No. 18-1946

In the United States Court of Appeals
for the Sixth Circuit

League of Women Voters of Michigan *et al.*,

Plaintiffs – Appellees,

v.

Ruth Johnson, in her official capacity as Michigan Secretary of State, *et al.*,

Defendants,

and

Rep. Lee Chatfield, in his official capacity as Speaker Pro Tempore of the Michigan House of Representatives, and Rep. 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
Civ. No. 17-cv-14148, Hon. Eric L. Clay, Denise Page Hood, Gordon J. Quist

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CORRECTED RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

As required by Fed. R. App. P. 26.1(a) and Sixth Circuit Local Rule 26.1, Plaintiffs-Appellees certify that none of them is a subsidiary or affiliate of a publicly owned corporation, and that to the best of their knowledge, no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome of this appeal. Plaintiffs-Appellees are eleven individuals and the League of Women Voters of Michigan ("Voters") a private nonpartisan community-based statewide nonprofit organization founded in 1919.

/s/ Harmony Mappes
Harmony Mappes
Counsel for Plaintiffs-Appellees

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STATEMENT REGARDING ORAL ARGUMENT

Voters' motion to remand should be granted without oral argument in light of their decision no longer to contest the proposed intervention. Alternatively, the ruling below can be affirmed on the briefs without oral argument. As discussed below, time is of the essence in resolving this appeal so as to allow the case to proceed expeditiously to trial.[1]

JURISDICTIONAL STATEMENT

Voters' complaint asserts violations of the First and Fourteenth Amendments to the U.S. Constitution, and invokes the district court's subject-matter jurisdiction pursuant to 28 U.S.C. § 1331; 28 U.S.C. §§ 1343(a)(3) & (4); 28 U.S.C. § 1357; 28 U.S.C. § 2201; 28 U.S.C. § 2202; 28 U.S.C. § 2284; 42 U.S.C. § 1983; and 42 U.S.C. § 1988. (*See* Compl., RE 1 ¶ 12, Page ID #9.) Because Voters challenged congressional and legislative redistricting maps as unconstitutional partisan gerrymanders, they requested appointment of a three-judge panel pursuant to 28 U.S.C. § 2284(a). (*Id.* at ¶ 13, Page ID #9.) Chief Judge Cole designated the following three judges to serve as the three-judge district court: Hon. Eric L. Clay,

[1] As explained below, even the most optimistic timetable for final decision on the merits by the district court and by the Supreme Court leaves no margin for delay with respect to the adoption of remedial maps in Michigan. Voters calculate that under the current trial schedule a Supreme Court decision could not reasonably occur before **January 2020.** Michigan's statutes, meanwhile, require maps to be in place by **March 20, 2020**, so that candidates can gather signatures and file no later than **April 21, 2020**. Pushing the trial date by two months to April 2019, as intervenors request, will put the possibility for new maps beyond the registration deadline applicable to the 2020 Michigan primaries. A Supreme Court decision in late March 2020 inevitably would come too late for Michigan's 2020 elections. *See infra* at Part I.

United States Circuit Judge from this Court; Hon. Gordon J. Quist, District Judge for the United States District Court for the Western District of Michigan; and Hon. Denise Page Hood, Chief Judge for the United States District Court for the Eastern District of Michigan. (*See* Order, RE 9, Page ID #71.)

On August 14, 2018, the district court denied a motion to intervene filed by Michigan Representatives Lee Chatfield and Aaron Miller ("Legislators"). (Order, RE 91, Page ID #2059-65.) In pertinent part, the panel concluded that "[g]ranting Applicants' motion to intervene could create a **significant likelihood of undue delay and prejudice to the original parties**," and that "[a]ny delay caused by Applicants' intervention would be undue in light of Applicants' lack of cognizable interest in this matter." (*Id.* at Page ID #2063-64, emphasis added.)

The district court's order denying Legislators' motion to intervene is immediately appealable under the collateral-order doctrine. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987)("[W]hen an order prevents a putative intervenor from becoming a party in *any* respect, the order is subject to immediate review" under the *Cohen* collateral-order exception); *Bhd. of* R.R. *Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947)(as to orders denying intervention as of right, "the order denying intervention becomes appealable"); *Purnell v. City of Akron*, 925 F.2d 941, 944-45 (6th Cir. 1991)(order denying motion to intervene under both Rule 24(a) and 24(b) was appealable under the collateral-order doctrine).

Legislators timely filed their notice of appeal to this Court on August 20, 2018. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. In light of Voters' determination no longer to contest intervention, should this matter be remanded to the district court so Legislators may intervene on the current trial schedule?

2. Alternatively, if the Court chooses to address the intervention issue on the merits, did the district court err in denying Legislators' motion to intervene as of right under Fed. R. Civ. P. 24(A)(2), or abuse its discretion in denying Legislators' motion for permissive intervention under Fed. R. Civ. P. 24(b)(1)?

STATEMENT OF THE CASE

A. In 2011, Michigan's Republican-controlled legislature gerrymanders Michigan's state and federal legislative districts for partisan advantage.

In 2011, Michigan's Republican-controlled legislature enacted state legislative and federal congressional districting plans following the 2010 census. (Compl., RE 1 ¶ 20, Page ID #11.) Redistricting plans S.B. 498 and H.B. 4780 (the "Plans") maximized Republicans' partisan advantage by tilting already-gerrymandered legislative and congressional maps to favor the Republican party still more. (*Id.*) The Republican-controlled legislature intentionally, effectively, and severely gerrymandered the State House, State Senate, and federal congressional maps to benefit Republicans and diminish the voting strength of Democratic voters throughout the 10-year life of the maps. (*Id.* at ¶ 21, Page ID #11-12.)

B. Election data confirm that this partisan gerrymander is durable and severely burdens Michigan Democrats.

The legislature's 2011 gerrymander has proven successful for the Republicans in each subsequent election cycle. Democrats' voting strength was diluted and their representational rights were burdened because of their party affiliation. This has reduced the ability of Michigan's Democratic voters to elect representatives in their own districts and to elect Democratic representatives across the state. (Compl., RE 1 ¶ 37, Page ID #17.)

Advancements in technology now enable more effective and sophisticated gerrymanders. They also, however, provide tools for political scientists, and the courts, to quantify and measure the effect of the gerrymander on voters. As Justice Kennedy said: "Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months." *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring).

Under the Republican gerrymander, Democratic vote shares consistently have underperformed their respective "seat shares." (*See* Compl., RE 1 ¶ 38, Page ID #17-18.) For example, in the 2014 State House elections, Democrats won the statewide 2-party popular vote 50.98% to 48.93%. Yet Democrats won only 42.7% of the seats, compared to Republicans' 57.3%. (*Id.* at ¶ 39, Page ID #18.) This has been true in State Senate and federal congressional elections as well. (*Id.* at ¶¶ 40-41.)

