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**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 G. 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

**PLAINTIFFS' BRIEF IN  
SUPPORT OF RESPONSE TO  
MOTION TO INTERVENE BY  
REPUBLICAN  
CONGRESSIONAL DELEGATION**

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Issues Presented

Eight of the 9 Republican Michigan Members of Congress (“Applicants”) have moved to intervene by right under FRCP 24(a) or permissively under FRCP 24(b). The Plaintiffs oppose intervention by right and leave to the Court’s discretion whether to allow permissive intervention.

1. Intervention by right should be denied because the Applicants have no “right” to certain congressional districts and have no substantial legal interest in congressional districts for the 2020 elections at issue here; their minimal interests are adequately represented by Defendant and her legal counsel; and their motion is untimely.

2. Permissible intervention, if allowed by the Court in its discretion, should be conditioned on Applicants not filing the duplicative motion for stay and meritless motion to dismiss attached to their motion to intervene; not revisiting discovery matters already settled; and conferring with the Defendant in the future to avoid duplicative filings and delay.

Controlling or Most Appropriate Authorities

*Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007)

*Grubbs v. Norris*, 870 F.2d 343 (6th Cir. 1989)

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INTRODUCTION

Proposed Interveners “stand to be irrevocably harmed by any redrawing of congressional districts.”

- Brief at 2 (emphasis added)

“[T]he voters should choose their representatives, not the other way around.”

*-Arizona State Legislature v. Arizona Indep. Redistricting Commission, 135 S. Ct. 2652, 2677 (2015)*

Proposed Interveners’ (hereafter “Applicants”) brief crystallizes the very evil this lawsuit seeks to remedy – the belief that an officeholder has an inherent “right” to his or her district which trumps the voters’ rights to fair and effective representation. As the Supreme Court held in *Arizona State Legislature*, it is the voters’ rights which are paramount.

The Motion to Intervene is based on the false premise that officeholders “own” their districts. For that reason and others, Applicants have no right to intervene and precious little basis for permissive intervention either.

I. APPLICANTS ARE NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

The Sixth Circuit has established a 4-factor standard governing intervention by right under FRCP 24(a):

We have explained that a proposed intervenor must establish four factors before being entitled to intervene: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor’s ability

to protect their interest may be impaired from the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest. *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir., 1999)

*Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007) (affirming denial of intervention by right). “[F]ailure to meet [any] one of the [four factors] will require that the motion to intervene be denied.” *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

Applicants fail to meet any of the 4 factors.

A. Applicants Have No Substantial Legal Interest in the Congressional Districts for the 2020 Elections.

Pervading the Applicants’ motion and brief is an attitude of ownership and entitlement to the current congressional districts. They claim they will be “significantly harmed by any . . . change to their current districts” (Brief at 6, emphasis added) and they will be “irrevocably harmed by any redrawing of congressional districts” (Brief at 2, emphasis added).

The current congressional districts are not the personal political fiefdoms of the Applicants – that concept is completely alien in our democracy where, as the Supreme Court has observed, the “core principle of republican government” is that “voters should choose their representatives, not the other way around.”

*Arizona State Legislature v. Arizona Indep. Redistricting Commission*, 135 S. Ct. 2652, 2677 (2015). According to the Applicants, they have a legal right to

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immutable districts which supersedes even the constitutional rights of voters.

That has never been the law – the Applicants serve at the pleasure of the voters, not vice-versa.

In addition, the Applicants have no legally protected interest – let alone a substantial one – in Michigan’s congressional districts for purposes of the 2020 elections.

Contrary to Applicants (Brief at 5, 7), this lawsuit is not about relief for the 2018 elections but about relief for the 2020 elections for terms beginning January 3, 2021. *See* Plaintiffs’ Brief in Support of Response to Defendant’s Motion to Stay or Dismiss at 2 [Doc. 15, Pg ID 134] (Plaintiffs seek a remedy for the 2020 elections, not the 2018 elections).

The Applicants’ current terms expire on January 3, 2019. It is entirely speculative whether any of them will even be in office in 2020, let alone be candidates for Congress for a term beginning in 2021. Already this decade, 5 of the 9 Republican Members of Congress serving in 2012 have since left the Congress and one of the Applicants, David Trott, has publicly declared that he will not seek reelection in 2018. *See* U.S. Rep. Dave Trott to leave Congress. Thus, a claim by any of the Applicants that he will be a candidate in “his district”



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in 2020 is purely speculative and does not remotely represent the “substantial legal interest” required for intervention.<sup>1</sup>

The Applicants have no substantial legal interest in this litigation.

