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

LEGISLATIVE INTERVENORS' EMERGENCY MOTION TO STAY PENDING APPEAL

Pursuant to Federal Rule of Appellate Procedure 8(a)(1)(A), and for the reasons outlined in the attached Memorandum in Support, Proposed Legislative Intervenors Lee Chatfield and Aaron Miller ("Legislative Intervenors") move this Court to stay this case pending their appeal to the United States Court of Appeals for the Sixth Circuit. *See* Leg. Notice of Appeal (ECF No. 145). A stay is essential to preserve Legislative Intervenors' rights, including participation at trial.

Pursuant to Local Rule 7.1(a), Legislators Intervenors have consulted with Plaintiffs' and Defendant's counsel concerning the substance of this Motion. Defendant consents to the relief sought in this Motion. Plaintiffs do not consent to the relief sought in this motion.

WHEREFORE, Legislative Intervenors request that the Court grant their Motion to Stay the proceeding pending the appeal of this Court's Order Denying Legislators' Unopposed Motion to Intervene. (ECF No. 144). Furthermore, Legislative Intervenors request that, due to the looming deadlines in this action, this Court issue its ruling on this Motion by noon on December 7, 2018.

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Date: December 5, 2018

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BRIEF IN SUPPORT OF LEGISLATIVE INTERVENORS' EMERGENCY STAY PENDING APPEAL

CONCISE STATEMENT OF THE ISSUE PRESENTED

I. WHETHER THIS COURT SHOULD GRANT LEGISLATIVE INTERVENORS' EMERGENCY STAY PENDING APPEAL OF THIS COURT'S ORDER DENYING THEIR UNOPPOSED MOTION TO INTERVENE.

Movants answer: Yes

Plaintiffs answer: No

Defendants answer: Yes

This Court should answer: Yes

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)

Fed. R. Civ. P. 8(a)(2)

Cases

Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006)

Crookston v. Johnson, 841 F.3d 396 (6th Cir. 2016)

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

Representative Lee Chatfield, in his official capacity as Speaker Pro Tempore of the Michigan House of Representatives, and Representative Aaron Miller, in his official capacity as Chairman of the Elections and Ethics Committee of the Michigan House of Representatives, each a Member of the Michigan Legislature (collectively, "Legislators" or "Legislative Intervenors"), by their undersigned counsel, respectfully request this case be stayed pending the resolution of their appeal in the United States Court of Appeals for the Sixth Circuit.

Legislators filed their original 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 Secretary of State concurred in Legislators' Motion. *See* Def's Resp. Mot. Intervene (ECF No. 79). This Court denied the original Motion to Intervene on August 14, 2018. Order Denying Mot. Intervene (ECF No. 91). Legislators promptly filed their first 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 Congressional Intervenors. On August 30, 2018, the Sixth Circuit ordered that 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) (hereinafter, *League of Women Voters I*). On September 19, 2018, Plaintiffs filed a Motion to Remand Legislative Intervenors' appeal in the Sixth Circuit. Plaintiffs argued 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 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).

Legislators opposed Plaintiffs' Motion to Remand on the sole basis that they were "doubtful that a remand for further proceedings . . . would actually result in an order granting" intervention. *See* Leg. Intervenors' Response in Opp. to Pls.' Mot. to Remand (Doc. No. 21). The Sixth Circuit, however, 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). On November 1, 2018, Legislators once again sought to intervene in this matter and filed an unopposed motion to intervene. *See* Legislators' Renewed Mot. Remand (ECF No. 136).

On November 6, 2018, the Michigan general election was held and the Democratic Party candidate, Jocelyn Benson, was elected as the new Secretary of State of Michigan.[1]

[1] As previously briefed by Legislators and Congressional Intervenors, aside from the

On November 30, 2018, this Court denied the unopposed Motion. Order Denying Renewed Mot. Intervene (ECF No. 144).