Another way of looking at the data is to examine the "efficiency gap" of each map. The efficiency gap measures departures from partisan symmetry by assessing "wasted votes." (*Id.* at ¶ 45, Page ID #20.) Partisan symmetry is the simple democratic principle that fair maps generally give a vote for one party the same weight as they give a vote for the other party. (*Id.* at ¶ 48, Page ID #21.) This analysis illustrates how the Plans are the most pro-Republican partisan gerrymander in modern Michigan history, and have some of the widest efficiency gaps in the entire country. (*Id.* at ¶ 51, Page ID #22.)

C. Voters challenge the Plans as unconstitutional partisan gerrymanders.

Voters filed this action to challenge the Plans as unconstitutional gerrymanders that violate the First and Fourteenth Amendments. (*See generally* Compl., RE 1.) The individual Plaintiffs include Democrats who vote for Democratic candidates and assist them in their election efforts. (*Id.* at ¶ 10, Page ID #6-9.) These individual voters, along with the League of Women Voters of Michigan, brought the lawsuit against Ruth Johnson, Michigan's Secretary of State, in her official capacity, because she is the "chief election officer" in Michigan and is thus responsible for the conduct of Michigan elections. (*Id.* at ¶ 11, Page ID #9.) She is specifically charged with enforcing the gerrymanders described in the Complaint. (*Id.*)

Secretary Johnson filed two motions attempting to dispose of or delay the case. She moved to dismiss Voters' claims for lack of subject-matter jurisdiction, contending that partisan gerrymandering claims are non-justiciable political questions,

and that Voters lack standing. (*See generally* Mot. to Stay and to Dismiss, RE 11, Page ID #97-108.) The district court held a hearing on the Secretary's motion to dismiss on March 19, 2018. On May 16, 2018, the district court granted the motion in part and denied it in part. (Order, RE 54, Page ID #942-58.)

At the same time she moved to dismiss, the Secretary moved to stay proceedings until the Supreme Court decided *Gill v. Whitford* (Supreme Court Docket 16-1161) and *Benisek v. Lamone* (Supreme Court Docket 17-333), which cases address similar partisan-gerrymandering issues.[2] (Mot. to Stay and to Dismiss, RE 11, Page ID #92-97.) On March 14, 2018, the district court denied that motion, in large part because of its concern that a stay of even a few months would delay proceedings so as to impair Voters' effort to vindicate their rights. In an analysis that also applies to the issues in this appeal, the district court wrote:

> Defendants' argument fails because **there exists a fair possibility that a stay would prejudice Plaintiffs as well as the public interest.** The parties are operating under the reasonable assumption that, if Plaintiffs succeed on the merits, 'a 2020 remedial plan must be in place no later than March of 2020 to be effective for the November 2020 election. [RE 22 at Page ID #279.] **Voting rights litigation is notoriously protracted.** *See, e.g., McCain v. Lybrand*, 465 U.S. 236, 243 (1984) (discussing litigation delays as an impetus for Voting Rights Act of 1965). **Indeed, Congress took extraordinary measures—providing for this Court to sit as a three-judge panel and for any appeal to be taken directly to the Supreme Court—precisely so that voting rights cases could be decided more quickly.** *See Swift & Co. v. Wickham*, 382 U.S. 111, 124 (1965)("The purpose of the three-judge scheme was in major part to expedite important litigation.") Based on this history of voting rights litigation, **there is a risk that this case will not be resolved by March 2020 even in the absence of a stay.**

[2] *Whitford* and *Lamone* were decided on June 18, 2018. *See Whitford*, 138 S.Ct 1916; *Lamone*, 138 S. Ct. 1942 (per curiam)

> Defendants' argument incorrectly minimizes the possible duration of this case as well as the prejudice to Plaintiffs and the public interest that would arise if this case were to persist through three election cycles.

(Order Denying Def.'s Mot. to Stay, RE 35, Page ID #613-14)(emphases added). While these motions were pending, Voters began the discovery process in earnest by serving many non-party subpoenas and requests for production. (*See* Resp. to Mot. to Intervene, RE 37, Page ID #632-33.)

D. Members of Michigan's Congressional delegation move to intervene, and the district court denies their motion.

On February 28, 2018, eight Republican members of Michigan's Congressional delegation (the "Congressional Intervenors") moved to intervene, asserting interests in the litigation that included their constituent relationships, the increased costs of running in new, non-gerrymandered districts in 2020, and diminished chances of winning re-election in new, non-gerrymandered districts. (RE 21.) Voters opposed their motion. (RE 37.) On April 5, 2018, the district court denied the Congressional Intervenors' motion to intervene. (Order, RE 47, Page ID #902-04.)

E. Legislators move to intervene, and the district court denies their motion.

Legislators filed their motion to intervene on July 12, 2018, arguing that they were entitled to intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b). (Mot. to Intervene, RE 70, Page ID #1204-24.) Generally, Legislators argued that they had a significant interest in the litigation, and that Secretary Johnson would not adequately represent their interest. (*Id.*)

Voters opposed intervention as of right (because Legislators have no "right" to be elected in gerrymandered districts), and argued that the district court should exercise its discretion to deny permissive intervention as well. (Opp. to Mot. to Intervene by Republican Legislators, RE 78, Page ID #1779-99.) Legislators argued that "[a]ny potential delay is ameliorated by" the district court's ability to "set reasonable limits on intervenors in order to avoid any prejudice or delay[.]" (Reply in Support of Mot. to Intervene, RE 85, Page ID #2033-34.) They also represented that they were "prepared to work in any expedited schedule the Court may order to prevent any such prejudice," and insisted that "there is no significant delay or prejudice that would result by allowing intervention." (*Id.* at Page ID #2034.)

On August 14, 2018, the district court denied Legislators' motion to intervene. (Order Denying Mot. to Intervene by Individual Mich. Legislators, RE 91.) The court found that "[i]nsofar as Applicants claim an official interest in this litigation, Applicants' interest is a component of the state's overall interest and is exclusively represented by the executive." (*Id.* at Page ID #2059-60.) The district court also found that Legislators "attempt[ed] to assert non-official interests in support of intervention"—interests that are foreign to "Michigan's republican form of government," in which "members of the legislature serve at the will of the people and have no official interest in maintaining their elective offices." (*Id.* at Page ID #2062.) To the extent that Legislators "attempt[ed] to assert an interest in maintaining their 'or their

successors' reelection chances,'" the court found that "[t]his purported interest is grounded in either partisanship, notions of elective office as property, or both," and "is not cognizable for purposes of Applicants' motion to intervene." (*Id.*) Rejecting Legislators' argument that they have an "economic interest" in the Plans, the district court found that "such interest belongs to the state and is adequately represented by the executive." (*Id.* at Page ID #2063.)

