

**IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF OHIO EASTERN DIVISION**

MICHAEL GONIDAKIS, MARY
PARKER, MARGARET CONDITT, BETH
VANDERKOOI, LINDA SMITH,
DELBERT DUDUIT, THOMAS W. KIDD
JR., DUCIA HAMM,

Plaintiffs,

BRIA BENNETT, REGINA C. ADAMS,
KATHLEEN M. BRINKMAN, MARTHA
CLARK, SUSANNE L. DYKE, MERYL
NEIMAN, HOLLY OYSTER,
CONSTANCE RUBIN, EVERETT TOTTY,

Intervenor-Plaintiffs,

v.

FRANK LAROSE, in his capacity as Ohio
Secretary of State,

Defendant.

Case No. 2:22-cv-00773

Judge Algenon L. Marbley

Magistrate Judge Elizabeth Preston Deavers

BENNETT PETITIONERS' MOTION TO INTERVENE

Bria Bennett, Regina C. Adams, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Meryl Neiman, Holly Oyster, Constance Rubin, and Everett Totty (the “Bennett Petitioners”) hereby move, pursuant to Fed. R. Civ. P. 24, to intervene in the above-captioned matter. Pursuant to Fed. R. Civ. P. 24(c), the attached Memorandum in Support states the grounds for intervention. This Motion is also accompanied by a proposed complaint (Exh. A) and a motion to abstain and stay (Exh. B) to be filed if intervention is granted, as well as a proposed order granting

intervention.

Prior to filing this Motion, counsel for the Bennett Petitioners contacted counsel for the existing Plaintiffs and Defendant in this Case via email to determine whether the parties would consent to or not oppose the Bennett Petitioners' intervention. Counsel for Plaintiffs confirmed receipt of the email but did not indicate whether they would oppose the Bennett Petitioners' intervention at this time. There has been no response from counsel for the Defendant as of this time.

Respectfully submitted,

s/ Donald J. McTigue
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** Motions for admission pro hac vice
forthcoming

Counsel for Bennett Petitioners

MEMORANDUM IN SUPPORT

This action concerns Ohio’s redrawing of districts for its bicameral state legislature, the General Assembly. That process is governed by Article XI of the Ohio Constitution, which bestows on the Ohio Supreme Court exclusive jurisdiction over any disputes arising under that constitutional provision. That process is, as described below, ongoing. The Gonidakis Plaintiffs ask the Court to interject itself, take control of Ohio’s redistricting process away from the Ohio Supreme Court and Ohio Redistricting Commission, and order the adoption of a General Assembly plan that the Ohio Supreme Court has already declared invalid under the Ohio Constitution.

Proposed intervenors, the Bennett Petitioners¹, are currently litigating a case before the Ohio Supreme Court concerning the same redistricting process. In Ohio, the redrawing of General Assembly district lines is done by the Ohio Redistricting Commission (the “Commission”). The Commission approved a General Assembly plan on September 16, 2021, and the Bennett Petitioners filed a complaint challenging the plan eight days later. The challenge was successful: the Ohio Supreme Court struck down the plan in January 2022, concluding it violated Article XI of the Ohio Constitution. *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, __ Ohio St.3d __, 2022-Ohio-65, 2022 WL 110261, at *28 (Ohio Jan. 12, 2022) (“*LWV I*”). When the Commission passed a remedial plan, the Bennett Petitioners objected, and were again successful: on February 7, 2022, the Ohio Supreme Court (1) struck down the Commission’s remedial plan for violating the Ohio Constitution and (2) ordered the Commission to draw a new plan that complied with the state constitution by February 17 and file it with the court the following day. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, __ Ohio St.3d __, 2022-Ohio-342,

¹ In the action now pending before the Ohio Supreme Court, the proposed intervenors here (along with an additional individual voter who joined that suit but is not seeking intervention here) are styled as “petitioners.” *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, __ Ohio St.3d __, 2022-Ohio-65, 2022 WL 110261, at *5 n.1 (Ohio Jan. 12, 2022). Accordingly, this motion refers to the proposed intervenors as the “Bennett Petitioners.”

2022 WL 354619, at *14 (Ohio Feb. 7, 2022) (“*LWV II*”). This failed “remedial” plan is the very plan the Gonidakis Plaintiffs ask the Court to adopt.

