UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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 and RASHIDA H. TLAIB, Plaintiffs, v. RUTH JOHNSON, in her official Capacity as Michigan Secretary of State, Defendant.	No. 2:17-cv-14148 Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist **VOTERS' COMBINED OPPOSITION TO MOTIONS TO INTERVENE BY SENATE INTERVENORS**

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Voters' Combined Opposition to Motions to Intervene by Senate Intervenors

The eleventh-hour motion brought by the Michigan Senate and Michigan Senators Jim Stamas, Ken Horn, and Lana Theis (collectively, the "Senate Intervenors") should be denied. This case is mere days away from its trial date, and nothing in the proposed consent decree the existing parties have filed—which the Senate Intervenors argue gives rise to their "need to intervene"—renders this motion warranted or timely.

The Senate Intervenors are not entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2) because their motion is untimely, they lack a substantial legal interest in the case that would support intervention, and the existing Defendant and intervenors are adequately representing any interests they might have in any event. Further, the Court should not exercise its discretion to permit the Legislators to intervene under Fed. R. Civ. P. 24(b) because the disruption and prejudice to the existing parties that would result outweigh their insubstantial interest in intervention.

For these reasons, and for those set forth in the accompanying brief, the Voters respectfully request that the Legislators' motion be denied.

Respectfully submitted,

Date: January 31, 2019

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Issue Presented

Should this Court grant the motion of the Michigan Senate and individual Michigan Senators Jim Stamas, Ken Horn, and Lana Theis (collectively, the "Senate Intervenors") to intervene in this matter as of right pursuant to Fed. R. Civ. P. 24(a)(2) or exercise its discretion to permit the Senate Intervenors to intervene in this matter pursuant to Fed. R. Civ. P. 24(b)?

Controlling or Most Appropriate Authority

Rules:

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

Fed. R. Civ. P. 24(b)

Cases:

Blount-Hill v. Zelman, 636 F.3d 278, 285 (6th Cir. 2011)

United States v. Michigan, 424 F.3d 438 (6th Cir. 2005)

United States v. Tennessee, 260 F.3d 587 (6th Cir. 2001)

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

Bradley v. Milliken, 828 F.2d 1186 (6th Cir. 1987)

Introduction

The eve-of-trial intervention bids filed by three Michigan state senators (Dkt. No. 206) and the Michigan Senate as a whole (Dkt. No. 208), who admit that they knowingly made no effort to enter the proceedings for months despite watching them very closely, are untimely and cynically ascribe improper motives to a newly elected official. Moreover, saying that "Secretary Benson [is] laying down her sword rather than defending duly enacted Michigan Law," Dkt. No. 206 at 7708; Dkt. No. 208 at 7782, misjudges both the Secretary and the Consent Decree, which actually *protects* the Senate map and would not necessitate a special election. (*See* Dkt. No. 211-1 (listing as "Enjoined Districts" **only** districts of the Michigan House of Representatives).)

Indeed, as the Secretary explains, *avoiding* a Court-ordered special election was a primary driver of her decision to negotiate the Consent Decree. (Dkt. No. 222 at 8188–89.) Voters use the term "negotiate" intentionally. Contrary to the false and derogatory picture the Senate conjures from press reports about a "settlement proposal between Secretary Benson and her political mentor, Mark Brewer," Dkt. No. 208 at Page ID #7783, the proposed Consent Decree is "'the product of arms-length negotiations,' compromise, and cooperation." (Joint Mot. to Approve Consent Decree, Dkt. No. 211 at Page ID #7868.)

In short, neither the Michigan citizens' decision to elect a new the Secretary of State nor the announcement that the Secretary and the Voters had negotiated a Consent Decree—a compromise—results in an "adversarial void in this case," Dkt.

No. 206 at Page ID #7707; Dkt. No. 208 at Page ID #7781. The intervention motions should be denied.

I. Proposed intervenors have not satisfied the Rule 24(a) criteria for intervention as of right.

Both the Senate and the individual Senators primarily seek intervention as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). (*See* Senators' Brief, Dkt. No. 206 at 7711; Senate Brief, Dkt. No. 208 at 7785.) Under that Rule, intervention is required "[o]n timely motion" only if the putative 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." Those criteria are not met here.

a. The motions are untimely.

The "timeliness of a motion to intervene is a threshold issue[.]" *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (quotation omitted). A request to intervene is timely only if the proposed intervenors apply to the court "promptly after discovering their interest" in the case. *Zelman*, 636 F.3d at 285. The Sixth Circuit has identified five factors to weigh in determining the timeliness of an application to intervene:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to

> the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990) (quoting *Grubbs v. Norris,* 870 F.3d 343, 345 (6th Cir. 1989)). This Court has discretion with respect to determining an application's timeliness. *See U.S. v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001). *Tennessee* involved the consolidated appeal of denials of motions to intervene brought in two district court cases seeking reforms to Tennessee's mental healthcare system. *Id.* at 591.[1] *Tennessee*'s application of the five-prong *Jansen/Grubbs* timeliness analysis is particularly instructive here.

