No. 18-1437

In the United States Court of Appeals
for the Sixth Circuit

League of Women Voters of Michigan; Roger R. 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. Tlaib,

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,

Proposed Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Civ. No. 17-cv-14148, Hon. Eric L. Clay, Denise Page Hood, Gordon J. Quist

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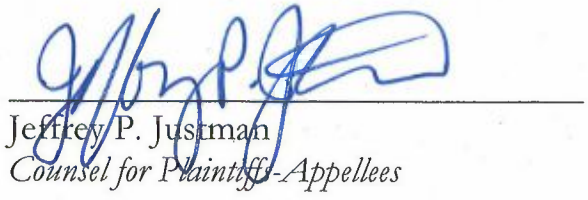
CORPORATE DISCLOSURE STATEMENT

As required by Fed. R. App. P. 26.1(a) and Sixth Circuit Local Rule 26.1, Plaintiffs-Appellees certify that none of them is a subsidiary or affiliate of a publicly owned corporation, and that to the best of their knowledge, no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome of this appeal. Plaintiffs-Appellees are eleven individuals and the League of Women Voters of Michigan (the "League"), a private nonpartisan community-based statewide organization founded in 1919.



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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees (the "Voters") believe that the ruling below can be affirmed on the briefs without oral argument.

JURISDICTIONAL STATEMENT

The Voters' complaint asserts violations of the First and Fourteenth Amendments to the U.S. Constitution, and invokes the district court's subject-matter jurisdiction under 28 U.S.C. § 1331; 28 U.S.C. §§ 1343(a)(3) & (4); 28 U.S.C. § 1357; 28 U.S.C. § 2201; 28 U.S.C. § 2202; 28 U.S.C. § 2284; 42 U.S.C. § 1983; and 42 U.S.C. § 1988. (*See* Complaint, RE 1 ¶ 12, Page ID # 9.) Because the Voters challenged congressional and legislative redistricting maps as unconstitutional partisan gerrymanders, they requested appointment of a three-judge panel under 28 U.S.C. § 2284(a). (Complaint, RE 1 ¶ 13, Page ID # 9.) Chief Judge Cole designated the following three judges to serve as the three-judge district court: The Hon. Eric L. Clay, United States Circuit Judge from this Court; the Hon. Gordon J. Quist, District Judge for the United States District Court for the Western District of Michigan; and the Hon. Denise Page Hood, Chief Judge for United States District Court for the Eastern District of Michigan. (*See* Order, RE 9, Page ID # 71.)

On April 5, 2018, in a decision signed by Circuit Judge Clay, the three-judge panel Clay denied a motion to intervene filed by eight Republican congressmen representing Michigan in the United States House of Representatives (the "Representatives"). (Order, RE 47, Page ID # 902-04.) In pertinent part, it concluded

that the Representatives did not satisfy the standard for intervention as of right under Federal Rule of Civil Procedure 24(a)(2), and that permissive intervention under Rule 24(b) was not warranted.

The district court's order denying the Representatives' motion to intervene is immediately appealable under the collateral-order doctrine. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) ("[W]hen an order prevents a putative intervenor from becoming a party in *any* respect, the order is subject to immediate review" under the *Cohen* collateral-order exception); *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947) (as to orders denying intervention as of right, "the order denying intervention becomes appealable"); *Purnell v. City of Akron*, 925 F.2d 941, 944-45 (6th Cir. 1991) (order denying motion to intervene under both Rule 24(a) and 24(b) was appealable under the collateral-order doctrine).

The district court entered its order denying the motion to intervene on April 5, 2018. The Representatives timely filed their notice of appeal to this Court on April 13, 2018. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUE

Did the district court err in denying the Representatives' motion to intervene as of right under Rule 24(a)(2), or abuse its discretion in denying the Representatives' motion for permissive intervention under Rule 24(b)(1)?

STATEMENT OF THE CASE

A. In 2011, Michigan's Republican-controlled legislature gerrymanders Michigan's state and federal legislative districts for partisan advantage.

In 2011, Michigan's Republican-controlled legislature was charged with enacting state legislative and federal congressional districting plans following the 2010 census. (Complaint, RE 1 ¶ 20, Page ID #11.) Working to maximize their partisan advantage, Michigan Republicans enacted redistricting plans S.B. 498 and H.B. 4780 (the "Plans") that tilted already gerrymandered legislative and congressional maps to additionally favor the Republican Party. (*Id.*) The Republican-controlled legislature intentionally, effectively, and severely gerrymandered the State House, State Senate, and federal congressional maps to benefit Republicans and diminish the voting strength of Democratic voters throughout the 10-year life of the maps. (*Id.* at ¶ 21, Page ID # 11-12.)

B. Election data confirm that this partisan gerrymander is durable and severely burdens Michigan Democrats.

The legislature's gerrymander worked. Democrats' voting strength was diluted and their representational rights were burdened because of their party affiliation. This has reduced the ability of Michigan's Democratic voters to elect representatives in their own districts and to elect Democratic representatives across the state. (Complaint, RE 1 ¶ 37, Page ID # 17.)

Advancements in technology now enable more effective and sophisticated gerrymanders. They also, however, provide tools for political scientists, and the courts, to quantify and measure the effect of the gerrymander on voters. As Justice Kennedy has said, "Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months." *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (concurring opinion).

Under the Republican gerrymander, Democratic vote shares consistently have underperformed their respective "seat shares." (*See* Complaint, RE 1, ¶ 38, Page ID # 17-18.) For example, in the 2014 State House elections, Democrats won the statewide 2-party popular vote 50.98% to 48.93%. Yet Democrats won only 42.7% of the seats, compared to Republicans' 57.3%. (*Id.* at ¶ 39, Page ID # 18.) This has been true in State Senate and federal congressional elections as well. (*Id. at* ¶¶ 40-41.)

Another way of looking at the data is to examine the "efficiency gap" of each map. The efficiency gap measures departures from partisan symmetry, by assessing "wasted votes." (Complaint, RE 1 ¶ 45, Page ID # 20.) Partisan symmetry is the simple democratic principle that fair maps generally give a vote for one party the same weight as they give a vote for the other party. (*Id.* at ¶ 48, Page ID # 21.) Using this analysis, the Plans are the most pro-Republican partisan gerrymander in modern Michigan history, and have some of the widest efficiency gaps in the entire country.

(*Id.* at ¶ 51, Page ID # 22.) Statistically, there is almost no chance that the Plans will neutralize absent court intervention. (*Id.* at ¶ 55, Page ID #23.).

