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

OPENING BRIEF OF APPELLANTS

Jason Brett Torchinsky
HOLTZMAN VOGEL
JOSEFIAK TORCHINSKY
45 N. Hill Drive
Suite 100
Warrenton, VA 20186
540-341-8808

Charles R. Spies
CLARK HILL
212 E Cesar Chavez Ave.
Lansing, Michigan 48906
313-965-8300

Counsel for Appellants

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Appellants certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. Appellants are two individual legislators in the Michigan House of Representatives.

By: ***/s/ Jason Torchinsky***
Attorney for Appellants
Aaron Miller and Lee Chatfield

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES & RULES

STATEMENT REGARDING ORAL ARGUMENT

Proposed Legislative Intervenors-Appellants, in the interest of an expeditious ruling on the merits, wish to forego oral argument. However, should this Court find that oral argument would be helpful in reaching a decision, Legislators respectfully request oral argument, if any, be scheduled at the first available opportunity. Fed. R. App. P. 34(a).

JURISDICTIONAL STATEMENT

Plaintiff-Appellees' Complaint asserts violations of the First and Fourteenth Amendments to the U.S. Constitution. Therefore, subject matter jurisdiction is proper pursuant to 28 U.S.C. § 1331; 28 U.S.C. §§ 1343(a)(3)-(4); 28 U.S.C. § 1357; 28 U.S.C. § 2284.

This Court has jurisdiction over orders denying intervention. *See 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, 1244 (6th Cir. 1997). In the alternative, this Court has jurisdiction under the *Purnell* exception to the collateral order doctrine. *See, e.g., Purnell v. Akron*, 925 F.2d 941, 944 (6th Cir. 1991); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987). The district court has denied Proposed Legislative Intervenors' ("Legislators") Motion to Intervene both as of right and permissively on two separate occasions. These orders prevent Legislators from entering the case in any respect. *See* Order Denying Intervention

(ECF No. 91) (Page ID# 2059-65); *See* Order Denying Renewed Mot. Intervene (ECF No. 144) (Page ID# 5346-52) Therefore, this Court has jurisdiction. See Fed. R. App. P. 28(a)(4)(B).

This appeal is timely. The Notice of Appeal was filed with the district court on November 30, 2018, the same day intervention was denied. *See* Fed. R. App. P. 4(a)(1)(A) (notice of appeal must be filed within 30 days of order appealed from); *see also* Fed. R. App. P. 28(a)(4)(C).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Under *Horne v. Flores*, 557 U.S. 433 (2009) did the district court abuse its discretion by failing to follow this Court's Order on Remand?
2. Under Federal Rule of Civil Procedure 24(a)(2) and *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018), did the district court commit an error of law when it denied intervention as of right to Proposed Legislative Intervenors?
3. Under Federal Rule of Civil Procedure 24(b) and *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018), did the district court abuse its discretion when it denied permissive intervention to Proposed Legislative Intervenors?
4. Are Plaintiff-Appellees barred from opposing intervention due to waiver and/or judicial estoppel?

STATEMENT OF THE CASE

On December 22, 2017, over six years and three election cycles after the 2011 decennial apportionment plan (Current Apportionment Plan) became law in Michigan, Plaintiffs League of Women Voters, 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) filed a Complaint seeking declaratory and injunctive relief because the current legislative and congressional apportionment plans are allegedly unconstitutional. Specifically, Plaintiffs contend that the current plan is unconstitutional because there are too many Republicans in both delegations. Complaint for Declaratory and Injunctive Relief, Dec. 22, 2017 (ECF No. 1) (Page ID# 1-34).

Plaintiffs' Complaint asserts claims under 42 U.S.C. §§ 1983, 1988 and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs allege that by continuing to implement the current apportionment Plans, Defendant Secretary of State has impermissibly discriminated against Plaintiffs as "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 the further use of

the current district lines in the upcoming congressional and state legislative elections scheduled for 2020.

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"), filed their original Motion to Intervene on July 12, 2018 (hereinafter, the "Original Motion") (ECF No. 70) (Page ID# 1204-24).

The currently named Defendant, Ruth Johnson, in her official capacity as Michigan Secretary of State ("Defendant" or "Secretary"), concurred in Legislators' Original Motion. Plaintiffs opposed Legislators' Original Motion.

On August 14, 2018, the three-judge panel of the district court denied Legislators' Original Motion in a six-page order. This was based primarily on a flawed "separation of powers" rationale. Original Order Denying Intervention (ECF No. 91) (Page ID# 2059-65) (hereinafter, "Original Order"). Legislators then timely filed a Notice of Appeal on August 20, 2018, (ECF No. 96) (Page ID# 2079) (hereinafter, the "Original Appeal"), and motions to stay in both this and the district court. *See* Mot. Stay (ECF No. 98) (Page ID# 2083-2104) (hereinafter, "Original Motion to Stay"); *League of Women Voters of Mich. v. Johnson*, No. 18-

1946 (6th Cir. Sept. 13, 2018) (Doc. No. 16).

On August 30, 2018, ten days after the Original Appeal was filed, this Court issued its Opinion and Order reversing the district court's denial of Congressional Intervenors' intervention *in this same case*. *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018) (hereinafter, "*League of Women Voters I"*). This Court held that the district court abused its discretion by denying the Congressmen permissive intervention.

On September 18, 2018, Plaintiffs filed a Motion to Remand in which they withdrew their opposition to Legislators' intervention. *League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir. Sept. 18, 2018) (Doc. No. 19). While Plaintiffs' new stance on intervention was welcome, Legislative Intervenors opposed the Motion to Remand on the sole grounds that they were "doubtful that a remand for further proceedings . . . would actually result in an order granting" intervention. *League of Women Voters of Mich. v. Johnson*, No. 18-1946 (6th Cir. Sept. 20, 2018) (Doc. No. 21). On October 25, 2018, this Court ordered remand "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*." Order Remanding Original Appeal (ECF No. 131) (Page ID# 5038-5041).

On November 1, 2018, Legislators again sought intervention and, consistent with the Order on Remand filed an *unopposed* Motion to Intervene. *See*

Legislators' Renewed Mot. Remand (ECF No. 136) (Page ID# 5083-5134) (hereinafter, the "Renewed Motion").

