RECORD NO. 18-2383

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendant,

and

LEE CHATFIELD; AARON MILLER,

Proposed Intervenors-Appellants.

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

LEGISLATIVE INTERVENORS' EMERGENCY MOTION TO STAY DISTRICT COURT PROCEEDINGS

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MOTION TO STAY DISTRICT COURT PROCEEDINGS

This is the third time Intervenors' legal interests in this litigation have received short shrift from the district court.

First, the district court gave short shrift to both Congressional and Legislative Intervenors' interests in the district court's opinions. *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 578, 580 (6th Cir. 2018) (describing the district court's opinion denying Congressional Intervenors intervention as "bare-bones" and "cursory"); *League of Women Voters of Michigan*, No. 17-14-148 (ECF 91) (Page ID 2059-2065) (similarly cursory analysis, particularly no analysis of how intervention prejudices anyone or timeliness).

Second, the district court gave short shrift to this Court's order that the district court adjust the discovery and dispositive motions deadline for Congressional Intervenors.[1]

Third, the district court gave short shrift to this Court's opinion in *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018), after this Court remanded to the district court with instructions to reconsider

[1] *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018); *see also* Order Granting In Part The Congressional Intervenors' Emergency Motion To Alter Case Management Order #1, ECF 115 (Page ID 2308-2310).

its denial of Legislative Intervenors' Motion to Intervene in light of this Court's opinion in *League of Women Voters, I. League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir. Oct. 25, 2018) (Doc. 32-1 at 2). Now Legislators return to this Court seeking the same relief, intervention.

Pursuant to Federal Rules of Appellate Procedure 8(a)(1)(A) and 8(a)(2)(A), Proposed Legislative Intervenors Lee Chatfield and Aaron Miller move this Court to stay the below case pending this Court's review of the district court's Order Denying Legislative Intervenors' Renewed Motion to Intervene, a motion that was *unopposed*. (ECF 144) (Page ID 5346-5352) (Nov. 30, 2018). The district court has not ruled on the Legislators' Motion to Stay, a motion Legislators asked the court to rule upon by noon Friday December 7. *See* Legislators' Memorandum in Support of Stay (ECF No. 151) (Page ID 6140) (*filed* Dec. 5, 2018). The following facts necessitate that this Emergency Motion be filed irrespective of a ruling in the district court.

An expeditious ruling is necessary because the current deadline for the pre-trial hearing is Tuesday December 11, the current deadline for the pre-trial briefs is January 28, and the first day of trial is February 5, 2019. *See* Case Management Order #2 (ECF No. 140) (Page ID 5224-5225). Because this Court, on an expedited schedule, issued its *League of Women Voters, I*,

ruling three months after it was filed, a stay is necessary to obtain meaningful appellate review. Without a stay, Legislators risk a victory that is hollow – a grant of intervention after the February 5 trial is completed.

Due to the extremely time sensitive nature of this Motion, Legislators bring this appeal of their Emergency Motion to Stay pending appeal now pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A)(i) or (ii).

Plaintiffs-Appellees oppose this Motion. The Defendant Secretary of State consents to this filing.

INTRODUCTION

Legislators filed their Motion to Intervene in this matter more than seven months before trial, nearly six weeks before discovery closed, and before the district court ruled on Defendant Secretary of State's second Motion to Dismiss. *See* Legislative Intervenors' Mot. to Intervene (ECF 70) (Page ID 1204-1239) (July 12, 2018); *see also* Case Management Order 1 (ECF 53) (Page ID 939-941) (May 9, 2018); Order Denying Second Motion to Dismiss (ECF 88) (Page ID 2046-2053) (Aug. 3, 2018). Despite Legislators' material interests in this litigation and the diligence they have exercised in seeking to intervene in this matter, on November 30, 2018, the district court denied Legislative Intervenors' Motion to Intervene. *See* Order Denying Legislative Intervenors' Motion to Intervene (ECF 91) (Page ID

2059-2065) (Aug. 14, 2018); *see* Order Denying Legislative Intervenors' Renewed Motion to Intervene (ECF 144) (Page ID 5346-5352) (Nov. 30, 2018).

