UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,

Plaintiffs,

v.

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

Defendant.
_____/

Civil Action No. 17-cv-14148

Hon. Eric L. Clay
Hon. Denise Page Hood
Hon. Gordon J. Quist

UNOPPOSED RENEWED MOTION TO INTERVENE BY INDIVIDUAL MICHIGAN LEGISLATORS

In light of the October 25, 2018 order of the United States Court of Appeals for the Sixth Circuit, Proposed Intervenors Lee Chatfield, in his official capacity as Speaker Pro Tempore of the Michigan House of Representatives and Aaron Miller, in his official capacity as Chair of the Elections and Ethics Committee, each a Member of the Michigan Legislature (collectively, "Legislative Intervenors" or "Legislators"), by and through their undersigned counsel, respectfully request, pursuant to Rule 24 of the Federal Rules of Civil Procedure, this Court grant Legislators' Motion to Intervene as defendants in the above-captioned proceeding for the purpose of participating in the disposition of that proceeding. In support of this Motion, Applicants submit the accompanying Brief in Support. Additionally,

Applicants incorporate by reference their Answer filed as an attachment to their Motion to Intervene. *See* Legislators' Mot. Intervene, (ECF No. 70 at Exhibit A) (attached hereto as Appendix A).

In accordance with LR 7.1(a), Applicants sought and obtained the consent of all parties, including Plaintiffs, to intervene in this matter.

WHEREFORE, Applicants respectfully request that the Court grant Legislators' Motion to Intervene and permit their intervention as Defendants in this proceeding.

Respectfully submitted,

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Date: November 1, 2018

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BRIEF IN SUPPORT OF UNOPPOSED RENEWED MOTION TO INTERVENE BY INDIVIDUAL MICHIGAN LEGISLATORS

CONCISE STATEMENT OF THE ISSUE PRESENTED

I. WHETHER THIS COURT SHOULD GRANT APPLICANTS' RENEWED MOTION TO INTERVENE IN LIGHT OF THE CIRCUIT COURT'S HOLDING IN *LEAGUE OF WOMEN VOTERS I* AND PLAINTIFFS' WITHDRAWAL OF THEIR OPPOSITION TO INTERVENTION.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Constitutional Provisions

U.S. Const. art. I, § IV

Rules

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

Fed R. Civ. P. 24(b)

Cases

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

League of Women Voters of Mich. v. Johnson, 902 F.3d 572 (6th Cir. 2018)

Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)

INTRODUCTION

On December 22, 2017, the League of Women Voters of Michigan, Roger J. Brdak, Frederick C. Durhal, Jr., Jack E. Ellis, Donna E. Farris, William "Bill" J. Grasha, Rasa L. Holliday, Diana L. Ketola, Jon "Jack" G. Lasalle, Richard "Dick" W. Long, Lorenzo Rivera and Rashida H. Tlaib (collectively, "Plaintiffs") filed a Complaint, (ECF No. 1), seeking declaratory and injunctive relief based on the claim that the current legislative and congressional apportionment plans ("Current Apportionment Plans") are unconstitutional. Plaintiffs bring claims under 42 U.S.C. §§ 1983, 1988 and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs contend that by continuing to implement the Current Apportionment Plans, Defendant, Michigan Secretary of State Ruth Johnson has impermissibly discriminated against Plaintiffs as an identifiable political group (likely Democratic voters) in contravention of the Equal Protection Clause of the Fourteenth Amendment, and unreasonably burdened Plaintiffs' right to express their political views and associate with the political party of their choice in contravention of the First Amendment. Plaintiffs seek to enjoin further implementation of the Current Apportionment Plans in the 2020 congressional and state legislative elections. *See* Pls' Resp. to Motion for Stay, at 2 (ECF No. 15).

Legislators filed their Motion to Intervene on July 12, 2018 (ECF No. 70) in which they sought to intervene as Defendants either as of right or permissively.

Plaintiffs' opposed this Motion. *See* Pls.' Resp. Mot. Intervene (ECF No. 78). Defendant concurred in Legislators' Motion. *See* Def's Resp. Mot. Intervene (ECF No. 79). This Court denied the Motion to Intervene on August 14, 2018. Order Denying Mot. Intervene (ECF No. 91). The Legislators promptly filed their notice of appeal on August 20, 2018. Notice of Appeal (ECF No. 96). Legislators subsequently moved to stay these proceedings pending resolution of the appeal. *See* Mot. to Stay (ECF No. 98).