Legislative Intervenors now bring this Emergency Motion to request this Court stay this case pending resolution of the appeal in the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

In light of the Sixth Circuit's previous decision in *League of Women Voters I*, where it ordered that certain members of Michigan's Republican Congressional delegation be permitted to intervene in this matter, there is a likelihood that Legislators will ultimately prevail in their current appeal. This Court should stay the proceedings pending appeal, as denying a stay will cause irreparable harm to the Legislators.

I. THIS CASE SHOULD BE STAYED PENDING APPEAL

Four factors govern whether a stay should be granted:

> (1) The likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay."

Crookston v. Johnson, 841 F. 3d 396, 398 (6th Cir. 2016) (citing *Coal. to Defend*

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fact that Ms. Benson is a Democrat who will naturally desire to support additional Democrats in office, she is an advocate for redistricting reform and has spoken at League of Women Voters events. *See Infra* at fn. 6-8.

Affirmative Action v. Granholm, 472 F.3d 237, 244 (6th Cir. 2006)).[2] The factors are "not prerequisites but are interconnected considerations that must be balanced together." *Coal. to Defend Affirmative Action*, 472 F.3d at 244. In addition, a strong showing of one factor may overcome any weaknesses of the others. *Id.* at 252; *Americans United for Separation of Church & State v. Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990).

Legislators have established that the balance of the equities tips in their favor and that granting the stay "will further the interest of judicial time and resources." *Ricketts v. Consumers Energy Co.*, No. 16-13208, 2017 U.S. Dist. LEXIS 82501, *4-5 (E.D. Mich. May 31, 2017). Their Motion should be granted.

a. LEGISLATORS ARE LIKELY TO PREVAIL ON THE MERITS.

On remand from the Sixth Circuit, this Court was to "evaluate the Legislative Intervenors' now-unopposed motion in light of the standards articulated in *League of Women Voters I*." *League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir. Oct. 25, 2018) (Doc. No. 32-1) (citing *Siding & Insulation Co. v. Alco Vending Inc.*, 822 F.3d 886, 901 (6th Cir. 2016)). Applying these standards to the facts of this case, it is likely that the Sixth Circuit will rule in favor of Legislative Intervenors on appeal.

[2] An emergency motion to stay pending appeal is decided using the same factors as any other stay motion. *See e.g., Coalition to Defend Affirmative Action,* 473 F.3d at 244.

A. Legislators 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 represent that interest." Fed. R. Civ. P. 24(a)(2). 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)).

i. Legislators' 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). Legislative Intervenors have satisfied this test.

(1) Legislators' Motion to Intervene Cannot be Both Premature and Untimely.

In denying Legislators' original motion to intervene, this Court concluded that "Applicants' motion is premature. Although Applicants speculate about the 'possibility' that the executive branch will end its participation in this matter, Applicants' argument presupposes events that have not yet come to pass . . . ." Original Order Denying Mot. Intervene (ECF No. 91 at ¶ 4). A similar finding was made by this Court in its Order Denying the Renewed Motion to Intervene. *See* Order Denying Renewed Mot. Intervene (ECF No. 144 at 4). As noted by Judge Quist in his dissent, however, "the political landscape completely changed with the November 6 election . . . it is difficult to imagine that the new Democrat Secretary will continue to defend a Republican-adopted redistricting plan that is alleged to discriminate against Democrats and the Democratic Party." Order Denying Renewed Mot. to Intervene, ECF No. 144-1 at 1 (Quist, J., dissenting). Consequently, Legislators' request to intervene is no longer premature.

In addition, this Court found that Legislators' "Motion is not timely, even if this Court construes it as having been filed on the date when the Legislative Intervenors filed their Original Motion." Order Denying Renewed Motion (ECF No. 144 at 5). This finding is at direct odds with the Court's determination that the

Motion was premature. A motion cannot be both premature and untimely. For the reasons stated below and in Legislators' prior motions, this conclusion is also erroneous.

(2) The Stage of the Proceeding.

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 finding that Legislators' Original Motion was not timely, the Court did not address or appear to give credit to highly probative facts that weigh in favor of intervention. Intervention was sought by Legislators only a month after the Answer

was filed, *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). At this time, the Court had taken only minimal substantive actions. *See Grubbs*, 870 F.2d at 346 (finding intervention during the remedial phase was timely).