Crucially, the district court found that "[g]ranting the Applicants' motion to intervene **could create a significant likelihood of undue delay and prejudice to the original parties**. Any delay caused by Applicants' intervention would be undue in light of Applicants' lack of cognizable interest in this matter." (*Id.* at Page ID #2063-64; emphasis added.) The district court thus denied intervention under both Fed. R. Civ. P. 24(a)(2) and 24(b).

F. This Court reverses the district court's denial of the Congressional Intervenors's motion to intervene.

Two weeks after the district court denied Legislators' motion to intervene, this Court reversed the district court's earlier denial of the Congressional Intervenors' motion to intervene. (*See League of Women Voters of Michigan v. Johnson*, No. 18-1437 (6th Cir. Aug. 30, 2018) ("August 30 Decision").) Obviously, the district court could not have applied the August 30 Decision when it denied Legislators' motion to intervene on August 14. On August 20, Legislators filed a notice of appeal of the district court's denial of their request to intervene. (RE 96.)

G. The district court sets and enforces an aggressive discovery and dispositive motion schedule.

The district court's case management order contains an aggressive discovery and trial schedule. (*See* Case Mgmt. Order, RE 53, at Page ID #939-41.) In a September 4, 2018 order signed by Circuit Judge Clay, the district court "order[ed] that the Congressional Intervenors, as Intervenor, must comply with the [case management] deadlines already in place[.]" (RE 108, at Page ID #2188.) The Congressional Intervenors filed an "Emergency Mot. to Alter Case Management Order #1," seeking, among other relief, to "[a]djust all dates in the Scheduling Order," ***including moving the trial to April 8, 2019*** (from February 5, 2019), with proposed findings of fact and conclusions of law due April 23, 2019. (*See* Emergency Mot. to Alter Case Mgmt. Order, RE 111, at Page ID #2231-32.)

On September 11, 2018, the district court ruled on that motion. (*See* Order Granting in Part the Congressional Intervenors' Emergency Mot. to Alter Case Mgmt. Order #1, RE 115, at Page ID #2308.) The district court, in another order signed by Circuit Judge Clay, noted that it was "not aware of any reason that the Congressional Intervenors are incapable of complying with the existing case management deadlines." (*Id.* at Page ID #2308) The district court ordered the Congressional Intervenors to "comply with the deadlines already in place in the Case Management Order, but allowed them to "seek additional discovery on a case-by-case basis." (*Id.* at Page ID #2309.) The Congressional

Intervenors then sought relief from this Court, filing an Emergency Motion to Enforce the Court's ruling allowing intervention, and seeking a sixty-day extension of all deadlines. (No. 18-1437, Sixth Cir. ECF No. 38.) This Court denied that motion. (No. 18-1437, Sixth Cir. ECF No. 39.) Accordingly, the Congressional Intervenors moved for summary judgment on September 21, 2018. (RE 121.)

H. Legislators appeal the district court's denial of their motion to intervene.

Legislators filed their Appellant's Brief on September 5, 2018. (*See* Sixth Cir. ECF No. 11.) They also filed a motion to stay the district court's proceedings pending this appeal. (*See* Sixth Cir. ECF No. 16.) Voters opposed the motion to stay, *see* Sixth Cir. ECF No. 20, and filed a motion to remand this case, explaining that "[g]iven the timing of" the district court's denial of Legislators' motion to intervene and this Court's August 30 Decision, "and the current posture of the case, remanding for further proceedings in light of this Court's first ruling on intervention is the most efficient and practical outcome for the parties and preservation of judicial resources." (Sixth Cir. ECF No. 19.) Legislators, however, opposed the motion to remand, "absent an Opinion and Order form this Court." (Sixth Cir. ECF No. 21, at 4.) The motion to remand is fully briefed and awaiting decision.

Summary of Argument

Voters determined, in light of this Court's August 30 Decision, that they would no longer oppose Legislators' intervention. As explained in their motion to remand, Voters' decision was driven, above all, by the need to preserve the February 2019 trial date so that the issues of critical constitutional importance at stake in this case can be fully litigated, and so Voters can vindicate their rights and effective meaningful relief in the underlying case.

To this end, Voters have filed a motion to remand this case to the district court so that Legislators may intervene consistent with this Court's August 30 Decision. Voters' motion should be granted because doing so will allow Legislators to assert their interests and allow the district court to continue managing its docket while the parties prepare for trial in February 2019.

If this Court, however, declines to remand this case, or otherwise reaches the merits of Legislators' position, Voters respectfully request that the Court affirm the district court's decision denying intervention.

I. The Court should grant Voters' motion to remand.

Though they claim that "a February 2019 trial date is not absolutely necessary to resolve the case before the 2020 elections," *see* Legislators' Resp. to Mot. to Remand, Sixth Cir. ECF No. 21, at Page ID #4, Legislators' transparent strategy is and has been to upend the current trial schedule and prevent Voters from obtaining effective redress for their Constitutional injuries.

Almost any alteration of the trial date would result in the practical impossibility of implementing revised, non-gerrymandered maps in time for the November 3, 2020 election. This matter is set for trial on **February 5, 2019**. (*See* RE 53 at Page ID #940.) Proposed Findings of Fact and Conclusions of Law are due by **February 22, 2019**. (*Id.*) Assuming the district court enters judgment just three weeks later, on March 15, 2019, that would allow *just* enough time for the Supreme Court to decide, by the end of its current Term in June, whether to set the case for full briefing and argument early in October Term 2019. That, in turn, would allow a decision from the Supreme Court in early 2020.

An early January 2020 Supreme Court decision would leave **just over a month and a half** to implement any remedial maps ordered by the district court. That is critically important in view of Michigan's primary schedule in 2020. Michigan's statutes establish the following timetable:

- The Michigan primary election for the 2020 election will be held on **August 4, 2020**. MICH. COMP. LAWS § 168.534.

- The filing deadline for congressional and legislative candidates for the 2020 election is **April 21, 2020**. MICH. COMP. LAWS § 168.551.

- Legislative candidates can file for the primary either by paying a $100 fee or by filing petition signatures by the April 21 deadline. MICH. COMP. LAWS § 168.163. Congressional candidates, by contrast, must file a minimum of 1,000 petition signatures. MICH. COMP. LAWS §§ 168.133; 168.544f.

- In order to gather signatures, candidates must know the district boundaries. A diligent candidate can gather the requisite signatures in 30 days.

- So, remedial maps must be in place by **March 20, 2020**.