C. The Voters challenge the Plans as unconstitutional partisan gerrymanders.

The Voters filed this action to challenge the Plans as unconstitutional partisan gerrymanders in violation of the First and Fourteenth Amendments. (*See generally* Complaint, RE 1.) The individual plaintiffs include Democrats who vote for Democratic candidates and assist them in their election efforts. (Complaint, RE 1 ¶ 10, Page ID # 6-9.) These individual voters, along with the League of Women Voters of Michigan, brought the lawsuit against Ruth Johnson, Michigan's Secretary of State, in her official capacity, because she is the "chief election officer" in Michigan and is thus responsible for the conduct of Michigan elections. (*Id.* at ¶ 11, Page ID #9.) She is specifically charged with enforcing the gerrymanders described in the Complaint. (*Id.*)

After she was served with the Complaint, Secretary Johnson filed two motions attempting to dispose of or delay the case. She moved to dismiss the Voters' claims for lack of subject-matter jurisdiction, contending that partisan gerrymandering claims are non-justiciable political questions, and that the Voters lack standing to make the sorts of challenges they are making in the Complaint. (*See generally* Motion To Stay and To Dismiss, RE 11, Page ID # 97-108.) The district court held a hearing on the Secretary's motion to dismiss on March 19, 2018. On May 16, 2018, the same day this

brief was filed, the district court granted the motion in part and denied it in part. (Order, RE 54, Page ID # 942-58.)

At the same time she moved to dismiss, the Secretary also moved to stay proceedings until the Supreme Court decides *Gill v. Whitford* (Supreme Court Docket 16-1161) and *Benisek v. Lamone* (Supreme Court Docket 17-333), cases which address similar issues in the partisan-gerrymandering context. (Motion To Stay and To Dismiss, RE 11, Page ID # 92-97.) On March 14, 2018, the district court denied that motion, in large part because of its concern that a stay of even a few months would delay proceedings so as to make the Voters' ability to vindicate their rights difficult. In an analysis that also applies to the issues in this appeal, it said:

> Defendant's argument fails because **there exists a fair possibility that a stay would prejudice Plaintiffs as well as the public interest**. The parties are operating under the reasonable assumption that, if Plaintiffs succeed on the merits, 'a 2020 remedial plan must be in place by no later than March of 2020 to be effective for the November 2020 election.' [RE 22 at Page ID #279.] **Voting rights litigation is notoriously protracted**. *See, e.g., McCain v. Lybrand,* 465 U.S. 236, 243 (1984) (discussing litigation delays as an impetus for Voting Rights Act of 1965). **Indeed, Congress took extraordinary measures—providing for this Court to sit as a three-judge panel and for any appeal to be taken directly to the Supreme Court—precisely so that voting rights cases could be decided more quickly**. *See Swift & Co. v. Wickham,* 382 U.S. 111, 124 (1965) ("The purpose of the three-judge scheme was in major part to expedite important litigation."). Based on this history of voting rights litigation, **there is a risk that this case will not be resolved by March 2020 even in the absence of a stay**. Defendant's argument incorrectly minimizes the possible duration of this case as well as the prejudice to Plaintiffs and the public interest that would arise if this case were to persist through three election cycles.

(Order Denying Defendant's Motion To Stay, RE 35, Page ID # 613-14) (emphases added). While these motions were pending, the Voters began the discovery process in earnest by serving several dozen non-party subpoenas and requests for production. (*See* Voters' Resp. to Mot. to Intervene, RE 37, Page ID # 632–33.)

D. The Representatives move to intervene, and the district court correctly denies the motion.

Shortly before the hearing on the motion to dismiss, the Representatives filed their motion to intervene, both as of right under Rule 24(a)(2), and permissively under Rule 24(b). (*See* Motion to Intervene By Republican Congressional Delegation, RE 21.) Generally, the Representatives argued that they had a significant interest in the litigation, and that Secretary Johnson would not adequately represent their interest. (*Id.* at Page ID # 219-221.) The Representatives attached proposed motions to stay and to dismiss that echoed the arguments already presented by the Secretary. (*See* Intervenors' Proposed Motion to Dismiss, RE 21-2, Page ID # 226-53; Intervenors' Proposed Motion to Stay, RE 21-3, Page ID # 254-75.)

The Voters opposed intervention as of right (because the Representatives have no "right" to be elected in gerrymandered districts), and argued that the district court should exercise its discretion to deny permissive intervention as well. (*See* Response in Opposition To Motion To Intervene, RE 37, Page ID # 622-35.) The Representatives replied, indicating some conditions they would accept if the district court allowed intervention, including agreeing to "abide by the discovery plan now in effect," to

"produce documents within a short period of time," and not to file the duplicative motion to stay (which has since been denied). (*See* Reply in Support of Motion To Intervene, RE 40, Page ID # 662.) Notably, however, at no time did the Representatives actually attach their proposed "pleading" showing common defenses, as required under Rule 24(c).

On April 4, 2018, the district court denied the Representatives' motion to intervene. It specifically found that the Representatives' elected office "does not constitute a property interest" sufficient to support intervention as of right. (*See* Order, RE 47, Page ID # 902-03.) It also specifically found that the Representatives' purported interest in protecting relationships with their constituents was "not materially distinguishable from the generalized interest shared by all citizens." (*Id.* at Page ID # 903.) It concluded that the Representatives' interests would be adequately represented by Secretary Johnson's interest in "protecting the current apportionment plan and other governmental actions from charges of unconstitutionality." (*Id.*) And finally, it found that, given the need for "expeditious resolution of the case, and the massive number of citizens who share the Delegation's interest in this litigation," granting intervention "could create a significant likelihood of undue delay and prejudice to the original parties." (*Id.*) The district court thus denied intervention under both Rule 24(a)(2) and Rule 24(b). The Representatives now appeal.

E. The district court sets an aggressive discovery schedule.

After the Representatives filed their Opening Brief, the district court entered a case management order that resolved the competing proposals presented by each side in the discovery plan in favor of an aggressive discovery and trial schedule. (*See* Case Management Order No. 1, RE 53, Page ID # 939-41.) Expert disclosures are due on June 1 and June 29, respectively. The discovery cutoff is August 24, 2018, with a dispositive motion deadline of September 21, 2018. Trial is set less than nine months from now, starting on February 5, 2019. (*Id.*)

SUMMARY OF ARGUMENT

The Representatives come up short on the requirements to intervene as a matter of right. The three purported interests they assert—their constituent relationships; increased costs of running in new, non-gerrymandered districts in 2020; and diminished chances of winning re-election in new, non-gerrymandered districts in 2020—are not sufficient as a matter of law to warrant intervention as of right. No court has recognized a protectable legal interest in a "constituent relationship," and the Representatives have failed to articulate how this relationship (which they share with every Michigan citizen) is meaningfully different than a general ideological interest in the lawsuit, which this Court has expressly rejected as a ground for intervention. Similarly, the Representatives ignore that whether an "economic interest" is valid basis for intervention is an open question. Regardless, the economic interest the Representatives assert is too attenuated and speculative to justify

intervention. And like an interest in the districts themselves, an interest in in winning an election in a gerrymandered district is not a substantial legal interest. The Representatives' misplaced focus on plaintiff standing cases is a distraction that does not address these deficiencies. Finally, the Representatives offer no evidence to substantiate their claimed interests or the alleged impairment of these interests.

If these shortcomings were not enough, the Representatives also fail to establish that the Secretary is not adequately protecting their interests. Secretary Johnson is *presumed*, as the government official charged with implementing the Plans, to be providing adequate representation. The Representatives have made no showing to the contrary, and indeed they do not cite the governing presumption of adequate representation. The Secretary and the Representatives share the same objective—upholding the Plans. The Representatives' professed concern that a Democrat may take over the Secretary's office sometime before trial is mere speculation and should be rejected as a basis to conclude the Representatives have a right to intervene.