The "stage of the proceeding" analysis is not the only dispositive issue in the timeliness inquiry. *See Mich. Ass'n. for Retarded Citizens*, 657 F.2d at 105 (quoting *NAACP v. New York*, 413 U.S. at 365-66). This Court made no findings under the remaining timeliness factors. The failure to do so could lead to reversal of the decision on appeal.

(3) 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 timeliness 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).

Legislators did not know their rights would be inadequately protected until a ruling was made on the issue of 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). As a result of this decision, the state Legislature was made subject to civil discovery and had its own independent interests that required protection. *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. Plaintiffs do not dispute that there is no prejudice resulting from Legislators' intervention, as they did not oppose Legislators' request to be a party to this lawsuit. *See, e.g.,* Legislators' Renewed Mot. Intervene at App. C (ECF No. 136-4) (E-Mail of Mr. Yeager). Legislators also sought intervention only a month after the Answer was filed and just over a month after their legislative privilege was found largely inapplicable.[3] Legislators have satisfied this prong of the analysis.

[3] Alternatively, the Legislators' Renewed Motion to Intervene was timely the second the new Democratic Secretary of State was elected on November 6, 2018. There can be no doubt that there is no longer a party to the litigation who can defend the legislative reapportionment plans.

ii. 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.

First, the Legislators have *the exact same type of interest*[4] in their legislative districts as the Congressmen have in their congressional districts. The Sixth Circuit noted that the Secretary of State "just ensures the maps are administered fairly and accurately. In contrast, 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." *League of Women Voters I*, 902 F.3d at 579. The Sixth Circuit went on to note that "[a]s elected representatives, the Congressmen serve constituents and support legislation that will benefit the district and individuals and groups therein." *Id*. (internal quotations and alterations omitted) (quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991)). Accordingly, the interests shared by the Legislators and Congressman in their specific districts are sufficient enough to support intervention.

The Legislators have additional interests that are, in many ways, superior to those of the Congressional Intervenors. These interests include: (1) the vested power

[4] While this is the same *type* of interest, it is not an *identical* interest that can be represented by the Congressional Intervenors. *See, e.g., infra* at Subsection (2).

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).

(2) Regulation of Official Conduct.

The remedy Plaintiffs seek to obtain in their lawsuit would have a direct effect of regulating Legislators' official conduct. As the Sixth Circuit stated, "[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 I*,

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 . . . .").

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.

(3) Diminishment of Reelection Chances.

Legislators have a significant interest in their, or their successors', reelection chances.[5] *See, e.g., Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586, 587 n.4 (5th Cir. 2006) ("A second basis for the [Texas Democratic Party's] direct standing is harm to its *election prospects*." (emphasis added)). Partisanship is fundamental to Plaintiffs' cause of action because Plaintiffs bring claims of *partisan* gerrymandering. *See* Compl. (ECF No. 1). If 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). 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.

(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 standing." *Id.* (citing *Barlow v. Collins*, 397 U.S. 159, 163-64 (1970)). Legislators

[5] In fact, Legislators' prior reelections could be subject to "remedial special elections" which "may be required to remedy the constitutional harms that Plaintiffs allege." Order Denying Summ. J. (ECF No. 143 at fn. 10) (Page ID 5305-5306). This potential alone serves as a sufficient reason to satisfy this prong of the analysis.

are economically harmed in their official capacities as candidates and members in three distinct ways: (1) the increased costs of running for reelection in new or altered districts; (2) the increased costs of engaging and serving new constituents; and (3) the costs associated with a mid-decade court-ordered reapportionment.

Should 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.").

iii. No Current Party Adequately Represents Legislators' 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)).