Any alteration of the trial date would require the Supreme Court either to (1) consider a jurisdictional statement and motion to dismiss/affirm during the Court's summer recess, or (2) significantly expedite the typical briefing and argument schedule. The Court, of course, has discretion to do either of those things. But it would be highly presumptuous to plan on the Court's doing either.

The Congressional Intervenors already attempted to delay trial by **two months**, from February 5, 2018 to April 8, 2018. (*See* Emergency Mot. to Alter Case Mgmt. Order #1, RE 111, at Page ID #2231-32.) As explained above, even that two-month move would render it all but impossible for Voters to obtain relief in time for the 2020 elections, because unless the Supreme Court departed from its normal practices, remedial maps would not be in place until late May 2020 at the very earliest—leaving insufficient time for the petition process required by Michigan law.

If this matter is remanded and Legislators are allowed to intervene on the existing trial schedule, they will have no difficulty in participating in the litigation and defending their interests because they are represented by the same counsel who represent the Congressional Intervenors. (*Compare* Sixth Cir. ECF No. 3, No. 18-1437 (appearance of attorney Jason Torchinsky on behalf of the Congressional Intervenors), *with* Sixth Cir. ECF No. 5, No. 18-1946 (appearance of Mr. Torchinsky on behalf of Legislators).)

Legislators' purported strategic interest in intervening—asserting the alleged non-justiciability of Voters' constitutional claims as an affirmative defense, *see* RE 70 at Page ID #1221-22—is one subject of the 63-page motion for summary judgment

filed by original Defendant Ruth Johnson. (*See generally* Def.'s Br. in Support of Mot. to Dismiss and for Summary J., RE 119, at Page ID #2401-13.) Legislators' counsel, Mr. Torchinsky, has filed a separate motion for summary judgment on behalf of the Congressional Intervenors, arguing that Voters lack standing and that their claims are barred by laches. (*See generally* Congressional Intervenors' Mot. for Summ. J., RE 121.[3]) Those two facts belie any notion that Legislators are inadequately represented.

In short, a remand to afford the opportunity for the district court to apply this Court's August 30 order in allowing Legislators to intervene, on the current trial schedule, would not prejudice Legislators and would allow Voters, should they prevail on their claims, the opportunity to obtain redress for their Constitutional injuries in time for the 2020 elections.

II. If the Court does not grant Voters' motion to remand, or considers Legislators' position on the merits, the Court should affirm the district court.

Voters' decision not to further contest Legislators' attempt to intervene was driven by a pragmatic reading of this Court's August 30 Decision regarding the Congressional Intervenors. Legislators' request to intervene is materially different from the Congressional Intervenors', however, so to the extent this Court does not grant Voters' motion to remand, or considers the Legislative Intervenor's request on

[3] The Legislative Intervenors told the district court that they "differ from the Secretary in affirmative defenses" insofar as they "contend that there are no judicially manageable standards to evaluate Plaintiffs' claims and therefore this Court should dismiss Plaintiffs' claims as non-justiciable." (RE 70 at Page ID #1221-22.) It is curious, given that purported strategic difference, that the *Secretary* was the party to raise non-justiciability on summary judgment. (*See generally* RE 119.)

the merits, Voters respectfully request that the Court affirm the district court's refusal to allow intervention.

a. Standard of Review.

Legislators seek intervention as of right under Fed. R. Civ. P. 24(a)(2). This Court applies a four-part test to evaluate intervention motions under that Rule: "(1) **timeliness** of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by the parties already before the court." *Mich. State. AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)(emphasis added). Unless the putative intervenor satisfies *each* criterion, intervention as of right will be denied. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000). This Court reviews the district court's decision regarding intervention as of right *de novo*, except for the timeliness element, which is reviewed for abuse of discretion. *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001).

b. Legislators' request to intervene was untimely.

This Court has identified five factors to weigh in determining the timeliness of an application to intervene:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990). Here, Legislators' lack of justification for their lengthy delay in seeking intervention (*Jansen* factor 3) and the prejudicial impact intervention would cause in this time-sensitive case (factor 4) weigh heavily against a finding of timeliness.

A request to intervene is timely only if the proposed intervenors apply to the court "promptly after discovering their interest" in the case. *Blount-Hill v. Zelman*, 636 F.3d 278, 285 (6th Cir. 2011). Legislators did not act promptly. Voters' impending lawsuit has received significant public attention since early 2017—almost a year, in fact, before Voters' lawsuit was filed.[4]

Whatever Legislators' separate interest in the case may be—and, as discussed below, there are ample reasons to conclude that Legislators have no separately cognizable interest—it undeniably was apparent by December 2017 when the Complaint was filed. Indeed, it was so apparent that the Congressional Intervenors (who, again, are represented by the same counsel) requested to intervene in February 2018—*six months before Legislators' request.* The timely intervenors alleged purported interests that are substantially similar to those that Legislators eventually raised. (*Compare* Mot. to Intervene by Republican Congressmen, RE 21, at Page ID #219-221 ("Applicants, as current members of Congress, … are currently attempting to run for

[4] *See, e.g.*, "Democrats Challenge Gerrymandered Michigan Districts," DETROIT FREE PRESS (Jan. 31, 2017), https://www.freep.com/story/news/politics/2017/01/31/democrats-challenge-gerrymandered-michigan-districts/97254240/. *Cf. Johnson v. City of Memphis*, 73 Fed. App'x 123, 133 (6th Cir. 2003)(noting that "newspaper articles can serve as a basis for determining the date [on] which proposed intervenors knew or should have known of their interest in the case").

reelection in districts that will be directly impacted by any change in the congressional districts as they are currently drawn"), *with* Mot. to Intervene by Individual Michigan Legislators, RE 70, at Page ID #1210 (noting that Applicants' "reelection or their successors' chances of election may be reduced as a result of redrawing the Current Apportionment Plan").)[5]

Legislators offered no justification for their seven-month delay in seeking leave to intervene, and they did not contend that anything occurred since December 2017 that revealed to them an interest at previously was hidden. In this Court, they argue only that their "motion was timely as it was filed not long after the Answer and the Order Denying Legislative Privilege," Sixth Cir. ECF No. 11, at Page ID #12, "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", (*id.* at Page ID #18). They fail to mention that by the time they finally sought to intervene, (1) the parties had briefed, and the district court had denied, the Secretary's motion to dismiss or stay the action, ECF Nos. 11, 15, 20, 35; (2) the Congressional Intervenors had sought and been denied leave to intervene, ECF Nos. 21, 37, 40, 47; (3) both

[5] As this Court noted, the "question is whether it was an abuse of discretion for the district court to deny permissive intervention as the case stood in February 2018, when the Congressmen moved to intervene. At that time, no scheduling order was in place and discovery had not yet begun. The district court had not ruled on Johnson's motion to stay or her motion to dismiss. Put simply, the case was in its infancy. If the Congressmen had been allowed to intervene from the outset, they would have been allowed input into scheduling matters, and duplicative discovery and motion practice would have been unnecessary. Any delay attributable to the Congressmen's presence in the case would have been minimal at best, *especially since they are all represented by the same attorney*." August 30 Decision at 7 (emphasis added).

parties had served expert reports; (4) Voters had served dozens of third-party subpoenas (including subpoenas to numerous Michigan State Representatives and the Clerk of the Michigan House of Representatives); and (5) the parties had exchanged two rounds of discovery, and had scheduled numerous depositions, with discovery nearly complete, *see* Case Mgmt. Order, RE 53.