On November 6, 2018, the Michigan general election was held. The Democratic Party candidate, Jocelyn Benson, was elected as the new Secretary of State of Michigan. She will assume office on January 1, 2019.

Nearly a *month* after the election, on November 30, 2018, a two-person majority of the district court panel denied Legislators' *unopposed* Renewed Motion in a perfunctory and, in parts, contradictory four-page opinion. Order Denying Renewed Mot. Intervene (ECF No. 144) (Page ID# 5346-52) (hereinafter, "Second Order").

On December 5, 2018, Legislators filed an Emergency Motion to Stay pending this appeal in the district court. (ECF No. 151) (Page ID# 6139-6166). The district court has yet to issue an order granting or denying the stay, but due to the limited time for relief, Legislators filed an emergency Motion for Stay Pending Appeal in this Court on December 10, 2018. *See League of Women Voters of Mich. v. Johnson*, No. 18-2383 (6th Cir. Dec. 10, 2018) (Doc. No. 17-1).

Plaintiffs do not oppose intervention at this Court, except to the extent that any grant of intervention would result in postponing or in otherwise delaying trial.

Legislators now bring this expedited Appeal requesting an order from this Court granting Legislators intervention and granting the following additional relief:

- The right to file a Motion for Summary Judgment brief adopting, as their own, the current Secretary of State's arguments;[1]
- The right to introduce an expert report on behalf of Legislators in defense of the maps; and
- The right to file a *Motion in Limine* adopting the current Secretary of State's Motions as the Legislators' own;
- The right to participate in all pre-trial procedures.[2]

In the interest of a speedy resolution to this matter and negating *any possibility* of prejudice, Legislators concur with Plaintiff in requesting that the trial date *not be moved*, so long as this Court has sufficient time to issue an order regarding Legislators intervention *before trial* starts on February 5, 2019. The parties request that this Court grant intervention as soon as is practicable. Otherwise, Legislators request that this Court stay any further proceedings in the district court while this Court considers intervention so that the proceedings below do not potentially moot this appeal.

[1] Legislators must do so to preserve their appellate rights in the likely event that the new Secretary of State will either choose not to defend the current maps or join with Plaintiffs in attempting to strike down the maps. As the summary judgment motions have already been ruled upon, the district court will not be required to take any additional action and no delay will result.

[2] Legislators and Plaintiffs are exchanging witness and exhibit lists so that should this Court order intervention, any resulting inconvenience will be minimal.

SUMMARY OF THE ARGUMENT

The district court has so far been presented with three motions to intervene, one from Congressional Intervenors and two from Legislators. The district court has denied all three motions. For the past five months Legislators have diligently pursuing intervention, the application for which is to be broadly construed "in favor of recognizing an interest." *See Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (quoting *Miller*, 103 F.3d at 1247). This Court's opinion in *League of Women Voters I*, which should control this appeal, the facts and applicable law, and all parties' agreement to permit Legislators intervention, should have resulted Legislators being permitted to intervene by the district court. Second Order (ECF No. 144) (Page ID# 5346-52). This Court should reverse the district court and order Legislators' intervention.

ARGUMENT

I. THIS APPEAL IS PROPERLY BEFORE THE COURT

a. A Denial of Intervention is Immediately Appealable.

The appeal from the denial of Legislators' Original and Renewed Motion to Intervene are properly before this Court.[3] "It is fairly well established that denial of

[3] While Legislators are specifically appealing the Order Denying Intervention from November 30, 2018, the district court relied on language from its Original Order in issuing the Second Order.

a motion to intervene as of right, i.e. on based on Rule 24(a)(2), is an appealable order." *Purnell,* 925 F.2d at 944; *see also Neroni v. Hubbard*, 1990 U.S. App. LEXIS 21986 (6th Cir. 1990); *League of Women Voters I*, 902 F.3d at 576. The collateral order exception to the final judgment rule "recognizes that a limited class of prejudgment orders is sufficiently separate from the underlying dispute that immediate appeal should be available." *Stringfellow*, 480 U.S. at 375. Therefore, "[t]he denial of a motion to intervene under Fed. R. Civ. P. 24(a) is immediately appealable as a collateral matter." *Midwest Realty Mgmt. v. City of Beavercreek,* 93 Fed. Appx. 782, 784 (6th Cir. 2004).

Furthermore, even though this is an appeal from a three-judge panel established under 28 U.S.C. § 1253, it is this Court and not the Supreme Court that has jurisdiction. *League of Women Voters I*, 902 F.3d at 576; *see also MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975); *Hays v. Louisiana*, 18 F.3d 1319, 1321 (6th Cir. 1994).

The district court has now twice denied Legislators' intervention in this case. *See* Original Order (ECF No. 91) (Page ID# 2059-65); Second Order (ECF No. 144) (Page ID# 5346-52). As such, the district court's Second Order is immediately appealable. *See Stringfellow*, 480 U.S. at 377.

II. THE DISTRICT COURT'S SECOND ORDER WAS AN ABUSE OF DISCRETION AND SHOULD BE REVERSED.

It is an abuse of discretion for a district court to fail to follow instructions on

remand. *Horne v. Flores*, 557 U.S. 433, 455-56 (2009). A general remand only grants the district court "authority to address all matters as long as remaining consistent with the remand." *United States v. Campbell*, 168 F.3d 263, 265 (1999).[4]

In *Horne v. Flores*, the United States Court of Appeals for the Ninth Circuit remanded a case and instructed the district court "to hold an evidentiary hearing regarding whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy." *Horne*, 557 U.S. at 455 (internal quotations omitted). The district court, ignoring the Ninth Circuit, essentially "rested its postremand decision on its preremand analysis." *Id*. at 456. Therefore, since the "district court failed to follow [the remand] instructions" it "abused its discretion." *Id*. at 455-56.