1. The point to which the suit has progressed.

In *Tennessee*, the intervention motions were brought as the district courts were deciding whether to approve a consent decree. 260 F.3d at 592. The courts had taken preliminary actions with respect to the settlement, and in one of the cases, "the motion for final approval of the settlement was already pending" when intervention was sought. *Id.* at 592-93. After observing that "'all circumstances' must be examined to determine the substantive progress that has occurred in the litigation," and that if "the litigation has 'made extensive progress in the district court before the appellants

[1] In *Tennessee*, the putative intervenor sought intervention both as of right and permissively in each case and appealed only the denial of the motions to intervene as of right. 260 F.3d at 591.

moved to intervene' then this factor weighs against intervention," the Court held that "[t]his factor weighs strongly against allowing intervention[.]" *Id.* (citation omitted).

The procedural parallel with this case is striking. Both the Senate and the Senators admit that, though they "contemplated intervening in this lawsuit last year," they made no effort to intervene until Secretary Benson "announced on January 17 that she will submit to a Consent Order[.]" Dkt. No. 206 at Page ID #7707; Dkt. No. 208 at Page ID #7781 (same).[2] The day after the Senate's motion, the Voters and the Secretary filed their Joint Motion to Approve Consent Decree. (Dkt. No. 211.) This factor weighs against a finding of timely intervention.

2. The purpose for which intervention is sought.

In *Tennessee*, the putative intervenor applied for intervention "during the remedial stages of a consent decree" so that it could "be an active party in future remedial proceedings." 260 F.3d at 592-593. The Court found that these "interests [were] not compelling," and that this factor weighed against intervention. *Id.* at 593.

Though they each cite *Jansen*'s five timeliness factors, *see* Dkt. No. 206 at 7714; Dkt. No. 208 at Page ID #7788, neither the Senate nor the Senators explicitly address *Jansen*'s "purpose" factor. Instead, they suggest that they seek intervention to "defend

[2] That is not what Secretary Benson "announced." Rather, in her January 17 response to Defendants-Intervenors' Emergency Motion to Stay Trial, the Secretary reported that she and the Plaintiffs were "*negotiating* a mutually agreeable and complete resolution of their disputes," and that the parties would "*likely* be able to reach a mutually favorable resolution that ensures a just outcome for Michigan voters." (Dkt. No. 199 at Page ID #7601, 7603, emphasis added.)

duly enacted State laws, to protect its constitutionally established four-year terms of office, and to prevent a special election for the Senate in 2020." Dkt. No. 206 at Page ID # 7716; Dkt. No. 208 at Page ID #7790 (same). For the reasons discussed below, these interests are not compelling and so weigh against allowing intervention.

3. The length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case.

Both the Senators and the Senate explicitly admit that they "knew of their [its] interests and those of the State in the case last year[.]" (Dkt. No. 206 at Page ID #7716; Dkt. No. 208 at Page ID #7790 (same).) Likewise, in *Tennessee*, the putative intervenor "admit[ted] it knew of the litigation … at all stages and it also knew that its members had an interest in the outcome of the litigation." 260 F.3d at 593. The Senators and Senate both argue that their supposed "interests were being properly defended by Secretary Benson's predecessor," but contend (wrongly) that "[l]ast week that changed[.]" (Dkt. No. 206 at Page ID #7716; Dkt. No. 208 at Page ID #7790 (same).) Likewise, in *Tennessee*, the putative intervenor "contend[ed] that it believed that the existing parties to the [case] adequately represented its interest initially, and thus, it was not required to intervene in the lawsuits. It now claims that it only recently became apparent that these parties were not adequately representing its interest." 260 F.3d at 593.

"An entity that is aware that its interests *may be* impaired by the outcome of the litigation is obligated to seek intervention as soon as it is reasonably apparent that it is

entitled to intervene." *Id.* (citations omitted) (emphasis added). The would-be intervenors in *Tennessee* "waited too long before intervening." *Id.* at 594. So too here.

The Senate and Senators suggest that they only tried to intervene because they were *shocked* to read about the Consent Decree in the newspaper. (*See, e.g.*, Dkt. No. 206 at Page ID #7715 "[U]pon learning of Secretary Benson's positional change, the Michigan Senators realized that their interests and those of the State in this case would be adversely affected without their participation[.]"); Dkt. No. 208 at Page ID #7790 (nearly identical text).)