The non-party subpoenas, and the partially successful effort to quash those subpoenas launched in March, demonstrate Legislators' full awareness of this case and the tardiness of their attempt to intervene. As Defendant noted, "Plaintiff's Counsel issued *subpoenas duces tecum* … on dozens of non-party, former and current legislative officials and staff, seeking production of certain documents relating to the introduction, consideration, or passage of Michigan's current apportionment plan[.]" (*See* Non-Parties' Mot. to Quash Subpoenas and for Protective Order, RE 27, at Page ID #319.) Legislators admit that they were "already covered parties under various third-party discovery requests." (RE 70 at Page ID #1214.) And they argue that "***[i]ntervention was made necessary once the state legislature was fully and improperly made subject to civil discovery***." (Appellant's Br., Sixth Cir. ECF No. 11 at Page ID #20; emphasis added.) Yet they waited until *two months after the motion to quash had been decided* before they requested to intervene. (*See* RE 58 (May 23, 2018 Order on Mot. to Quash), RE 70 (July 12, 2018 Mot. to Intervene).) They offer no excuse for this failure; there is none to consider.

The district court has emphasized repeatedly that time is of the essence here. In March (four months before Legislators sought to intervene), the court denied the

Secretary's motion to stay because if Voters prove their case, "a 2020 remedial plan must be in place no later than March of 2020 to be effective for the November 2020 election." (RE 35 at Page ID #613.) In May (two months before Legislators sought to intervene), the district court denied the Congressional Intervenors's bid to intervene, noting the need for "expeditious resolution" of the case in light of the public interest at stake. (RE 47 at Page ID #903.) And in August, the court noted that "[g]ranting Applicants' motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties." (RE 91 at Page ID #2063.) What was true then is truer now: permitting intervention would be highly prejudicial. *See Zelman*, 636 F.3d at 285 (concluding that delay caused by intervention would be prejudicial where the existing parties and the public had an "interest in the expeditious and efficient disposition" of a lawsuit "seek[ing] to invalidate a significant statutory scheme").

Because Legislators' months-long delay in bringing their motion was unjustified, they are not entitled to intervention. *See Zelman*, 636 F.3d at 284 (analyzing timeliness in the first instance and noting that the "timeliness of a motion to intervene is a threshold issue")(citations omitted).

c. The Secretary and Congressional Intervenors are presumed to, and do, adequately represent any interests Legislators may have.

Legislators may intervention as of right only if they prove that the existing parties to the litigation do not "adequately represent" their interests. *See Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). They cast this as a "minimal" burden, *see* Appellant's Brief, Sixth Cir. ECF No. 11, at Page ID #28, and say they meet it

because "the Secretary has not and will not make all of the prospective intervenors' arguments", *id.* (quotation omitted).

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

Here, the Secretary, the Congressional Intervenors, and Legislators all share the same objective and seek the same outcome: a holding that the Plans are constitutional. It does not matter that this shared objective might be motivated by marginally different interests, or that there is an alleged difference in "litigation strategy."[6] So long as the proposed intervenors share a desired end result with the existing

[6] To the extent there is a difference; *see supra* at footnote 3.

defendants, the presumption of adequate representation applies. *See Bradley*, 828 F.2d at 1192.

This presumption is even stronger when an existing party is a government official charged with defendant a state's law as part of her official duties. "[W]hen a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government. It is after all the government that, through the democratic process, gains familiarity with the matters of public concern that lead to the statute's passage in the first place." *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013); *see also Freedom From Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011)(holding, in the context of a challenge to a federal statute, that "th[e] presumption of adequacy is nowhere more applicable" than where the government is defending the statute's constitutionality)(citation omitted). In short, it is "presume[d] that the government entity adequately represents the public." *FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015)(citation omitted).

Legislators claim to have four interests at stake: (1) their "official conduct" would be impacted by an order requiring the Legislature to draw new maps (2) they would suffer "economic harm" from the "increasing costs of election and reelection" imposed by an unfavorable ruling; (3) their reelection chances might be reduced; and (4) they will be "forced to expend significant public funds and resources" to carry out any remedial orders. (RE 70 at Page ID #1210.) As explained below, none of these interests is cognizable, but to the extent any is, each is adequately represented already.

i. The "economic harm" and reduced reelection chances interests are adequately represented by the Congressional Intervenors.

With respect to the prospect of reduced reelection chances, as the district court rightly noted, while Legislators disclaim any "property interest in their elected positions," RE 91 at Page ID #2062 (quoting RE 70 at Page ID #1215), this "purported interest is grounded in either partisanship, notions of elective office as property, or both," and as such, "is not cognizable for purposes of Applicants' motion to intervene." (*Id.* at Page ID #2062.) While they dispute this characterization, *see* Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #24 and *id.* at Page ID #26, they fail to mention that this interest is *identical* to that asserted by the Congressional Intervenors. Indeed, as this Court noted, "the contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent in the legislature." (Aug. 30 Decision, No. 18-1437, Sixth Cir. ECF No. 37-2 at Page ID #8.)

With respect to the economic harm Legislators supposedly would face from being forced to compete in and represent new districts, that interest, too, is adequately represented by the Congressional Intervenors. (*See* Reply in Support of Mot. to Intervene, RE 39, Page ID #650-52.) (Note, though, that as explained below, Legislators *have no* economic interest, because they will be term-limited.)

ii. The "official conduct," "public funds," and federal constitutional interests are adequately represented by the Secretary.