The first denial came on August 14, 2018. There, the district court issued an order denying Legislators' intervention as of right and permissive intervention as defendants under Fed. R. Civ. P. 24(a)(2) and (b). *See* Order Denying Intervention, ECF No. 91 (Page ID 2064). Legislators filed an appeal on August 20, 2018. *See* Notice of Appeal (ECF 96) (Page ID 2079-2081). This order said nothing about timeliness and said nothing about how intervention prejudiced Plaintiffs. Three days later, Legislators filed a motion to expedite that appeal, a motion that this Court granted. *See League of Women Voters, et al. v. Johnson*, No. 18-1946 (6th Cir. Aug. 23, 2018); *id*. (6th Cir. Aug. 28, 2018).

While Legislators' initial appeal was pending, this Court issued its opinion in *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018). In that case, this Court concluded that the district court erred by refusing to allow several members of Michigan's congressional delegation to intervene in Plaintiffs' lawsuit. As a result, several members of Michigan's Republican congressional delegation were granted permissive intervention and are now defendants.

In granting Congressional Intervenors permissive intervention, this Court determined that (1) the district court's opinion did not "provide enough of an explanation for its decision to enable [us] to conduct meaningful review;" (2) the issues in the case were not complex or novel; (3) intervention would not risk expeditious resolution of the case because Congressional Intervenors' defenses overlap with the Secretary's; (4) and Congressional Intervenors' interest in the litigation, particularly their interest in protecting their relationship between constituent and representative, differed from the interest of the Secretary. *Id*. at 577-580.

In light of this ruling, Plaintiffs withdrew their opposition to Legislators' intervention and requested that this Court remand the appeal to the district court. *See* Pls.' Mot. to Remand at 2 (Doc. 19) (6th Cir. Sept. 18, 2018).

More than a month later, and after merits briefing was completed, this Court granted Plaintiffs' Motion to Remand. *See League of Women Voters, et al.*, No. 18-1946 (6th Cir. Oct. 25, 2018) (Doc. 32-1). This Court noted that remand was necessary because the district court's denial of Legislators' Motion to Intervene was issued without the benefit of this Court's opinion granting Congressional Intervenors' Motion. *See id*. at 2. As a result, this Court ordered that, "a remand is appropriate so that the district court panel

may evaluate the Legislators' now-unopposed motion in light of the standards articulated in *League of Women Voters I*." *Id*.

Less than a week later, Legislators filed a Renewed Motion to Intervene. This motion was unopposed. (ECF 136) (Page ID 5083-5134) (Nov. 1, 2018). Nearly a month later, the district court denied Legislators' Motion to Intervene for a second time. (ECF 144) (Page ID 5346-5352) (Nov. 30, 2018).

First, a two-judge majority ruled that the motion was untimely. (Page ID 5347). The district court, however, failed to explain, contrary to this Court's precedents, how the timing of Legislators' Motion prejudiced the Plaintiffs, particularly when the Motion was unopposed.[2] Again, the district court gave the interests of Legislators short shrift.

Second, the district court denied intervention as of right on the same incorrect ground as it did in Legislators' original motion – because, in the district court's view, Legislators' asserted interest is "a component of the state's overall interest and is exclusively represented by the executive." *Id*.

[2] As this Court's precedents demonstrate, it is insufficient, standing alone, to show the mere passage of time justifies denial of intervention. Rather, it must be shown that the passage of time causes the parties prejudice. *See, e.g., Grubbs v. Norris*, 870 F.2d 343, 345-46 (6th Cir. 1989); *Jansen v. Cincinnati*, 904 F.2d 336, 339-40 (6th Cir. 1990) (permitting intervention six months into discovery where discovery period was 12 months long and trial was eight months away).

Again, the district court gave the interests of the Legislators short shrift.

