RECORD NO. 18-1437

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

JACK BERGMAN; BILL HUIZENGA; JOHN MOOLENAAR; FRED UPTON; TIM WALBERG; MIKE BISHOP; PAUL MITCHELL; DAVID TROTT,
Republican Congressional Delegation,

Proposed Intervenors-Appellants.

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

REPLY BRIEF OF APPELLANTS

Brian D. Shekell
CLARK HILL
500 Woodward Avenue
Suite 3500
Detroit, MI 48226
313-965-8803

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

Counsel for Appellants

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

INTRODUCTION

Appellants Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott (collectively "Appellants" or "Congressional Intervenors"), Members of Congress representing the State of Michigan and putative intervenor-defendants below submit this Reply Brief in support of their appeal.

Appellees' Brief in Response attempts to muddy the waters—and in doing so delve into more than just a little hyperbole—with various arguments that boil down to little more than, to borrow a phrase, "interpretive jiggery-pokery." *See King v. Burwell*, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting). The Court should allow Congressional Intervenors timely intervention because the Intervenors have an interest in the litigation that will not be properly represented by the current named defendant. Above all else, granting intervention in this case will allow for the proper and efficient administration of justice of an issue that is both of practical and political import to the congressmen, their constituents, the citizens of Michigan, and the nation as a whole.

ARGUMENT

I. PROPOSED CONGRESSIONAL INTERVENORS MUST BE GRANTED INTERVENTION AS OF RIGHT.

A. Standard of Review.

The history of intervention in the United States has been, over time, to broaden those parties that may seek to intervene. *See Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 203 (7th Cir. 1982) ("[I]t is clear that the 1966 amendment of the rule was intended to broaden the kinds of interests cognizable as a basis for intervention as of right."). The very purpose of Rule 24 is to protect interests that will either be gained or lost "by the direct legal operation and effect of the judgment." *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (quoting and citing *Smith v. Gale*, 144 U.S. 509, 518 (1892)).

Intervention as of right is *required* when an intervening party "claims an interest" in the subject matter of the case and that any resolution "may as a practical matter impair . . . the movant's ability to protect its interest." Fed. R. Civ. Proc. 24(a)(2). Only when an existing party is so situated as to otherwise "adequately represent" the movants interest will intervention as of right be denied. Fed. R. Civ. Proc. 24(a)(2). This Court employs a four-factor test—each of which must be met—to be

granted intervention as of right. *See Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984). The following four factors are met in this case: (1) timeliness[1]; (2) substantial legal interest; (3) the impairment of a movants ability to protect their interest; and (4) lack of adequate representation by existing parties. *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). The rules governing intervention are "construed broadly in favor of the applicants." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1246 (6th Cir. 1997). All three factors under dispute are reviewed *de novo*. *See Grubbs*, 870 F.2d at 345.

B. Proposed Congressional Intervenors Have a Substantial Legal Interest.

The second factor in the intervention analysis is whether the "applicant" has a "substantial, legal interest in the subject matter of the pending litigation." *Grubbs* 870 F.2d at 345. This factor is reviewed *de novo*. *Id*. Though not required for intervention, the Congressional Intervenors have an interest sufficient to meet Article III standing. *See Purnell v. Akron*, 925 F.2d 941, 948 (6th Cir. 1991). Any interest

[1] The district court found the Congressional Intervenors' motion was timely. Order Denying Mot. to Intervene, ECF No. 47 (Page ID# 902). Appellees do not contest this ruling. Appellees' Br. at 12.

sufficient to maintain independent standing under Article III is *necessarily* sufficient for intervention purposes. *See id*. (stating that proposed intervenor need only show that he "may have" an interest in the litigation). The bar for intervention in this Circuit is "minimal." *See Miller*, 103 F.3d at 1247. To meet this minimal bar, the Congressional Intervenors, in their Opening Brief, put forth the following three distinct interests, any one of which *on its own* is sufficient for intervention: (1) any new congressional boundaries will damage the relationship between constituents and their duly elected congressmen; (2) the Congressional Intervenors will suffer economic harm as they spend money for re-election in a district they will no longer represent; and (3) the Appellants have an interest in not having their election chances diminished by the Appellees' actions.

As an initial matter this Circuit has declared that "there is no clear definition of what constitutes a litigable 'interest' for purposes of intervention under Rule 24(a)(2)." *Purnell*, 925 F.2d at 947. Undeterred, Appellees exclaim with certainty that Congressional Intervenors have *no* substantial interest in the case. *See, e.g.*, Appellees' Br. at 24-26. To do so, Appellees bring the following four arguments: (1) Congressional

Intervenors are simply arguing that they have a property interest in the districts they represent; (2) congressmen do not have an interest in cultivating and maintaining relationships with constituents; (3) Congressional Intervenors do not have an economic interest and an economic interest may not be a protectable interest for intervention purposes; and (4) the Congressional Intervenors' diminished election chances are not a substantial interest. Intervenors address each contention in turn.

i. Appellees Once Again Mischaracterize Congressional Intervenors Interest as Merely a Property Interest.