B. Applicants Can Protect Their *De Minimis* Interest by Participating as Amicus Curiae.

Applicants’ ability to protect their *de minimis* legal interest in this case will not be impaired in the absence of intervention. They can participate as *amicus curiae*.

C. The Defendant Can Adequately Protect Applicants’ *De Minimis* Interest.

Applicants make a conclusory 1-paragraph argument that their interests cannot be adequately protected by the current Defendant. (Brief at 7-8)

That argument ignores the role of Defendant’s legal counsel. Unlike Applicants’ counsel, Johnson’s legal counsel has advised the Michigan Republican Party and its officeholders, and defended Michigan Republican interests, in redistricting since 1992. *See, e.g., In re Apportionment of the State Legislature – 1992*, 439 Mich. 251; 483 N.W.2d 52 (1992) (order); *LeRoux v Secretary of State*, 465 Mich. 594; 640 N.W.2d 849 (2002) (congressional

<sup>1</sup> Indeed, as of today only Applicant Huizenga has even filed nominating petitions to seek reelection in 2018.

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redistricting); *O'Lear v Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002) (*per curiam*) (3-judge panel) (congressional redistricting); *NAACP v Snyder*, 879 F. Supp. 2d 662 (E.D. Mich. 2012) (3-judge panel) (*per curiam*) (legislative redistricting).

Applicants' minimal interests will be adequately protected by Defendant Johnson and her legal counsel.

D. The Application is Untimely.

The Sixth Circuit has established a standard for evaluating timeliness:

The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances. *See Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir.1987). We have held that the following factors should be considered: (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. *Grubbs*, 870 F.2d at 345.

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

These factors all weigh in Plaintiffs' favor.

First, the Applicants should have known for over a year of their interest in this case and should have filed their motion within a few weeks of this case's filing, instead of over 2 months later.

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On February 6, 2017 Applicant John Moolenaar received a letter advising him that this lawsuit would be brought and that he had a duty to preserve evidence. *See* Exhibit 1.<sup>2</sup> Since the mailing of that letter and dozens like it by Plaintiffs' counsel there have been several press articles about the coming filing of this case.<sup>3</sup> On December 22, 2017 when the case was filed and thereafter there have been several more press stories about it.<sup>4</sup>

Despite over 10 months' warning before this suit was filed and all of the publicity generated during that time and since, it took Applicants over 2 months to file a simple 2-page motion to intervene and 10-page brief. There is no excuse for that delay. This motion should have been filed within a few weeks of the complaint being filed.

Second, contrary to Applicants' assertion that the lawsuit is in its "nascent stages" (Brief at 4), it is not:

- On January 23, 2018 Defendant filed a Motion to Stay or Dismiss for Lack of Standing, a motion now fully briefed with a hearing tentatively

<sup>2</sup> He received that letter because he was a State Senator in 2011 who served on the Senate Redistricting Committee which voted for the 3 plans at issue here. In essence, he helped create the district in which he now serves. He is not the only Republican Member of Congress who has done so.

<sup>3</sup> *See, e.g.,* <https://www.freep.com/story/news/politics/2017/01/31/democrats-challenge-gerrymandered-michigan-districts/97254240/>

<sup>4</sup> *See, e.g.,* <https://www.freep.com/story/news/local/michigan/detroit/2017/12/22/redistricting-gerrymandering-league-women-voters-lawsuit/972341001/>, <https://www.detroitnews.com/story/news/politics/2017/12/22/lawsuit-gerrymandering-michigan/108856648/>, <https://www.usnews.com/news/best-states/michigan/articles/2017-12-22/lawsuit-challenges-partisan-gerrymandering-in-michigan>, <https://www.detroitnews.com/story/news/politics/2017/12/28/judge-panel-michigan-gerrymandering-case/108977702/>

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scheduled for March 20 unless the panel decides the motion without a hearing;

- On February 16, 2018 the parties held the FRCP 26(f) conference; the conference report was filed and initial disclosures were made under FRCP 26(a) on March 2; and
- Discovery has started with the service of 64 subpoenas on third parties so far with the first due March 16; objections to and/or motions to quash some of those subpoenas have been filed, with responses pending.

