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

EMERGENCY MOTION FOR STAY

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PROPOSED LEGISLATIVE INTERVENORS' EMERGENCY MOTION FOR STAY PENDING APPEAL

Pursuant to Federal Rules of Appellate Procedure 8(a)(1)(A) and 8(a)(2)(A), Proposed Legislative Intervenors Lee Chatfield and Aaron Miller move this Court to stay the below case pending the Court's review of the district court's Order Denying Intervention August 14, 2018, (ECF No. 91) (Page ID# 2059-2065) (hereinafter, Order). The district court has not ruled on the Legislators' Motion to Stay. The following facts necessitate that this Emergency Motion be filed irrespective of a ruling in the district court.

Legislators requested an expedited ruling either granting or denying their stay motion by September 12, 2018. *See* Legislators' Reply in Support of Stay (ECF No. 113) (Page ID # 2281). The current deadline for summary judgment motions is eight days away. *See* Case Management Order (ECF No. 53) (Page ID# 939-40); *see also* Order Directing Compliance with Case Management Order No. 1 (ECF No. 108) (Page ID# 2188-89) (hereinafter, Order Directing Compliance); Order Granting in Part Congressional Intervenors' Emergency Motion to Alter Case Management[1] (ECF No. 115) (Page ID# 2308-09) (hereinafter, Order on Emergency Motion). As of this filing, the district court has not issued its order on the Motion to Stay nor

[1] In fact, it is imminently plausible that if the district court followed the ruling of this Court in the Congressional Intervenor case, a stay would potentially not be necessary.

given any reasons for failing to do so. In fact, every action of the district court has been to announce that it will continue without any delays, irrespective of the reason or this Court's dictates. *See* Order Directing Compliance (ECF No. 108) (Page ID# 2188-89); Order on Emergency Motion (ECF No. 115) (Page ID# 2308-09). Therefore, due to the extremely time sensitive nature of this Motion, Legislators bring this appeal now pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A)(i) or (ii).

INTRODUCTION

Plaintiffs (collectively, "Democratic Voters") assert claims of partisan gerrymandering. Plaintiffs argue that Michigan's legislative and congressional maps are partisan gerrymanders in contravention of the First and Fourteenth Amendments to the U.S. Constitution.

Proposed Intervenors 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"), by their undersigned counsel, respectfully request the case, *League of Women Voters v. Johnson*, No. 17-cv-14148 (E.D. Mich. Dec. 22, 2017) (complaint filed) (ECF No. 1) (Page ID# 1-34), be stayed pending the resolution of the appeal filed in this Court.

The district court's Order, (ECF No. 91) (Page ID# 2059-2065), was contrary to this Circuit's precedents and without support in the laws of the United States. Therefore, to prevent prejudice and delay to both Legislators and the parties, this case should be stayed.

ARGUMENT

I. This Case Should be Stayed Pending Appeal.

Four factors govern whether this Court should grant a stay: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016). "All four factors are not prerequisites but are interconnected considerations that must be balanced together." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). A strong showing of possibility of success on the merits can overcome a weak showing of the other factors and *vice versa*. *See id.* at 252; *Americans United for Separation of Church & State v. Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990).

To obtain a stay, the balance of the equities must tip in favor of the movant and the movant must show that granting the stay "will further the interest in economical use of judicial time and resources." *Ricketts v. Consumers Energy Co.,* 2017 U.S. Dist. LEXIS 82501, *4-5 (E.D. Mich. May 31, 2017) (citing and quoting

F.T.C. v. E.M.A. Nationwide, Inc., 767 F.3d 611, 627-28 (6th Cir. 2014)). The facts of this case, when "balanced together," lead inevitably to the conclusion that this Court should stay the case below. *See Coal. to Defend Affirmative Action*, 473 F.3d at 244.

a. Legislators Are Likely to Succeed on the Merits.[2]

i. Legislators are Entitled to Intervene as a Matter of Right.