Rubbish. For months before the "media reports" touted in their briefing were published, *see* Dkt. No. 206 at Page ID #7708; Dkt. No. 208 at Page ID #7782 (same), Michigan Republicans had been prophesizing that Secretary Benson would do what they now accuse her of having done. *See, e.g.*, Appellant's Brief, *League of Women Voters of Mich. et al. v. Johnson et al.*, 6th Cir. ECF No. 46, No. 18-1437 (6th Cir. Apr. 25, 2018) ("There exists a real likelihood that a newly elected Democrat Secretary of State would be less inclined to zealously defend what the Plaintiffs term a Republican gerrymander…. This is not a far-fetched notion."); July 12, 2018 Mot. to Intervene by Individual Michigan Legislators, Dkt. No. 070 at Page ID #1221 ("There … exists a significant possibility that the newly elected Secretary of State would be less inclined to defend the 2011 apportionment, which is not an uncommon occurrence when elected officials are involved."); *cf. League of Women Voters of Mich. et al. v. Johnson et al.*, 902 F.3d 572, 580 (6th Cir. Aug. 30, 2018) (discussing what might happen"[i]f the new

Secretary takes office in January 2019 and decides not to further pursue the state's defense of its apportionment schemes").

In fact, on December 10, 2018, the Senators' lower chamber colleagues explained this position at length as part of their own effort to intervene:

> [A]n independent grounds [sic] for timeliness exists as a result of the November 6, 2018 general election…. [T]he election of a Democrat as Secretary of State is undoubtedly an additional and independent reason to intervene. The district court disregards the practical reality that the new Secretary of State has associated herself with the League of Women Voters…. Furthermore, it may lead to a delayed decision from the new Secretary of State with respect to the defense of this litigation.

Appellant's Br., *League of Women Voters et al. v. Johnson et al.*, 6th Cir. ECF No. 18, No. 18-2283 (6th Cir. Dec. 10, 2018) (footnote speculating that Secretary Benson "is a *member* of the League of Women Voters" omitted). The lower chamber continued:

> [T]he 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.

Id. at Page ID #35 n.13 (emphasis added). That this argument was overblown and erroneous is irrelevant; the point is that, to the extent the Senate Intervenors believe that "Democrats now occupy both sides of the case, as Plaintiffs and Defendant," Dkt. No. 206 at Page ID #7707; Dkt. No. 208 at Page ID #7781 (same), the circumstances that fueled that belief have been apparent since "the second the new Democratic Secretary of State was elected on November 6, 2018." (Of course, their belief is erroneous; the League is non-partisan. *See, e.g.*, Compl., Dkt. No. 1, at ¶ 23.)

Moreover, each movant admits *in the very first sentence of their respective briefs* that they "contemplated intervening in this lawsuit last year[.]" Dkt. No. 206 at Page ID #7707; Dkt. No. 208 at Page ID #7781 (substantially identical text). They say they were "dissuaded … from doing so" because of "this Court's August 14, 2018 Order denying intervention by members of the Michigan House of Representatives[.]" Dkt. No. 206 at Page ID #7707; Dkt. No. 208 at Page ID #7781. As the Senate's and Senators' counsel know,[3] however, on August 30, 2018, the Sixth Circuit issued its Order reversing this Court's denial of the certain Republican Congressmen's motion to intervene in this matter. 902 F.3d 572 (6th Cir. 2018). After that Order, members of the Michigan House of Representatives appealed the denial of *their* intervention motion, Dkt. No. 105, and renewed their motion to intervene after the Sixth Circuit remanded in light of its August 30 decision on the Congressional Intervenors' appeal. (Dkt. No. 136.) The Legislators' renewed motion was denied, Dkt. No. 144, but the Sixth Circuit reversed that denial on December 20, 2018. (Dkt. 166.)

[3] In March 2018, the Senate's and Senators' counsel at Dykema Gossett appeared in this case on behalf of numerous individuals and entities, including the Michigan Chamber of Commerce (Dkt. No. 24); various legislators (including former Senate Majority Leader Randy Richardville and then-Senate Redistricting Committee Chairman Joe Hune) and legislative staff (Dkt. No. 26, Dkt. No. 29); and various House and Senate offices and officers (Dkt. No. 44, Dkt. No. 45). On information and belief, because of these appearances, putative Senate Intervenors' counsel—who purport to represent multiple Senate leadership bodies—have received PACER notice of every subsequent filing in this case—including the pertinent Sixth Circuit opinions.

Through all of these procedural machinations, the Senate and Senators chose to employ the same unsuccessful "wait-and-see" approach rejected in *Tennessee*. 260 F.3d at 594 (citing *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 & n.3 (6th Cir. 1982)) This factor weighs heavily against a finding of timely intervention.

4. The prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case.

This Court noted the "significant likelihood of undue delay and prejudice to the original parties" when it denied the Legislative Intervenors' motion to intervene in *August 2018*. (*See* Dkt. No. 91 at Page ID #2063-64.)[4] The individual Senators' motion brought their motion *fourteen days* before the scheduled February 5, 2019 trial. (Dkt. No. 206.) The Senate brought its motion two days later. (Dkt. No. 208.)