With respect to their "public funds" and "official conduct" arguments, Legislators argue that the "Michigan Legislature … will be directly impacted by any order of the district court requiring a redrawing of the current legislative and congressional maps." (Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #22.) In support, they cite *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972). There, however, the Minnesota State Senate had enacted a specific resolution authorizing its involvement in "both state and federal court actions involving the prescription of the bounds of senatorial and representative districts[.]" *Id.* at 193. Legislators identify no such resolution in this case and, in any event, ignore the fact that, as the district court held, "[r]epresenting the State of Michigan in court—whether against a challenge to the validity of a state law or a threat to state resources—is an executive function[.]" (RE 91 at Page ID #2060 (citing Mich. Const. art. 5, §§ 1, 8; Mich. Comp. Laws §§ 14.29, 21.162).) There is no suggestion that the Secretary is abdicating this function in a way that might warrant legislative intervention. *Cf. United States v. Windsor*, 570 U.S. 744, 762-63 (2013)(where executive branch declined to defend DOMA, Congressional group intervened).

Finally, Legislators purport to assert a "federal constitutional interest in their constitutionally prescribed power to reapportion." (Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #27.) This argument is waived because it was not presented to the district court. *United States v. Univ. Mgmt. Servs., Inc.*, 191 F.3d 750, 759 (6th Cir. 1999).

Even if the argument had not been waived, it fails for the same reason that the "official conduct" argument fails: the task of representing the State of Michigan in court belongs to the executive branch. (*See* RE 91 at Page ID #2060 (citing Mich. Const. art. 5, §§ 1, 8; Mich. Comp. Laws §§ 14.29, 21.162).)

d. Legislators do not have a "substantial, legal interest" in the subject of the case.

"The second prong of the Rule 24(a)(2) requirements is that the proposed intervenor must have a direct and substantial interest in the litigation…. The interest must be significantly protectible." *Grubbs*, 870 F.2d at 346 (citation omitted); *see also United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993)(explaining that a "direct, significant legally protectable interest" is required). "In cases like this one, where a group of plaintiffs challenge state legislation, the court should evaluate requests to intervene with special care, lest the case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place." *One Wisc. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015).

Legislators purport to identify four interests they seek to protect by intervening: "(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." (Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #21-22.) The first and fourth factors are inextricably linked, so will be treated together here.

i. The regulation of Legislators' official conduct/vested power of Michigan's legislative branch under the United States Constitution is not a separately cognizable interest.

Legislators argue that the "Michigan Legislature … will be directly impacted by any order of the district court requiring a redrawing of the current legislative and congressional maps." (Appellant's Br., Sixth Cir. ECF No. 11, at 14.) While it is true that if Voters prevail, new maps will have to be drawn, that does not give the *Legislature* a cognizable interest distinct from the *State's* interest, which is currently and adequately being represented by the Secretary. The district court recognized this when it observed that Legislators' "attempt to intervene is in tension with the principle of separation of powers." (Order Denying Mot. to Intervene, RE 91, at Page ID #2059.)

Legislators call the district court's separation-of-powers ruling "inexplicable." (*See* Sixth Cir. ECF No. 11 at Page ID #12.) To the contrary: the district court's ruling was fully explicated and is correct. (*See* Order, RE 91 at Page ID #2509-2016.) Legislators devote less than a full page to attacking merits of the district court's ruling. (*See* Sixth Cir. ECF No. 11 at Page ID 34-35.) In that space, Legislators say that *Windsor*, 570 U.S. at 754, "stands for the proposition that individual legislators *may intervene*." (*Id.*, emphasis in original.) *Windsor*, however, does not stand for that proposition. As the district court properly noted, the Supreme Court in *Windsor* allowed legislative intervention "*where the executive decided not to participate in the litigation[.]"* (Order, RE 91, at Page ID #2061, emphasis added.) Here, of course, the

executive—through the Secretary—is participating fully in the litigation. Sensibly, but tellingly, Legislators do not claim otherwise. Instead, they claim without explanation or citation that "[s]eparation of powers principles are of simply no moment when the legislature wielded powers specifically granted by the Federal Constitution." (Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #35.)

Legislators claim that the Constitution "makes a specific grant of authority to … the Michigan State Legislature." Article I, § IV, of course, provides that the "times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." Under Michigan law, the Secretary is the "chief election officer" of Michigan, responsible for the conduct of Michigan's elections and for the enforcement of the gerrymandered Plans. (*See* Compl., RE 1 at Page ID #9 (citing MICH. COMP. LAWS § 168.21).) The Secretary is one of four executive branch officials elected by statewide election. (*See* "Executive Branch," MICHIGAN.GOV (last accessed Oct. 1, 2018).) As the district court explained, "[r]epresenting the State of Michigan in court—whether against a challenge to the validity of a state law or a threat to state resources—is an executive function." (RE 91, at Page ID #2060 (citing MICH. CONST. art. 5, §§ 1, 8; MICH. COMP. LAWS. §§ 14.29, 21.162).) Put simply, Legislators are seeking to interfere in a function the people of Michigan have delegated exclusively to their executive officers. The district court correctly declined to allow this interference.

ii. The alleged interest in avoiding diminished reelection chances is insufficient under Rule 24(a)(2).

Next, Legislators argue that their reduced chances at obtaining reelection under non-gerrymandered maps constitutes a substantial legal interest. (*See* Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #23-25.) In their original motion, they cited *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016), for the proposition that "evidence of impairment of reelection prospects can constitute an Article III injury for standing purposes". (*See* RE 70, at Page ID #1218.) As the district court noted, "in *Wittman*, the Supreme Court *rejected* standing for members of the Virginia legislature, explaining that it 'need not decide when, or whether, evidence of the kind of injury they allege [potential harm to reelection prospects] would prove sufficient for purposes of Article III's requirements." (Order, RE 91, at Page ID #2063 (quoting *Wittman*, 136 S. Ct. at 1734).) And while Legislators say they have "cited to significant additional authority to show that diminishment of reelection chance is a cognizable injury," Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #25 n.4, **each of these cases is irrelevant to the facts and issues before this Court**:

- ***Texas Dem. Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006)(cited on Page ID #25 of Appellant's Brief).** *Benkiser* is inapposite for two reasons. *First*, it is a case about plaintiff standing, not defendant intervention. *Second*, the case dealt with alleged economic injury, in that the putative plaintiff argued that he would have to spend money to prepare a new campaign in a short timeframe. The Fifth Circuit affirmed the district court's finding that the candidate had standing, holding that a "finding of financial injury is not *clearly erroneous* because it is supported by testimony in the record." 459 F.3d at 586.

- ***Smith v. Boyle*, 144 F.3d 1060, 1061-63 (7th Cir. 1998) (cited on Page ID #25 of Appellant's Brief).** In *Smith*, a suit seeking a declaration that Illinois' method of electing Supreme Court justices violated the Fourteenth

Amendment was dismissed as non-justiciable. 144 F.3d at 1061. The court reversed the finding of non-justiciability but affirmed anyway, holding that the complaint "fail[ed] to state a claim because the plaintiffs have not alleged and they do not seek an opportunity to prove facts essential to establish that the discrimination of which they complain is intentional." *Id.* at 1066.