In response to the Ohio Supreme Court’s February 7 order, and in what would appear to be a transparent attempt to lay the groundwork for the Gonidakis Plaintiffs’ lawsuit, the Republican supermajority on the Commission refused to draw new maps, rejected the proposal from the Democratic minority on the Commission, and refused to even consider a constitutional alternative plan proposed by the Bennett Petitioners. While the Commission imperiously styled its decision to refuse to follow the court-ordered deadline as an “impasse,” the Ohio Supreme Court has ordered the Commission, and its members, to “show cause by filing a response with the clerk of this court no later than 12:00 p.m. on February 23, 2022, why [they] should not be found in contempt for failure to comply with this court’s February 7, 2022 order.” Order, *Bennett v. Ohio Redistricting Comm’n*, 02/18/2022 Case Announcements #2, 2022-Ohio-498. In an apparent response to this show-cause order, during a Commission meeting held just a few hours ago, the Commission discussed scheduling an additional meeting as soon as tomorrow, February 23, to discuss further work on a General Assembly plan. Litigation concerning Ohio’s General Assembly plan is therefore actively ongoing before the Ohio Supreme Court and the Commission’s discussions of General Assembly plans are similarly still in progress.

The Bennett Petitioners have significant interests at stake in the case now before this Court. Given the complicated procedural history of the ongoing state court proceedings, the Bennett Petitioners’ present and future interests are also complicated. On the one hand, the Bennett Petitioners seek to “defend” their victory in the Ohio Supreme Court. In particular, the relief sought by the Gonidakis Plaintiffs is the implementation of a Commission plan that the Bennett Petitioners successfully argued was unconstitutional as a matter of Ohio law before the Ohio Supreme Court.

The Bennett Petitioners also have an interest in ensuring that Ohio's new General Assembly districts comply with state and federal law, which would be impaired if this Court orders the implementation of a plan already declared invalid by the Ohio Supreme Court. Any other relief that might be granted in this litigation would also prejudice the Bennett Petitioners' ability to seek relief in the Ohio Supreme Court. Indeed, as set out in the Motion to Abstain and Stay filed herewith, the Bennett Petitioners submit that this Court should duly defer to the ongoing state redistricting process under *Growe v. Emison*, 507 U.S. 25, 34 (1993).

The Bennett Petitioners also have an interest in ensuring that they are able to cast votes in state legislative districts that are properly apportioned and fully compliant with both federal and state law. These are interests that are properly vindicated, at this stage, before the Ohio Supreme Court. But ultimately, the Bennett Petitioners raise claims in this litigation that have common questions of law and fact with those raised by the Gonidakis Plaintiffs, even if this action is a premature attempt to do an end run around the Ohio Supreme Court.

Thus, in the event further action in this lawsuit ultimately is warranted, the Bennett Petitioners allege that the prior General Assembly plan is malapportioned and that, prior to the 2022 election, a General Assembly Plan must be implemented that complies with state and federal law. Accordingly, whether under Fed. R. Civ. P. 24(a) (mandatory intervention) or 24(b) (permissive intervention), intervention on the part of the Bennett Petitioners as intervenor-plaintiffs is proper in this action.²

² For the reasons set out above, the Bennett Petitioners submit that they plainly have protectible interests that warrant intervention under Fed. R. Civ. P. 24, and believe that such intervention is most appropriately construed as intervention as *plaintiffs* rather than *defendants*, as the Bennett Petitioners do not seek to defend the existing malapportionment, but to ensure their rights are protected, should the existing malapportionment ultimately be addressed by this Court. That said, the Bennett Petitioners acknowledge the complicated procedural considerations that have led another group of petitioners from the ongoing state court litigation to style themselves as intervenor-defendants in their own pending motion to intervene. League of Women Voters & A. Philip Randolph Institute of Ohio's Motion to Intervene, ECF No. 3 at 1 (Feb. 20, 2022).

RELEVANT FACTUAL BACKGROUND

I. Prior Litigation

The Commission is responsible for the drawing of General Assembly districts in Ohio following each decennial census. The Commission consists of the Governor, Secretary of State, Auditor of State, and appointees of the state Senate and House leadership for each of the two largest political parties in each chamber of the General Assembly. Ohio Const. Art. XI § 1(A). Data for the 2020 census was released on August 12, 2021. *LWV I*, 2022 WL 110261, at *6. On September 16, 2021, the Commission approved a redistricting plan (“First Commission Plan”) on a party-line, 5-2, vote. *Id.* at *4.