The prejudice to Voters and the other parties that was merely "significantly likely" last August is manifest now, when intervention is sought on the eve of trial. Indeed, in ruling on the Congressional intervenors' appeal in late August 2018, the Sixth Circuit noted that "any delay attributable to allowing the Congressmen to intervene now is *surely less* than the delay that will occur if the Congressmen must

[4] The Legislative Intervenors ultimately were allowed to intervene permissively. *League of Women Voters et al. v. Johnson et al.*, No. 18-2383, Dkt. No. 25 (6th Cir. Dec. 20, 2018); *cf. League of Women Voters et al. v. Johnson et al.*, 902 F.3d 572, 579 (6th Cir. 2018) (reversing denial of Congressional intervention and "point[ing] out that any delay attributable to allowing the Congressmen to intervene [in August 2018] is surely less than the delay that will occur if the Congressmen must intervene in January 2019").

intervene in January 2019." *League of Women Voters et al. v. Johnson et al.*, 902 F.3d 572, 580 (6th Cir. Aug. 30, 2018) (emphasis added).

This factor weighs heavily against a finding of timely intervention.

5. The existence of unusual circumstances militating against or in favor of intervention.

The remedy Voters seek in this action is extraordinarily time-dependent. Unless redistricting is ordered and all appeals are completed by early 2020, they will be deprived of any meaningful opportunity for redistricting before the 2020 elections. Time is therefore of the essence; the Court has recognized and emphasized this consideration in its orders dating to last spring. In March 2018, for example, the Court denied the Secretary's motion to stay because if Voters prove their case, "a 2020 remedial plan must be in place no later than March of 2020 to be effective for the November 2020 election." (Dkt. No. 35 at Page ID #613 (quotation omitted)) In May 2018, the Court denied the Congressional Intervenors' bid to intervene, noting the need for "expeditious resolution" of the case in light of the public interest at stake. (Dkt. No. 47 at Page ID #903.) And in August 2018, the Court noted that "[g]ranting Applicants' motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties." (Dkt. No. 91 at Page ID #2063.)[5]

[5] Though the Sixth Circuit ultimately ordered that the Legislative Intervenors be allowed to intervene on permissive grounds, it did so after the Voters withdrew their opposition in hopes of ensuring that the intervention would not further jeopardize the trial schedule. The Sixth Circuit's one-page order permitting the Legislative Intervenors' intervention did not address, or reverse, the reasoning in this Court's

What was true last year is truer now: permitting strategic intervention would be highly prejudicial. *See Zelman*, 636 F.3d at 286-87 (delay caused by intervention would be prejudicial where existing parties had an "interest in the expeditious and efficient disposition" of a lawsuit "seek[ing] to invalidate a significant statutory scheme").

Because the Senate's and Senators' delay in bringing their motion was unjustified, they may not intervene.

b. The Senate intervenors have not demonstrated that they have protectible interests that would be impaired if they are not permitted to intervene.

"The second prong of the Rule 24(a)(2) requirements is that the proposed intervenor must have a direct and substantial interest in the litigation. …The interest must be significantly protectable." *Grubbs*, 870 F.2d at 346 (citation omitted); *United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993) (explaining that a "direct, significant legally protectable interest" is required). The third prong of the test is closely related: a proposed intervenor must not only demonstrate that a protectable interest exists in the abstract, but that "impairment of its substantial legal interest is possible if intervention is denied." *Michigan State AFL-CIO v. Miller,* 103 F.3d 1240, 1247 (6th Cir. 1997). "In cases like this one, where a group of plaintiffs challenge state legislation, the court should evaluate requests to intervene with special care, lest the

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August 14 and November 30 orders as to the Rule 24(a) criteria for intervention as of right. *See League of Women Voters of Mich. v. Johnson,* No. 18-2383, Dkt. No. 25 (6th Cir. Dec. 20, 2018).

case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place." *One Wisc. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015).

Here, the Senate Intervenors assert that they have four interests that would be impaired if they are denied intervention on the eve of trial: (1) an interest in defending the constitutionality of their "official conduct" from regulation by Court order; (2) an interest in avoiding Senate special elections in 2020; (3) a "representative" interest in protecting relationships with their constituents; and (4) an interest in avoiding the expenditure of "significant public funds and resources" if the Court orders the legislature to comply with any remedial order. (Dkt. No. 206 at 7717-18; Dkt. No. 208 at 7792-93.)

The first of these purported interests would never justify intervention, and even if it did, nothing about the proposed consent decree renders last-minute intervention timely. The other interests the Senate Intervenors invoke are not implicated at all by the proposed Consent Decree that supposedly sparked this latest intervention bid; to the extent such interests are triggered by the underlying fact that the Voters sought to overturn the 2011 Michigan gerrymander, the Senate Intervenors could, and should, have raised them long ago as the Legislators and Congressmen did.