Intervention as of right under Federal Rule of Civil Procedure 24(a)(2) is required when: (1) the application for intervention is timely; (2) the applicant has a substantial legal interest in the subject matter of the litigation; (3) the applicant's ability to protect that interest will be impaired if intervention is denied; and (4) the present parties do not adequately represent the applicant's interest. *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

The district court briefly addressed only two of the intervention factors. First, the district court held that the Motion to Intervene is premature because the Secretary adequately represents Legislators' interests. Order (ECF No. 91 ¶ 4) (Page ID# 2061-62). Second, the district court held that the Legislators have no official interest in their elective offices. *Id*. (ECF No. 91 ¶ 5-8) (Page ID# 2062-63). Both of these

[2] Legislators direct this Court's attention to the arguments on the merits filed in this Court on September 5, 2018. *See* Dkt. No. 11. In the interest of space and time the intervention arguments here are an abridged version of those found within Appellants Brief on the merits. We invite this Court to review that document for a more fulsome recitation of Legislators' intervention arguments.

grounds for denial are unsupportable on this record. Furthermore, since the district court neglected to rule on the timeliness and the impairment of interests elements of Legislators' motion, those arguments are presented for *de novo* review. *See Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011).

A. Legislators' Motion to Intervene Was Timely.

"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). This Circuit has identified 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 v. Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990). While the district court made no finding as to timeliness, the Legislators meet all five timeliness factors.

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.*

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

B. Legislators Have Substantial Interests that May be Impaired Absent Intervention.

"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 (internal citation omitted). Legislators have repeatedly offered significant, protectable, and legally cognizable interests that are unique[3] to them and justify their intervention, including: (1) the regulation of Legislators' official conduct; (2) the reduction in Legislators' or their successors' reelection chances; (3) the economic harm to Legislators caused by increasing costs of reelection, constituent services and mid-

[3] The Legislators and the Congressional Intervenors are currently represented by the same counsel. However, this is of little importance as it is the rights of the intervening party and not the attorney who represents them that are of critical importance. For example, the Congressional Intervenors do not have the same Elections Clause interest as Legislators. Furthermore, should an appeal need to be brought on the merits, the Congressional Intervenors may have standing issues defending the state legislative maps.

decade reapportionment; and (4) the power over congressional apportionment vested with the Michigan legislative branch under the U.S. Constitution.

First, Plaintiffs are seeking through a court order the regulation of Legislators' official conduct. While the district court's Order Denying Intervention does not address this unique interest, *see generally* (ECF No. 91) (Page ID# 2059-65), it is undisputed that, should a new map be ordered, it will require the Legislators' official action. Mich. Const. art. II, § 4; *see also* Mich. Const. art. IV, § 1 (vesting the general legislative power with the Legislature); Mich. Comp. Laws §4.261 (setting out the authority and procedure for conducting reapportionment). The Legislators are leadership members of the Michigan House of Representatives and the specific committee that will be charged with passing any remedial plan. *See* Mich. Const. art. II, § 4; Mich. Const. art. IV, § 1; Mich. Comp. Laws §4.261. The Secretary of State, on the other hand, is simply the individual charged with enforcing Michigan's election laws. *See* Mich. Const. art. 4, § 1; MCL §§ 168.21.

Second, diminishment of reelection chances is a cognizable interest. The district court disregards this interest because it "is grounded in either partisanship, notions of elective office as property, or both." Order (ECF No. 91) (Page ID# 2062). Whether the district court approves or not, partisanship is a fundamental truth of all partisan gerrymandering litigation. Democratic Voters are bringing claims of partisan gerrymandering—effectively seeking less Republicans in the congressional

delegation and state legislature—which includes the Legislators. *See* Complaint, (ECF No. 1) (Page ID# 1-34). If, as the district court maintains, partisan interests are no interests at all, *see* Order (ECF No. 91 ¶ 6) (Page ID# 2062-63), then this case should be immediately dismissed because Plaintiffs lack standing.[4] It cannot possibly be the case that partisan interests are not cognizable as at least *some* interest.