Here, the district court similarly erred. This Court, at Plaintiffs' urging, remanded the Original Appeal so that "the district court may evaluate the Legislative Intervenors' now-unopposed motion in light of the standards articulated in *League of Women Voters I*." Remand Order (ECF No. 131) (Page ID# 5039) (citing *Siding & Insulation Co. v. Alco Vending, Inc*. 822 F.3d 886, 901 (6th Cir. 2016). While the "Legislative Intervenors oppose[d] an unqualified

[4] It can also be argued that this Court actually issued the district court a limited remand. Remand Order (ECF No. 131) (Page ID# 5038-41). The nature of the remand is of little moment when the district court wholly disregarded this Court's instructions in any event.

remand," this Court felt the "remand [was] required for the district court to apply the correct legal standard" as "articulated in *League of Women Voters I*." *See id.*[5]

The district court disregarded these instructions.[6] The district court (1) *never substantively addressed* this Court's opinion in *League of Women Voters I*; (2) did not confine its opinion to the "evaluat[ion] of Legislative Intervenors' now-unopposed motion in light of the standards articulated in *League of Women Voters I*", *id.*; and (3) in large part, "rested its postremand decision on its preremand analysis." *See Horne*, 557 U.S. at 456.

a. The District Court Never Substantively Addressed This Court's Reasoning in *League of Women Voters I* and Therefore Did Not Confine Its Review to That Same Opinion.

League of Women Voters I is identified twice in the district court's Second

[5] What is striking is that the Legislators have the exact same *type* of interest as Congressional Intervenors, which was never addressed by the district court on remand. *See* Second Order (ECF No. 144) (Page ID# 5346-52).

[6] The district court has also failed to follow certain directives from this Court with respect to Congressional Intervenors. The district court refused to alter its scheduling order to accommodate the Congressmen's intervention and has yet to issue an order permitting their expert witness from participating even though this Court "fully recognize[d] that allowing Congressmen to intervene as this stage will require the district court to adjust the discovery and dispositive motion deadlines." *See League of Women Voters I*, 902 F.3d at 579 (Order "Granting in part" Mot. Alter Case Mgmt. Order No. 1 (ECF No. 115) (Page ID# 2308-2310) (denying all requested relief expect that the Congressmen submit, for the three-judge panel's consideration, a request for an expert); Mot. Alter Case Mgt. Order No. 1 (ECF No. 137) (Page ID# 5135-5152) (the request to add expert filed November 1, 2018 is still outstanding).

Order. First, the district court acknowledged that its charge was to evaluate Legislators' motion in light of *League of Women Voters I*. Second Order (ECF No. 144) (Page ID# 5346). Second, the district court, after four-pages essentially repeating its Original Opinion[7], cursorily surmises that "[a]fter further consideration . . . its previous decision did not violate the standards articulated in *League of Women Voters I*." *Id*. at (Page ID# 5349). *Nowhere* in the district court's four-page opinion does it address *why* or *how* its decision does not violate *League of Women Voters I*.

The district court also erred by failing to grant permissive intervention, which was the basis for this Court's Order granting Congressional Intervenors' intervention.

First, the district court denied permissive intervention because it *sua sponte* found that the Legislators' Motion was "untimely." The district court did not make a similar finding in its Original Order and the finding is without support in the record. *Compare* Original Order (ECF No. 91) (Page ID# 2059-65) *with* Second Order (ECF No. 141) (Page ID# 5346-50).

Second, the district court re-adopts the erroneous reasoning from its Original Order holding that Legislators "lacked a cognizable interest in the litigation and

[7] The exception is that the district court now states that Legislative Intervenors' Original Motion is untimely, despite making ***no*** finding on timeliness in the Original Order. *See infra* at 12-16.

that any interest they did possess was already represented by the executive." Second Order (ECF No. 144) (Page ID# 5348). The district court *ignores* that this Court has already rejected the proposition that the executive can adequately represent an interest other than that of Michigan's chief elections officer. *League of Women Voters I*, 902 F.3d at 579 ("The contours of Michigan's district maps do not affect Johnson directly—she 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"); *see also id*. ("Nor is it enough to say that, even though the Congressmen's interests differ from those of Johnson . . . their interests are still adequately protected by Johnson's participation in the case.").

The district court also erred by going outside of the dictates of this Court's Remand Order. This included the district court's findings regarding timeliness, which was *never* addressed in its Original Order and was *never* addressed in *League of Women Voters I*. *Compare* Original Order (ECF No. 91) (Page ID# 2059-65) *and League of Women Voters I*, 902 F.3d 572 *with* Second Order (ECF No. 144) (Page ID# 5347) (stating that "Legislative Intervenors' 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."[8]). Furthermore, the timeliness finding is incorrect under either a *de novo* or abuse of discretion standard of review. *See generally infra*.

The district court's ruling cannot survive an abuse of discretion standard of review where it is based on a "whim" without any reasoning or analysis. *See League of Women Voters I*, 902 F.3d at 580 ("The existence of a zone of discretion does not mean that the whim of the district court governs." (quoting *Miller*, 103 F.3d at 1248)). The district court's failure amounts to an abuse of discretion, *see, e.g., Horne*, 557 U.S. at 455-56. Its ruling should be reversed.

b. The District Court, On the Issue of Intervention as of Right, Repeated Its Erroneous Pre-remand Analysis in Its Post-remand Opinion.

The remainder of the district court's Second Order involved the same analysis and findings that were present in its Original Order denying intervention as of right. *See* Second Order (ECF No. 144) (Page ID# 5347) (giving laundry list of findings from Original Order). Based on this identical reason, the district court concluded that "[t]he Legislative Intervenors have still not established a legally cognizable interest in these proceedings or that the existing parties do not adequately protect any hypothetical interest they may possess." *Id*. at (Page

[8] While Legislative Intervenors do not believe that this Court should give *any* weight to the district court's new ruling on timeliness, the Legislators' Motion was timely.

ID#5347-48).

This finding is erroneous. In addition to several interests that no current party is capable of protecting Legislators' interests largely mirrors that of the Congressional Intervenors as outlined in *League of Women Voters I*, 902 F.3d at 579-80. The district court never addresses this interest or the distinction raised in *League of Women Voters I*. It abused its discretion. *See Horne*, 557 U.S. at 455-56.

III. LEGISLATORS SHOULD BE GRANTED INTERVENTION AS OF RIGHT.

Intervention as of right under 24(a) 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). Above all else, "Rule 24 should be broadly construed in favor or potential intervenors." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell*, 925 F.2d at 950); *see also Miller*, 103 F.3d at 1246. 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*, 188 F.3d at 399 (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).