1. The Senate Intervenors do not have a valid interest in defending the 2011 Michigan gerrymander; any interest in defending the Senate's authority to conduct apportionment would not be impaired by a Court order.

Both the Senate and the individual Senators argue that they have an interest in this suit because the Voters seek a Court order regulating their "official conduct." Dkt. No. 206 at Page ID # 7717; Dkt. No. 208 at Page ID #7793. They appear to argue that because the Michigan Senate is one of the bodies "bestowed with the constitutional obligation to prepare and enact" redistricting legislation, then it (and its members) must have an interest in a lawsuit that challenges the fruits of that work as unconstitutional. Dkt. No. 206 at Page ID #7718-19; Dkt. No. 208 at Page ID #7793-94. Citing the Supreme Court's decision in *Sixty-Seventh Minnesota State Senate v. Beens,* they argue that they have an institutional stake in a lawsuit challenging an apportionment plan that is distinct from the "generalized interest shared by all citizens." *Id.* (citing 406 U.S. 187, 194 (1972)).

This type of interest does not warrant intervention. Representing the State of Michigan in court—whether against a challenge to the validity of a state law or a threat to state resources—is an executive function. Mich. Const. art. 5, §§ 1, 8; Mich. Comp. Laws §§ 14.29, 21.162).[6] When two members of the Michigan House of

[6] Outgoing Governor Snyder recognized this principle when he vetoed Enrolled House Bill 6553, which would have authorized the Legislature, and either house thereof, to intervene "in any action commenced in any court of this state whenever the legislature or a house of the legislature deems such intervention necessary in order

Representatives moved to intervene in this case back in July 2018, they asserted precisely the argument that the Senate Intervenors have repeated nearly verbatim here. (*Compare* Dkt. No. 70 at Page ID # 1215–1217 *with* Dkt. No. 206 at Page ID #7718–20; Dkt. No. 208 at Page ID #7793–95.) The Court rejected that purported interest, observing that bedrock separation of powers principles vest the executive branch, including the Secretary of State's office, with the authority to enforce Michigan's laws and to "prosecute and defend all suits relating to matters connected with their departments." (Dkt. No. 91 at Page ID #2060 (quoting M.C.L. § 14.29).)[7]

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to protect any right or interest of that body because a party to that action challenges the constitutionality of a state statute[.]" In his veto message, Governor Snyder wrote:

> [I]magine a scenario where the State of Michigan is a defendant to a lawsuit challenging the validity of a recently enacted statute. The governor, as CEO, and thus client, is responsible for coordinating the State's response to the litigation with her or his attorney at the Department of Attorney General. The Attorney General his- or herself could conceivably erect a conflict wall and take a position 'on behalf of the people' that is different from that which the governor as CEO takes. Consider then that the House of Representatives intervenes in the lawsuit to take another position. And then the Senate similarly intervenes and takes yet another position. Who then is speaking in court for the State?

Letter from Hon. Rick Snyder, Governor of Michigan, to Michigan House of Representatives and Michigan Senate regarding veto of Enrolled House Bill 6553, https://content.govdelivery.com/attachments/MIGOV/2018/12/28/file_attachments/1130302/Veto%20Letter%206553.pdf (last accessed Jan. 31, 2019).

[7] Again, permissive intervention was ultimately granted because the Voters dropped their opposition, not because the Court's reasoning was rejected. *League of Women Voters et al. v. Johnson et al.*, No. 18-2283, Dkt. No. 25 (6th Cir. Dec. 20, 2018).

Even assuming, without deciding, that legislators or a legislative body could *ever* have an institutional interest in defending an enacted law, the Court held that the legislators' motion would be premature, because it depended on unfounded speculation about executive abdication of its constitutional role. *Id.* at Page ID #2161–62. *Cf. United States v. Windsor* 570 U.S. 744, 754 (2013) (endorsing intervention by a group of U.S. representatives in a lawsuit challenging federal legislation where, among other factors, the executive did not oppose limited intervention). After an appeal to the Sixth Circuit, this Court reached the same conclusion in rejecting the legislative intervenors' renewed motion to intervene in its order of November 30, 2018. (Dkt. No. 144 at Page ID #5347.) The Voters had on other grounds agreed to the Legislative Intervenors' *permissive* intervention in light of Sixth Circuit guidance and in order to avoid the prospect that an appellate order permitting the intervention would threaten the February 2019 trial date, and the Sixth Circuit ordered intervention on that basis, but this Court's reasoning stands. As discussed below, *see* Section I(c) *infra*, the Senate Intervenors' professed concerns about the inadequacy of the existing parties' representation of their interests are just as baseless and speculative as were the legislative intervenors'. More fundamentally, the Senate Intervenors have provided this Court no reason to accept the same argument regarding protectable interests that it has already rejected twice.

