.

If this Court determines that Legislators are not permitted to intervene in this lawsuit as a matter of right, Legislators—similarly to Congressional Intervenors—should be granted permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). Rule 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b).

"In deciding whether to allow a party to intervene, 'the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *League of Women Voters of Mich.*, 2018 U.S. App. LEXIS 24684, *6 (quoting Fed. R. Civ. P. 24(b)). "So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors is reviewed for an abuse of discretion." *Miller*, 103 F.3d at 1248; *see also League of Women Voters of Mich.*, 2018 U.S. App. LEXIS 24684, *7-8.

> "[T]hough the district court operates within a 'zone of discretion' when deciding whether to allow intervention under Rule 24(b), the district court nevertheless must, except where the basis for the decision is obvious in light of the record, provide enough of an explanation for its decision to enable us to conduct meaningful review."

Id. at *7 (alterations omitted) (quoting *Kirsch v. Dean*, 733 F.App'x 268, 279 (6th Cir. 2018)); *see also Miller*, 103 F.3d at 1248.

As expected, there are a number of similarities between this case and the recently decided *League of Women Voters of Mich. v. Johnson*. *See* 2018 U.S. App. LEXIS 24684. This Court found that the district court below abused its discretion and, accordingly, allowed the Congressional Intervenors intervention because, *inter alia*, "the district court provided only a cursory explanation of its reasons for denying permissive intervention, and what little justification it did provide is unsupported by the record." *League of Women Voters of Mich.*, 2018 U.S. App. LEXIS 24684, *16. This is nearly a mirror image of this case.

The District Court gave the following two reasons, each without citation to authority, for its denial of permissive intervention: (1) "Any delay caused by Applicants' intervention would be undue in light of Applicants' lack of cognizable interest in this matter", and (2) "Insofar as Applicants' litigation strategy could conflict with that of the executive, Applicants' intervention could be prejudicial to the executive's representation of state interests." Order (ECF No. 91) (Page ID# 2064). Neither of these propositions were backed by citation to legal authority, as they are outside the bounds of this Circuit's precedents and the wider law of intervention.

First, the district court conflates permissive intervention and intervention of right. *Compare* Fed. R. Civ. P. 24(a); *with* Fed. R. Civ. P. 24(b). "Cognizable interest" is simply not an issue in the permissive intervention context. "Undue delay"

and "prejudice" are about the delay and prejudice caused by the intervention itself. *See Michigan*, 424 F.3d at 445. Even if "cognizable interest" is a factor in the permissive intervention context, the Legislators have several significant cognizable interests in this litigation. *See supra* at 13-20.

As to the second point, the District Court misapprehends the law and constructs permissive intervention to be a zero sum game. Differences in litigation strategy is sufficient to permit intervention as of right. *Miller*, 103 F.3d at 1247 ("One is not required to show that the representation will in fact be inadequate. For example, it may be enough to show that the existing party who purports to seek the same outcome *will not make all of the prospective intervenors arguments*." (emphasis added)).

Furthermore, the Secretary of State has agreed that Legislators should be allowed to intervene. Secretary's Response to Mot. to Intervene (ECF No. 79) (Page ID# 1803-04, 1809) ("Defendant Ruth Johnson states that she supports [Legislators'] intervention for the reasons stated in the motion and brief filed by the proposed intervenors."). The Secretary cannot be prejudiced by an intervention she believes has every right to occur.

Similarly to Congressional Intervenors, "none of the . . . factors cited by the court actually weigh against permissive intervention." *League of Women Voters of Mich.*, 2018 U.S. App. LEXIS 24684, *8. Other than the denial of Congressional

Intervenors' Motion to Intervene in the same case below, it is hard to think of an abuse of discretion more egregious than the one instituted upon the Legislators by the District Court. The only way to protect the fairness of the litigation and lend credibility and finality to the district court's eventual decision on the merits is to permit Legislators' intervention.

IV. THE SEPARATION OF POWERS IS NO BAR TO INTERVENTION.

The District Court denied intervention primarily because the "attempt to intervene is in tension with the principle of separation of powers." Order (ECF No. 91) (Page ID# 2059). Setting aside that this "rationale" was never briefed by any of the parties, the separation of powers doctrine has no impact on Legislators' right to intervene.

The only case the District Court cites in support of its separation of powers rationale is *United States v. Windsor*, 570 U.S. 744, 754 (2013). *See* Order (ECF No. 91) (Page ID# 2059-61). However, *Windsor* stands for the proposition that individual legislators *may intervene*. *See Windsor*, 570 U.S. at 754. Additionally, state constitutional concerns over the separation of powers have no weight when the U.S. Constitution makes a specific grant of authority to, in this instance, the Michigan State Legislature. *See* U.S. Const. art. I, § IV; *see also supra* at 19-20. "States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it 'terminates

according to *federal* law.'" *Arizona v. Inter. Tribal Council of Ariz., Inc*., 570 U.S. 1, 15 (2013) (emphasis added) (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)). Separation of powers principles are of simply no moment when the legislature wielded powers specifically granted by the Federal Constitution.

CONCLUSION

For the aforementioned reasons, the Legislators respectfully request this Court swiftly reverse the District Court's Order improperly denying Legislators' Motion to Intervene and direct it to grant the motion.

Respectfully submitted this 5th day of September 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) (i) because the brief contains 6389 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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CERTIFICATE OF SERVICE

The undersigned herby certifies that the Opening Brief of Appellants was electronically filed with the Sixth Circuit Court of Appeals on September 5, 2018. The Opening Brief of Appellants was served by ECF on September 5, 2018, on counsel for Appellee. The address for Counsel for the Appellee:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Dkt. No. 1	Complaint	Page ID # 1-34
Dkt. No. 53	Case Management Order	Page ID # 939-941
Dkt. No. 58	Legislative Privilege Order	Page ID # 985-1004
Dkt. No. 59	Answer	Page ID # 1005-1047
Dkt. No. 70	Motion to Intervene	Page ID # 1204-1239
Dkt. No. 79	Secretary's Response to Motion to Intervene	Page ID # 1802-1810
Dkt. No. 85	Reply in Support of Intervention	Page ID # 2032-2039
Dkt. No. 91	Order Denying Intervention	Page ID # 2059-2065
Dkt. No. 96	Notice of Appeal	Page ID # 2079-2081