Once again, Appellees attempt to incorrectly characterize the Congressional Intervenors' many substantial interests as mere property interests. *See* Appellees' Brief in Response, at 25-26.

Appellees cite *Raines v. Byrd* to buttress their contention that Congressional Intervenors are merely asserting a property interest in their districts.[2] Quite to the contrary of Appellees apparent intention,

[2] Appellees rely on a single case for their argument that elected officials do not have a property interest in their elected seats, which is entirely inapposite. *See Gamrat v. Allard*, 2018 U.S. Dist. LEXIS 42535 (W.D. Mich. 2018). *Gamrat* involves a Fourteenth Amendment procedural due

Raines in fact supports Congressional Intervenors' argument. Like in *Raines*, Congressional Intervenors are claiming not "a loss of political power" generally but instead the loss of certain "private right[s], which . . . make the injury more concrete." *Raines v. Byrd,* 521 U.S. 811, 821 (1997). [3] As addressed *infra*, each injury alleged by Congressional Intervenors is personal to them as congressional representatives.

Furthermore, Appellees continue to strain the meaning of the phrase "their district" to insinuate that the Congressional Intervenors contend, despite all evidence to the contrary, they have a property interest in their districts. In contorting that phrase, Appellees have become—to paraphrase William F. Buckley—pyromaniacs in a field of straw men. Congressional Intervenors will not burden the Court with the overly pedantic and wordy choice of phrase "district in which the

---

process claim for the deprivation of the right to public office, a claim not present here. *See Gamrat*, U.S. Dist. LEXIS 42535 at *15.

[3] As an aside, *Raines* appears to stand for the proposition that Members of Congress can have a property interest in their districts after they have been elected to them. *See Raines*, 521 U.S. at 821 ("[A]ppellees do not claim that they have been deprived of something to which they *personally* are entitled--such as their seats as Members of Congress after their constituents had elected *them*." (emphasis in original)).

congressmen represent" and instead utilize the much more common "their district" or "congressman's district" in order to avoid a non-issue that was disclaimed by Congressional Intervenors as early as their Reply brief before the district court. Amended Reply in Support of Mot. to Intervene, Mar. 16, 2018 (ECF No. 40) (Page ID# 659). To put it another way, presumably Appellees counsel would say they wrote "their brief" for "their clients" using research prepared by "their associates." Congressional Intervenors highly doubt that Appellees' counsel would claim a property interest in *their* clients, *their* associates, or *their* clients' brief. This Court should reject Appellees' attempt to manufacture a nonexistent issue.

ii. Congressional Intervenors Have a Reliance Interest in Maintaining The Bonds They Have Cultivated Over the Past Eight Years.

Several of the Congressional Intervenors have represented their constituents in *these very districts* for almost 8 years, and all of them are current incumbents. One of the many things congressmen do for their constituents is constituent services. "Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator." *McCormick v.*

United States, 500 U.S. 257, 272 (1991). Constituent services is simply the act of assisting constituents with, in part, "navigating public-benefits bureaucracies." *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

Despite what Appellees and the district court would have us believe, the bond between constituent and legislator is not an interest held by everyone in Michigan; it is an interest unique to public officials who are elected to represent the people. "As the Framers of the Constitution . . . comprehended, representatives serve all residents." *Evenwel*, 136 S. Ct. at 1132. As "a result of voters' demands for assistance in dealing with large bureaucratic government," *Gordon v. Griffith*, 88 F. Supp. 2d 38, 47 (E.D.N.Y. 2000), "[t]he modern role of legislators centers less on the formal aspects of representing . . . and more on maintaining the relationship between legislators and their constituents." *Id.* Appellees are seeking to disrupt that relationship, one that Congressional Intervenors have spent time, money, and resources cultivating for the past eight years.