The Senate argues that the Supreme Court's decision in *INS v. Chadha,* 462 U.S. 919 (1983), supports its institutional interest in "defend[ing] a power granted to it by a

statute." Dkt. No. 208 at Page ID #7791-92. It does not. *Chadha* concerned the constitutionality of a provision of the Immigration and Nationality Act granting Congress a "legislative veto" over a determination by the Immigration and Naturalization Service as to the deportation or non-deportation of particular aliens. The Court ultimately held that the legislative veto violated the separation of powers, 462 U.S. at 944–50, but as an antecedent matter, it concluded that the case presented a cognizable "case or controversy" under Article III because the House of Representatives advocated for the petitioner's deportation even though the INS did not. *Id.* at 939–40. In doing so, the Court noted that the Ninth Circuit had *invited* the House to weigh in as *amicus curiae*. *Id.* at 939–40 & n.5.

The U.S. House of Representatives had a twofold stake in the outcome of *Chadha* that the Michigan Senate lacks here. Not only was it the body that had, in effect, ordered the petitioner alien to be deported by exercising its legislative veto in that case, but it also had an interest in defending a statutory authority that would be taken away if the Supreme Court declared the legislative veto unconstitutional. Here, by contrast, the Senate seeks only to "defend a law that it duly enacted." (Dkt. No. 208 at Page ID #7792.) Its *power* to draw Michigan's district lines is not called into question—indeed, the Senate complains elsewhere in its brief about the burdens it will bear if required to *exercise* that power. (*Id.* at Page ID #7793 ("The Senate would be required to play an integral part in drawing and enacting the remedial plans[.]").)

The only authority the Senate Intervenors cite that relates to redistricting, the Supreme Court's 1972 *Beens* decision, is also distinguishable here. In *Beens*, the Court concluded that the Minnesota Senate had standing to appeal a court order overturning the state's legislative districts as unconstitutional and implementing a remedial plan. The court order invalidated Minnesota's entire Senate map and drew new districts, and it was in this context that the Court found the state senate to be "directly affected" by the order. 406 U.S. at 194. Here, by contrast, the proposed consent decree, which the Senate Intervenors claim gives rise to their "need to intervene," Dkt. No. 206 at Page ID #7715; Dkt. No. 208 at Page ID #7789, will not affect the Michigan Senate map at all. (*See* Dkt. No. 211-1 (listing as "Enjoined Districts" only districts of the Michigan House of Representatives).) The Michigan Senate's role in drawing new districts after the 2020 census will be unaffected.[8]

In sum, intervention as of right in support of an institutional interest in defending the Senate's power to conduct apportionment or in its own composition is timely only if the proposed Consent Decree presents a *new* possibility that a cognizable interest will be impaired. *Cf. Miller*, 103 F.3d at 1047. It does not.

[8] The individual Senators' citation of *Beens* in support of an interest in defending the Senate's constitutional responsibilities, Senators' Br. 13, is even more misplaced. "Elected office does not constitute a property interest." *Gamrat v. Allard*, 2018 WL 1324467, at *5 (W.D. Mich. Mar. 15, 2018). Whatever interest the *Senate* may have in defending its institutional power, *individual Senators* do not partake of it.

2. The Senate Intervenors' asserted interests in avoiding special elections and representing their districts as currently constituted will not be impaired by the proposed consent decree.

The Senate Intervenors also assert two related interests in avoiding changes to the status quo. *First*, both briefs allege an interest in preventing any resolution of this case that would require special elections in 2020 and thus reduce the current senators' terms in office. Such an outcome, they contend, would violate Article IV, Section 2 of the Michigan Constitution. (Dkt. No. 206 at Page ID # 7717, 7721; Dkt. No. 208 at Page ID #7793.) *Second*, the Senate Intervenors point to their interest in "protecting the relationship between constituent and representative." (Dkt. No. 206 at Page ID #7718; Dkt. No. 208 at Page ID #7793.) While the Senate invokes this interest only in perfunctory fashion, the individual Senators explain that their "interest in their reelection chances" is linked to defending the Senate district's current boundaries. (Dkt. No. 206 at Page ID #7720-21.)

Regardless of whether these interests could *ever* support intervention,[9] they certainly do not warrant eleventh-hour intervention, because to the extent the Senate Intervenors contend their "representative interest" would be impaired by *any* order from the Court declaring all or part of the 2011 gerrymander unconstitutional, that

[9] The only case they cite, *McCormick v. United States*, 500 U.S. 257 (1991), has no relation to either intervention under Rule 24 or redistricting. The Senate Intervenors quote, entirely out of context, a passage in that decision discussing whether there was sufficient evidence to convict a state legislator of taking campaign contributions in violation of the Hobbs Act. *See* 500 U.S. at 272.

prospect was just as apparent when the case was first filed, or when they weighed intervention in August 2018, as it is now. Intervention should be denied.