Third, Applicants' tardy motion prejudices Plaintiffs. Not only have all the events described above occurred, but if Applicants are allowed to intervene Plaintiffs will have to respond to a duplicative motion for stay (Amended Attachment 2 to Motion) and a motion to dismiss (Attachment 1 to Motion) based on an alleged lack of justiciability, a claim the Supreme Court and other courts have repeatedly rejected for decades. *See Davis v Bandemer*, 478 U.S. 109, 113 (1986) (“[W]e find such political gerrymandering to be justiciable. . . .”); *LULAC v. Perry*, 548 U.S. 399, 415 (2006) (“Although the legislative branch plays the primary role in congressional redistricting, our precedents recognize an important role for the courts when a redistricting plan violates the Constitution.”); *Whitford v Nichol*, No. 15-cv-421-bbc, 2015 WL 9239016, at \*9 (W.D. Wis. Dec. 17,

2015) (3-judge court) (order denying motion to dismiss) (a partisan gerrymandering claim “stated a claim for relief that is plausible on its face . . .”).

Applicants’ proposed motions, meritless as they are, will nonetheless consume the time and resources of the Court and the Plaintiffs, and will slow the progress of the case, a delay which very well may be Applicants’ true purpose in intervening.

Fourth, the purposes for which intervention is sought are insubstantial, *see* Section I.A., *supra*, and duplicative. Defendant has already filed a motion to stay which is fully briefed with a decision pending.

The Motion to Intervene is untimely.

## II. PERMISSIVE INTERVENTION IS DISCRETIONARY WITH THE COURT.

As demonstrated by the Sixth Circuit decision in *Coalition to Defend Affirmative Action, supra*, permissive intervention is not automatic and may be denied in the exercise of the Court’s discretion. *See* 501 F.3d at 784.

The Court has already been presented with an untimely and duplicative motion to stay and a meritless motion to dismiss by Applicants who possess no substantial legal interest in this case, tardily sought intervention, and whose de minimis interests can be adequately represented by Defendant and her counsel. In *Coalition* similar considerations led to a denial of permissive intervention, a decision affirmed by the Sixth Circuit. *See id.*

If the Court in the exercise of its discretion permits Applicants to intervene, Plaintiffs request that the Court order that: 1) the duplicative motion to stay and meritless motion to dismiss attached to Applicants' Motion not be filed; 2) Applicants are bound by the FRCP 26(f) report already filed; 3) Applicants make their FRCP 26(a) disclosures within seven (7) days of the Court's order; and 4) that the Applicants and Defendant shall in the future confer so as to avoid duplicative filings and delay.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Plaintiffs pray that the Court deny Applicants' Motion to Intervene by right under FRCP 24(a) and, if the Court in its discretion grants permissive intervention under FRCP 24(b), the Court order that: 1) the motion to stay and motion to dismiss attached to Applicants' Motion not be filed; 2) Applicants are bound by the FRCP 26(f) report already filed; 3) Applicants make their FRCP 26(a) disclosures within seven (7) days of the Court's order; and 4) that the Applicants and Defendant shall in the future confer so as to avoid duplicative filings and delay.

Respectfully submitted,

Date: March 14, 2018

/s/ Mark Brewer

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# EXHIBIT 1





January 31, 2017

John Moolenaar  
4410 Linden Dr  
Midland, MI 48640-2614

Dear Congressman Moolenaar:

We represent Democratic voters who intend to bring an action challenging the constitutionality of the current redistricting plans for both chambers of the Michigan Legislature and for Michigan Representatives in the United States House of Representatives. Our clients believe that the current plans are unconstitutional partisan gerrymanders.

On November 21, 2016, a federal court struck down Wisconsin's legislative redistricting plan as an "unconstitutional political gerrymander" in *Whitford v. Gill*, Case No. 3:15-cv-00421-bbc, 2016 WL 6837229 (W.D. Wis. 2016).<sup>46</sup> In *Whitford*, the court held that the Wisconsin redistricting plan was intended to and in fact did unconstitutionally "burden the representational rights" of Democratic voters, impermissibly "impeding their ability to translate their votes into legislative seats."

Our clients believe that the current Michigan legislative and congressional redistricting plans are similarly flawed. In 2011, the Republican-controlled Legislature intentionally and effectively gerrymandered the maps to benefit Republican state and federal legislators and diminish the effect of the votes of Democratic voters to such a degree as to violate the First and Fourteenth Amendments. Our clients intend to bring suit in accord with the principles outlined in *Whitford*.

You<sup>47</sup> will be either a party to or recipient of a subpoena in the forthcoming litigation, or are an attorney for one of them. You and/or one or more of your agents may possess, have custody of or control information (including electronically stored information) that may be relevant to the lawsuit. By this letter you have been put on notice of the anticipated litigation and your corresponding ongoing duty to preserve physical documents and electronically stored information that may be relevant to the lawsuit.<sup>48</sup> This letter expressly covers not only

<sup>46</sup> A copy of this decision can be found at [http://www.wiwd.uscourts.gov/sites/default/files/15cv421\\_Order.pdf](http://www.wiwd.uscourts.gov/sites/default/files/15cv421_Order.pdf).