- ***Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (cited on Page ID #25 of Appellant's Brief).** In *Smith*, the Second Circuit addressed intervenor standing to appeal after the government acquiesced to the district court's decision that the statute at issue was invalid. *Id.* at 52. Additionally, while the decision was grounded in an injury analysis relating to increased competition for votes, the issue in *Smith* (which was decided just a week before the election) was whether certain Libertarian candidates would be named on a ballot.

- ***Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (cited on Page ID #25 of Appellant's Brief).** In *Owen*, the court found standing to challenge a preferential Post Office rate that would allow an opponent to gain an advantage in an upcoming election.

- ***Dem. Party of U.S. v. Nat'l Conservative PAC*, 578 F. Supp. 797, 810 (E.D. Pa. 1983), *aff'd in part and rev'd in part on other grounds sub nom. FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 489-90 (1985) (cited on Page ID #25 of Appellant's Brief).** Legislators do not attempt to explain why this case supports their position. That is likely because the case has *nothing whatsoever to do* with the question whether a legislator has standing, separate and apart from the executive official charged with defending a statute, to intervene and separately defend the statute.

iii. The alleged economic interest is unsubstantiated and inadequate under Rule 24(a)(2).

Legislators also claim an "economic interest" in their districts and say this is "sufficient for intervention." (Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #25.) Specifically, they argue they must incur "(1) the increased costs of running 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." (*Id.* at Page ID #26.)[7] This argument is flawed for several reasons.

First, Legislators' potential economic interest in their district is nonexistent, because Voters seek a remedy for an election that will not affect either of the Legislators. Voters seek a remedy for 2020. (*See* Compl., RE 1 ¶ 26, Page ID # 13.) Assuming each wins reelection in November 2018, each will be term-limited from serving in the Michigan House of Representatives ever again. MICH. CONST. art. IV, § 25. Moreover, as Voters informed the parties, they are not currently challenging the district lines for House district 59—the district represented by Mr. Miller. (*See* Voters' Resp. to Mot. to Stay, RE 110-1, at Page ID #2209 (listing districts Voters intend to challenge).) So, as an evidentiary matter, whatever economic harm *might* exist at some point as to someone else, such unsubstantiated, speculative harm is no basis for intervention by Legislators. *Cf. Wittman*, 136 S. Ct. at 1737 ("[W]e have examined the briefs, looking for any evidence … and have found none…. We need go no further.").

The only case Legislators cite in support of a purported "economic" interest is *Benkiser*. In that case, the Texas Democratic Party argued that after the state Republican Party declared Tom DeLay ineligible for election and named a replacement, the Democrats would be forced to spend additional funds to prepare a new campaign on a short timeline. 459 F.3d at 584-85. The Fifth Circuit held, in

[7] They also quote the August 30 Decision in claiming they "also 'serve constituents and support legislation that will benefit the district and individuals and groups therein.'" (*Id.* at Page ID #25, quoting Aug. 30 Decision at Page ID #8.) (If they have the same interests as the Congressional Intervenors, those interests are *ipso facto* represented by existing parties.)

affirming a ruling on standing under a deferential standard of review, that a "finding of financial injury [was] not *clearly erroneous* because it [was] supported by *testimony in the record*." *Id.* at 586 (emphases added). Once again, there is no such testimony here, nor is there other evidence that could support intervention.

Furthermore, despite Legislators' repeated citation of standing cases, they have offered no authority (or even an explanation) establishing that *plaintiff standing* cases, such as *Benkiser*, are relevant to a case about *defendant intervention*. Moreover, and to the limited extent that standing doctrine is relevant here, the leading *defendant standing* cases cut against Legislators' position here. *See Hollingsworth v. Perry*, 570 U.S. 693, 705-707 (2013)(holding that defendant-intervenors did not have standing to appeal); *see also infra*, Part II.d.ii (discussing *Wittman v. Personhuballah* and its dismissal for lack of defendant-intervenor standing).

Finally, there is significant doubt as to whether an economic interest can ever be sufficient to support Rule 24 intervention. *See, e.g.*, *Tennessee*, 260 F.3d at 596 (rejecting asserted economic interest as inadequate to support intervention); *Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482, 486 (6th Cir. 2006) (rejecting asserted economic interest and explaining that "White Hat's primary interest is economic. It is not a party to any challenged contract nor is it directly targeted by plaintiff's complaint.").

The Court should reject the sort of hypothetical, attenuated economic interest Legislators allege. *See Tennessee*, 260 F.3d at 595 (Proposed intervenor's "claimed interest does not concern the constitutional and statutory violations alleged in the

litigation."); *Blount-Hill*, 195 F. App'x at 488 (explaining that, like Legislators, the unsuccessful intervenor in *Tennessee* was concerned that the "implementation of the remedial plan would drain its financial resources").

For these reasons, Legislators have not met their burden to establish that their alleged economic interests in their districts are sufficient under Rule 24(a).

e. The speculation regarding hypothetical *future* inadequacy of representation is premature.

Legislators take issue with this Court's recognition in the August 30 Decision that, under *Michigan*, 424 F.3d at 444, courts do "not typically allow intervention based upon 'what will transpire in the future.'" (Appellant's Br. at Page ID #29 (quoting Aug. 30 Decision, No. 18-1437, Sixth Cir. ECF No. 37-2 at PageID #10).) Indeed, they say that "this is a reading of the *Michigan* case that cannot be squared with *Michigan* itself[.]" (*Id.*) They say that putative intervenors need show only "that representation *may be inadequate*" or "that there is *a potential* for inadequate representation." (*Id.*, quotations omitted). That is a misreading of this Court's holding in *Michigan*: "Rather than identifying any weakness in the state's representation in the current phase of the proceedings, the proposed intervenors seem more concerned about what will transpire *in the future* …. While the proposed intervenors may be legitimately concerned about these future issues, they are not now, and possibly never will be, before the district court." 424 F.3d at 444 (emphasis in original).

Legislators argue that "[a]t issue here is if the Secretary will, of her own accord, adequately represent all of [the] Legislators' interests in either phase of the proceeding.