Appellees cite *Coalition to Defend Affirmative Action v. Granholm* for the proposition that "advocates for the passage of the statute should not be permitted to intervene merely on the strength of a rooting interest

in the statute being upheld." Appellees' Br. at 28. This case is inapposite. While *Granholm* generally prohibits "rooting interest" intervention, that is not the case here. In *Granholm*, the Court approvingly clarifies that it has held "that where a group is 'regulated by the new law, or, similarly, whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted.'" *Coalition to Defend Affirmative Action v. Granholm,* 501 F.3d 775, 782 (6th Cir. 2007) (quoting and citing *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 345 (6th Cir. 2007)). Here, if Appellees are successful, the relationship between Congressional Intervenors and their constituents (read: members) will be negatively impacted by the outcome of this suit. This is more than a mere "rooting interest"

If Appellees were to prevail, this litigation will impact the Congressional Intervenors' conduct. The outcome of this litigation will determine the contours of Michigan's congressional districts and will thereby determine the residents and voters Congressional Intervenors will represent. Elected officials are not automatons of their party affiliation. *Buckley v. Valeo*, 424 U.S. 1, 70 (1976) ("In many situations the label 'Republican' or 'Democrat' tells a voter little."). Instead,

Congressmen "are the instruments of government elected directly by and directly representative of the people." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). This is a unique interest held only by Members of Congress.

iii. Economic Loss Is the Quintessential Injury In Fact and Is Therefore Sufficient for Rule 24(a).

Congressional Intervenors have an economic interest in their current districts. *See* Appellants' Br. at 25-26. An economic interest is *the* quintessential injury in fact under Article III and therefore certainly enough to warrant intervention. *Barlow v. Collins*, 397 U.S. 159, 163-64, 172, n.5 (1970) ("Injury in fact has generally been economic in nature, but it need not be.") (Brennan, J., dissenting); *see also Democratic Party v. Benkiser*, 459 F.3d 582, 586-88 (5th Cir. 2006) (an injury in fact exists when "campaign coffers" are "threatened").

Appellees first contend that Congressional Intervenors' economic interest is "speculative." Appellees' Br. at 30. This argument is specious.[4]

[4] Appellees also take issue with Congressional Intervenors reference to their Statements of Candidacy in the Opening Brief. Appellees' Br. at 30, n.8. Ignoring, for the moment, the irony of Appellees introduction of evidence in footnote 9 of their brief, *see* Appellees' Br. at 30, n.9, Statements of Candidacy are government documents on file with the Federal Elections Commission and as such are subject to judicial notice. *See United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012) ("The court may judicially notice a fact that is not subject to reasonable dispute

Trial begins in February of 2019. Case Management Order No. 1 (*filed* May 9, 2018) (ECF No. 53) (Page ID# 939-941). According to Appellees' theory, Congressional Intervenors must wait until they file new statements of candidacy in January of 2019, and then seek intervention on the eve of trial. Conveniently enough for Appellees, by the time January 2019 comes to pass, intervention will be tardy. The low bar of intervention does not require proposed intervenors to sail between the Scylla of timeliness and the Charybdis of speculative interest.

Furthermore, it is simply implausible that a remedy, should the district court order one, will be in place before Congressional Intervenors expend funds for reelection in 2020. The district court recently handed down its scheduling order, which has trial beginning on February 5, 2019.

---

because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." (quoting and citing Fed. R. Evid. 201)); *Armengau v. Cline*, 7 Fed. Appx. 336, 344 (6th Cir. 2001) ("At this preliminary stage in litigation, courts may also consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies."). *Bailey v. City of Ann Arbor*, 860 F.3d 382, 386 (6th Cir. 2017) ("[A] court ruling on a motion to dismiss may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice.") (internal quotation omitted).

See Case Management Order No. 1, May 9, 2018 (ECF No. 53) (Page ID# 939-941). In fact, Appellees maintained in their proposed discovery plan that due to the likelihood of appeals, trial must be in early 2019 so that a final order can be in place in time for the 2020 elections. *See* Joint Report from Rule 26(f) Conference And Joint Discovery Plan (*filed* March 2, 2018) (ECF No. 22) (Page ID# 277-78). Congressional elections often begin more than a year before the election date. *See* Appellants' Br. at 25-26. It is without doubt that Congressional Intervenors will already be running for re-election, and therefore expending funds on their current districts, by the time any new redistricting is ordered. *See e.g. Id.* (showing FEC campaign registration dates well in advance of the 2018 elections).

The Appellees also express some concern over the possibility that any of the current congressman acting as intervenors may no longer be in office. Appellees' Br. at 30-31. This possible problem is of course not without a solution. In *Page v. Virginia State Bd. Of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 180310, at *1 (E.D. Va. June 5, 2015), Congressman Eric Cantor was an intervenor in the action and subsequently lost his seat to Mr. Dave Brat. The district court simply

allowed the new Congressman—Mr. Brat—to substitute for Mr. Cantor. *Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 556 n.2 (E.D. Va. 2016) (three-judge court) (noting that David Brat was an Intervenor-Defendant and part of the Republican Congressional Delegation); *see also* Fed. R. Civ. Proc. 25(d) ("An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party.").