Similarly, the district court is incorrect in its assertion that Legislators are asserting a property interest in their elective offices.[5] *See id.* Legislators are not asserting that they have a *right*, property or otherwise, to their elective seats. What Legislators assert is that their reelection chances not be harmed in some way without the opportunity to mount a defense. This is a very different type of interest. *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., Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) ("A second basis

[4] This standing issue is likely to be back before the Supreme Court soon in *Common Cause v. Rucho*, No. 16-cv-1026 (M.D.N.C. 2016), because the district court there just issued a stay of its liability ruling pending appeal to the Supreme Court. *See* Order of Sept. 12, 2018 (ECF 155) (noting that an appeal to the Supreme Court was already noticed and requiring the jurisdictional statement be filed by October 1, 2018 or that the stay would dissolve automatically).

[5] Unlike Legislators, Plaintiffs are effectively asserting something akin to a property interest by arguing for a right to proportional representation. The Constitution contains no such right to proportional representation. *See Vieth v. Jubelirer*, 541 U.S. 267, 287-88 (2004) (plurality op.); *see also id.* at 308 (Kennedy, J., concurring); *id*. at 338 (Stevens, J., dissenting).

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).

The district court's citation to *Wittman v. Personhuballah*, 136 S. Ct. 1732, 195 L. Ed. 2d 37, 43 (2016), is misplaced. Even though the *Wittman* legislators were denied standing, it was due to the lack of *evidence* of injury. Standing was not denied, as the district court contends, because the diminishment of election chances is a *per se* insufficient injury. *Compare Wittman*, 195 L. Ed. 2d at 43 (assuming without deciding that impairment of reelection prospects can constitute injury sufficient for standing purposes); *with* Order (ECF 91 ¶ 7) (Page ID# 2063) (stating that *Wittman* stands for the proposition that there is no standing for an alleged harm to the diminishment of electoral chances).

Contrary to the district court's assertions, there are plenty of examples showing that the diminishment of election chances constitutes an injury. *See e.g., Meese* , 481 U.S. at 475; *Bay Cty. Democratic Party* , 347 F. Supp. 2d at 423; *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 an opponent); *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. National 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).

Third, economic injury is sufficient to warrant intervention. *See Barlow v. Collins*, 397 U.S. 159, 163-64, 172 n.5 (1970) (Brennan, J., dissenting); *see also Benkiser*, 459 F.3d at 586-88 (an injury in fact exists when "campaign coffers" are "threatened"). Legislators are harmed in their official capacities and as candidates in three distinct ways: (1) the increased costs of engaging and serving new constituents; (2) the increased costs of running for reelection in new or altered districts; and, (3) the costs associated with a mid-decade court ordered reapportionment.

This economic interest is differentiated from an interest in reelection chances and is instead partly based on well settled principles of constituent services. "Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator." *McCormick v. United States*, 500 U.S. 257, 272 (1991). Constituent services are simply the act of, in part, assisting constituents with "navigating public-benefits bureaucracies." *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). Legislators "serve constituents and support legislation that will benefit the district and individuals and groups therein." *See*

League of Women Voters of Michigan, No. 18-1437, 2018 U.S. App. LEXIS 24684, *13 (quoting *McCormick*, 500 U.S. at 272 (internal alterations omitted)). Seeking to engage with new constituents in newly drawn districts will necessarily require the expense of public and private funds.

Also, it is self-evident that should the district court order a new map, the Legislators must expend additional funds to become familiar with new areas, new constituents, and new voters. This expenditure of funds is only necessary because of the Legislators' unique position as members of the Michigan Legislature. Reapportionment is also an inherently expensive and time intensive task. A court order requiring a mid-decade reapportionment will siphon funds and time from other legislative priorities and refocus them on a job that is already done and a job that must be completed again in three years anyway.

Despite what the district court claims, the expenditure of funds is most certainly an interest that belongs to the legislature and *not* the executive. *Compare See* Mich. Const. art. IV, § 31 (stating that appropriations shall be passed by the legislature); *with* Order (ECF No. 91 ¶ 8) (Page ID# 2063). It is a fundamental principle of Michigan law that the power of the purse belongs to the state 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.").