Nor did the district court abuse its discretion or fail to adequately explain its reasoning in denying permissive intervention. It correctly concluded that allowing these additional defendants to intervene "could create a significant likelihood of undue delay and prejudice to the original parties." The district court's denial of permissive intervention can only be reversed if it is a clear abuse of discretion, and there is no basis in the record for such a conclusion.

Finally, this Court may affirm on the independent ground that the Representatives have not satisfied Rule 24(c), which requires that a proposed intervenor attach a "pleading" when seeking to intervene. The Representatives never attached any answer with their motion to intervene, and their failure to comply with the rule warrants denial of their motion under any standard.

ARGUMENT

I. The district court properly found that the Representatives are not entitled to intervene as of right.

A. Standard of Review

The Representatives first seek intervention as of right under Fed. R. Civ. P. 24(a)(2), which provides that "[o]n timely motion, the court must permit anyone to intervene who . . . 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." This Court has distilled the Rule 24(a)(2) standard into a four-part test: "(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). The party seeking

intervention must satisfy *each* of these criteria, or intervention as of right will be denied. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

This Court reviews the district court's decision regarding intervention as of right *de novo*, except for the timeliness element, which is reviewed for an abuse of discretion. *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001). The Voters do not challenge the district court's conclusion on the timeliness factor.

Because the Representatives' failure to show that the Secretary does not adequately represent their claimed interests most clearly demonstrates the flaws of their argument for intervention as of right, the Voters address that criterion first.

B. The Secretary adequately represents any interests the Representatives may have.

To secure intervention as of right, the Representatives must demonstrate that the existing parties to the litigation do not "adequately represent" their interests. *See Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). As discussed below, the Representatives have no substantial legal interest in this case that stands in danger of being impaired if they are not permitted to intervene. But even if they did have such an interest, intervention is unwarranted here because any interest is adequately represented by the Secretary.

The Representatives contend that they bear the "minimal" burden of showing that the Secretary's representation of their interests "*may be* inadequate." (Opening Br.

33–34 (quoting *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972); *Miller*, 103 F.3d at 1247)) (emphasis added). The Representatives are mistaken, for two reasons.

First, they misunderstand the governing standard, which *presumes* the Secretary's representation will be adequate. The Representatives never even attempt to make the type of showing that would be necessary to overcome that presumption. Second, the Representatives' argument that a future Democratic Secretary of State would not adequately represent their interests is speculative and thus insufficient.

1. The Representatives fail to overcome the presumption that the Secretary adequately represents their interests.

This Court recognizes "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). This test is applied at a high level of generality: a proposed intervenor and existing party share the same "objective" as long as they seek the same relief. *See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012), *reversed on other grounds, Schuette v. Coal. to Defend Affirmative Action,* 134 S. Ct. 1623 (2014)(concluding that proposed intervenors and Michigan attorney general "share[d] the same ultimate objective: the validation of [the statute]"); *Moore v. Johnson*, No. 14-11903, 2014 WL 2171097, at *2 (E.D. Mich. May 23, 2014) (finding that because Secretary Johnson herself shared "the exact same objective in this 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). Here, the Representatives and the Secretary have the same objective and seek the same outcome: a holding that the Plans are constitutional. That this shared objective might be spurred by different interests—that the Secretary may be motivated by her official duty to defend the state's laws while the Representatives are motivated by a more worldly interest in keeping their gerrymandered congressional seats—does not matter. Nor would a mere difference in preferred "litigation strategy" signal inadequate representation, so long as the proposed intervenors share a desired end result with the existing defendant. *See Bradley*, 828 F.2d at 1192.

The presumption in favor of adequate representation is even more difficult to overcome when the existing party is a government official charged with defending a state's law as part of her official duties. "[W]hen a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government. It is after all the government that, through the democratic process, gains familiarity with the matters of public concern that lead to the statute's passage in the first place." *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013); *see also Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (holding, in the context of a challenge to a federal statute, that "the presumption of adequacy is nowhere more applicable" than where the government is defending a statute's constitutionality) (citation omitted).

The contrary rule proposed by the Representatives—that government defendants are suspect as representatives of an intervenor-defendant's interests—is based on a misleading citation to a distinguishable case. In *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312 (D.C. Cir. 2015), the sole case the Representatives cite for this proposition, the FEC's office of general counsel, acting on an administrative complaint, recommended that the Commission find Crossroads GPS in violation of federal election law. 788 F.3d at 315. When the Commission dismissed the complaint and the dismissal was challenged in federal court, the very same FEC office of general counsel that had recommended charges was required to defend the Commission's decision *not* to bring those charges. *Id.* at 315–16. Under those particularly awkward circumstances—where the existing defendant had *already* taken positions adverse to the intervenor's—the court concluded that Crossroads GPS could intervene. *Id.* at 321. The D.C. Circuit rooted its ruling in Aesop's dictum that a "doubtful friend is worse than a certain enemy." *Id.* at 314. To derive from that principle a rule that an official-capacity defendant is an inherently unreliable representative is to defy the widespread, common-sense recognition that a state government is fully capable of defending its own laws against constitutional challenge. *See, e.g., FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015) ("We presume that the government entity adequately represents the public.") (citation omitted).

Indeed, the Representatives neither acknowledge the presumption of adequacy nor demonstrate the presence of any factors that courts have held sufficient to

overcome it. A movant fails to meet his burden of demonstrating inadequate representation when "(1) no collusion is shown between the existing party and the opposition; (2) the existing party does not have any interests adverse to the intervener; and (3) the existing party has not failed in the fulfillment of its duty" to represent. *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000); *Bradley*, 828 F.2d at 1192. Here, the all-Republican Representatives do not argue that the Secretary, a fellow Republican, is colluding with the Voters' challenge to the statute she is charged with administering. In fact, the Representatives have stated that they "share" a "defense" with the Secretary. (Opening Br. 43.)[1] And although the Representatives claim to have *interests* distinct from those of the Secretary, they do not contend these interests are adverse—or deny that they share a common "*ultimate objective*" with her. *Cf. Coal. to Defend Affirmative Action*, 701 F.3d at 491 (emphasis in original).[2]

Finally, the Representatives do not attempt to show that the Secretary has failed to pursue that shared objective diligently, or that she has taken any actions

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[1] As to what this precise "shared defense" is, the Voters can only speculate. Rule 24(c) requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought," but the Representatives never attached an answer that sets forth the specific defenses they claim to share with the Secretary. The Representatives' failure to satisfy the requirements of Rule 24(c) is an independent basis to affirm. *See infra* Part III.