In other words, the only precipitating event in the 'potentially inadequate' analysis here are [sic] the actions of the Secretary herself and *not* any precipitating finding by the Court." (Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #30.) That line of reasoning misapprehends this Court's August 30 Decision, which dealt with the fact that Secretary Johnson is not eligible for reelection, and the speculative possibility that "[i]f the new Secretary takes office in January 2019 and decides not to further pursue the state's defense of its apportionment schemes, the district court will have to appoint someone to take the Secretary's place." (August 30 Decision, No. 18-1437, Sixth Cir. ECF No. 37-2, at Page ID 9.) Moreover, if the possibility that a future Secretary might decline to defend the law equals inadequate representation *now*, that would mean that *no* elected official could ever adequately defend a statute, so long as there is a chance that she might lose an election (or resign, or be impeached, etc.) and be replaced by a member of the opposite party while the lawsuit is pending. Merely to state that principle is to refute it. And finally, even if the Secretary might someday fail to defend adequately, the Congressional Intervenors, represented by Legislators' own counsel, will still be in the case.

f. None of Legislators' supposed interests will be impaired.

As described above, Legislators have not asserted a sufficient interest to establish intervention as of right. But even if their claimed economic and speculative interests were sufficient, Legislators cannot meet their burden to establish impairment. *Miller*, 103 F.3d at 1247 ("To satisfy this 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."). Legislators "show" nothing of the sort; instead, they argue that they have "interests that will be impaired by the disposition of this case." (Appellant's Br., Sixth Cir. ECF No. 11, Page ID #21.) That is not enough.

III. The district court did not abuse its discretion in denying Legislators' request for permissive intervention.

In the alternative, Legislators argue that the district court should have granted their request for permissive intervention. (Appellant's Br., Sixth Cir. ECF No. 11, at Page ID #31-34.) Here, too, they are incorrect.

a. The district court's denial of permissive intervention can be reversed only if it was a clear abuse of discretion.

Rule 24(b)(1)(B), governing permissive intervention, provides that district courts "may" permit anyone to intervene who has a "claim or defense that shares with the main action a common question of law or fact." The Rule requires that the district court "exercis[e] its discretion" by "consider[ing] whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Reversal of a district court's ruling on permissive intervention requires a "clear" abuse of discretion. *Zelman*, 636 F.3d at 287-88; *see also NAACP v. New York*, 413 U.S. 345, 366 (1973)(decision on permissive intervention will be affirmed unless it is an abuse of the district court's "sound discretion"). As this Court has stated, it can "seldom, *if ever*, be shown that the trial court had abused its discretion in denying the permissive right to intervene." *Burger Chef Sys., Inc. v. Burger Chef of Mich., Inc.*, 334 F.2d 926, 927 (6th Cir. 1964)(quotation omitted; emphasis added.) Ultimately, the denial of

a request for permissive intervention can be reversed only if this Court is left with a "definite and firm conviction" that the district court acted outside its discretion. *Coal. to Defend Affirm. Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007).

b. The district court did not clearly abuse its discretion in denying Legislators' request for permissive intervention.

The district court held that, "[t]o the extent that [Legislators] have any legitimate official interest in this litigation, … such interest belongs to the state and is adequately represented by the executive." (RE 91, at Page ID #2063.) That holding is correct for the reasons explained above. Because the Secretary (and now, the Congressional Intervenors) will adequately protect Legislators' interests, it was no abuse of discretion for the district court to deny permissive intervention. *See NAACP*, 413 U.S. at 368 (affirming order denying permissive intervention in part because the proposed intervenors' claim of inadequate representation was "unsubstantiated"); *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 759 (6th Cir. Jan. 9, 2018)(affirming order denying permissive intervention in part because the putative intervenor's position was "being represented," thus "counsel[ing] against granting permissive intervention"); *Coal. to Defend Affirm. Action*, 501 F.3d at 784 (affirming order denying permissive intervention in part because proposed intervenors were adequately represented by existing parties).

More important, though, the district court also complied with Rule 24(b)(3) by "exercising its discretion [in] consider[ing] whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." (*See* Order, RE 91 at Page

#2063-64 ("Granting Applicants' motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties. Any delay caused by Applicants' intervention would be undue in light of Applicants' lack of cognizable interest in this matter."). This holding is correct for the same reasons that the district court explained in denying Secretary Johnson's earlier motion to stay: voting rights litigation is "notoriously protracted," and based on past cases, there is a "risk that this case will not be resolved" by the time necessary to implement relief if intervention were granted. (*See* Order Denying Def.'s Mot. to Stay, RE 35, Page ID #613-14.) The district court's decision to deny permissive intervention reflects the court's expressed commitment to adjudicating Voters' case on the merits so that, if Voters prove their case, there will be sufficient time to implement a remedy. (*See also* Case Mgmt. Order, RE 53, at Page ID # 939-41 (setting Feb. 2019 trial date).)

Under this Court's precedents, the district court's determination to avoid the delay that necessarily would attend intervention was well within the district court's discretion. *See Vasalle v. Midland Funding, LLC*, 708 F.3d 747, 760 (6th Cir. 2013) (affirming order denying permissive intervention, even though there were claims in common with those of the original parties, because intervention "would unduly delay the adjudication of the original parties' rights"); *Coal. to Defend Affirm. Action*, 501 F.3d at 784 (affirming order denying permissive intervention because it was not a clear abuse of discretion for the district court to conclude that intervention would "inhibit, not promote, a prompt resolution")(citation omitted); *Michigan*, 424 F.3d at 445 (affirming order denying permissive intervention because allowing intervention would

have "inject[ed] management and regulatory issues into the current phase of the proceedings," thus leading to delay that "would have prejudiced the original parties"); *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889, 891 (6th Cir. 1978) (per curiam)(affirming order denying permissive intervention because it was no abuse of discretion to conclude that intervention would "unduly delay" the proceedings"). Likewise, the district court has correctly determined that the current trial schedule is critically important for Voters to have a meaningful opportunity to achieve final judgment and resolution of their claims in time for Michigan's 2020 elections. The district court properly denied Legislators' request to intervene and attempt to delay these proceedings.

CONCLUSION

The district court's August 14, 2018 Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 9,777 words, excluding the parts exempted by Rule 32(f). *See* Fed. R. App. P. 32(a)(7)(B).

This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14-point Garamond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 09, 2018, this Corrected Response Brief of Plaintiffs-Appellees was electronically filed with the United States Court of Appeals for the Sixth Circuit, using the Court's CM/ECF system. A copy of the motion will also be served on the following counsel through the Court's CM/ECF system:

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No. 18-1946

In the United States Court of Appeals
for the Sixth Circuit

League of Women Voters of Michigan *et al.*,

Plaintiffs – Appellees,

v.

Ruth Johnson, in her official capacity as Michigan Secretary of State, *et al.*,

Defendants,

and

Rep. Lee Chatfield, in his official capacity as Speaker Pro Tempore of the Michigan House of Representatives, and Rep. 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
Civ. No. 17-cv-14148, Hon. Eric L. Clay, Denise Page Hood, Gordon J. Quist

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PLAINTIFFS-APPELLEES' DESIGNATION OF DISTRICT COURT DOCUMENTS

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