On appeal, the district court's "consideration of the timeliness of an application to intervene is ordinarily tempered by deference to the district court." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). However, *de novo* review is appropriate when the district court "failed to make any factual findings in this regard." *Id*. The other factors of the intervention analysis are reviewed *de novo*. Furthermore, while the district court was confined by the remand order, this Court is not so similarly confined.

a. Legislators' Motion to Intervene Was Timely.

"The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001) (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 v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)).

This Court typically reviews timeliness findings under an abuse of discretion standard. *Blount-Hill*, 636 F.3d at 283. However, the Court will review timeliness *de novo* if a district court makes no finding as to timeliness. *See, e.g., Id*.

i. The Stage of the Proceeding.

When examining 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 I*, 902 F.3d at 578-79 (using where "the case stood . . . when the [party] moved to intervene" as the basis for its permissive intervention analysis).

The district court's new timeliness finding exceeded its authority on remand and, as such, is a *per se* abuse of discretion. *See Horne*, 557 U.S. at 455-56.

Te district court simply listed two reasons under the "stage of the proceeding" factor as to why Legislators' intervention is untimely. Second Order (ECF No. 144) Page ID# 5347). The district court fails to conduct any analysis of timeliness and does not address the other timeliness factors. *See id*. "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)). "If [this Court is] to review a district court's exercise of discretion, the court must . . . provide enough explanation for its decision to enable this Court to conduct meaningful review." *Miller*, 103 F.3d at 1240 (the only exception being if the "basis for the decision is obvious."). This Court cannot conduct a meaningful review as the district court failed to provide its reasoning to the other timeliness factors. *See Mich. Ass'n. for Retarded Citizens*, 657 F.2d at 105. Therefore, the district court's decision should be reviewed *de novo*.

The district court recognized the potential for Legislators' intervention at a later time. In both its Original and Second Orders denying intervention, the court stated that Legislators' Motions were "premature" *See* Original Order (ECF No. 91) (Page ID# 2061); *see also* Second Order (ECF No. 144) (Page ID# 5347). Since the District Court implied that intervention would be timely at a later date, it stands to reason that Legislators' current Motion is timely now. *See infra* at 19-25.

In its Second Order, the district court states that Legislators' Original Motion is now untimely. *See* Second Order (ECF No. 144) (Page ID# 5347). The district court's misunderstanding of the law of intervention and its willful neglect of the authority set out by this Court in *League of Women Voters I* begins with the

first sentence of their untimeliness finding when it states that "[t]he Legislative Intervenors' 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." *Id*. First, Legislators Renewed Motion was at the direction of this Court. *See* Remand Order (ECF No. 131) (Page ID# 5039). Second, timeliness is examined from the time intervention was sought. *See League of Women Voters I*, 902 F.3d at 578-79; *Jansen*, 904 F.2d at 340-41. Legislators first moved to intervene on July 12, 2018 and any calculation for intervention purposes should utilize that date, and not from the date of their Renewed Motion.

The district court states that the Original Motion was filed "nearly two months after the [district court] decided the motion to dismiss and approximately four-and-a-half months after Congressional Intervenors filed their motion to intervene." Second Order (ECF No. 144) (Page ID# 5347). While these two statements are factually true, they do not support a finding of untimeliness on their own and the district court further ignores additional facts that strongly weigh in favor of intervention.

When examining timeliness the district court must "focus . . . on the stage of the proceedings and the nature of the case." *Detroit*, 712 F.3d at 931. The District 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 approximately a month after the Answer was filed by Defendant. *See* Answer, filed May 30, 2018 (ECF No. 59) (Page ID# 1005-47). At this time there was 43 days left in the condensed discovery period, over two months *before* summary judgment motions were due, and *over seven months* before trial. Case Mgt. Order (ECF No. 53) (Page ID# 939-41). While it was "four-and-a-half months" between when Congressional Intervenors and Legislators sought intervention, Legislators moved to intervene *before* the Congressmen's intervention was ordered by this Court. *Compare League of Women Voters I*, 902 F.3d 572 (issued Aug. 30, 2018) *with* Original Motion (ECF No. 70) (Page ID# 1204-1224). At the time intervention was sought, this matter was still in its early stages, and therefore intervention was timely.[9]

ii. The Remaining Timeliness Factors—The Purpose of Intervention, When Legislators Knew Their Rights Were Impacted, and the Prejudice that any Delay may have Caused the Parties, and the Reason for any such Delay—Weigh Heavily in Favor of Intervention.

"[T]he 'purposes of intervention' prong of the timeliness element normally

[9] Even now, Legislative Intervenors are willingly forgoing rights that otherwise ought be theirs in order to secure intervention and minimize any hint of prejudice. *See supra* at 6-7. (forgoing filing Motion for Summary Judgment on additional grounds, forgoing delaying the trial date unless absolutely necessary to preserve intervention, and forgoing a *Motion in Limine* on independent grounds).

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).

The "purposes of intervention" is evident: Legislators seek to preserve the legislative maps and pursue the defense of a law duly enacted under the laws of Michigan by an express delegation of authority by the Constitution of the United States. A duly enacted law of the Michigan Legislature is best served by the full presentation and full throated defense of all the issues by members of the State Legislature, which is currently in peril as *no existing party* has standing to defend the Legislative maps if and when the Secretary abandons that defense.[10] Of similar import is that, *no other party* has both the standing and will to appeal an adverse finding of the district court as it pertains to the legislative maps.

While Legislators knew their rights would be impacted when this lawsuit was filed, Legislators did not know their rights would not be adequately protected until the district court's order effectively waived legislative privilege. Order Granting in Part and Denying in Part Non-Party Movant's Motion to Quash (ECF No. 58) (Page ID# 985-1004) (hereinafter, Legislative Privilege Order). Had the

[10] *See, e.g., Agre v. Wolf*, No. 17-cv-04392, 39:15-23 (E.D. Pa. Dec. 7, 2017) (Democratic Governor abandoning defense of Republican map); *North Carolina v. N.C. Conf. of the NAACP*, 137 S. Ct. 1399 (2017); Transcript of Oral Argument at 26:16-27:9 (Dec. 8, 2015), *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016); (same); *Brat v. Personhuballa*, 883 F.3d 475, 477 (4th Cir. 2018) (same).