[2] As the Representatives acknowledge, the Secretary shares their stake in the outcome of this case in a more personal sense as well: she is running for State Senate in a district whose boundaries are set by the current Plans. (*See* Opening Br. 35.)

inconsistent with its achievement. This is not a case where the existing defendant's litigation conduct signals divergent goals or a desire to pursue a half-hearted defense. *Cf. Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 788 (6th Cir. 2007) (concluding that inadequate representation existed where the "procedural history" indicated that the defendants' and intervenors' divergent approaches "could significantly alter the enforcement and ultimately the interpretation" of the constitutional provision); *Ne. Ohio Coal. for Homeless & SEIU, Local 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (holding that intervenor had met its burden of showing inadequate representation where defendant had stated its desire not to appeal an unfavorable ruling). On the contrary, all the Secretary's actions thus far are consistent with a vigorous defense of the Plans, and the proposed filings the Representatives attached to their motion to intervene are *almost exact duplicates* of the motions to dismiss and to stay filed by the Secretary. (*Compare* Motion to Dismiss or Stay, RE 11, Page ID # 74, *with* Motion to Intervene Attachments 1–2, RE 21, Page ID # 226–275.) The Representatives present no grounds at all on which to doubt that the Secretary is "mounting a firm defense" of the Plans, or that she will continue to do so. *See Coal. to Defend Affirmative Action*, 701 F.3d at 491; *Moore*, 2014 WL 2171097, at *2 (finding no grounds to overturn presumption of adequacy where defendant had "present[ed] the strongest possible arguments against Plaintiffs' request for relief"). The district court was thus correct to conclude that the Secretary would adequately protect the Representatives' interests.

2. The Representatives' speculation regarding a *future* Secretary's adequacy of representation is insufficient.

Rather than offer a serious challenge to the Secretary's defense of the Plans, the Representatives instead indulge in speculation about what might happen when a new Secretary takes office, noting that "there will be a different person serving as Secretary of State of Michigan—quite possibly a member of the Democratic party—at the time of trial." (Opening Br. 35.) There is a "real likelihood," the Representatives suggest, that a hypothetical Democrat would be "less inclined to zealously defend" the Republican gerrymander than the current incumbent. *Id.*

Basing a claim for intervention on such speculation is directly counter to this Court's teaching. In *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005), this Court reiterated that the adequate-representation inquiry must focus on the *present* rather than hinging on proposed intervenors' worries about issues that may arise in the future. The Court explained: "Rather than identifying any weakness in the state's representation in the current phase of the proceedings, the proposed intervenors seem more concerned about what will transpire *in the future* . . . . While the proposed intervenors may be legitimately concerned about these future issues, they are not now, and possibly never will be, before the district court." 424 F.3d at 444 (emphasis in original). The same limiting principle applies here. The Representatives have shown

no defect in the Secretary's pursuit of their shared objective of upholding the constitutionality of the Plans, and speculation about future Secretaries is no substitute. *See id.* at 445.

The Representatives resist this conclusion by citing cases in which the political affiliation of official-capacity defendants has played a role. None of these cases is analogous to the facts before this Court, and not one lends any support to the theory that the possibility of a future party switch in the Michigan Secretary of State's office affects this Court's conclusion. Neither of the two categories of cases the Representatives cite carries the weight needed to support intervention.

First, the Representatives observe that in a number of cases, electoral realignment has affected an official-capacity defendant's position on pending litigation. But all of those cases addressed situations where a political shift had *already* occurred. In *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016), for instance, the Arizona attorney general took a different position on the constitutionality of that state's redistricting commission on appeal than his predecessor had before the district court. (Opening Br. at 36–38.) But nowhere in the Representatives' discussion of *Harris*—or in the district court or Supreme Court opinions in that case—is there any discussion of intervention, much less preemptive intervention to *anticipate* such a party switch. Similarly, the Representatives cite *Brat v. Personhuballah*, 883 F.3d 475, 478 (4th Cir. 2018), which recounts how Virginia official-capacity defendants declined to appeal a district court decision striking down a

congressional district as a racial gerrymander, leaving a group of Republican defendant-intervenors to continue the fight (unsuccessfully).[3] While the Voters do not dispute that such switches in party affiliation are possible, or that they could have consequences that in some cases might warrant intervention by outsiders, these cases offer no support to the Representatives' suggestion that this Court jump the gun and appoint back-up defendants just in case.

Second, the Representatives assert that, in light of the possibility that elected officials are unreliable permanent advocates for politically sensitive laws, courts have "typically granted" outsiders' motions to intervene in gerrymandering cases and "in election law cases generally." (Opening Br. 38–39.) The cases the Representatives cite do not support that sweeping proposition. One case predominantly involved members of congress' motion to intervene *as plaintiffs*—an entirely different context in which the adequacy of the official-capacity defendant is not at issue. *See Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011), *vacated and remanded*, *Perry v. Perez*, 565 U.S. 388

[3] In that case, the Republican intervenor-defendants had filed an *unopposed* motion to intervene while the matter was before the district court. *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 659 (E.D. Va. 2014). The district court twice ruled against the Republican congressmen-intervenors on the merits, and on the intervenors' second appeal of this unfavorable ruling, the Supreme Court also found that the intervenors lacked standing. *See Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016). The *Brat* decision the Representatives cite is a Fourth Circuit appeal on the question of whether those intervenors would be required to pay the plaintiff's attorneys' fees for the intervenors' failed defense of the gerrymander. *See Brat*, 883 F.3d at 484.

(2012).[4] In two of the other cases the Representatives cite, the intervention in question was unopposed. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 570 n.2 (6th Cir. 2004)[5]; *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 659 (E.D. Va. 2014). And in *Wright v. Rockefeller*, 376 U.S. 52 (1964), the Supreme Court noted that Congressman Adam Clayton Powell, who had been permitted as an intervenor-defendant in a racial gerrymandering case, intervened only to advocate for an entirely different constitutional theory than the state defendants.[6]

Clark v. Putnam County, 168 F.3d 458 (11th Cir. 1999), is also distinguishable. There, a group of white voters challenged a court-ordered county elections districting scheme on equal protection grounds, arguing that it impermissibly favored black voters. On appeal, the Eleventh Circuit permitted a group of black voters to

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[4] Although some intervenor-defendants appeared on the docket of *Perez*, there is no indication that any motions to intervene as defendants were opposed. *See Perez v. Perry,* Case No. 5:11-cv-00360-OLG-JES-XR.

[5] In *Sandusky County Democratic Party*, the district court granted three voters' motion to intervene as defendants in a suit seeking to enjoin the Ohio secretary of state's use of a voter-identification screening question on ballots, contending that the secretary's interest in facilitating a smooth election process (the November elections being only weeks away at the time) diverged from the intervenors' own more absolute interest in preventing voter fraud. *See* Motion to Intervene, Case No. 3:04-cv-07582-JGC, RE 8, Page ID # 106-107 (N.D. Ohio Oct. 4, 2004). The district court did not explain why it granted the apparently unopposed motion. *See* Order Granting Motion to Intervene, *id.* at RE 12, Page ID # 146 (N.D. Ohio Oct. 7, 2004).