3. Any purported economic interest, even if it had been timely asserted, has already been rejected by this Court.

The Senate and Senators both contend that if the Court enters an order or approves a settlement requiring remedial redistricting, they "would be required to expend significant legislative funds and resources toward the extraordinary costs of developing apportionment plans." (Dkt. No. 206 at Page ID #7721, Dkt. No. 208 at Page ID #7795.) This purported interest does not support intervention.

First, this Court has already rejected the very same argument. In their motion to intervene, two members of the Michigan House argued that they had an interest in the case because they would be "forced to expend significant public funds and resources to fulfill the remedial orders sought by Plaintiffs." (Dkt. No. 70 at Page ID #1215.) Indeed, their motion offered *precisely* the same recitation regarding the "extraordinary costs of developing apportionment plans" as the Senate Intervenors now restate six months later. (*Id.* at Page ID #1218.) The Court rejected this "proffered economic interest," explaining that even if it exists, "such interest belongs to the state and is adequately represented by the executive." (Dkt. No. 91 at Page ID #2063.) The Court expressly reaffirmed that ruling in a second order on the proposed legislative

intervenors' renewed motion. (Dkt. No. 144 at Page ID #5347.)[10] Although they allege that the Secretary no longer adequately represents their interest in upholding the constitutionality of state laws—an argument that is unfounded, *see* Section I.C—nowhere do they suggest that Michigan's executive branch has somehow abdicated its role in protecting in the state's finances.

Indeed, it is clear that Secretary Benson is protecting the public fisc. (*See, e.g.*, Secretary's Tr. Br., Dkt. No. 222 at Page ID #7602 ("[A]n expedient resolution of this controversy by consent decree will … conserve public resources, including taxpayer funds and the time and productivity of public officials that would be otherwise consumed through multiple forthcoming stages of a resource-intensive litigation"); Joint Mot. to Approve Consent Decree, Dkt. No. 211, at Page ID #7867 ("[T]he costs, expenses, and uncertainty associated with a lengthy trial are real for the Parties.").) The executive branch is diligently protecting the State's coffers.

Second, the proposed Consent Decree threatens no impairment of this purported interest that was not threatened from the moment this suit was filed. A Court order declaring the 2011 gerrymander unconstitutional *always* carried with it the prospect that the legislature would have to incur the "costs of developing apportionment plans." This threatened impairment of any economic interests was

[10] Though the Sixth Circuit ultimately ordered that *permissive* intervention be allowed, it did not disturb this Court's rejection of the "public funds" argument. *See League of Women Voters of Mich. v. Johnson,* No. 18-2383, Dkt. No. 25 (6th Cir. Dec. 20, 2018).

apparent enough as of July 2018, in fact, that the proposed legislative intervenors included in their motion to intervene the *same language* that has now been copied and pasted into the Senate Intervenors' brief. (*Compare* Dkt. No. 70 at Page ID #1218 *with* Dkt. No. 206 at Page ID #7721–22; Dkt. No. 208 at Page ID #7795.). Even if this asserted interest were viable, intervention now to protect it would be untimely.

c. The Senate intervenors have not shown that the existing Defendants are not adequately protecting their interests.

The Senate Intervenors' argument that the Senate's "interests are not adequately and fairly represented by any existing party to this action," Dkt. No. 206 at Page ID #7723; Dkt. No. 208 at 7796, ignores the "presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit … have the same *ultimate objective*." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (emphasis added; citation omitted); *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005). A proposed intervenor shares the same "objective" as an existing party so long as each seeks the same relief. *See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012), *rev'd on other grounds, Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (concluding that the proposed intervenors and the Michigan attorney general "share[d] the same ultimate objective: the validation of [the statute]"); *Moore v. Johnson*, 2014 WL 2171097, at *2 (E.D. Mich. May 23, 2014) (finding that because party shared "the exact same objective in the

litigation [as the proposed intervenors]—i.e. securing a holding from the Court that the [challenged state statute] is constitutional," the presumption of adequacy applied).