Fourth, the U.S. Constitution vests Michigan's legislative branch with the power to enact time, place, and manner restrictions for elections. *See* U.S. Const. art. I, § IV. 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. Members of the legislature have a federal constitutional right to defend the legislature's sovereign decisions because 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 interest is fundamentally unique to state legislatures and fundamental to traditional concepts of federalism enshrined by the founders. *See generally* The Federalist Nos. 59-61 (Hamilton, A.) (discussing the power of congress to regulate the election of its members).

C. Legislators' Interests are Not and May Not Be Adequately Represented.

To intervene Legislators need only prove that the "representation of [their] interest *may be* inadequate." *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). This burden is *minimal*. *Miller*, 103 F.3d at 1247. The current Defendants, the Secretary of State and Congressional Intervenors, do not, cannot, and will not adequately represent Legislators' interests. The Legislators have several significant interests that are not represented. In fact, most of these interests cannot possibly be represented by the Defendants. These include, *inter alia*, defending a

validly enacted law that the legislature itself passed; the drawing and passage of any new plan; and the defense of their authority under the U.S. Constitution's Elections Clause to make time, place, and manner restrictions. *See* U.S. Const. art. I, § IV.

Furthermore, regardless of whether the Legislators' interests are currently represented, it is undisputed that they *may not* be adequately represented. The current Secretary of State is term limited and will not be the Secretary of State at the time of trial. *See* Mich. Const. art. V, § 30; *see also* Case Management Order (ECF No. 53) (setting trial for February 5, 2019). The Democratic candidate for Secretary of State is a speaker at League of Women Voters' events and is unlikely to vigorously defend the current Michigan apportionment plans.[6] The district court admits in its Order Denying Intervention that this possibility exists. (ECF No. 91 at 6 ¶ B) (Page ID# 2064).

This Court, in a related appeal, noted that a future inadequacy is typically insufficient. *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)). This interpretation of *Michigan* is in direct conflict with the inadequacy of representation

[6] *League of Women Voters Ann Arbor Newsletter*: October 2nd, 2018, http://myemail.constantcontact.com/News-from-the-League-of-Women-Voters-of-the-Ann-Arbor-Area.html?soid=1109132130187&aid=miQBDZpAarQ (last visited Sept. 11, 2018).

caselaw. *See Miller*, 103 F.3d at 1247; *Michigan*, 424 F.3d at 443; *Grutter*, 18 F.3d at 400.[7] It is undisputed by Plaintiffs, and all but admitted by the district court, that the *potential* exists for inadequate representation by the Secretary and therefore intervention is appropriate. To compel the Legislators to wait until January when a new Secretary is sworn into office would force legislators to wait until the eve of trial to intervene.[8] This prejudices Legislators by not allowing them to participate in the dispositive motion phase of this litigation and only allow them approximately one month to prepare for trial on a massively large record they were forbidden from helping to build.

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[7] The holding in *Michigan* can be easily distinguished because the "future" event that court was concerned with was dependent upon a holding of the court itself. *See Michigan*, 424 F.3d at 440-41, 445-45. This situation is different; the future event is dependent on the Secretary of State alone and not the courts.

[8] The district court states that Legislators "may file a second motion to intervene if the executive abandons its participation in this matter." Order (ECF No. 91 at 6 ¶ B) (Page ID# 2064). Because of the district court's denial of intervention, Legislators are now certain to experience the following specific harms: (1) they will be unable to engage in the same discovery they have been subjected to; (2) they will not be able to participate in *any* dispositive pretrial motions; (3) they will have an insufficient time to become familiar with the more than 63,000 *documents* that have been produced to Congressional Intervenors thus far. Congressional Intervenors are still obtaining documents. Reportedly, more than 270,000 *documents or files* have been disclosed in this case. Legislators need the requested stay so that they can timely review the productions and adequately develop a trial and summary judgment strategy specific to them; and (4) they will necessarily need to seek extensions of time to prepare for trial and potentially offer up their own expert discovery—the pursuit of which would be held against them when seeking intervention. The end result is that the district court's Order sets in motion a series of events that can only result in the continued waste of judicial resources.

ii. Permissive Intervention Is Appropriate In this Case.