During the above proceedings, the United Stated Court of Appeals for the Sixth Circuit considered the appeal of the Congressional Intervenors in this case. On August 30, 2018, the Sixth Circuit ordered that the Congressional Intervenors be permitted to intervene. *See League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018) (ECF No. 103). On September 19, 2018, Plaintiffs filed a Motion to Remand Legislative Intervenors' appeal in the Sixth Circuit. Plaintiffs stated that the Sixth Circuit should remand the case to this Court in light of its ruling in *League of Women Voters I*, and because Plaintiffs' no longer oppose the Legislators' intervention. *See* Pls.' Mot. Remand, *League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir. Sept. 19, 2018) (Doc. No. 19) (attached as Appendix B). The Sixth Circuit ordered that this matter be remanded "so that the district court panel may evaluate the Legislative Intervenors' now-unopposed motion in light of the standards articulated in *League of Women Voters I*." Sixth Cir. Order (ECF No. 131).

Applicants Lee Chatfield, the Speaker Pro Tempore of the Michigan House of Representatives and Aaron Miller, the Chair of the Elections and Ethics Committee (together "Legislators"), now bring this Motion to request this Court grant intervention—either as of right or permissively—in light of the Sixth Circuit's holding in *League of Women Voters I* and the Plaintiffs' withdrawal of their opposition.[1]

[1] If necessary, the Court may take this as a Motion under Rule 60(b)(5) or (6) as a request to modify its Order Denying Intervention. *See* Fed. R. Civ. P. 60(b)(5)-(6). Federal Rule of Civil Procedure 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order is 'a significant change in either factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). In this case there has been both a "change in factual conditions" and "in law." First, the Sixth Circuit issued its Remand Order so that this "court may apply the correct legal standard" based on the Circuit Court's decision in *League of Women Voters I. See* Order from Sixth Cir. (ECF No. 131). Second, the Plaintiffs have withdrawn their opposition to Legislators' intervention and have also concurred in this Motion—as have the Secretary and Congressional Intervenors. *See* E-mail of Mr. Yeager (attached as Appendix C); *see also* Appellees' Mot. Remand (App. B).

Rule 60(b)(6) relief is available at the Court's discretion upon consideration of "a wide range of factors . . . include[ing] . . . the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). Here, there is no risk of injustice to the parties as all of the parties now agree that intervention is appropriate. *See* E-mail of Mr. Yeager (App. C); *see also* Appellees' Mot. Remand (App. B). Additionally, intervention can only increase the public's confidence in the judicial process as the intervenors are two of the public's elected representatives.

ARGUMENT

I. LEGISLATORS WITHDRAW THEIR MOTION FOR STAY AND, SHOULD INTERVENTION BE GRANTED, WILL NOT REQUEST AN EXTENSION OF TIME.

As an initial matter, Legislators' agree that Plaintiffs' withdrawal of their opposition to Legislators' intervention is pursuant to their desire to maintain the current trial schedule. *See* E-mail of Mr. Yeager (App. C); Appellees' Mot. Remand (App. B); *see also* Case Management Order No. 1 (ECF No. 53). To that end, should intervention be granted pursuant to this Motion, Legislators will not seek any order from this Court to re-open discovery (beyond the forthcoming motion from the Congressional Intervenors for their expert report[2]), extend deadlines for dispositive motions, or make any motion to delay the currently scheduled trial date. In light of these representations, Legislators do not dispute that their outstanding Motion to Stay is moot. *See* Mot. Stay Pending App. (ECF No. 98).

II. MOVANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Intervention as a matter of right is required when an intervenor "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately

[2] Legislators intend to join, should intervention be granted, and be represented by Congressional Intervenors' expert.

represent that interest." Fed. R. Civ. P. 24(a)(2). "Rule 24 should be broadly construed in favor of potential intervenors." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell*, 925 F.2d at 950); *see also Michigan State AFL-CIO v. Miller,* 103 F.3d 1240, 1246 (6th Cir. 1997). To effectuate this broad construction, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (quoting *Miller*, 103 F.3d at 1247). A proposed intervenor must establish the following four factors to be granted intervention as of right:

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

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

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

Women Voters of Mich., 902 F.3d 572 (ECF No. 103) (ordering intervention of eight members of the Michigan congressional delegation); *Ohio A. Philip Randolph Inst., v. Smith*, No. 1:18-cv-357 (S.D. Ohio Aug. 16, 2018) (allowing intervention of incumbent members of congress).

A. Applicants Motion to Intervene Is 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) (quoting *Jansen v. Cincinnati*, 904 F.2d 336, 340 6th Cir. 1990)). The Sixth Circuit has outlined five factors to determine if a motion to intervene is timely:

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

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

(1) <u>The Stage of the Proceeding.</u>

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

Timeliness is calculated from the time intervention was sought. *See Jansen*, 904 F.2d at 340-41 (using as a benchmark the date the proposed intervenors filed

their motion to intervene); *see also League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 578-79 (6th Cir. 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 this instance, intervention should be calculated from the time of the original Motion to Intervene, which gave rise to the appeal and remand. *See League of Women Voters of Mich.*, 902 F.3d 572; *see also Tennessee*, 260 F.3d at 592.

This Court had taken only minimal substantive actions by the time Legislators moved to intervene. *See Grubbs*, 870 F.2d at 346 (finding intervention during the remedial phase was timely); *cf. Tennessee*, 260 F.3d at 593-94 (holding that resolution of all substantive issues weighs strongly against intervention). Intervention was sought by Legislators only a month after the Answer was filed by Defendant, *see* Answer, filed May 30, 2018 (ECF No. 59), when there were still 43 days left in the discovery period, over two months before summary judgment motions were due, and over seven months before trial. Case Mgmt. Order No. 1 (ECF No. 53). Intervention was timely, since, at the time intervention was originally sought, this case was still in its early stages.

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

"[T]he 'purposes of intervention' prong of the timeliness element normally examines *only* whether the lack of an earlier motion to intervene should be excused, given the proposed intervenor's purpose." *Stupak-Thrall*, 226 F.3d at 479 n.15 (emphasis in original).

While Legislators knew their rights would be impacted when this lawsuit was filed, Legislators did not know their rights would be inadequately protected until this Court's order effectively setting aside legislative privilege. Order Granting in Part and Denying in Part Non-Party Movant's Mot. Quash (ECF No. 58) (hereinafter, Legislative Privilege Order).

On May 23, 2018, just a week before Defendant's filed an Answer, this Court issued its Legislative Privilege Order. ECF No. 58. The Order diminished the Legislators' long established and constitutionally protected right to legislative privilege. *Compare id.*; *with* Mich. Const. art. IV, § 11 (Senators and Representatives "shall not be questioned in any other place for any speech in either house."); Mich. Comp. Laws § 4.553 ("A member of the legislature shall not be subject to a subpoena for any matter involving statements made by the legislator pursuant to his or her duty as a legislator."); *United States v. Gillock*, 587 F.2d 284, 287 (6th Cir. 1978) ("[U]nder Rule 501 of the Rules of Evidence, defendant [state senator] has a speech

or debate privilege with respect to, but only with respect to, *his legislative acts and motivation therefore*. . . ." (emphasis added)).[3]

Intervention became necessary once the state Legislature was made subject to civil discovery. *See* Legislators' Reply in Supp. Intervention (ECF No. 85); *see also Jansen,* 904 F.2d at 341 (calculating timeliness from when an intervenor learns their interest may not be adequately protected).

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

[3] *Overruled* in *United States v. Gillock*, 445 U.S. 360 (1980). Nothing in that opinion, however, disturbs the Sixth Circuit's reasoning in the *civil* context. *See Supreme Court v. Consumers Union of United States,* 446 U.S. 719, 732-34 (1980).

B. Applicants Have A Sufficient Interest Which May Be Impaired by the Disposition of this Case.

"To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Miller*, 103 F.3d at 1247.

The Legislators have multiple significant and protectable interests that will be impaired by the disposition of this case. These interests include: (1) the vested power of Michigan's legislative branch under the United States Constitution over the apportionment of congressional districts; (2) the regulation of Legislators' official conduct; (3) the reduction in Legislators' or their successors' reelection chances; and (4) the economic harm to Legislators caused by increasing costs of election or reelection, constituent services, and mid-decade reapportionment.