As explained above, Secretary Benson occupies the governmental office charged with representing the State's interest in this case. *See* Mich. Const. art. 5, §§ 1, 8; Mich. Comp. Laws §§ 14.29, 21.162. It is "presume[d] that the government entity adequately represents the public." *FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015) (citation omitted). As the Secretary explains, she "is an indispensable defendant to this lawsuit whose interests as Michigan's chief elections officer are, first and foremost, aligned with the Constitutions of the United States and the State of Michigan." (Secretary's Tr. Br., Dkt. No. 222, at 8195-96.) "Counsel for the Secretary will zealously represent her interests during trial in this matter to facilitate a resolution that remediates the most severe instances of partisan gerrymandering during the only election cycle in the brief window before the independent, nonpartisan, citizen-led ICRC [Independent Citizen Redistricting Commission] assumes control of the redistricting process." (*Id.* at 8196)

"[T]he Secretary has not conceded Plaintiffs' claims, as some … have wrongly asserted." (*Id.* at 8191.) "Indeed, in the event the consent decree is not approved, the Secretary is prepared to defend her distinct interests in this case; and her willingness to compromise with Plaintiffs in an effort to avoid a protracted trial and subsequent appeal should not weigh against the Secretary being an indispensable defendant should this case proceed without settlement." (*Id.*)

To the extent that the Senate Intervenors aim to "protect their constitutionally established four-year terms of office, and to prevent a special election for the Senate in 2020," Dkt. No. 206 at Page ID #7716; Dkt. No. 208 at Page ID #7790, the Secretary is doing precisely that. "Contrary to the Plaintiffs' position," she argues, "a special election for State Senate offices during the upcoming State House election cycle in 2020 is not an appropriate remedy under the circumstances, and would be a substantial disruption to the normal electoral process." (Secretary's Tr. Br., Dkt. No. 222 at Page ID # 8191). "The unique circumstances here – the last major elections cycle before the ICRC draws new State Senate districts for the 2022 election – do not support a special election in 2020, which would mean some Senate candidates would be forced to run three campaigns in six years (2018, 2020, and 2022). (*Id.* at Page ID #8192-93.) "This case does not present the extraordinary circumstances necessary for a special election, particularly because, even if Plaintiffs prevail on the merits of their Senate District claims, the current maps will not govern the next State Senate election in 2022." (*Id.* at 8193-94.)

Any legitimate interests the Senate Intervenors might have are adequately represented by the existing Defendants. Intervention should be denied.

II. The Senate Intervenors cannot satisfy the Rule 24(b) criteria for permissive intervention.

Alternatively, the Senators and the Senate seek permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B). (*See* Dkt. No. 206 at 7711; Dkt. No. 208

at 7785.) Under that Rule, "[o]n timely motion, the court *may* permit" intervention where the putative intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(3). The Rule requires that the Court "exercis[e] its discretion" by "consider[ing] whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.*

The Sixth Circuit has "recognized that identity of interest is one of several 'relevant criteria' under Rule 24(b), *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007), and '[t]he fact that [a proposed intervenor's] position is being represented counsels against granting permissive intervention.' *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 759 (6th Cir. 2018)." *League of Women Voters of Mich. et al. v. Johnson et al.*, 902 F.3d 572, 578 (6th Cir. 2018). *See also NAACP v. New York*, 413 U.S. 345, 368 (1973) (affirming order denying permissive intervention in part because the proposed intervenors' claim of inadequate representation was "unsubstantiated"); *Bay Mills*, 720 F. App'x at 759 (affirming order denying permissive intervention in part because the putative intervenor's position was "being represented," thus "counsel[ing] against granting permissive intervention"); *Coal. to Defend Affirm. Action*, 501 F.3d at 784 (affirming order denying permissive intervention in part because proposed intervenors were adequately represented by existing parties).

Finally, it is proper to exercise discretion to deny permissive intervention to avoid the sort of unnecessary delay that inevitably would attend an eve-of-trial intervention. *See Vasalle v. Midland Funding, LLC*, 708 F.3d 747, 760 (6th Cir. 2013)

(affirming order denying permissive intervention, even though there were claims in common with those of the original parties, because intervention "would unduly delay the adjudication of the original parties' rights"); *Coal. to Defend Affirm. Action*, 501 F.3d at 784 (affirming order denying permissive intervention because it was not a clear abuse of discretion for the district court to conclude that intervention would "inhibit, not promote, a prompt resolution") (citation omitted); *Michigan*, 424 F.3d at 445 (affirming order denying permissive intervention because allowing intervention would have "inject[ed] management and regulatory issues into the current phase of the proceedings," thus leading to delay that "would have prejudiced the original parties"); *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889, 891 (6th Cir. 1978) (per curiam) (affirming order denying permissive intervention because it was no abuse of discretion to conclude that intervention would "unduly delay" the proceedings").

If the Consent Decree is not approved, then the current trial schedule is critically important for Voters to have a meaningful opportunity to achieve final judgment and resolution of their claims in time for Michigan's 2020 elections. Permissive intervention should be denied.

Conclusion

The Senate Intervenors' motion is untimely. Any legitimate interest they may wish to defend is already being defended by the existing Defendants. Both intervention as of right and permissive intervention should be denied.

Respectfully submitted,

Date: January 31, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2019, I caused to have electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record in this matter.

Respectfully submitted,
/s/ Joseph H. Yeager, Jr.