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).

On May 23, 2018, just a week before Defendant's Answer was filed, the district court issued its Legislative Privilege Order. ECF No. 58 (Page ID# 985-1004). This Order completely obliterated 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 § 4.551 ("A member of the legislature of this state shall not be liable in a civil action for any act done by him or her 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. . . .") *reversed by United States v. Gillock*, 445 U.S. 360 (1980).[11]

Intervention was made necessary once the state legislature was fully and improperly made subject to civil discovery. *See* Legislative Intervenors' Reply in

[11] Nothing in *United States v. Gillock*, 445 U.S. 360 (1980) disturbs this reasoning in the *civil* context. *Supreme Court v. Consumers Union of U.S.*, 446 U.S. 719, 733-34 (1980).

Supp. of Intervention, ECF No. 85 (Page ID# 2034); *see also Jansen*, 904 F.2d at 341 (calculating timeliness from when an intervenor learns their interest may not be adequately protected).

Even if this Court decides that Legislators' Motion was untimely earlier in the proceeding, an independent grounds for timeliness exists as a result of the November 6, 2018 general election. *See* Dissent of Second Order (ECF No. 144-1) (Page ID# 5351). In so far as Legislators' Original Motion was "premature," *see* Original Order (ECF No. 91) (Page ID# 2061 at ¶ 4); Second Order (ECF No. 144) (Page ID# 5347), the election of a Democrat as Secretary of State is undoubtedly an additional and independent reason to intervene.[12] The district court disregards the practical reality that the new Secretary of State has associated herself with the League of Women Voters. These are not "musings" and "prognostications" as to what may happen when the new Secretary of State takes office in January 2019. *See* Second Order (ECF No. 144) (Page ID# 5349 at fn. 2). *See infra* at fn. 18-20. Furthermore, it may lead to a delayed decision from the new Secretary of State

[12] It is also worth noting that both Legislators and Congressional Intervenors have long been concerned that the new Secretary of State would not only be a Democrat, but would be a Democrat who is an ardent opponent of the Legislature's redistricting power and is friendly with the League of Women Voters and its positions in this case. *See infra* at fn. 18-20. It is, in fact, entirely possible that Ms. Benson—the Secretary of State elect—is a *member* of the League of Women Voters. However, as discovery has been closed for some time and the new Secretary does not take office until January 2019, Legislators have no ability to confirm this specific fact.

regarding the position she will take with respect to the defense of this litigation. *See* Transcript of Trial Day 3: Afternoon, *Agre v. Wolf*, No. 17-cv-04392, 39:15-23 (E.D. Pa. Dec. 7, 2017) ("co-defendant" Pennsylvania Democratic Governor taking no substantive actions on the trial record until closing argument where he vociferously sided with plaintiffs in arguing that the map was a partisan gerrymander); *id*. at 55:12-16 (In rebuttal "I thought they were on our side of the V. That was quite a speech by the Governor's counsel, who basically just utterly abandoned the state's duly enacted law . . . .").

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*, there was no improper delay and therefore no prejudice. [13] Should this Court find that there was any delay, any such delay is fully justified for exactly the same reasons explained above. Furthermore, Plaintiffs do not dispute that there is no prejudice resulting from Legislators' intervention, as they do not oppose Legislators' request to be a party to this lawsuit. *See, e.g.,* Renewed Motion at App. C (ECF No. 136-4) (E-Mail of Mr. Yeager). Legislators have satisfied this prong of the analysis.

[13] 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 will be willing and able to defend the legislative reapportionment plans.

iii. Legislators' Motion to Intervene Cannot be Both Premature and Untimely.

In denying Legislators' Original and Renewed Motions, the district 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 (ECF No. 91) (Page ID# 2061 at ¶ 4); *see also* Second Order (ECF No. 144) (Page ID# 5347-48). However, as noted by Judge Quist in his dissent, "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." Second Order (ECF No. 144) (Page ID# 5347). This finding is at direct odds with the Court's determination that the Motion was premature. A motion cannot be both premature and untimely at the exact same time.

b. Legislators 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. In its Original Order, the district court briefly addressed only two intervention factors,[14] one of which was its contention that the Legislators have no official interest in their elective offices. Order (ECF No. 91) (Page ID# 2062-63).

First, the Legislators have *the exact same type of interest*[15] 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

[14] The district court simply regurgitates its Original Order while adding nothing of substance, despite the Legislators adding two additional interests in its Renewed Motion—which were included as a result of the district court's "separation of powers" holding. The district court addresses these additional interests in the same perfunctory way it has everything else in this intervention saga, by stating "[n]either of these arguments persuades the Court." Second Order (ECF No. 144) (Page ID No. 5348 at fn. 1).

[15] 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*.

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.

i. Regulation of Official Conduct.

Plaintiffs' alleged harm and requested relief attempt to regulate Legislators' official conduct. It is axiomatic that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Should a new map be ordered, it will be the Michigan Legislature that is tasked with passing a new map in the first instance. *See id.* ("It is well settled that reapportionment is primarily the duty and responsibility of the State."); *see also* U.S. Const. art. I, § 4 (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). The "courts must also recognize . . . the intrusive potential of judicial intervention into the legislative realm." *Miller v. Johnson*, 515 U.S. at 915 (addressing the "intrusive potential" of the judiciary in the context of the Federal Rules of Civil Procedure).

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 the district court requiring a redrawing of the current legislative and congressional maps. *See 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). 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.

ii. Diminishment of Reelection Chances

Legislators have a significant interest in their, or their successors', reelection chances. *See, e.g., Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586, 587 n.4 (5th Cir. 2006). The district court asserts that "[t]his purported interest is grounded in either partisanship, notions of elective office as property, or both [and] [a]s such . . . is not cognizable." Order (ECF No. 91) (Page ID# 2062). This is a plain misinterpretation of Legislators' interests.