Finally, Appellees express doubts as to "whether an economic interest *can ever* be sufficient to support intervention under Rule 24." Appellees' Br. at 32 (emphasis added). Appellees doubts can be sated in the exact case they offer in support. *See* Appellees' Br. at 32. In *Blount-Hill v. Board Of Educ.*, while comparing the defendants' legal interest to that of the defendant in *United States v. Tennessee,* 260 F.3d 587 (6th Cir. 2001), the court stated that proposed defendant-intervenor's interest is "primar[ily] . . . economic. It is not a party to any challenged contract nor is it directly targeted by plaintiffs' complaint." *Blount-Hill v. Board Of Educ.*, 195 Fed. Appx. 482, 486 (6th Cir. 2006). Putting aside the issue

of economic injury for a moment, the Congressional Intervenors were, in fact, "directly targeted by plaintiffs' complaint." *Cf. id*. The face of the complaint seeks a redrawing of all Michigan congressional districts. *See generally* Compl. (ECF No. 1) (Page ID# 1-34). Congressional Intervenors currently occupy eight of those districts. If one takes Appellees' complaint at face value—that there is in-fact a gerrymander in Michigan—then what the Appellees are really asking for is less Republican congressional seats. The intervention rules exist, in part, for parties who would otherwise be bound by the outcome of a suit, to vindicate their rights. *American Tel. & Tel. Co.,* 642 F.2d at 1292. Finally, nothing in this decision—other than a remark from a concurring opinion—casts doubt on if economic injury can ever be sufficient to support intervention. *See Blount-Hill*, 195 Fed. Appx. at 486.

Furthermore, it simply cannot be the case that an injury sufficient for an injury in fact analysis for Article III standing purposes not be sufficient for the purposes of intervention. *See Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 320 (D.C. Cir. 2015) (if a party "has constitutional standing, it *a fortiori* has an interest relating to the property or transaction which is the subject of the action.")

(internal quotation omitted). The Appellees raise *Hollingsworth v. Perry*, 570 U.S. 693 (2013), and further opine that the holding in *Hollingsworth* cuts against Congressional Intervenors' position, when it in fact does no such thing. *See* Appellees' Br. at 31-32. The *Hollingsworth* petitioners did not have standing for Article III purposes because they lacked a direct stake in the outcome of their appeal. *See Hollingsworth*, 570 U.S. at 706-07. As the Court explained, petitioners' "only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable . . . law." *Id.* at 706. Congressional Intervenors, unlike the *Hollingsworth* petitioners, have a significant and direct stake in the outcome of this litigation.

Assuming, *arguendo*, that Congressional Intervenors do not have an interest sufficient for standing purposes, that fact is of little moment. Intervention is a lower bar to entry than Article III standing. *See Purnell,* 925 F.2d at 948*; see also, e.g., Blount-Hill,* 195 Fed. Appx. at 485; *Providence Baptist Church v. Hillandale Comm.,* 425 F.3d 309, 315 (6th Cir. 2006); *Liberte Capital Grp. v. Capwill,* 126 Fed. Appx. 214, 218 (6th Cir. 2005); *Grutter v. Bollinger,* 188 F.3d 394, 398-99 (6th Cir. 1999); *Bradley v. Milliken,* 828 F.2d 1186, 1192 (6th Cir. 1987). "Notably, an

intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing." *Blount-Hill*, 195 Fed. Appx. at 485 (internal quotation omitted).

iv. The Supreme Court Has Noted That Diminished Election Chances Constitute an Injury In Fact.

Diminished electoral chances are a legally protectable interest that has been recognized by numerous Courts and, despite Appellees' assertions to the contrary, the United States Supreme Court. Appellees go case by case in attempt to discredit the overall valid proposition that a diminishment of electoral chances is an injury in fact. Appellees' Br. at 33-34. It is fundamentally true of the American system of jurisprudence that when arguing that the weight of *stare decisis* applies—yet the case at bar does not exhibit the very same facts—there are always several nits to pick. Any nits notwithstanding, the fundamental truth remains that, broadly speaking, harm to one's electoral chances or political career is a cognizable harm. *See Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Meese v. Keene*, 481 U.S. 465, 475 (1987); *Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 423 (E.D. Mich. 2004); *Smith v. Boyle*, 144

F.3d 1060, 1061-63 (7th Cir. 1998); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981); *Democratic Party of the U.S. v. National 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).