(1) The Secretary of State

Unlike when intervention was first sought, this Court now has the benefit of knowing that Democratic candidate Ms. Jocelyn Benson will be the next Secretary of State. Secretary elect Benson, as has been well documented, is a speaker at League of Women Voters events[6], has been an advocate for a ballot initiative in Michigan to "fix this broken [redistricting] system"[7], and has noted that she feels gerrymandering is a problem in Michigan[8]. Furthermore, Judge Quist, in his dissent, correctly identifies the political reality: Ms. Benson is a Democrat. Order Denying Renewed Mot. to Intervene (ECF No. 144-1 at 1) (Quist, J., dissenting) ("[I]t is difficult to imagine that the new Democrat Secretary of State will continue to defend a Republican-adopted redistricting plan that is alleged to discriminate against

[6] *See, e.g.,* League of Women Voters of Ann Arbor, Fall Membership Meeting: Speaker Jocelyn Benson, available at https://myemail.constantcontact.com/News-from-the-League-of-Women-Voters-of-the-Ann-Arbor-Area.html?soid=1109132130187&aid=miQBDZpAarQ

[7] *See* Jocelyn Benson, *Voters can rule redistricting—let's do it*, Detroit Free Press July 3, 2015, accessed at http://lwvmi.org/documents/RedistrColumnJBenson7-15.pdf.

[8] *See* Julie Mack, *Election reform is front and center in Michigan Secretary of State race*, MLive, October 19, 2018, available at https://www.mlive.com/news/index.ssf/2018/10/michigan_secretary_of_state_ra_1.html ("All anyone has to do is look at a map (of districts), and if you don't see that there's something wrong, I don't know what to tell you." (quoting Ms. Benson)).

Democrats and the Democratic Party."). Certainly the political affiliation of the party litigants matters where, as here, the *sine qua non* of the litigation *is partisanship*.

Despite the lingering doubts as to process, it is now a certainty that the incoming Secretary of State will be aligned with Plaintiffs upon assuming that office. *See supra*. In any event, as noted 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. As such, she will not adequately protect the Legislators' interests irrespective of her specific actions moving forward.[9]

(2) Congressional Intervenors

Congressional Intervenors similarly do not represent Congressional Intervenors' interests. Initially, the Legislators do not share the same "ultimate objective" as Congressional Intervenors when it comes to the defense of the state house and senate maps.[10] Congressional Intervenors interests are in the preservation of Michigan's *congressional* districts, not its *state legislative* districts. As such, there is no "presumption of adequacy." *See Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th

[9] The Sixth Circuit also made the pragmatic point in reference to Congressional Intervenors—which was also made by Judge Quist in dissent as it relates to Legislators—that allowing intervention now, as opposed to January 2019 "may very well prove more efficient for all involved." *See League of Women Voters I*, 902 F.3d at 580; *see also* Order Denying Renewed Mot. to Intervene (ECF No. 144-1 at 1) (Quist, J., dissenting).

[10] *See* Congressional Intervenors' Motion for Summary Judgment, (ECF No. 121) (focusing on the congressional redistricting plan when making their laches and standing arguments).

Cir. 1987). However, in so far as a "presumption of adequacy" attaches, 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"). Therefore, Legislators' various interests more than meet the minimal burden of adverseness required under Supreme Court and Sixth Circuit precedent.

B. Legislators Are 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).

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 compels the Legislators' intervention. *See League of Women Voters I*, 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 been diligent in seeking intervention ever since. Furthermore, Legislators 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.

b. Legislators Will Be Irreparably Harmed Absent a Stay and Any Harm to the Other Parties Is as a Result of this Courts Denial

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

The injury to the Legislators is substantial, irreparable, and has continued to grow since Legislators first appealed. Legislators have already been forced to miss the remainder of discovery and the summary judgment proceedings. Additionally, there are several fast approaching deadlines including pre-trial motions, the final pre-trial conference, and trial. *See* Case Management Order No. 2 (ECF No. 140).

Without a stay it is likely Legislators will be unable to participate in trial, even if the appeal is taken on an expedited basis. Congressional Intervenors' appeal took over four months to resolve. *Compare League of Women Voters of Mich. v. Johnson*, No. 18-1437 (6th Cir. April 24, 2018) (Appellant Congressional Intervenors' brief filed) *with League of Women Voters of Mich. v. Johnson*, No. 18-1437 (6th Cir. Aug. 30, 2018) (Opinion and Judgment issued by the Court). Trial begins in this action in exactly two months. *See* Case Mgmt. Order No. 1 (ECF No. 53). At this point, without a stay and even on an expedited appeal, it is a near certainty that Legislators will be unable to participate in trial. *See id*. To secure meaningful appellate review, this Court should grant the Motion to Stay.