Third, the district court denied intervention because even though the incoming Secretary of State has been publicly critical of the enacted maps and has spoken at events sponsored by Plaintiff League of Women Voters, the Motion, according to the district court, is still premature. *See id*. The district court characterized Legislators' argument—also contrary to this Court's precedents—that the incoming Secretary is inadequate to represent their interests as speculation.[3] *Id*.

The district court further supported its decision by finding that there is no property interest in maintaining elected office. Legislators never raised this argument. Rather, Legislators asserted that they had an interest in the litigation due to their relationship with their constituents, a relationship this Court previously found sufficient to permit intervention. *See* Renewed Mot. to Intervene at 11-12 (Page ID 5098-5099); *League of Women Voters, I*, 902 F.3d at 579.

Judge Quist dissented from the panel's decision, succinctly stating, "it

[3] This is contrary to this Court's precedent that requires proving that inadequacy of representation is only a "possibility" not a certainty. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247-48 (6th Cir. 1997). Furthermore, despite the district court's insistence that the Secretary and Legislative Intervenors share the same interest, *id.* at 3 (Page ID 5348), this Court previously ruled that legislators and the Secretary do not share the same interests. *League of Women Voters of Michigan*, 902 F.3d at 579-80.

is difficult to imagine that the new Democratic Secretary will continue to defend a Republican-adopted redistricting plan that is alleged to discriminate against Democrats and the Democratic Party." (Page ID 5351) (Quist, J., dissenting).

Later on November 30, Legislative Intervenors filed their notice of appeal. Notice of Appeal (ECF 145) (Page ID 5353-5355).

STANDARD OF REVIEW

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

ARGUMENT

I. LEGISLATIVE INTERVENORS ARE LIKELY TO SUCCEED ON THEIR APPEAL.

A. Legislative Intervenors are Entitled to Intervene as a Matter of Right.

Intervention as of right under Federal Rule of Civil Procedure 24(a)(2) is required when: (1) the application for intervention is timely; (2) the applicant has a substantial legal interest in the subject matter of the litigation; (3) the applicant's ability to protect that interest will be impaired if intervention is denied; and (4) the present parties do not adequately represent the applicant's interest. *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). Above all else, "Rule 24 should be broadly construed in favor of potential intervenors." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000). In order to effectuate the broad purposes of this Rule, "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).

i. The Motion to Intervene was Timely.

"The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *United States v.*

Tennessee, 260 F.3d 587, 592 (6th Cir. 2001). This Circuit has identified five factors to determine if a motion to intervene is timely:

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

Jansen v. Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990).

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

First, Legislators filed their Motion to Intervene less than two months after the district court denied the application of legislative privilege to the communications of various legislators and legislative staff. *See* Order Granting In Part And Denying In Part Non-Party Movants' Motions To Quash, (ECF 58) (Page ID 985-1004) (May 23, 2018); Legislative

Intervenors' Mot. to Intervene, (ECF 70) (Page ID 1204-1239) (July 12, 2018). Had Legislators intervened prior to this ruling, they risked waiver of the privilege. *See, e.g.*, *Powell v. Ridge,* 247 F.3d 520, 525 (3d. Cir. 2001) (ruling that by intervening, the legislative defendants could not then claim legislative privilege because, in doing so, they would turn the privilege into a sword, rather than a shield). Accordingly, intervention is still timely. *Cf. Jansen*, 904 F.2d at 339-40 (permitting intervention six months after Complaint filed and when intervenors knew their interests were impacted because intervenors' interests did not become inadequately protected until the government defendant's summary judgment brief did not contain arguments in intervenors' interest).

When Legislators filed their Motion to Intervene, it was: seven months before trial, two months before dispositive motions were due, and six weeks before close of discovery. Further, the Motion was filed before the district court ruled on Defendant Secretary of State's second Motion to Dismiss. *See* Legislative Intervenors' Mot. to Intervene (ECF 70) (Page ID 1204-1239) (July 12, 2018); *see also* Case Management Order 1 (ECF 53) (Page ID 939-941) (May 9, 2018); Order Denying Second Motion to Dismiss (ECF 88) (Page ID 2046-2053) (Aug. 3, 2018).