Appellees take issue foremost with Intervenors' reliance on *Wittman v. Personhuballah*. Appellees' Br. at 33-34. The intervenors in *Wittman* were found to have lacked standing to maintain an appeal in their own right because they failed, in part, to produce record evidence of the harm the new congressional districts would place upon them. *Wittman*, 136 S. Ct. at 1737. Appellees then point to the lack of record harm Congressional Intervenors have produced. Appellees' Br. at 34. This entirely ignores the differing stage of proceedings between the two cases. The *Wittman* intervenors failed to produce evidence of harm even though the map was found unconstitutional and the contours of the remedial map were then known. *Wittman*, 136 S. Ct. at 1737. That is simply not the case here. Congressional Intervenors do not yet know

what any new plan, should any such plan be adopted, might do to their districts because any such future plan has not yet been written.

Appellees attempt to distinguish Congressional Intervenors significant authority by noting the cases cited are not redistricting cases involving a member of congress' attempted intervention. *See* Appellee' Br. at 34-35. For example, Appellees attempt to distinguish *Meese v. Keene*. In *Meese*, the Supreme Court approved of the district court's determination that the evidence "supported the conclusion that appellee could not exhibit films without a risk of injury to his reputation and an *impairment of his political career*." *Meese*, 481 U.S. at 475 (emphasis added). The mere fact that *Meese* arose as a First Amendment case does not diminish its value in an injury in fact analysis. Furthermore, even if this Court does not accept the voluminous authority for the general proposition that diminished election chances are a cognizable injury for the purposes of Article III standing, the authority cited is certainly enough to show a substantial legal interest for intervention purposes.

C. A Ruling on The Constitutionality of The Challenged Congressional Districts Will Impair Proposed Congressional Intervenors' Interests.

To show that their rights will be impaired, Congressional Intervenors "must show only that impairment of its substantial legal interest *is possible* if intervention is denied." *Miller*, 103 F.3d at 1247 (emphasis added). "This burden is minimal." *Id.* Congressional Intervenors previously argued that (1) the *stare decisis* effect of any adverse ruling will likely impair their ability to run for re-election in their new districts; and (2) any delay to intervention in election cases "dissipates" Congressional Intervenors' rights. Appellants' Br. at 31-33. Like all requirements under Rule 24(a), other than timeliness, the court reviews this factor *de novo*. *Grubbs*, 870 F.2d at 345.

Appellees attempt to argue, without any citation to authority, that that Congressional Intervenors are attempting to create a right where none exists. Appellee Br. at 36. First, Appellees' argument bears no relationship to the standard for finding impairment. Second, as this Court's precedent makes clear, this line of argument stretches credulity to its breaking point. In *Miller*, the Michigan Chamber of Commerce was permitted to intervene as a defendant to defend a challenged campaign

finance law. *Miller*, 103 F.3d at 1244. There, as here, the Chamber relied on what the precedential effect of an adverse ruling would have should intervention be denied and the time-sensitive nature of the case. *Id.* at 1247. The Court found the Chamber met its burden of showing impairment. The Court should do so here as well.

D. The Secretary of State Does Not, Cannot, and Will Not Adequately Represent Proposed Congressional Intervenors Interest.

The fourth factor in the intervention analysis is whether the "present parties . . . adequately represent the applicant's interest." *Grubbs*, 870 F.2d at 345. This factor is also reviewed *de novo*. *Id*. The Congressional Intervenors bear the burden of "establishing that [their] interest is not adequately protected." *Miller*, 103 F.3d at 1247; *see also Trbovich v. UMW,* 404 U.S. 528, 538, n.10 (1972) However, "the burden . . . *is minimal*." *Miller*, 103 F.3d at 1247 (emphasis added).

Appellees assert that this Court imposes a higher standard to prove inadequacy of representation because the Secretary of State and the Congressional Intervenors share the same ultimate objective. Appellees' Br. at 13, 16. According to Appellees, Congressional Intervenors are required to show that the Secretary of State is colluding with Appellees,

that the Secretary of State and Congressional Intervenors have an interest that is adverse, and that the Secretary of State is failing in her duty to defend the challenged map. *Id.* at 16. Appellees misread this Court's precedents and overstate the appropriate standard to satisfy the "minimal" inadequacy of representation burden. *Miller*, 103 F.3d at 1247; *see also United States v. Michigan,* 424 F.3d 438, 443-44 (6th Cir. 2005) (stating that even though there is a presumption of adequacy when the intervenor and party share the same ultimate objective, a presumption that must be overcome, the burden for proving *potential* inadequacy is minimal).