(1) Federal Constitutional Interest.

Legislators have a federal constitutional interest in their constitutionally prescribed power to reapportion congressional districts. The Elections Clause of the U.S. Constitution states that "[t]he times, places and manner of holding elections . . . shall be prescribed in each state by the legislature thereof . . . ." U.S. Const. art. I, § IV. The drawing of congressional districts "involves lawmaking in its essential features and most important aspect." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2667 (2015). This specific delegation of authority is held

by the legislatures of the fifty states and, with the exception of Congress itself, no one else. *See Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004).

Furthermore, intervention will promote fundamental principles of federalism. Where a specific delegation of authority under the federal constitution is concerned, no state law to the contrary—including a state's constitution—may override it. *Cf. McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (noting in the Electors Clause[4] context, U.S. Const. art. II, § 1, cl. 2, that the "power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions."); *U.S. Term Limits*, 514 U.S. at 822 (a state constitution may not impose term limits upon members of Congress); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 78 (2000) (when discussing the Electors Clause, "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under" the Constitution). In short, no state statute or constitutional provision may override the Legislators' interest in defending a law—a law which they would have no power to enact but for the delegation found in the Elections Clause.

(2) Regulation of Official Conduct.

Plaintiffs' alleged harm and the remedy they seek attempts to regulate

[4] The Electors Clause generally "parallels" the Elections Clause. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 804-05 (1995).

Legislators' official conduct. As the Circuit Court noted "[a]s elected representatives, the Congressmen serve constituents and support legislation that will benefit the district and individuals and groups therein." *League of Women Voters of Mich.*, 902 F.3d at 579 (quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991)). This reasoning is equally applicable to the Legislators, as they also "serve constituents and support legislation that will benefit the district." *Id*. Also, as the legislators serve in a fundamentally different legislative body than the Congressmen, these interests are materially distinct from and cannot be adequately represented by the Congressmen.

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

be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The Legislators are in the best position to defend their "redistricting calculus."

The Michigan Legislature, led in part by House Speaker Pro Tempore Lee Chatfield and House Elections and Ethics Committee Chairman Representative Aaron Miller, will be directly impacted by any order of this Court requiring a redrawing of the current legislative and congressional maps. *See Sixty-Seventh Minn. State Senate,* 406 U.S. at 194 (recognizing intervention is appropriate for the Minnesota State Senate because that body would be directly impacted by the district court's orders). Just like in *Sixty-Seventh Minnesota State Senate*, the Legislators' conduct in this case will be directly impacted by any order of this court. Therefore, the Legislators' intervention is appropriate.

(3) Diminishment of Reelection Chances.

Legislators have a significant interest in their, or their successors', reelection chances. Partisanship is fundamental to Plaintiffs' cause of action. Plaintiffs bring claims of *partisan* gerrymandering. *See* Compl. (ECF No. 1). Insofar as partisan gerrymandering claims are justiciable at all, Plaintiffs must prove some amount of *partisanship* is too much. *See generally Vieth v. Jubelirer*, 541 U.S. 267 (2004). The remedy Plaintiffs seek is intended to result in *less Republicans* and *more Democrats* in Michigan's legislative and congressional offices. Insofar as partisanship is the

sine qua non of partisan gerrymandering litigation, Legislators are left to assume that partisan interests are at least *some* interest.

It is also well established that diminishment of reelection chances is a cognizable interest. *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586, 587 n.4 (5th Cir. 2006). Diminished reelection chances are a very different interest than a mere "property interest" in the seat. *Compare Gamrat v. Allard*, U.S. Dist. LEXIS 42535, *15 (W.D. Mich. March 15, 2018) (holding elected officials do not have a property interest *to the seat itself*); *with e.g., Benkiser*, 459 F.3d at 586 ("A second basis for the [Texas Democratic Party's] direct standing is harm to its *election prospects*." (emphasis added)); *id*. at 587 n.4 (collecting cases); *Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 405, 423 (E.D. Mich. 2004) (diminishment of political power is, *inter alia*, sufficient for standing purposes); *Meese v. Keene*, 481 U.S. 465, 475 (1987) (detriment to reputation and political candidacy is sufficient for standing purposes).