[6] In Justice Douglas's dissent in that case, he noted that unlike the state official-capacity defendants, Representative Powell defended the redistricting plan not on the grounds that it was not a racial gerrymander, but that racial gerrymanders like it were *preferable*. *See Wright*, 376 U.S. at 62 (Douglas, J., dissenting). In light of that fundamental divergence, it is understandable that the lower court would have found that the state defendants did not adequately represent Powell's interests.

intervene, reasoning that the county-commissioner defendants did not adequately represent the black intervenors' interests. In its analysis, the court credited the fact that the defendants were politicians, whose electoral interests and desire to represent the county as a whole might make their interests diverge from those of the black voters. But unlike in this case, that hunch was buttressed by *facts* sufficient to overcome the presumption of adequate representation: the commissioners had indicated their interest in a compromise plan, while the defendant-intervenors' objective was to uphold the court-ordered scheme at all costs. 168 F.3d at 461–62.

The Representatives extract the wrong lesson from the cases discussing intervention in the election law context. This Court and others have routinely recognized that when an existing defendant *does* in fact become adverse to the interest of proposed intervenors, intervention *may* be warranted, subject to other facts in the record and the other Rule 24 factors.[7] But the fact that intervention may be warranted when party shifts actually do occur only buttresses the conclusion that there is no right of intervention here and now.

[7] In such cases, intervention is considered timely if sought promptly after the intervenor knows or reasonably should know of "significant" obstacles to the adequacy of existing representation. *See Clarke v. Baptist Mem'l Healthcare Corp.*, 427 Fed. App'x 431, 434–35 (6th Cir. 2011). In *Jansen v. City of Cincinnati*, for instance, a timely motion to intervene was filed after the existing defendant's arguments in response to summary judgment "alerted the proposed intervenors that their interest was not being adequately protected." 904 F.2d 336, 341 (6th Cir. 1990).

If taken seriously, the Representatives' argument would mean that *no* elected official could ever be an adequate defender of a statute, so long as there were a chance that an election (or an impeachment, or a resignation) could result in the replacement of that official with a member of the opposing party during the pendency of the lawsuit. The argument's premise would compel the conclusion that only the respective party committees—or various other interest groups—could serve as the rightful custodians or defendants of the laws they manage to enact. Even if this notion were not a cynical subversion of republican ideals, it would still be impractical. "Rule 24 is not designed to turn the courtroom into a forum for political actors who claim ownership of the laws that they pass." *One Wisc. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015). As a practical matter, intervention cannot be an insurance policy against the possibility of political change, "lest the case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place." *Id.* (citing *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

Because the Secretary is adequately representing the Representatives' interests, the Court should affirm the denial of intervention as of right under Rule 24(a)(2). If it agrees on this factor, it need not analyze any of the other factors under Rule 24(a)(2).

C. The Representatives do not have a "substantial, legal interest" in the subject of the case.

"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 v. Norris*, 870 F.2d 343, 346 (6th Cir. 1989) (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). "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 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.,* 310 F.R.D. at 397.

The Representatives identified three supposed interests in an attempt to satisfy Rule 24's requirement that they have a "substantial legal interest in the subject matter of the pending litigation." Specifically, they say that (1) new congressional boundaries will damage the relationship between them and their constituents; (2) they will suffer economic harm if they spend money for re-election in districts they no longer represent; and (3) they have an interest in not having their election chances diminished by the Voters' actions. (Opening Br. 21.) None of these interests is sufficient under Rule 24, for numerous reasons. Accordingly, the Representatives cannot establish that they have a "substantial legal interest" in the case *or* that any such interest would be impaired if intervention is denied.

1. The Representatives' purported interests are nothing more than an interest in their "districts," which is not a cognizable interest under Rule 24.

The Representatives' three "interests" under Rule 24(a)(2) are not materially different than the interest that the district court found deficient. All three are premised on the same core assertion—that each elected official has an interest in continuing to have the lines drawn as they are now. That is, the assertion of interests in constituent relationships, in avoiding economic harm, and in avoiding diminished re-election chances is nothing more than a recharacterization of the interest the district court correctly rejected—an interest in each of their "districts." (*See* Order, RE 47, Page ID # 902 (citing *Gamrat v. Allard*, No. 1:16-CV-1094, 2018 WL 1324467, at *5 (W.D. Mich. Mar. 15, 2018) ("Michigan law has long held that a public office does not constitute a property interest. … The United States Supreme Court and the Sixth Circuit have likewise held that elected office does not constitute a property interest.")); *cf. Raines v. Byrd*, 521 U.S. 811, 821 (1997) ("[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. Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete.") (emphasis added).

In a further effort to distance themselves from the district court's holding, the Representatives now expressly claim that they "never alleged any … property interest" in their districts. (Opening Br. 20-21.) This, however, is difficult to reconcile with the

record. Below, the Representatives argued merely that they "stand to be significantly harmed by any mid-reapportionment change to their current districts" and thus had an interest sufficient to intervene under Rule 24(a). (Motion to Intervene, RE 21, Page ID # 219.) Indeed, it was not until the reply brief below that the Representatives even mentioned their constituents, any economic harm, or even expressly their chances at reelection. (*See* Reply in Support of Motion To Intervene, RE 39, Page ID # 650-52.) Even now while disclaiming such an interest, three pages later they say they do have a "substantial interest in their current congressional districts." (Opening Br. 23.) Accordingly, contrary to their half-hearted renunciation, the Representatives' motion to intervene cannot reasonably be interpreted as being premised on anything other than an interest in their districts, which is insufficient as a matter of law.

In any event, none of the Representatives' three belatedly asserted interests is legally sufficient, even when addressed on their own terms.

2. The Representatives' relationship with their constituents is not a sufficient interest under Rule 24(a)(2).

The Representatives argue that the new districts that will result if the Voters succeed at trial "will damage the relationship between constituents and their duly elected congressman." (Opening Br. 21). But no court has ever recognized a legally protectable interest in a constituent relationship. Moreover, whatever "interest" exists is also held equally by every single constituent in Michigan. That sort of generally-held interest cannot from the basis of intervention as of right.

The Representatives cite no law whatsoever establishing that a constituent relationship is a "substantial, legal interest" for purposes of Rule 24. The only case they cite on this issue, *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1243 (6th Cir. 1997) (*see* Opening Br. 24), is distinguishable. In *Miller*, the Michigan Chamber of Commerce sought to intervene in a case brought by labor unions challenging a section of the Michigan Campaign Finance Act requiring labor unions to obtain affirmative consent at least once per year from members utilizing an automatic payroll deduction to make contributions to their union for political purposes. *Miller*, 103 F.3d at 1243. The Chamber argued that its involvement in the process that culminated in the legislation and its status as an entity regulated by the legislation was sufficient. This Court agreed, noting that it was a "close" call. *Id.* at 1247. Relying on cases from other circuits, the Court found the following facts supported intervention: the Chamber was "(1) a vital participant in the political process that resulted in legislative adoption of the 1994 amendments in the first place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs." *Id.* at 1246–47.