The only substantive issue that the district court had disposed of was

the Secretary's Motion to Dismiss. Accordingly, the case was still in its nascent stages. The Motion was timely. *Jansen*, 904 F.2d at 339-40 (permitting intervention six months into discovery where discovery period was 12 months long and trial was eight months away); *see Mich. Ass'n for Retarded Citizens*, 657 F.2d at 105.

The district court did not explain how Legislators were untimely. The court simply asserted it. This is not the first time the district court's curt reasoning has come before this Court. *See League of Women Voters of Michigan*, 972 F.3d at 580 (finding abuse of discretion for denying permissive intervention because "the district court provided only a cursory explanation of its reasons for denying permissive intervention, and what little justification it did provide is unsupported by the record."). The district court merely noted the passage of time in relation to its decision on the Motion to Dismiss and when Congressional Intervenors filed. *See* Order Denying Intervention (ECF 144) (Page ID 5347). The mere passage of time is not dispositive in determining timeliness. *Detroit*, 712 F.3d at 931. There was no discussion about Legislators' decision to file only *after* the district court denied legislative privilege.

There was also no discussion of how the Motion prejudiced Plaintiffs, particularly when Plaintiffs *consent* to intervention. Legislators' Renewed

Motion to Intervene (ECF 136) (Page ID 5084). The prejudice "analysis must be limited to the prejudice caused by the untimeliness, not the intervention itself." *See Detroit*, 712 F.3d at 933. In fact, Plaintiffs asked this Court to remand Legislators' appeal to the district court because Plaintiffs no longer objected to intervention. *See League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir. Sept. 18, 2018) (Doc. 19 at 2). Plaintiffs' position on intervention demonstrates that Legislators' Motion in July did not prejudice Plaintiffs. Furthermore, as this Court recognized, there was minimal disruption to Plaintiffs in permitting Congressional Intervenors to intervene since they are all represented by the same attorney. *League of Women Voters*, 902 F.3d at 578-79. The same holds true here for Legislators since they and Congressional Intervenors are represented by the same attorneys.

Additionally, the district court's reasoning is contradictory. On the one hand, the district court asserts Legislators are untimely by filing their Motion to Intervene two months after the district court ruled on the Motion to Dismiss. Legislators' Renewed Motion to Intervene (ECF 136) (Page ID 5084). The district court then states that Legislators' Motion to Intervene is premature. Order Denying Intervention (ECF 144) (Page ID 5347).

According to the district court, it is not clear if the incoming

Democratic Secretary will end her participation in the case. *Id*. To the district court, the motion is premature because Legislators are only speculating about what may come to pass. However, this is all that is required to show inadequacy. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247-48 (6th Cir. 1997).

Legislators are likely to succeed in demonstrating that their motion was timely.

ii. Legislators Have Substantial Interests.

"To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Miller*, 103 F.3d at 1247 (internal citation omitted). Legislators have repeatedly offered significant, protectable, and legally cognizable interests that are unique to them and justify their intervention, including: (1) the vested power of Michigan's legislative branch under the United States Constitution over the apportionment of congressional districts;[4] (2) the regulation of Legislators'

[4] U.S. Const. art. I, § 4; *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.") (internal citation omitted); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting

official conduct;[5] (3) the reduction in Legislators' or their successors' reelection chances;[6] and (4) the economic harm to Legislators caused by increasing costs of election or reelection, constituent services, and mid-decade reapportionment.[7]

This Court has already recognized that Congressional Intervenors possess a similar interest. In reversing the district court, and granting Congressional Intervenors intervention, this Court ruled that the Congressmen's relationship with their constituents, particularly since the Congressmen serve constituents "and support legislation that will benefit the district and individuals and groups therein[]" constitutes an interest that differs from the Secretary and the citizens of Michigan. *League of Women Voters*, 902 F.2d at 579.