Partisanship is fundamental to Plaintiffs' cause of action as they brought claims of partisan gerrymandering. *See* Complaint (ECF No. 1) (Page ID# 1-34). In so far 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 necessarily means less Republicans and more Democrats in Michigan's legislative and congressional offices.[16] Further, for the district court to say that an interest "grounded in partisanship" is no interest at all is to effectively neuter Plaintiffs' standing. As the district court has yet to dismiss this case for lack of standing, Legislators are left to assume that partisan interests are at least some interest.

It is well established that diminishment of reelection chances is a cognizable interest. *Benkiser*, 459 F.3d at 586, 587 n.4. The district court incorrectly asserts that Legislators' reelection interest is a property interest to the seat itself. Original Order (ECF No. 91) (Page ID# 2063); Second Order (ECF No. 144) (Page ID# 5347). However, 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

[16] This is all the more striking taking into account the results of the 2018 general election where Democrats won the seat share expected by Democratic Voters' experts in *both* the state legislature and congress. *See* Order Denying Summ. J. (ECF No. 143) (Page ID# 5298-5340). Despite the fact that Michigan has now achieved roughly proportional representation, the district court sees fit to keep this case alive regardless of significant authority to the contrary. *See id*.

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, a Democratic judicial gerrymander. *See* Order Denying Mot. Summ. J. (ECF No. 143) (Page ID# 5298-5340). 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, as has been stated numerous times in this litigation, there is a wealth of authority for the proposition that the diminishment of election chances is an injury. *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), *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).

iii. Economic Interest

An economic injury is 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 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 a new map be ordered, Legislators will have to expend additional funds becoming familiar with new areas within Michigan and forming relationships with new constituents and voters. This expenditure of funds is but for the fact that the Legislators are public servants and candidates for public office.

Legislators also "serve constituents and support legislation that will benefit the district and individuals and groups therein." *See League of Women Voters I,* 902 F.3d at 579 (quoting *McCormick,* 500 U.S. at 272 (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.

Finally, reapportionment is inherently costly. 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). The district court, instead of acknowledging this increased expense, pivots to casting this expense as "belong[ing] to the state." However, 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.").

iv. Federal Constitutional Interest

Legislators also have a federal constitutional interest in their constitutionally prescribed power to reapportion. The Elections Clause of the United States 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 unique interest is not shared with any

other governmental body in the State of Michigan and is specifically unique to state legislatures. And the district court's refusal to allow Legislators' intervention discards fundamental principles of federalism. Legislators have shown multiple significant interests and should be allowed to intervene.

c. No Current Party Adequately Represents Legislators' Interest.

"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. This factor is reviewed *de novo*. *Grubbs*, 870 F.2d at 345. The district court briefly addressed only two intervention factors, one of which was its contention that the Legislators have no official interest in their elective offices. Order (ECF No. 91) (Page ID# 2062-63).

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

i. The Secretary of State[17]

[17] As a matter of law, this circuit has rejected "the proposition that a stronger

Unlike when intervention was first sought, this Court now has the benefit of knowing that Ms. Jocelyn Benson (the Democratic Party's candidate) will be Michigan's Secretary of State effective January 1, 2019. Secretary-elect Benson is a regular speaker at League of Women Voters events[18], has been an advocate for a ballot initiative in Michigan to "fix this broken [redistricting] system"[19], and has stated that gerrymandering is a problem in Michigan[20]. Furthermore, Judge Quist, in his dissent, correctly identifies the political reality: Ms. Benson is a Democrat. Dissent of Second Order (ECF No. 144-1) (Page ID# 5351-52) (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

---

showing of inadequacy is required when a governmental agency is involved as the existing defendant. *Grutter,* 188 F.3d at 400; *see also Stupak-Thrall*, 226 F.3d at 479 (noting that the doctrine of *parens patriae* "has no hold in this Circuit.").

[18] *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

[19] *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.

[20] *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)).

discriminate against 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 a near certainty that the Secretary of State-elect will be aligned with Plaintiffs upon assuming that office. *See supra*. In any event, as noted by the this Court, the interest of the Secretary of State is that of the chief elections officer of the state. *See League of Women Voters I*, 902 F.3d at 579-80; *see also* MCL §§ 168.21. As such, she will not adequately protect the Legislators' interests irrespective of her specific actions moving forward.[21]

ii. Congressional Intervenors

Congressional Intervenors similarly do not represent Legislators' interests. Legislators do not share the same "ultimate objective" as Congressional Intervenors when it comes to the defense of the state house and senate maps.[22]

[21] 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* Dissent of Second Order (ECF No. 144-1 at 1) (Page ID# 5351-52) (Quist, J., dissenting).

[22] *See* Congressional Intervenors' Mot. Summ. J. (ECF No. 121) (Page ID# 2761-2791) (focusing on the congressional redistricting plan when making their laches and standing arguments).

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 Cir. 1987). In fact, it is unclear and unlikely that Congressional Intervenors have standing to defend the state legislative maps at either trial or on appeal. *Cf.* Second Order (ECF No. 144) (Page ID# 5349 at fn. 2) (noting that the Congressional Intervenors "are more than capable of proceeding without the Secretary of State" and that the case will move forward "uninterrupted")[23].

In so far as a "presumption of adequacy" attaches, it can be easily rebutted by the minimal required showing of inadequacy. *See United States v. Michigan*, 424 F.3d 438, 443-44 (2005) (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 and basic principles of the standing doctrine more than meet the minimal burden of adverseness required under Supreme Court and Sixth Circuit precedent.

[23] It is unclear why the district court believes that Congressional Intervenors have the authority, desire, or standing to defend state legislative maps and the district court has given no reasoning or analysis as to its opinion in this regard.

IV. LEGISLATORS SHOULD BE GRANTED PERMISSIVE INTERVENTION.

If not granted intervention as of right, Legislators should be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(b). 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).

"In deciding whether to allow a party to intervene, 'the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *League of Women Voters I*, 902 F.3d at 577 (quoting Fed. R. Civ. P. 24(b)). "So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors is reviewed for an abuse of discretion." *Miller*, 103 F.3d at 1248; *see also League of Women Voters I*, 902 F.3d at 577. "[T]hough the district court operates within a 'zone of discretion' when deciding whether to allow intervention under Rule 24(b), the district court nevertheless must . . . provide enough of an explanation for its decision to enable [this Court] to conduct meaningful review." *Id.* (alterations omitted) (quoting *Kirsch v. Dean*, 733 F.App'x 268, 279 (6th Cir. 2018)); *see also Miller*, 103 F.3d at 1248.