The Bennett Petitioners, a group of voters from throughout the state of Ohio, filed a lawsuit in the Ohio Supreme Court challenging the First Commission Plan on September 24, 2021. *Id.* at *5. The complaint alleged that the First Commission Plan violated Sections 6(A) and 6(B) of Article XI of the Ohio Constitution, which require the Commission to attempt to pass a plan that complies with the following provisions: “(A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party; (B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.” On September 29, the Ohio Supreme Court issued a scheduling order requiring the submission of all evidence that the parties intended to use in the action on October 22, merits briefs from Petitioners on October 29, briefs from Respondents on November 5, and replies from Petitioners on November 10. Order, *Bennett v. Ohio Redistricting Commission*, 09/29/2021 Case Announcements #2, 2021-Ohio-3424. The parties then engaged in discovery for the next three weeks, at the end of which they submitted evidence and briefs. Oral argument was held in the case

on December 8. *LWV I*, 2022 WL 110261, at *6.

On January 12, the Ohio Supreme Court issued a decision declaring the First Commission Plan invalid, concluding that it violated both Sections 6(A) and 6(B) of Article XI. *Id.* at *1. The Ohio Supreme Court then ordered the Commission to pass a plan that complied with the Ohio Constitution within ten days, and ordered Petitioners to file any objections to the plan within three days of the new plan's approval by the Commission. *Id.* at *28-29.

On January 22, 2022, the Commission approved another General Assembly plan ("Second Commission Plan"), again on a 5-2 party-line vote. *LWV II*, 2022 WL 354619, at *5. Three days later, the Bennett Petitioners filed their objections in the Ohio Supreme Court, arguing that the Second Commission Plan once again violated Sections 6(A) and 6(B) of Article XI. *Id.* at *1. The Ohio Supreme Court again agreed, and on February 7 issued an opinion declaring the Second Commission Plan invalid under Sections 6(A) and 6(B) and ordering the Commission to adopt a new plan by February 17. *Id.* at *14.

II. The Commission's "Impasse"

After the Ohio Supreme Court's February 7 order, the Commission did not convene until the day of the court's deadline. In the interim, the Republican members of the Commission ignored entreaties by the members of the Democratic minority for the Commission to convene to consider new maps. Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 9, 2022, 4:06 PM), <https://twitter.com/joshrultnews/status/1491518880761757704?s=21>. Finally, on February 15, with two days to go before the court-ordered deadline, Speaker Cupp announced a meeting to take place on the day of the deadline. Ohio Redistricting Comm'n, *Announcement of Commission Meeting* (Feb. 17, 2022), <https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-february-17-2022-156/agenda.pdf>. During interviews

with the press, Speaker Cupp said he did not know if Republicans would introduce a proposal of their own at that meeting. Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 15, 2022, 12:51 PM), <https://twitter.com/joshrultnews/status/1491518880761757704?s=21>.

The Commission convened for its first and only meeting following the Court's February 7 order on February 17, the court-ordered deadline for adopting a new plan. The Ohio Channel, *Meeting of the Ohio Redistricting Commission* (Feb. 17, 2022), <https://ohiochannel.org/video/ohio-redistricting-commission-2-17-2022>. The Democratic Commissioners promptly introduced a proposal, which they had publicly released on February 9. *Id.* Next, Republicans Auditor Faber and Senate President Huffman articulated objections to the plan and the Commission voted down the proposal on a 5-2 party line vote. *Id.* Democratic House Minority Leader Allison Russo then made a motion that the Commissioners put their constitutional objections to the plan in writing, a motion that was similarly voted down 5-2. *Id.* After that, Republican Commissioners announced that they had no plan to propose and that the Commission was therefore at an impasse. *Id.*

The morning after disregarding the Ohio Supreme Court's February 17 deadline, the Commission filed a "notice of impasse" in the Ohio Supreme Court, declaring that the Commission was unable to approve a plan by the court-appointed deadline. Shortly thereafter, the Bennett Petitioners filed a motion for an order to the Commission to show cause why it had not complied with the court's order. Later that day, the Ohio Supreme Court sua sponte issued an order for the Commission and its members to show cause why they "should not be found in contempt for failure to comply with this court's February 7, 2022 order." The response to the show-cause order is due at noon on February 23. At a meeting today concerning congressional redistricting, the Commission discussed scheduling a meeting as soon as tomorrow (February 23) to consider

adopting a General Assembly plan.