The district court responded with the same assertion that this Court

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legislation represents a serious intrusion on the most vital of local functions.").

[5] *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (recognizing intervention is appropriate for the Minnesota State Senate because that body would be directly impacted by the district court's orders).

[6] *See, e.g., Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (reduction in election prospects is an injury-in-fact).

[7] *League of Women Voters I*, 902 F.3d at 579 ("[A]s elected representatives, the Congressmen serve constituents and support legislation that will benefit the district and individuals and groups therein."); *see, e.g., Benkiser*, 459 F.3d at 586 (5th Cir. 2006) ("[E]conomic injury is a quintessential injury upon which to base standing.") (citing *Barlow v. Collins*, 397 U.S. 159, 163-64 (1970)).

previously rejected – that "the Legislative Intervenors' claimed interest in the litigation is a component of the state's overall interest and is exclusively represented by the executive." Order Denying Renewed Motion to Intervene (ECF 144) (Page ID 5347). The district court also ruled that if the Legislators possess any official interest in the litigation, "[it] belongs to the state and is adequately represented by the executive." *Id*.

As this Court noted, the contours of the congressional districts—and by analogy the state legislative districts— do not affect the executive branch directly. *League of Women Voters*, 902 F.3d at 579. Furthermore, the interest in protecting the relationship between constituents and representative is not shared by the Secretary. As elected representatives, both the legislators and the congressmen support legislation that will benefit the people who live in their districts. *Id*. This is not an interest shared by the Executive. *League of Women Voters*, 902 F.2d at 579.

Next, the district court asserts that Legislators do not have an "official interest in maintaining their elected offices[]" and that the Legislative Intervenors asserted interests are grounded in either partisanship, or in the theory that their elected offices are property." (Page ID 5347). Legislators, like Congressional Intervenors, did not assert this interest. *See supra* at 14-15. Nor did this Court find that the asserted interest in maintaining the

relationship between constituents and elected official constituted a property interest in their elected office.

Additionally, the interest Legislators assert—that their reelection chances not be harmed in some way without the opportunity to mount a defense—is very different from claiming a property interest in their office. *Compare Gamrat v. Allard,* 320 F. Supp. 3d 927, 937 (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).

Accordingly, the Legislators are likely to succeed in satisfying the "minimal" burden that they have a substantial interest in the litigation. *Miller*, 103 F.3d at 1247.

iii. After The Nov. 6th General Election, Michigan's Secretary of State, At The Very Least, *May* Be Inadequate To Represent Legislative Intervenors Interests.

Legislators need only prove that the "representation of [their] interest *may be* inadequate." *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). This burden is *minimal*. *Miller*, 103 F.3d at 1247. The current Defendants, the Secretary of State and Congressional Intervenors, do

not, cannot, and will not adequately represent Legislators' interests. *League of Women Voters*, 902 F.3d at 579.

Legislators have several significant interests that are not represented. In fact, most of these interests cannot possibly be represented by the Defendants. These include, *inter alia*, defending a validly enacted law that the legislature itself passed; the drawing and passage of any new plan; the representation of constituents in the legislature; and the defense of their authority under the U.S. Constitution's Elections Clause to make time, place, and manner restrictions. *Id*; *see also* U.S. Const. art. I, § IV. This is particularly true of the Secretary whose primary interest is that of the chief elections officer of the state and to provide for the fair and smooth administration of elections. *See* MCL §§ 168.21, 168.31; *see also League of Women Voters*, 902 F.3d at 578-79.

The November 6th elections resulted in a Democratic member being elected to the office of Secretary of State. Now, the incoming Secretary of State, who is a Democrat, is charged with defending a map Democrats allege is a Republican gerrymander that harms Democrats. It strains credulity that the Secretary who will represent the State at trial on February 5 will represent the interests of the Republican Congressional Intervenors and the

Republican Legislators. *See* Order Denying Renewed Mot. to Intervene, ECF No. 144-1 at 1 (Quist, J., dissenting) (Page ID 5351).