Legislators should be permitted to intervene permissively, just as this Court

ordered in the case of Congressional Intervenors. In fact, this Court's reasoning in *League of Women Voters I* all but compels the Legislators' permissive intervention. *See League of Women Voters I*, 902 F.3d 572. In *League of Women Voters I*, this Court found that the district court below abused its discretion and, accordingly, allowed the Congressional Intervenors intervention because, *inter alia*, "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." *League of Women Voters I*, 902 F.3d at 580. The district court has gotten this case wrong twice, once when it did not have the benefit of *League of Women Voters I*, *see generally* Original Order (ECF No. 91) (Page ID# 2059-65), and again when it refused to follow this Court's dictates on remand, *see generally* Second Order (ECF No. 144) (Page ID# 5346-5350).

In its Original Order, the district court gave two reasons, each without citation to authority, for its denial of permissive intervention: (1) "Any delay caused by Applicants' intervention would be undue in light of Applicants' lack of cognizable interest in this matter", and (2) "Insofar as Applicants' litigation strategy could conflict with that of the executive, Applicants' intervention could be prejudicial to the executive's representation of state interests." Original Order (ECF No. 91) (Page ID# 2064). In the Original Order, neither of the above propositions were backed by citation to legal authority nor was it "an explanation

for its decision" sufficient "to enable [this Court] to conduct meaningful review." *League of Women Voters I*, 902 F.3d at 577. In its Second Order, the district court simply restated its original finding and holds without serious explanation that the Original Motion is now untimely and that the fact that Plaintiffs no longer oppose intervention simply does not matter. *See* Second Order (ECF No. 144) (Page ID# 5348-49). The district court, however, conducts *no* analysis of *League of Women Voters I* as it relates to Legislators' intervention.

First, Legislators have discussed at length that this newly discovered untimeliness finding is an abuse of discretion. *See supra* at 9-14. That same reasoning applies just as strongly in the permissive intervention context as it does in the context of Rule 24(a).

Second, if the district court had actually drafted its Second Order in compliance with *League of Women Voters I*, it would have found that: (1) an elected officials interest *is* distinguishable from that of the Secretary irrespective of her actions moving forward, *compare* 902 F.3d at 579 *with* Second Order (ECF No. 144) (Page ID# 5348); (2) "any delay attributable to allowing [intervention] now is surely less than the delay that will occur if [a party] must intervene in January 2019, *compare League of Women Voters I*, 902 F.3d at 580 *with* Second Order (ECF No. 144) (Page ID# 5346-50) (never addressing "undue delay"); and (3) even "though the district court operates within a 'zone of discretion' when

deciding whether to allow intervention under Rule 24(b), the district court must . . . provide enough of an explanation for its decision to enable [the Court] to conduct meaningful review." *Id*. at 577. Despite all the opportunities the district court had to correct its earlier mistakes, it has declined to do so.

Other than opining that the district court did not rely upon Plaintiffs' original opposition in making its determinations, the district court *never* addresses how a consenting party can be prejudiced in the first instance. This fact should be dispositive, as undue delay and prejudice to the existing parties are the crux of permissive intervention. *See* Fed. R. Civ. P. 24(b). No party can be prejudiced when they concur in a Motion, as both the current Secretary and Plaintiffs both do. At the very least, all parties effectively waive any prejudice upon their concurrence. Legislators should be granted intervention.

V. THE SEPARATION OF POWERS IS NO BAR TO INTERVENTION.

In its Original Order, the district court denied intervention because the "attempt to intervene is in tension with the principle of separation of powers." Original Order (ECF No. 91) (Page ID# 2059). This erroneous conclusion was also found in the district court's Second Order. *See* (ECF No. 144) (Page ID# 5347). Setting aside that this "rationale" was never briefed by any of the parties, the separation of powers doctrine has no impact on Legislators' right to intervene.

The only case the district court cites in support of its separation of powers

rationale is *United States v. Windsor*, 570 U.S. 744, 754 (2013). *See* Original Order (ECF No. 91) (Page ID# 2059-61). However, *Windsor* stands for the proposition that individual legislators may intervene. *See Windsor*, 570 U.S. at 754. Additionally, state constitutional concerns over the separation of powers have no weight when the United States Constitution makes a specific grant of authority to, in this instance, the Michigan State Legislature. *See* U.S. Const. art. I, § IV; *see also supra* at 32. "States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it 'terminates according to federal law.'" *Arizona v. Inter. Tribal Council of Ariz., Inc.*, 570 U.S. 1, 15 (2013) (emphasis added) (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)). Separation of powers principles are of simply no moment when the legislature wielded powers specifically granted by the Federal Constitution.

VI. WAIVER AND JUDICIAL ESTOPPEL PREVENT PLAINTIFF-APPELLEES FROM NOW OPPOSING LEGISLATORS' INTERVENTION.

a. Waiver

Democratic Voters have waived any right to oppose Legislators' intervention.[24] "It is well settled that a party may voluntarily relinquish a known

[24] Plaintiffs have communicated to Legislators that they are only opposing intervention on appeal in so far as it is necessary to prevent any delay to the start of trial. *See supra* at 6-7. Plaintiffs, however, have waived and are judicially estopped

right through words or conduct." *Apponi v. Sunshine Biscuits, Inc.*, 652 F.2d 643, 649 (6th Cir. 1981). Just as "[i]t is similarly settled that a party whose conduct misleads another is barred, or estopped from asserting legal rights that it otherwise could assert." *Id.* In the civil context, "the elements of waiver are: (1) the existence at the time of waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual of constructive knowledge of the right; and (3) the intention to relinquish the right." *Renasant Bank v. Ericson*, 801 F. Supp. 2d 690, 699 (M.D. Tenn. 2011) (internal alterations omitted). Not only are all elements of waiver found here, but basic principles of equity ought dictate this outcome.