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

diminishment of election chances is an injury.[5] *See, e.g.*, *Benkiser*, 459 F.3d at 586; *Smith v. Boyle*, 144 F.3d 1060, 1061-63 (7th Cir. 1998); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (Conservative Party official had standing to challenge the ballot position of a party opponent's candidates); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (holding that the "potential loss of an election" is an injury in fact); *Democratic Party of the U.S. v. Nat'l Conservative Political Action Comm.*, 578 F. Supp. 797, 810 (E.D. Pa. 1983) (three-judge panel) (holding that the Democratic Party had "a judicially cognizable injury" because the challenged action would "reduce the likelihood of its nominee's victory"), *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).

(4) Economic Interest.

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

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

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

Legislators "serve constituents and support legislation that will benefit the district and individuals and groups therein." *See League of Women Voters of Mich.*, 902 F.3d at 579 (quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991) (internal alterations omitted)). Assisting constituents in "navigating public-benefits bureaucracies" is the day-to-day task of legislators. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). Engaging with new voters and new constituents in new districts will necessarily require the expenditure of additional public and private funds.

Should new maps be ordered, it is undisputed that Legislators will be required to expend additional funds to become familiar with new areas within Michigan and form relationships with new constituents and voters. This expenditure of funds is because Legislators are public servants and candidates for public office.

Finally, reapportionment is expensive. If a special session of the Legislature is required, an already expensive process would become even more so. *See Terrazas v. Ramirez,* 829 S.W.2d 712, 727 (Tex. 1991) (noting the added expense of special

legislative sessions). It is a fundamental principle of republican governance and Michigan law that the power of the purse belongs to the legislature. *See* Mich. Const. art. IV, § 31; Mich. Const. art. IX, § 17 ("No money shall be paid out of the state treasury except in pursuance of appropriations made by law.").

C. No Current Party Adequately Represents the Applicants' Interests.

The fourth factor in the intervention analysis is whether the "present parties . . . adequately represent the applicant's interest." *Grubbs*, 870 F.2d at 345. Applicants 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); *Miller*, 103 F.3d at 1247 (quoting and citing *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311 (6th Cir. 1992).

The "presumption of adequacy" that occurs when the parties "have the same ultimate objective" is easily overcome in this instance. *See Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987). While this presumption exists, it can be easily rebutted by the minimal required showing of inadequacy. *See Michigan*, 424 F.3d at 443-44 (presumption was not rebutted because intervenor did not identify any separate and unique arguments); *St. Paul Fire & Marine Ins. Co. v. Summit-Warren Indus. Co.*, 143 F.R.D. 129, 135-36 (N.D. Ohio 1992) ("[I]nadequate representation is not limited to the showing of" the three factors and that the burden on a proposed intervenor is still "minimal"). Furthermore, the second factor requires a showing that

is more than a "slight difference" in the interests between Legislators, Congressional Intervenors, and the Secretary of State. *See Jansen*, 904 F.2d at 343. For example, "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenors arguments." *Miller*, 103 F.3d at 1247.

Legislators' various interests more than meet the minimal burden of adverseness required under Supreme Court and Sixth Circuit precedent. First, it is a matter of record that the Secretary has significantly different interests than the Legislators. "The contours of Michigan's maps do not effect [the Secretary] directly—she just ensures the maps are administered fairly and accurately." *League of Women Voters of Mich.*, 902 F.3d at 579. As such, for the same reasons the Secretary does not adequately represent Congressional Intervenors, she does not adequately represent Legislators. The Congressional Intervenors interests are in the preservation of Michigan's *congressional* districts, not its *state legislative* districts.

Finally, no existing party has any interest in the duly enacted law passed per a constitutional delegation of authority (as well as the general lawmaking authority inherent in the Michigan Legislature). Only Legislators, as ranking members of the Michigan House of Representatives, have their specific interest in maintaining Michigan's legislative maps and redistricting law. And the Legislators' are the only ones with a delegated federal constitutional interest. Legislators' varied interests are

not and cannot be adequately represented by any of the existing parties to this litigation.