The district court asserts that the Motion to Intervene was premature since the new Secretary has not entered the case and it is unknown if the new Secretary will defend the maps. Order Denying Renewed Motion to Intervene at 4 (Page ID 5349 n.2). First, this gives short shrift to this Court's opinion in *League of Women Voters of Mich*., *I*, which noted the difference between the Secretary's interest and the Congressional Intervenors' interest. *League of Women Voters of Mich*., *I*, 902 F.3d at 579. The district court did not address this dispositive point.

Second, waiting until the Secretary officially abandons her defense of the map grants license to the Secretary to engage in litigation by ambush. The Secretary may wait until the eve of trial to file a Motion for Realignment or simply provide a lukewarm defense of the map. The incoming Secretary has spoken at League of Women Voter events.[8] Because all Legislators must prove is that the Secretary "may" be inadequate to represent Legislators interests, this Court should permit intervention.

[8] League of Women Voters Ann Arbor Newsletter: October 2nd, 2018, http://myemail.constantcontact.com/News-from-the-League-of-Women-Voters-of the AnnArborArea.html?soid=1109132130187&aid=miQBDZpAarQ (last visited Dec. 7, 2018).

B. The District Court Abused Its Discretion In Denying Permissive Intervention.

"To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005). Once timeliness and a common question of law or fact are determined, "the district court must then balance undue delay and prejudice to the original parties . . . and any other factors to determine whether, in the court's discretion, intervention should be allowed." *Id*. If not granted intervention as of right, Legislators—while having significantly different interests than Congressional Intervenors—should be granted permissive intervention for many of the same reasons as Congressional Intervenors. *See League of Women Voters of Mich*., 902 F.3d at 577-580.

The district court denied permissive intervention because Legislators' Motion was untimely, Legislators asserted interests are already represented by the Secretary, and intervention would prejudice the original parties. Order Denying Renewed Motion to Intervene at 3-4 (Page ID 5348-5349).

First, as noted supra at 15, the district court did not explain how Legislators' Motion to Intervene was untimely. Part of the timeliness analysis is whether the Motion caused prejudice to the parties in the case. *Jansen*, 904 F.2d at 340. The district court did not explain how the parties

are prejudiced. Like its opinion for Congressional Intervenors, the district court's opinion provides only a "cursory explanation of its reasons for denying permissive intervention." *See League of Women Voters of Mich.*, 902 F.3d at 580. Because the district court did not explain how *anyone* is prejudiced, particularly when Plaintiffs do not object and the same attorneys represent Congressional Intervenors, this Court should reject the district court's conclusion. *Id*. at 579.

Second, as stated *supra* at 24-25, just as the Secretary does not represent the interests of Congressional Intervenors, *League of Women Voters of Mich. I.*, 902 F.3d at 579, the Secretary also does not represent the interests of the Legislators.

Third, the district court does not explain how *anyone* is prejudiced by Legislators intervening using the same attorneys as the Congressional Intervenors. *League of Women Voters of Mich. I.*, 902 F.3d at 578-79. This Court should reject their argument.

II. ABSENT A STAY, LEGISLATORS WILL BE IRREPARABLY HARMED.

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." *Mich. 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.

First, the substantial interests discussed *supra* at 20, will be injured absent a stay. This Court, on an expedited basis, issued its opinion and order on the Congressional Intervenors appeal, more than three months after briefing was completed in the case. *See League of Women Voters of Mich. v. Johnson*, No. 18-1437 (6th Cir. May 23, 2018) (reply brief filed); *League of Women Voters of Mich.*, 902 F.3d 527 (6th Cir. Aug. 30, 2018). Under the proposed expedited briefing schedule, briefing will be completed December 17, 2018, less than two months before trial. Legislators need the stay to maintain their ability to represent their interests at trial. Legislators appeal will either be meaningless or will create substantial prejudice to all involved if this Court reverses the district court and orders intervention after the trial is completed.