Up until their September 18 Motion to Remand, Plaintiffs have been consistent and adamant in their opposition to Legislators' intervention. *See, e.g.,* Plaintiffs' Resp. (ECF No. 78) (Page ID# 1775-1801). At the time Plaintiffs disclaimed their opposition to Legislators intervention, they had every right under rule and law to continue to pursue that opposition in this Court, and even in the Supreme Court. Similarly, it is obvious that they knew of their right to oppose Legislators' intervention as shown by the voluminous briefing in the district court and this court—and also in the related appeal by Congressional Intervenors. *See e.g.,* Resp. Mot. Intervene, (ECF No. 78) (Page ID# 1775-99); see also *League of Women Voters I*, 902 F.3d 572.

---

from opposing intervention in any respect.

Plaintiffs evidenced their "intention to relinquish the right." *Renasant Bank*, 801 F. Supp. 2d at 699. They should be precluded from now opposing intervention.

b. Judicial Estoppel

"[J]udicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citing and quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8 (2000)). "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *Id.* The overarching purpose of the judicial estoppel doctrine is "to protect the integrity of the judicial process." *New Hampshire*, 532 U.S. at 749 (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)). "Courts have observed that 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.'" *Id.* (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)).

The Supreme Court has identified three considerations in analyzing a claim of judicial estoppel: (1) "a party's later position must be 'clearly inconsistent' with its earlier position'", (2) "whether the party has succeeded in persuading a court to accept that party's earlier position", and (3) "whether the party seeking to assert an

inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51. However, a key feature of judicial estoppel is that it "may be applied even if detrimental reliance or privity does not exist." *Edwards*, 690 F.2d at 598.

Plaintiffs' position that they now oppose intervention, even if only conditionally, is "clearly inconsistent" with their earlier position. Plaintiffs previously represented to this Court that they no longer oppose Legislators' intervention when they moved for remand. *See* Appellees' Mot. Remand, *League of Women Voters v. Johnson*, No. 18-1946 (6th Cir. Sept. 18, 2018) (ER 19). This Court granted that motion, and in so doing imposed a detriment on Legislators by further delaying intervention or a decision on intervention. *See* Remand Order (ECF No. 131) (Page ID# 5038-41); *see also* Appellants' Resp. Mot. Ext. Time, *League of Women Voters v. Johnson*, No. 18-1946 (6th Cir. Sept. 26, 2018) (RE 23 at 2-4) (arguing that prejudice results from every additional day of delay). Accordingly, Democratic Voters are now judicially estopped from opposing the motion for intervention, even if only conditionally.

CONCLUSION

For the aforementioned reasons, the Legislators respectfully request this Court swiftly reverse the District Court's Order improperly denying Legislators' Motion to Intervene and direct it to grant the motion.

Respectfully submitted this 10th day of December 2018,

Holtzman Vogel Josefiak Torchinsky PLLC

/s/ Jason Torchinsky
Jason Torchinsky
Shawn Sheehy
Phillip M. Gordon
45 North Hill Drive, S 100
Warrenton, Virginia 20106
P: (540) 341-8800
F: (540) 341-8809
E: JTorchinsky@hvjt.law
ssheehy@hvjt.law
pgordon@hvjt.law

Clark Hill PLC

/s/ Charles R. Spies
Charles R. Spies
Brian D. Shekell (P75327)
212 E Cesar Chavez Ave.
Lansing, Michigan 48906
P: (313) 965-8300
cspies@clarkhill.com
bshekell@clarkhill.com

Date: December 10, 2018

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. 32(a)(7)(B)(i) because the brief contains 10,733 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. 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.

/s/ Jason Brett Torchinsky
Attorney for Appellant
Legislative Intervenors

CERTIFICATE OF SERVICE

The undersigned herby certifies that the Opening Brief of Appellants was electronically filed with the Sixth Circuit Court of Appeals on September 5, 2018. The Opening Brief of Appellants was served by ECF on September 5, 2018, on counsel for Appellee. The address for Counsel for the Appellee:

Mark C. Brewer
LAW OFFICES
17000 W. Ten Mile Road
Second Floor
Southfield, MI 48075
248-483-5000

Harmony A. Mappes
FAEGRE BAKER DANIELS LLP
300 N. Meridian Street
Suite 2700
Indianapolis, IN 46204

By: */s/ Jason B. Torchinsky*
Attorney for Appellant
Legislative Intervenors

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. 79	Secretary's Response to Motion to Intervene	Page ID# 1802-1810
ECF No. 85	Legislators' Reply in Support of Intervention	Page ID# 2032-2039
ECF No. 91	Order Denying Intervention (Original Order)	Page ID# 2059-2065
ECF No. 96	Original Notice of Appeal	Page ID# 2079-2081
ECF No. 98	Original Motion to Stay Pending Appeal	Page ID# 2083-2104
ECF No. 103	Order Granting Congressional Intervenors' Intervention	Page ID# 2152-2169
ECF No. 108	Order Directing Congressional Intervenors to Comply with Case Mgmt. Order No. 1	Page ID# 2188-2189
ECF No. 111	Congressional Intervenors' Emergency Motion to Alter Case Mgmt. Order No. 1	Page ID# 2225-2245
ECF No. 113	Reply in Support of Original Motion to Stay	Page ID# 2280-2284
ECF No. 115	Order "Granting in Part" Emergency Motion to Alter Case Mgmt. Order No. 1	Page ID# 2308-2310
ECF No. 121 through 121-17	Congressional Intervenors' Motion for Summary Judgment (with Exhibits)	Page ID# 2761-3209
ECF No. 131	Legislators' Sixth Circuit Remand Order	Page ID# 5038-5041
ECF No. 136	Legislators' Renewed and Unopposed Motion to Intervene (Renewed Motion)	Page ID# 5083-5110
ECF No. 136-4	E-Mail of Mr. Yeager (Exhibit C to Renewed Motion)	Page ID# 5133-5134

ECF No. 137	Congressional Intervenors' Motion to Alter Case Mgmt. Order re: Expert	Page ID# 5203-5216
ECF No. 143 & 143-1	Order Denying Summary Judgment (and dissent)	Page ID# 5298-5345
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