Applicants' also have an interest in the redrawing of a remedial plan, should the Court so order. Indeed, Plaintiffs request that, *inter alia*, "[i]n the absence of a state law establishing a constitutional apportionment plan adopted by the Legislature . . . in a timely fashion, establish legislative and congressional apportionment plans that meet the requirements of the U.S. Constitution and other applicable law." Compl. at 33 ¶d (ECF No. 1). Neither the Secretary of State nor the Congressmen could represent the interest of Legislators in establishing a new court ordered plan, as the power to enact Michigan laws is outside the purview of any other party.

As stated by the Sixth Circuit, the interest of the Secretary of State is that of the chief elections officer of the state. *See* MCL §§ 168.21. The current Secretary of State is also term limited, and will no longer be the Secretary of State once trial begins in this case. *See* Mich. Const. art. V, § 30; *see also* Case Management Order (ECF No. 53). There exists a significant possibility that the newly elected Secretary of State would be less inclined to defend the 2011 apportionment, which is not an uncommon occurrence when elected officials are involved. *See, e.g., Harris v. Arizona. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (Oral Arg. Tr. 26:16-27:13) (Dec. 8, 2015) (A newly elected Attorney General of Arizona sought to defend a map which his predecessor declined to defend); *Brat v. Personhuballah*, 883 F.3d

475, 478 (4th Cir. 2018) (summarizing how the Commonwealth of Virginia refused to defend the lawsuit on appeal so that the responsibility was left to congressional intervenors); *North Carolina v. N.C. Conf. of the NAACP*, 137 S. Ct. 1399 (2017) (statement of Chief Justice Roberts respecting denial of cert. disclaiming any opinion on the merits) (noting the actions of the newly elected Governor and Attorney General moving to dismiss a case that was already before the Supreme Court on a petition for writ of certiorari).

Applicants have a substantial interest in defending the Current Apportionment Plan that is not possessed by any currently named party. Accordingly, Applicants respectfully request leave of this Court to intervene in this case as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2).

III. APPLICANTS ARE ALSO ENTITLED TO PERMISSIVE INTERVENTION

Alternatively, pursuant to Federal Rule of Civil Procedure 24(b), this Court should permit Applicants to intervene permissively. Rule 24(b) provides for permissive intervention where a party timely files a motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Intervention under Rule 24(b) is a "discretionary power" left to the judgment of the district court. *Bradley v. Milliken*, 828 F.2d 1186, 1193 (6th Cir. 1987). In exercising its broad discretion under this Rule, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original

parties' rights. Fed. R. Civ. P. 24(b)(3).

The Legislators should be permitted to intervene permissively, just as the Sixth Circuit ordered in the case of Congressional Intervenors. In fact, the reasoning of the Sixth Circuit in *League of Women Voters of Michigan* all but controls the outcome of this Motion. *See League of Women Voters of Mich.*, 902 F.3d 572.

For the same reasons outlined above, Legislators have demonstrated their right to intervene in this matter permissively. Legislators filed their Motion early in the litigation and have already been subject to third-party discovery. Therefore, inclusion of Legislators as intervenors will not cause any delay or prejudice to the current parties. Legislators possess claims and defenses in line with the Current Apportionment Plan and will be directly and irrevocably impacted by any change to the Current Apportionment Plan. Additionally, there can be no prejudice when all parties consent to the intervention.

Disallowing Applicants intervention could prejudice Legislators' interests and rights. This case asks this Court to rule on the validity of the Current Apportionment Plans, and possibly order that they be redrawn. Doing so without the input of the parties responsible for creation of the Plan and any future plan would be inefficient and unjust. The only way to protect the fairness of the litigation and lend credibility and finality to the Court's decision on the merits is to permit Legislators to intervene.

CONCLUSION

For all of the foregoing reasons and authorities, Legislators Renewed Motion to Intervene should be granted and Legislators permitted to intervene as Defendants in order to protect their interests in the subject matter and outcome of this litigation concerning the constitutionality of the Current Apportionment Plan.

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Date: November 1, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2018, the forgoing has been electronically filed with the Clerk of the Court using the CM/ECF system. This system has sent a notice of electronic filing to all counsel of record.

/s/*Jason B. Torchinsky*
Jason Torchinsky