Unlike the Chamber in *Miller*, the Representatives here have presented *no evidence whatsoever*, and do not argue any interest analogous to those asserted by the Chamber. The Representatives proclaim that the Voters are not entitled to an order

requiring the redrawing of the maps without the Representatives' "input and an opportunity to offer a vigorous defense," but they provide no explanation for why this must be so. (Opening Br. 24.) The Michigan Legislature, not the Representatives (all of whom are members of Congress), adopted the redistricting Plans. The Representatives have no formalized role in that process.

Moreover, since *Miller*, this Court has clarified that "[w]here … an organization has only a general ideological interest in the lawsuit—like seeing that the government zealously enforces some piece of legislation that the organization supports—and the lawsuit does not involve the regulation of the organization's conduct, without more, such an organization's interest in the lawsuit cannot be deemed substantial." *Coal. to Defend Affirmative Action v. Granholm,* 501 F.3d 775, 782 (6th Cir. 2007) (citing *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007)). *Granholm* and *Northland* stand for the proposition that *after* a statute is enacted, 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.

The only aspect of *Miller* that is potentially relevant here is that the Chamber was an entity that is regulated by the statute at issue. But even on this point, the Representatives come up short, because unlike in *Miller*, the consequences of any such interest in this case are broad and far-reaching. Whatever interest the Representatives may have in these "constituent bonds," these interests are equally held by the constituents themselves. In other words, to the extent the Representatives are

"regulated" by the current redistricting maps, so too is every single voter and every single potential candidate in the entire state of Michigan. That was not the case in *Miller*. Thus, as the district court correctly concluded, at most the Representatives have identified a "generalized interest shared by all of the citizens in Michigan." And that is not enough. *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, No. 2:14-CV-2207, 2016 WL 3384298, at *3 (S.D. Ohio June 20, 2016), *aff'd sub nom. Ctr. for Powell Crossing, LLC v. Ebersole*, 696 F. App'x 702 (6th Cir. 2017) ("Petitioners' interests as Powell residents, taxpayers and voters in seeing that the City enforce the Charter Amendment are 'so generalized [that they] will not support a claim for intervention of right.'"); *One Wisc. Inst., Inc.*, 310 F.R.D. at 397 (rejecting asserted interest in "fraud-free elections" by legislators and voters seeking to intervene because "any qualified citizen can run for public office in Wisconsin, and any qualified citizen can vote").

3. The alleged economic interest is unsubstantiated and inadequate under Rule 24(a)(2).

The Representatives also argue that they have an "economic interest in their current districts." (Opening Br. 25.) They argue that if the maps change because of this lawsuit, then they will have to spend money to learn the new boundaries and their constituents, after having already spent time and resources to do it once. They claim that since this injury is "significant enough to meet the injury in fact requirements" it

is "therefore certainly significant enough to warrant intervention." *Id.* This argument is flawed, for several reasons.[8]

First, the Representatives' potential economic interest in their districts is attenuated and speculative, because the Voters are seeking a remedy for an election that might not affect any of the present Representatives. The Voters are seeking a remedy for 2020. (*See, e.g.*, Complaint, RE 1 ¶ 26, Page ID # 13.) And it is entirely plausible a court-ordered remedy will be in place before any of the Representatives begin expending any funds on 2020 election preparation. (*See* Case Management Order, RE 53, Page ID # 940 (setting trial for February 2019)). Unsurprisingly, there is no evidence in the record that any Representative intends to be a candidate in 2020 or has spent a single cent in connection with the 2020 election. Indeed, at least one of the Representatives, David Trott, has already announced that he is *not* running for re-election in 2018, which in all events should preclude his intervention in this litigation.[9]

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[8] In addition to the substantive flaws in the Representatives' arguments, their argument on appeal is defective because it relies on documents not in the district court record. The Representatives each offer their FEC Statements of Candidacy as evidence. (Opening Br. at 26 (attaching them for "ease of reference").) This evidence was not submitted to the district court below. It is hornbook law that new evidence cannot be submitted for the first time on appeal. *See United States v. O'Dell,* 805 F.2d 637, 643–44 (6th Cir.1986); Fed. R. App. P. 10(a).

[9] *See* Melissa Nann Burke, *Rep. Dave Trott is Retiring From U.S. House,* The Detroit News (Sept. 11, 2017), https://www.detroitnews.com/story/news/politics/2017/09/11/dave-trott-retirement-congress/105497044/; Mich. Dep't of State, 2018 Michigan Candidate Listing (May 9, 2018), http://miboecfr.nictusa.com/election/

Other departures from Congress by Representatives before the 2020 election begins in earnest—whether voluntary or involuntary—cannot be ruled out, for any number of reasons that are unrelated to the shape of the Representatives' districts. So, as an evidentiary matter, whatever economic harm might exist at some point, such unsubstantiated, speculative harm is no basis for intervention.

The only case cited by the Representatives in support of an "economic" interest is a Fifth Circuit case about plaintiff standing. (Opening Br. 25.) In *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), the Texas Democratic Party argued that after the state Republican Party declared the Republican candidate ineligible and identified a replacement, the Democratic side would be forced to expend additional funds to prepare a new campaign in a short time frame. The Fifth Circuit concluded, in affirming a ruling about standing on a deferential standard of review, that a "finding of financial injury is not *clearly erroneous* because it is supported by testimony in the record." *Id.* at 586 (emphasis added). The case is distinguishable based on the drastically different states of the record, dissimilar postures, and divergent standards of review.

Furthermore, despite the Representatives' repeated reliance on standing doctrine, they have offered no authority establishing that *plaintiff standing* cases, like *Benkiser*, are instructive as it relates to a case about *defendant intervention*. Moreover, the

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candlist/2018PRI_CANDLIST.html; *see also* Mich. Comp. Laws Ann. § 168.551 (establishing April 24 as the filing deadline for the August 2018 primary).

leading *defendant standing* cases cut against the Representatives' position here. *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (holding that defendant-intervenors did not have standing to appeal); *see also infra,* Part I(C)(4) (discussing *Wittman v. Personhuballah* and its dismissal for lack of defendant-intervenor standing).

Finally, there is significant doubt about whether an economic interest can ever be sufficient to support intervention under Rule 24. *See, e.g.*, *United States v. Tennessee*, 260 F.3d 587, 596 (6th Cir. 2001) (rejecting asserted economic interest as not adequate to support intervention); *Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482, 486 (6th Cir. 2006) (rejecting asserted economic interest and explaining that "White Hat's primary interest is economic. It is not a party to any challenged contract nor is it directly targeted by plaintiffs' complaint."); *see also id.* at 487 ("This Circuit has not definitively resolved whether an economic interest can ever suffice to support intervention as of right.") (Clay, J., concurring); *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (describing the viability of an economic interest as "an unsettled area of law").

The Representatives do not acknowledge or address this open question of law. To the extent the Court reaches this issue, it should reject the sort of hypothetical, attenuated economic interest asserted by the Representatives. *Tennessee*, 260 F.3d at 595 ("[Proposed intervenor's] claimed interest does not concern the constitutional and statutory violations alleged in the litigation."); *Blount-Hill*, 195 F. App'x at 488

(explaining that, like the Representatives, the intervenors in *Tennessee* were concerned that the "implementation of the remedial plan would drain its financial resources").