When a proposed intervenor and a party share the same ultimate objective, there may be a presumption of adequacy. *Bradley*, 828 F.2d at 1192. But *Bradley* did not impose three elements that must be proven to rebut the presumption. Instead, this Court has suggested three non-exhaustive individual *factors* that could rebut the presumption. *See Reliastar Life Ins. Co. v. MKP Invs.*, 565 Fed. Appx. 369, 373 (6th Cir. 2014) (stating that the presumption of adequacy is rebutted by either showing collusion, adverse interest, *or* failing in the duty to defend a statute); *Purnell v. Akron*, 925 F.2d 941, 949-50 (6th Cir. 1991)

(describing the *Bradley* list as non-exhaustive factors to be considered in determining adequacy); *Michigan,* 424 F.3d at 443-44 (determining that the presumption was not rebutted by looking to the claims brought by the party and the intervenor and finding the claims were nearly identical and 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) (stating that when the presumption arises, "inadequate representation is not limited to the showing of" the three factors and that the burden on a proposed intervenor is still "minimal"). The notion that this Court has identified three non-exhaustive factors is consistent with its rule that the potential inadequacy of representation prong is satisfied upon a minimal showing.

Furthermore, to satisfy the second factor—a showing that an interest between the intervenor and party are adverse—Congressional Intervenors need not demonstrate that they have an interest that is "wholly adverse" to prove inadequacy. *Purnell*, 925 F.2d at 950 (citing *Jansen v. Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990)). Congressional Intervenors must merely show something more than a "slight difference" in the interests between them and the Secretary of State. *See Jansen*, 904

F.2d at 343. "[I]t may be enough to show that the existing party *who purports to seek the same outcome* will not make all of the prospective intervenor's arguments." *Miller*, 103 F.3d at 1247 (emphasis added).

The Congressional Intervenors and the Secretary of State do have interests that are adverse. A simple comparison of the Motion to Dismiss filed by the Secretary of State and the Motion to Dismiss that was attached to Congressional Intervenors' Motion to Intervene reveal these differing interests, which is buttressed by the fact that the Secretary has not made all of the Congressional Intervenors' arguments. The Secretary of State's Motion to Dismiss was limited to challenging Plaintiffs/Appellees' standing. *See* Defs.' Mot. to Dismiss at 14-25 (*filed* Jan. 23, 2018) (ECF No. 11) (Page ID# 97-108). By contrast, in addition to challenging Plaintiffs/Appellees' standing, Congressional Intervenors stated that Plaintiffs/Appellees' failed to state a claim because the claims are non-justiciable. Proposed Intervenors' Mot. to Dismiss at 3-22 (*filed* Feb. 28, 2018) (ECF No. 21-2) (Page ID# 234-53). Congressional Intervenors further contend that there is no independent First Amendment cause of action, *id.* at 15-16 (Page ID# 246-47), that the Complaint is devoid of allegations that Plaintiffs/Appellees have been

silenced or prevented from speaking, campaigning for the candidate of their choice, or from endorsing their candidate of choice, *id.* at 16-17 (Page ID# 247-48), that partisan intent is precisely what the Framers knew and intended to happen in redistricting, *id*. at 17 (Page ID# 248), that the Equal Protection Clause is not violated because the legislature used partisan classifications in drawing districts, *id*. at 21 (Page ID# 250), and that laches bar Plaintiffs' claims. *Id.* at 21 (Page ID# 252). This is more than sufficient to show an adverse interest. *See Jansen*, 904 F.2d at 342-43 (holding that the presumption of adequacy is rebutted despite City defending a consent decree, where the intervenors relied on a paragraph in the consent decree that the City did not); *Miller*, 103 F.3d at 1247 (permitting a Chamber of Commerce to intervene as of right in a campaign finance case challenged by unions despite both Michigan's Secretary of State—a Republican—and the Chamber agreeing that a challenged statute should be upheld albeit for different reasons).

Furthermore, Congressional Intervenors' interest in election prospects, constituent relations, and economic loss are all divergent from the Secretary of State. If the Congressional Intervenors are not permitted to intervene, these interests will not be represented at all. *See Purnell*,

925 F.3d at 950. If the three-judge district court declares the congressional map unconstitutional, the Secretary will not suffer any harm. By contrast, the Congressional Intervenors will be "substantially affected" if the districts they represent and have represented for up to eight years are redrawn. They should, therefore, "as a general rule be entitled to intervene." *Id.* (citing Fed. R. Civ. P. 24(a)(2) adv. comm. note); *see also Jansen*, 904 F.2d at 342-43 (finding inadequacy of representation where the City's interest was in protecting its reputation as an employer and the intervenors' interest was in racially integrating the fire department).

Third, Appellees contend that Congressional Intervenors' concerns about the inevitable change in Secretary of State is to "indulge in speculation about what might happen." *See* Appellees' Br. at 18. However, this portends a misunderstanding of the relevant standard for intervention—a standard that Appellees address nowhere in their brief. Appellants are "not required to show that the" Secretary of State's "representation will *in fact* be inadequate." *Miller,* 103 F.3d at 1247 (emphasis added). The burden for establishing that Congressional Intervenors' interests are not adequately protected "is minimal because

it is sufficient that the movant prove that representation *may be* inadequate." *Miller,* 103 F.3d at 1247 (emphasis added) (internal quotation and alteration omitted).