<sup>47</sup> And/or any relevant entity, organization, or employer with whom you were affiliated during the relevant timeframe.

<sup>48</sup> "An obligation to preserve may arise 'when a party should have known that the evidence may be relevant to future litigation[.]'" *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 553 (6th Cir. 2010) (citing *Kronisch v. United States*,

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information in your or your agent's present possession custody or control, but also all information in the present possession of others but as to which you have any access, custody or control. Please take immediate steps to preserve such information even if not in your present physical possession.

Do not destroy, discard, alter or erase any document or electronically stored information or communication (collectively "Information") covered by the scope of this letter. This obligation to retain Information includes but is not limited to hard-copy paper documents, such as letters, faxes, reports, memos, invoices, notes, maps or drawings, including drafts of all the above as well as any electronically-stored information, which may be located on a computer network, servers, desktop computers, laptops, cell phones, tablets, and other electronic devices; removable storage media such as memory cards/sticks, flash drives, CDs, DVDs, and backup tapes; and Information with any persons such as consultants, vendors, contractors, advisors, collaborators, email providers, cloud storage providers, and Internet service providers. Information includes electronic information in any form, including emails, text messages, social media posts, and voicemail messages as well as the underlying metadata or computer coding associated with any Information.

You should preserve all Information relating in any way to the creation or effect of the Michigan redistricting plans. As used in this letter, "Michigan redistricting plans" means

- 1) The current legislative and congressional redistricting plans;
- 2) All draft, proposed and discussion legislative and congressional redistricting plans and partial plans; and
- 3) All draft, proposed and discussion individual legislative and congressional districts.

By way of example, your obligation to preserve Information relating to the creation or effect of the Michigan redistricting plans includes but is not limited to the following:

- Information related to Michigan's redistricting plans
- Information related to or created for or by any person, including any consultant or expert involved in any way in the creation, drafting, analysis, or consideration of any Michigan redistricting plan
- Information related to any analysis of Michigan's redistricting plans, including any election projections, forecasts and analyses, and any political or racial projections, forecasts and analyses
- Any software or computer program used to create or analyze the Michigan redistricting plans
- Any communication related to the Michigan redistricting plans

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litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action.").

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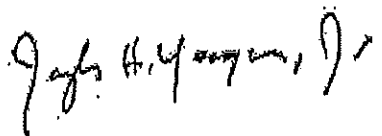
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Please do not hesitate to contact us in the event you have any questions or concerns.

Sincerely,





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SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY																
<ul style="list-style-type: none"> <li>■ Complete items 1, 2, and 3.</li> <li>■ Print your name and address on the reverse so that we can return the card to you.</li> <li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul> <p>1. Article Addressed to:</p> <p style="margin-left: 20px;">John Moolenaar 4410 Linden Dr Midland, MI 48640-2614</p>  <p style="text-align: center;">9590 9402 2492 6306 0113 50</p>	<p>A. Signature</p> <p><i>G. Mark</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name)</p> <p><i>Amy Moolenaar</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>C. Date of Delivery</p> <p><i>02-06-17</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <div style="text-align: center; border: 1px solid black; border-radius: 50%; width: 100px; margin: 10px auto; padding: 5px;">                 MIDLAND MI 48640-2614                  FEB - 6 2017                  USPS             </div>																
<p>2. Article Number (Transfer from service label)</p> <p style="font-size: small;">7016 3010 0001 1613 6226</p>	<p>3. Service Type</p> <table style="width: 100%; font-size: small;"> <tr> <td><input type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td></td> </tr> <tr> <td><input type="checkbox"/> Insured Mail</td> <td></td> </tr> <tr> <td><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</td> <td></td> </tr> </table>	<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Registered Mail™	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail Restricted Delivery	<input checked="" type="checkbox"/> Certified Mail®	<input type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Signature Confirmation	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Collect on Delivery Restricted Delivery		<input type="checkbox"/> Insured Mail		<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	
<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Registered Mail™																
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail Restricted Delivery																
<input checked="" type="checkbox"/> Certified Mail®	<input type="checkbox"/> Return Receipt for Merchandise																
<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Signature Confirmation																
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery																
<input type="checkbox"/> Collect on Delivery Restricted Delivery																	
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<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)																	



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