For these reasons, the Representatives have not met their burden to establish that their alleged economic interests in their districts are sufficient under Rule 24(a).

4. The alleged interest in avoiding diminished reelection chances is insufficient under Rule 24(a)(2).

Finally, the Representatives argue that their reduced chances at obtaining reelection under a new redistricting regime constitute a substantial legal interest. (Opening Br. 27.) The Representatives again come up short on both the facts and the law.

The Representatives cite a string of cases to argue that the "Supreme Court and a number of Circuit and district courts" have "noted" that elected officials have a "legal interest in their reelection success" constituting an injury in fact. (Opening Br. 27.) But upon a closer examination, these cases are all inapposite.

The Representatives rely on *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (Opening Br. 27), for the notion that "evidence of impairment of reelection prospects can constitute an Article III injury for purposes of standing." But contrary to supporting this assertion, the *Wittman* Court dismissed the case, finding that the intervenor-defendants did not have standing to pursue the appeal. Three representatives in Virginia's legislature intervened in a voters' suit challenging a district as a racial gerrymander. After the plan was struck down, Virginia did not appeal, but

the intervenors did, thus presenting the unusual situation where a court addressed a *defendant's* standing. The Court concluded that one representative did not have a sufficient injury because he indicated he was going to run in the district even under the new plan—"we do not see how any injury that Forbes might have suffered is likely to be redressed by a favorable judicial decision." *Id.* at 1736 (quotations omitted). And the other two representatives argued they had standing to challenge the district court's order because, "unless the Enacted Plan is reinstated, a portion of the[ir] base electorate will necessarily be replaced with unfavorable Democratic voters, thereby reducing the likelihood of the Representatives' reelection." *Id.* at 1737 (quotations omitted). The Court concluded that, "[e]ven assuming, without deciding, that this kind of injury is legally cognizable, Representatives Wittman and Brat have not identified record evidence establishing their alleged harm." *Id.* Thus, assuming the standing analysis is even relevant in the first instance, this analysis cuts squarely against intervention. The Representatives, like the intervenors in *Wittman*, have not identified any record evidence establishing their alleged harm.

All of the Representatives' other authorities on this point are distinguishable. *Meese v. Keene*, 481 U.S. 465 (1987), relied upon by the Representatives (Opening Br. at 27-28) is a First Amendment case about a state senator challenging the identification of certain Canadian films as political propaganda under the Foreign Agents Registration Act. The Court found, based on the extensive record evidence, that the risk to the Senator's reputation was sufficient "injury." Nothing about that case is

analogous to this one. Similarly, *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004) (Opening Br. at 28), is not on point. The cited portion of that case is focused on organizational standing for a political party based on the injury to its members. That discussion is not applicable here. *Bay Cnty.*, 347 F. Supp. 2d at 423 ("The plaintiffs will suffer an injury if their members who are qualified to vote do not have their votes counted, since that will diminish the political power of the organizations. The organizations are closely related to their membership.").

Schulz v. Williams, 44 F.3d 48 (2d Cir. 1994), is not relevant either. (Opening Br. at 28.) There, unlike here, the Second Circuit addressed intervenor standing to pursue an appeal after the government acquiesced to the district court's decision that the statute at issue was invalid. *Id.* at 52. In addition, the court's decision was grounded in an injury analysis relating to increased competition for votes, but the issue in that case, which was decided a mere week before the election in question, was whether certain Libertarian candidates would be named on a ballot. The Representatives, none of whom has indicated he will run in 2020, have shown no such concrete, direct injury. *Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1981), is distinguishable for the same reasons. (Opening Br. at 28) (finding standing to challenge preferential rate of Post Office that would allow an opponent to gain an unfair advantage in an upcoming election).

The Representatives cannot meet their burden to establish that an alleged diminished chance at reelection is a legally protectable interest sufficient to warrant intervention.

D. None of the Representatives' alleged interests will be impaired.

As described above, the Representatives have not asserted a sufficient interest to establish intervention as a matter of right. Accordingly, no such interest will be impaired.

But even if these interests were sufficient, the Representatives cannot meet their burden to establish impairment. *Miller*, 103 F.3d at 1247 ("To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied."). The Representatives argue that participating as a defendant in this case is the only possible venue to "vindicate their rights" in time for the 2020 election. (Opening Br. 32-33.)

But the practical import of this line of argument would be to *create* a right in favor of the Representatives to participate in the redistricting process. The Representatives are not members of the Michigan legislature and have no recognized voice or role in the redistricting process to begin with. Put another way, if the legislature decided to re-do the Plans prior to the next census, these Representatives would have no claim or standing to stop them. This illusory "impairment" of their "rights" should be rejected.

II. The district court did not abuse its discretion in denying the Representatives' request for permissive intervention.

In the alternative, the Representatives argue that the district court should have granted its request for permissive intervention. (Opening Br. 40-45.) On this issue too, the Representatives are incorrect.

A. The district court's denial of the Representatives' request for permissive intervention can only be reversed for a clear abuse of discretion.

The starting point in the permissive-intervention analysis is Rule 24(b)(1)(B), which states that a district court "may" permit anyone to intervene who has a "claim or defense that shares with the main action a common question of law or fact." Even for putative intervenors who might share common claims or defenses, permissive intervention is discretionary, and the Rule requires that a district court "exercise[e] its discretion" by "consider[ing] whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The Representatives acknowledge that the denial of permissive intervention "is reviewed for abuse of discretion" (Opening Br. 40), but even that is an understatement—there must be a "*clear*" abuse of discretion to require reversal. *Blount-Hill v. Zelman*, 636 F.3d 278, 287-88 (6th Cir. 2011) (emphasis added); *see NAACP v. New York*, 413 U.S. 345, 366 (1973) (decision on permissive intervention will be affirmed unless it is an abuse of the district court's "sound discretion"). Or as this Court stated, it can "seldom, if ever, be shown that the trial court had abused its

discretion in denying the permissive right to intervene." *Burger Chef Sys., Inc. v. Burger Chef of Mich., Inc.*, 334 F.2d 926, 927 (6th Cir. 1964) (quotation omitted). Ultimately, the denial of a request for permissive intervention can only be reversed if this Court is left with a "definite and firm conviction" that the district court acted outside its discretion. *Coal. To Defend Affirmative Action v. Granholm*, 501 F.3d at 784.

B. The district court did not clearly abuse its discretion in denying the Representatives' request for permissive intervention.

The district court exercised its discretion to deny permissive intervention for two reasons, both of which are sound. First, the district court concluded that the Representatives' interest in the litigation was adequately represented by Secretary Johnson. (Order, RE 47, Page ID # 903.) This is correct for the reasons described above—Secretary Johnson and the Representatives share a common objective in defending the Plans. Indeed, the Representatives admit that they "share a defense with" Secretary Johnson. (Opening Br. 43.) Because the Secretary will adequately protect the Representatives' interest, it was no abuse of discretion to deny permissive intervention. *See 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 Indian Cmty. v. Snyder*, --- F. App'x ----, No. 17-1362, 2018 WL 327452, , at *3 (6th Cir. Jan. 9, 2018) (affirming order denying permissive intervention in part because the putative intervenor's position was "being represented" and thus "counsel[ed] against granting permissive

intervention"); *Coalition To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007) (affirming order denying permissive intervention in part because proposed intervenors were adequately represented by existing parties).