While it is true that the current Secretary of State and the proposed Congressional Intervenors are both members of the same political party, that fact ought to be of no consequence to the intervention analysis. Indeed, Appellees fail to cite any legal authority that this is a determinative factor. What must be factored in is that a different individual, irrespective of party affiliation, will be the Secretary of State of Michigan at the start of trial. To put it another way, it is wholly possible that when trial begins, the only party left to defend the congressional map will refuse to do so.[5]

---

[5] It is important to note that the Democratic candidate for Michigan Secretary of State, who is running unopposed in the Democratic Primary, is Jocelyn Benson. Paul Egan, *Who is Running for Michigan Secretary of State?*, Detroit Free Press (April 4, 2018), https://www.freep.com/story/news/local/michigan/2018/04/04/who-running-michigan-secretary-state-michigan-november-election/458679002/. Ms. Benson is an avowed advocate for removing the power of redistricting from the hands of state legislators, Jocelyn Benson, *Voters can rule redistricting – let's do it,* Detroit Free Press (July 3, 2015), http://www.lwvmi.org/documents/RedistrColumnJBenson7-15.pdf, and is currently scheduled to be a speaker at a League of Women Voters event. League of Women Voters Ann Arbor Newsletter: October 2nd, 2018, http://myemail.constantcontact.com/News-from-the-League-of-

Between the time of Appellants' Opening Brief and now, the district court has issued its scheduling order outlining, *inter alia*, the discovery and trial dates and deadlines. Case Mgmt. Order No. 1, May 9, 2018 (ECF No. 53) (Page ID# 939-941). As explained in the opening brief, the current Secretary of State is term limited and consequently cannot seek reelection in 2018. Mich. Const. art. V, § 30. A new Secretary of State will be elected on November 6, 2018, Michigan Secretary of State, Michigan Election Dates, https://www.michigan.gov/documents/sos/2018_Dates_600221_7.pdf (last visited May 23, 2018), and will be sworn in on January 1, 2019. Mich. Const. art. XI, § 2. The following dates and deadlines for this trial will occur between the election and the swearing in: (1) Oral Argument on Motion for Summary Judgment; (2) Proposed pretrial orders submitted; (3) Trial motions in limine and any responses; and (4) the final pretrial conference. Case Mgmt. Order No. 1, May 9, 2018 (ECF No. 53) (Page ID# 940). The following proceedings will be conducted *after* the new

---

Women-Voters-of-the-Ann-Arbor-Area.html?soid=1109132130187&aid=miQBDZpAarQ (last visited May 23, 2018). It is not a stretch to imagine that Ms. Benson's desire to defend the current redistricting map will be impacted by her apparent views of the current redistricting process.

Secretary of State takes office: (1) the filing of trial briefs; (2) trial; and (3) proposed findings of fact and conclusions of law. *Id.*

Furthermore, the Court and the parties do have the benefit of knowing that there will be a different Secretary of State by the time trial commences. *See supra* at 27. The fundamental truth is that the Secretary of State's interest in defending the current map only extends so far as the specific office holder's desire to provide for the fair and smooth administration of elections. *See* MCL §§ 168.21, 168.31; *see also e.g.* Trial Trans. Day 4, *Agre v. Wolf,* 17-CV-04392 (E.D. Pa Dec. 7, 2017) (ECF No. 198)*; League of Women Voters of Pa. v. Commonwealth,* 2018 Pa. LEXIS 927 (Pa. Feb. 19, 2018). In any event, the same issues present in *Miller* are present here–the Congressional Intervenors are regulated by this Act because a ruling from this Court impacts the districts Intervenors represent. The Chamber was regulated by campaign finance law. It is not "indulg[ing] in speculation" to alert the court to a fact that is certain to occur. Appellees' Br. at 18.

II. THE THREE-JUDGE COURT ERRED WHEN IT DENIED PERMISSIVE INTERNVETION.

A. Standard of Review

While the denial of permissive intervention is reviewed for abuse of discretion, *Miller,* 103 F.3d at 1248, the district court must "provide enough of an explanation for its decision to enable [the Circuit court] to conduct meaningful review." *Id.* Here, the district court merely stated that, "[i]n light of the complex issues raised by the parties . . . the Delegation's motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties." ECF No. 47 (PG ID# 903). As such, the district court's ruling should not be given deferential treatment. *See Miller,* 103 F.3d at 1248; *see also United States v. Woods*, 885 F.2d 352, 353-54 (6th Cir. 1989); *TEC Eng'g Corp. v. Budget Molders Supply, Inc.,* 82 F.3d 542, 545 (1st Cir. 1996). The remedy for a finding that an order for permissive intervention is insufficient for a ruling on the merits is remand. *Miller,* 103 F.3d at 1248. However, given the expedited nature of the below action, the passage of time will only seek to create further complexities and delays in this case. Therefore, reversal of the district court's order and an order granting intervention using this Court's equitable powers is the appropriate course.