"To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *Michigan*, 424 F.3d at 445. Once timeliness and a common question of law or fact are determined, "the district court must then balance undue delay and prejudice to the original parties . . . and any other factors to determine whether, in the court's discretion, intervention should be allowed." *Id*. If not granted intervention as of right, the Legislators—while having significantly different interests than the Congressional Intervenors—should be granted permissive intervention for many of the same reasons as Congressional Intervenors. *See League of Women Voters of Mich.*, No. 18-1437, 2018 U.S. App. LEXIS 24684.

The district court only addressed the possibility of undue delay and prejudice to the original parties. *See* Order (ECF No. 91 ¶ 9) (Page ID# 2063-64). The district court relied on two contentions: (1) "intervention is undue in light of [Legislators'] lack of cognizable interest in this matter"; and (2) Legislators' litigation strategy could prejudice the Secretary's "representation of state interests." *Id*. Both of these contentions are a clear abuse of discretion and are likely to be reversed.

First, the district court confuses or conflates permissive intervention and intervention as of right. *Compare* Fed. R. Civ. P. 24(a); *with* Fed. R. Civ. P. 24(b). The inquiry in the permissive intervention context is about the delay and prejudice

experienced by the parties as a result of the intervention itself. *See Michigan*, 424 F.3d at 445. To put it another way, cognizable interests in the context of permissive intervention are quite simply beside the point.

Second, the contention that permitting the Legislators to intervene could prejudice the executive's representation is absurd. For permissive intervention, "[t]he existence of a zone of discretion does not mean that the whim of the district court governs." *Miller*, 103 F.3d at 1248. The Secretary of State concurred with Legislators' Motion to Intervene. Secretary's Response (ECF No. 79 at 2) (Page ID# 1803). The Secretary cannot be prejudiced by the intervention of a party she agrees should be permitted to intervene.

iii. The District Court's Separation of Powers Rationale Is No Bar To Intervention.

There is no separation of powers doctrine that precludes the Legislators' intervention. In fact, 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* (ECF No. 91 ¶ 3) (Page ID# 2061). *Windsor*, as the district court acknowledged, stands for the proposition that individual legislators *may* intervene. *See Windsor*, 570 U.S. at 754. No other relevant authority is offered in support of the district court's "separation of powers" argument. The federal constitution gives the Michigan legislature the express authority to redistrict. *See* U.S. Const. art. I, § IV. State constitutional concerns over the separation of powers can have no weight when the

federal Constitution makes a specific grant of authority to, in this case, the Michigan Legislature.

b. Legislators Will Be Irreparably Harmed Absent a Stay and a Stay Will Result in No Harm to the Other Parties.

In evaluating irreparable harm, the court looks at the following three factors: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). All three of these factors support a stay in this case.

The injury to the Legislators is substantial and certain.[9] There are several fast approaching and potentially outcome determinative deadlines. For example, summary judgment motions are due in eight days, (ECF No. 53 at 1-2) (Page ID# 939-40), and discovery—to which Legislators have already been subject—concluded on August 24th. *Id*. Even on an expedited appeal, without a stay Legislators will be unable to participate in these essential proceedings.

Just as injury to Legislators is certain absent a stay, the potential harm to the existing parties is minimal should one be granted. This is even more true now that

[9] Because the district court refuses to change any of the deadlines in this case despite the ruling from this Court, it is difficult to properly analyze what harms, if any, may result from a stay. *Compare* Order on Case Management Order (ECF No. 108) (Page ID# 2188); Order Granting in Part Emergency Motion to Alter Case Management Order (ECF No. 115) (Page ID# 2308-09); *with League of Women Voters of Mich.*, No. 18-1437, 2018 U.S. App. LEXIS 24684, *11-12.