Just as injury to Legislators is certain absent a stay, the potential harm to the existing parties is minimal by comparison, should a stay be expeditiously granted. First, it is possible that, should a brief stay and extraordinary and expedited relief be granted, any delay pending this appeal would only have a minimal effect on the February 5, 2018 trial date. *See id*. In the event that the trial date must be moved due to this stay, there will still be sufficient time to bring appeals and implement any remedial map. *See, e.g., Benisek v. Lamone*, No. 17-333 (U.S. June 18, 2018) (jurisdictional statement filed September 1, 2017 and decision obtained June 18, 2018).

Second, if any harm results form the stay, it is this Courts' continued denials

and the Plaintiffs' initial opposition, and not any action of the Legislators, that are the cause. Legislators initially moved to intervene five-months ago. *See* Legislators' Motion to Intervene (ECF No. 70). If intervention was granted at that time, or even upon Legislators' Renewed Motion, there would have been little to no chance for prejudice or delay. Furthermore, any complaint by the Plaintiffs' that a stay would result in significant harm is contradicted by the fact they waited over six years to bring their claims in the first place. *See* Congressional Intervenors' Mot. Summ. J. (ECF No. 121).

c. The Public Interest Counsel's in Favor of Granting a Stay

"[T]he public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and ultimately . . . upon the will of the people of Michigan being effected in accordance with [the] law." *Coalition to Defend Affirmative Action*, 473 F.3d at 252 (internal quotation and citation omitted). Given the transitioning status of the office of the Secretary of State, *see supra*, the only way to ensure that there is a full and complete airing of the issues is by permitting the Legislators' intervention. The residents of the State of Michigan are best served by the full litigation of all issues and the full throated representation by their chosen representatives in this action.

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

A district court can abuse its discretion in deciding whether to grant or deny

a request for a stay. *Ohio Environmental Council v. United States Dist. Court, Southern Dist.*, 565 F.2d 393, 396 (6th Cir. 1977) (holding that the district court abused its discretion in granting a stay). A district court can grant a stay of litigation pending the outcome of an appeal that will directly impact the litigation in the district court. *See Benisek v. Lamone*, 266 F. Supp. 3d 799, 801 (D. Md. 2017) (three-judge court) (granting stay of partisan gerrymandering litigation pending U.S. Supreme Court's ruling in *Gill v. Whitford*).

Here, to preserve judicial resources, this Court should stay the litigation pending the outcome of Legislators' appeal.[11] A denial of the requested stay comes with the ever increasing risk that the trial date will need to be moved in order to accommodate Legislators', expert report, motion for summary judgment, and pre-trial motions. Denying the stay would result in continuingly extensive duplicative action.

Legislators will also need time to comprehend discovery for defense of the legislative maps to prepare for trial. It is better to preserve judicial resources now

[11] The Supreme Court will soon determine whether to set *Common Cause v. Rucho* for argument on the merits within the next few weeks. *See Rucho v. Common Cause*, No. 18-422 (U.S. Nov. 20, 2018) (noting case is set for conference on December 7, 2018). Furthermore, the State defendants just filed their jurisdictional statement in *Lamone v. Benisek*, No 18-_____ (U.S. Dec. 3, 2018). That case raises similar issues including the defense of laches. Either one, or both, of these cases address issues similar to the ones raised on the merits in this action, which further counsels a stay here.

and grant the stay pending appeal as opposed to permitting the case to go forward towards trial. Denying the stay risks requiring that this Court move the trial date later so that Legislators may process discovery, file a motion for summary judgment, and adequately prepare for trial.

CONCLUSION

For all of the foregoing reasons and authorities, Legislators request this case be immediately stayed pending appeal.

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Date: December 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 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