B. Under Any Standard of Review, the District Court Erred by Denying Intervention.

The district court abused its discretion when denying Congressional Intervenors' permissive intervention. *See Coalition to Defend Affirmative Action*, 501 F.3d at 784 (noting the standard for denial of permissive intervention is abuse of discretion). Permissive intervention may be granted when the movant "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), so long as the intervention will not cause undue delay or prejudice the original parties. Fed. R. Civ. P. 24(b)(3). As previously argued, the Congressional Intervenors share a claim or defense with current Defendant. Furthermore, as discussed *supra* at 21-24, Congressional Intervenors have sufficient interest as to have independent Article III standing under the U.S. Constitution. Given the dates outlined in the district court's May 5th Order, there is sufficient time to allow Congressional Intervenors to intervene and cause no prejudice to the current parties.

III. Appellees' Argument that Congressional Intervenors Have Not Met the Requirements of Rule 24(c) has Been Waived, and No Prejudice Will Result.

This Court should disregard Appellees' argument that dismissal is appropriate for Congressional Intervenors' perceived failure to comply with Rule 24(c), as that argument has been waived. Appellees, for the first time on appeal, raise the issue of compliance with Fed. R. Civ. P. 24(c). Appellees' Br. at 43-44. However, arguments not raised before the district court . . . generally are considered waived on appeal." *Shelby Cty. Health Care Corp. v. Majestic Star Casino, LLC Group Health Benefit Plan*, 581 F.3d 355, 372, n.7 (6th Cir. 2009).

However, if waiver is inappropriate then Congressional Intervenors appeal should not be dismissed as no prejudice has or will result from a failure to strictly comply with Rule 24(c). At the time intervention was filed in this case, no answer was yet due from Defendants, because a Motion to Stay and Dismiss had been filed. Congressional Intervenors moved to intervene as defendants and filed both a motion to Stay and Dismiss as part of that motion. *See* Fed. R. Civ. P. 12(a)(4). As of this writing, an Answer has yet to be filed by named Defendant and is not due to be filed until May 30, 2018. Opinion and Order, May 16, 2018 (ECF

No. 54) (Page ID# 957). Congressional Intervenors simply took the procedural posture as if they themselves were a named defendant.

This Circuit takes a lenient approach to the requirements of Rule 24(c). *See Providence Baptist Church,* 425 F.3d at 314-15. Similar to *Providence Baptist Church*, Congressional Intervenors included a "statement of legal grounds, reasons, and arguments" supporting their motion to intervene. *See Id.* at 313. All parties certainly have notice of Intervenors' motion to intervene and no party has claimed any prejudice resulting from any failure to file a pleading (that is still otherwise not required of the named defendant). *See Id.* at 314; *see also* Appellees' Br. at 43-44. If given the opportunity to intervene, Congressional Intervenors will file their answer forthwith.

CONCLUSION

For the aforementioned reasons, Congressional Intervenors respectfully request this court allow for intervention in the district court.

Dated: May23, 2018

Respectfully submitted,

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky

Jason B. Torchinsky
Shawn T. Sheehy
Phillip M. Gordon
Dennis W. Polio
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Email: JTorchinsky@hvjt.law

CLARK HILL PLC

/s/ Brian D. Shekell

Brian D. Shekell (P75327)
Charles R. Spies. (to be admit.)
500 Woodward Avenue, S3500
Detroit, Michigan 48226
P: (313) 965-8300
E: bshekell@clarkhill.com

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 6,499 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 Century Schoolbook style.

By: /s/*Jason Brett Torchinsky*
Attorney for Appellant
Congressional Intervenors

CERTIFICATE OF SERVICE

The undersigned herby certifies that the Reply Brief of Appellants was electronically filed with the Sixth Circuit Court of Appeals on May 23, 2018. The Reply Brief of Appellants was served by ECF on May 23, 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

Jeffrey P. Justman
FAEGRE BAKER DANIELS
90 S. Seventh Street
Suite 2200
Minneapolis, MN 55402
612-766-7000

By: /s/*Jason Brett Torchinsky*
Attorney for Appellant
Congressional Intervenors

SUPPLEMENTAL DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Dkt. No. 53	Case Management Order #1	Page ID# 939-941
Dkt. No. 54	Opinion and Order	Page ID# 942-959