the district court is required to move its existing deadlines to accommodate Congressional Intervenors. *See League of Women Voters of Mich.*, No. 18-1437, 2018 U.S. App. LEXIS 24684, *11-12. There is enough time even within the current schedule that a short delay pending this appeal would leave time to bring the inevitable merits appeals to the Supreme Court and implement any potential remedial map.[10] *See, e.g., Benisek v. Lamone*, No. 17-333 (U.S. June 18, 2018) (district courts decision rendered on August 24, 2017, jurisdictional statement filed September 1, 2017, and Supreme Court opinion published June 18, 2018); *Benisek v. Lamone*, 266 F.Supp. 3d 799 (D. Md., August 24, 2017; *Benisek v. Lamone*, 138 S. Ct. 1942 (June 18, 2018). In *Benisek*, ten months passed between the district court's order denying intervention to the Supreme Court's affirmance. *Compare Benisek*, 266 F.Supp. 3d 799; *with Benisek*, 138 S. Ct. 1942. In the unlikely event Plaintiffs are successful in this litigation through an appeal to the United States Supreme Court, Plaintiffs will not be prejudiced. A stay pending the outcome of this appeal is appropriate because this Court can issue a decision with sufficient time for

[10] It is also pertinent that Plaintiffs waited more than six years and three election cycles to bring this lawsuit. In fact, Plaintiffs retained an expert at least a year before filing their Complaint. Any prejudice related to the timing thereof should be credited against the Plaintiffs. *Cf. Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (unreasonable delay in bringing a claim and close proximity to an election counsels against granting an injunction).

the district court and Supreme Court to rule in time for the 2020 primary and general elections.

c. The Public Interest Favors the Granting of a Stay.

The public interest favors settling the Legislators' status as a party now. "[T]he public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and ultimately . . . upon the will of the people of Michigan being effected in accordance with Michigan law." *Coalition to Defend Affirmative Action*, 473 F.3d at 252 (internal quotation and citation omitted). As previously described, the only way to ensure that there is a full and complete representation of the issues is by permitting the Legislators intervention. Legislators are leadership representatives in the Michigan House of Representatives. Their role on behalf of the interest of the people of Michigan and their constituents is unquestionable. Furthermore, Plaintiffs have waited seven years and three election cycles to bring their lawsuit. Any remedy the Plaintiffs may be entitled to will still be available for the 2020 primary elections. And the voters will continue to vote in the same districts in this years general election. Therefore, since the public interest will not be harmed, the public interest counsels in favor granting a stay.

d. Staying the Litigation Is the Best Use of Judicial Resources.

To preserve judicial resources, this Court should stay the litigation pending the outcome of Legislators' appeal. *See W. Tenn. Chp. Of Assoc. Builders & Contrs., Inc. v. City of Memphis*, 138 F. Supp. 2d 1015 (W.D. Tenn. 2000) ("[S]taying the proceedings facilitates a seamless and fair adjudication of the merits, and saves judicial resources and litigant expense."). A denial of the requested stay would risk the case below continuing to summary judgment without the participation of Legislators. If this Court reverses the district court and grants intervention, Legislators want to file their own motion for summary judgment, participate at trial, and participate in all other aspects of this litigation. Denying the stay would result in duplicative action, having two due dates for summary judgment filings and potentially two oral argument hearings.[11]

Legislators will also need time to analyze discovery in this case from a position unique to them, draft summary judgment motions, and prepare for trial. It is better to preserve judicial resources now as opposed to permitting the case to go forward towards trial. Denying the stay risks requiring that this Court order the

[11] Legislators have made every attempt to make clear that they were willing to participate in the case as it stood at the time intervention was requested and/or granted by the district court. Legislators' Reply in Support of Intervention (ECF No. 85 at 3) (Page ID# 2034). The Legislators continue to be ready to abide by certain modest restrictions if permitted to intervene. However, it is the district court's denial of intervention, and not the will of the Legislators, which makes any delay necessary.

district court to move the trial date for potentially the second time so that Legislators may file a motion for summary judgment, and adequately prepare for trial.

CONCLUSION

For the aforementioned reasons this Court should stay proceedings pending appellate review in the this Court.

Dated: September 13, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 27(d)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because the brief contains 5192 words, excluding the parts of the motion exempted by rule.
2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman style.

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CERTIFICATE OF SERVICE

The undersigned herby certifies that Appellants Emergency Motion to Stay was electronically filed with the Sixth Circuit Court of Appeals on September 13, 2018. The Opening Brief of Appellants was served by ECF on September 13, 2018, on counsel for Appellee. The address for Counsel for the Appellee:

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