Second, Legislators have constitutional interests at stake. Article I, Section 4 of the U.S. Constitution vests Legislators with the constitutional right and duty to draw legislative and congressional districts. Absent a stay, this constitutional interest will be left unprotected. Furthermore, the interest in assisting constituents and maintaining relationships with constituents, *League of Women Voters of Mich.*, 902 F.3d at 579, remains unprotected. These injuries are substantial.

Third, a stay does not prejudice Plaintiffs. As stated in Legislators' opening brief, Legislators are not seeking a change in the trial date. Legislators seek an expeditious appeal and respectfully request a ruling from this Court on the appeal as far in advance of the February 5 trial date as possible. Legislators seek this stay to protect their interests in the event that a ruling on their appeal cannot be issued before the February 5, 2019 trial date. In the event that the trial date must be moved due to this stay, there would still be more than 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).

III. THE PUBLIC INTEREST FAVORS GRANTING A STAY.

The public interest favors resolving Legislators' status as a party now. "[T]he public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and ultimately . . . upon the will of the people of Michigan being effected in accordance with Michigan law." *Coalition to Defend Affirmative Action*, 473 F.3d at 252 (internal quotation and citation omitted). 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 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.

IV. GRANTING THE STAY IS THE BEST USE OF JUDICIAL RESOURCES.

To preserve judicial resources, this Court should stay the litigation pending the outcome of Legislators' appeal. *See W. Tenn. Chp. Of Assoc. Builders & Contrs., Inc. v. City of Memphis*, 138 F. Supp. 2d 1015 (W.D. Tenn. 2000). The concern is that the district court proceeds with trial on February 5, 2019, a mere 60 days away from the date of this filing, and this Court issues its opinion after the beginning of trial. This risks making Legislators' appeal being moot and futile. It also risks wasting all of the Parties' resources because a ruling permitting intervention may require the district court to reopen the trial record to allow Legislators the ability to put on their case. This would be a terrible waste of judicial resources. Accordingly, this Court should grant the requested stay.

CONCLUSION

For the foregoing reasons, this Court should grant the Motion to Stay.

Dated: December 10, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because the brief contains 5,154 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 27(d)1(E) and Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman style.

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CERTIFICATE OF SERVICE

On December 10, 2018, I certify that I filed the foregoing with the Clerk of the Court using the CM/ECF system, which then sent a notification of electronic filing to all counsel of record.

/s/ *Jason Torchinsky*

Jason Torchinsky

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

ECF No. 1	Complaint	Page ID# 1-34
ECF No. 53	Case Management Order No. 1	Page ID# 939-941
ECF No. 58	Legislative Privilege Order	Page ID# 985-1004
ECF No. 59	Answer	Page ID# 1005-1047
ECF No. 70	Legislators' Motion to Intervene	Page ID# 1204-1239
ECF No. 88	Order Denying Second Motion to Dismiss	Page ID#2046-2053
ECF No. 91	Order Denying Intervention	Page ID# 2059-2065
ECF No. 96	Original Notice of Appeal	Page ID# 2079-2081
ECF No. 115	Order "Granting in Part" Emergency Motion to Alter Case Mgmt. Order No. 1	Page ID# 2308-2310
ECF No. 136	Legislators' Renewed and Unopposed Motion to Intervene	Page ID# 5083-5110
ECF No. 136-4	E-Mail of Mr. Yeager (Exhibit C)	Page ID# 5133-5134
ECF No. 144	Order Denying Legislative Intervenors' Renewed & Unopposed Motion to Intervene (Second Order)	Page ID# 5346-5350
ECF No. 144-1	Dissent of Quist, J. Re: Order Denying Legislators' Renewed Motion to Intervene	Page ID# 5351-5352
ECF No. 145	Second Notice of Appeal	Page ID# 5353-5355

ECF No. 151	Legislators' Second Emergency Motion to Stay Pending Appeal	Page ID# 6139-6166