Second, and perhaps more importantly, the district court correctly concluded that allowing eight new defendants into the case "could create a significant likelihood of undue delay and prejudice to the original parties." (Order, RE 47, Page ID # 903.) This is true for the same reasons the district court explained in denying Secretary Johnson's earlier-filed motion to stay: voting rights litigation is "notoriously protracted," and based on past cases, there is a "risk that this case will not be resolved" by the time necessary to implement relief if intervention is granted. (*See* Order denying Defendant's Motion To Stay, RE 35, Page ID # 613-14.) Its decision to deny permissive intervention reflects the district court's expressed commitment to adjudicating the Voters' case on the merits so that, if they can prove their case, there will be sufficient time to implement a remedy. (*See also* Case Management Order No. 1, RE 53, Page ID # 939-41 (setting trial date for February 2019).)

Under this Court's precedents, the district court's preference to avoid the delay that would necessarily accompany intervention was well within the proper bounds of its discretion. *See Vassalle v. Midland Funding, LLC*, 708 F.3d 747, 760 (6th Cir. 2013) (affirming order denying permissive intervention, even though claims were common with the original parties, because intervention "would unduly delay the adjudication of the original parties' rights"); *Granholm*, 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); *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (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 which "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 not an abuse of discretion to conclude that intervention would "unduly delay" the proceedings).

The Representatives cite but a few of these cases in their brief, and instead believe that it is "hard to fathom any delay [they] may cause." (Opening Br. 44.) It was not difficult for the district court to fathom such delay, and anyone with as much courtroom experience as the district court—a combined 65 years—knows why: adding more parties as defendants will almost surely lead to more discovery fights, more evidentiary issues, longer trial testimony, and other case complexities that are lacking with just one defendant. The Representatives cite *Service Employees Int'l Union Local 1 v. Husted*, 515 F. App'x 539, 542-43 (6th Cir. 2013) (*see* Opening Br. 44), and the Voters agree that case is on point. There, this Court affirmed the denial of voters' permissive-intervention request in a case challenging the constitutionality of Ohio's provisional ballot system, because circumstances unique to election cases require prompt resolution that could reasonably be undermined by intervention of additional

parties. In *Husted*, voters' request to intervene just five weeks after the filing of the complaint still led this Court to conclude that it "would cause undue delay" such that it was not an abuse of discretion to deny permissive intervention. So too here.

This Court's prior decisions also show that the Representatives are not without a remedy even if they cannot intervene. They may still participate as amicus curiae, and certain individual Representatives may still participate in discovery and/or trial. The presence of these alternatives further underscores how denial of permissive intervention was not an abuse of discretion. *See Blount-Hill v. Zelman*, 636 F.3d 278, 287-88 (6th Cir. 2011) (affirming order denying permissive intervention in part because the proposed intervenors were "not without a voice"—they could participate as amicus curiae); *Bradley*, 828 F.2d at 1194 (similar); *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983) (similar); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975) (similar).

In short, the district court acted well within its discretion by denying the Representatives' request for permissive intervention.

C. The district court adequately explained the basis for its decision.

The only other criticism the Representatives raise is that the district court did not sufficiently explain its reasoning for denying permissive intervention. (Opening Br. 40.) This criticism lacks merit.

The district court's order includes several paragraphs addressing intervention issues—both as of right, and as a permissive matter. Although it did not use separate

headings to designate which paragraphs addressed which type of intervention, that is not necessary. What is more, paragraph 7 clearly addresses the district court's concern about undue delay and prejudice—factors that are specifically part of the permissive-intervention analysis under Rule 24(b)(3). (*See* Order, RE 47, at Page ID # 903.)

Still, the Representatives try to analogize this case to *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), where this Court reversed an order denying permissive intervention because it was not explained sufficiently. But the analogy to *Miller* is inapt because there the district court gave *no reasons* for denying permissive intervention, leaving this Court unable to "conduct meaningful review." *Id.* at 1248. Here, by contrast, the district court did more than just "quote the rule and to state the result," *see id.*—it gave two reasons why intervention was not warranted or required under Rule 24.

The Representatives also complain that they don't know "how or why" their eight members would cause further delay if added as parties (Opening Br. 41), but the answer is given in both the Voters' underlying briefing (*see* Opposition to Motion to Stay, RE 15, Page ID # 138-141) and the district court's order denying Secretary Johnson's motion to stay (Order, RE 35, Page ID # 613-14): more defendants will invariably make an already protracted lawsuit longer and more complicated.

The Representatives also complain that they were never given an opportunity for a hearing on their motion to intervene (Opening Br. 41), but neither Rule 24 nor cases interpreting it require a hearing. Indeed, hearings are not even required for

dispositive motions, *see, e.g.*, *Himes v. United States*, 645 F.3d 771, 784 (6th Cir. 2011) (citing cases), so *a fortiori* hearings should not be, and are not, required for decisions on motions to intervene.

In short, the district court supplied more than enough reasoning to affirm its denial of permissive intervention as a sound exercise of discretion.

III. The Court may deny intervention for the independent reason that the Representatives have not satisfied the prerequisites of Rule 24(c).

In the alternative, there is an independent basis on which to affirm the district court's denial of the Representatives' request to intervene—the Representatives' failure to comply with Rule 24(c).

Rule 24(c) requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." The Federal Rules of Civil Procedure in turn define a "pleading" as a complaint or answer or reply thereto. Fed. R. Civ. P. 7(a). The Representatives filed two "motions" with their motion to intervene—one to stay and one to dismiss—but "motions and other papers" are distinct from "pleadings" under the rules. *Compare* Rule 7(a), *with* Rule 7(b). Because the Representatives have *never* filed the required "pleading" with their motion to intervene, that is an independent basis to affirm. *See Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 314-15 (6th Cir. 2005) (Clay, J.) (surveying decisions with varying approaches to this issue). Under no set of circumstances does the Representatives' motion satisfy Rule 24(c), because the Representatives have not

"at any time offer[ed] the requisite pleading." *Chevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987). The district court's judgment may be affirmed for this independent reason.

CONCLUSION

The district court's April 5, 2018 order should be affirmed.

May 16, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 11,133 words, excluding the parts exempted by Rule 32(f). *See* Fed. R. App. P. 32(a)(7)(B).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14-point Garamond.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2018, the Response Brief of Plaintiffs-Appellees was electronically filed with the United States Court of Appeals for the Sixth Circuit, using the Court's CM/ ECF system. A paper copy of the Response Brief will also be served on counsel for the Representatives at the following address:

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No. 18-1437

In the United States Court of Appeals
for the Sixth Circuit

League of Women Voters of Michigan; Roger R. 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. Tlaib,

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,

Proposed Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Civ. No. 17-cv-14148, Hon. Eric L. Clay, Denise Page Hood, Gordon J. Quist

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