III. This Litigation

This action was filed on the morning of Friday, February 18, 2022, even before the Commission filed its “notice of impasse.” The complaint alleges that the state process for drafting General Assembly maps is unlikely to come to a “resolution” prior to the scheduled primary election date of May 3, 2022. Compl. ¶¶ 57-62; *see also* Pls.’ First Amended Compl. ¶¶ 59-64.³ The complaint alleges that failure to adopt a plan prior to May 3 will mean that Ohio must either use the previous enacted state House and Senate maps adopted in 2011 (which the complaint alleges are malapportioned) or no maps at all. The complaint alleges denial of the right to vote and violation of the one-person-one-vote principle, both under the Fourteenth Amendment, and violation of their right to freely associate, under the First Amendment. The complaint requests a permanent injunction against use of the 2011 General Assembly plan. Along with their complaint, the Gonidakis Plaintiffs simultaneously filed a Motion for a Preliminary Injunction requesting this Court adopt the Second Commission plan. That is to say, the Gonidakis Plaintiffs request that this Court order the implementation of the General Assembly plan struck down by the Ohio Supreme Court as unconstitutional under Article XI just two weeks ago.

ARGUMENT

I. The Bennett Petitioners are entitled to intervene as of right.

The Bennett Petitioners are entitled to intervene as a matter of right in this case. Under Rule 24(a) of the Federal Rules of Civil Procedure, a court must “on timely motion . . . permit anyone to intervene” where the person “claims an interest relating to the property or transaction

³ Plaintiffs filed a First Amended Complaint earlier today, February 22, 2022. Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief, ECF No. 8 (Feb. 21, 2022). The portions described above appear in both the initial and First Amended Complaint.

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." Under this rule, accordingly, intervention as of right is appropriate where: "(1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest." *Alsaada v. City of Columbus*, No. 2:20-cv-3431, 2021 WL 1720999, at *1-2 (S.D. Ohio Apr. 30, 2021) (quoting *Coal. To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779, 780 (6th Cir. 2007)). For the reasons stated below, each of these conditions are satisfied here.

First, the Bennett Petitioners' application is timely. The Bennett Petitioners file this motion on the first business day after the complaint in this action was filed. Allowing intervention at this early stage, therefore, will not delay the proceedings or prejudice the Plaintiffs or the Defendant.

Second, the Bennett Petitioners have a substantial interest in the subject matter of this case. The U.S. Court of Appeals for the Sixth Circuit subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right." *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("'[I]nterest' is to be construed liberally."). No specific legal or equitable interest is required, *see Grutter*, 188 F.3d at 398, and even "close cases" should be "resolved in favor of recognizing an interest under Rule 24(a)," *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

When an action is brought that, if successful, could alter a favorable judgment secured by a proposed intervenor, that intervenor has a substantial interest in the action. *See Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) (holding that district court was required to grant

intervention in a case challenging a fire department's use of affirmative action, where fire department implemented affirmative action program as part of a consent decree to which proposed intervenors were a party). Here, the Bennett Petitioners have an interest in protecting the favorable judgment that they secured from the Ohio Supreme Court. In a separate proceeding before that court, the Bennett Petitioners successfully challenged General Assembly plans approved by the Commission on two separate occasions. In both instances, the court concluded that the plan approved by the Commission was invalid under the Article XI and that the Commission was required to draw a new plan. In the second instance, the Ohio Supreme Court struck down the precise plan now proffered by the Gonidakis Plaintiffs in this case as a remedial plan that this Court can implement should the Gonidakis Plaintiffs' claims succeed.

The Bennett Petitioners also have an interest in ensuring that, in the event this Court ultimately decides it must adopt a remedial plan—something the Bennett Petitioners oppose at the present juncture—any remedial plan it adopts complies with state and federal law. As outlined in the Bennett Petitioners' proposed complaint, Ohio's prior General Assembly plan is now malapportioned and cannot be used in upcoming elections. The proper forum for claims regarding Ohio's redistricting process is the Ohio Supreme Court. *See Emison*, 507 U.S. at 34. Nonetheless, in the event this Court ultimately decides to order the implementation of a new General Assembly plan, it is important that such plan does not run afoul of either federal law *or* state law (as construed by the Ohio Supreme Court).

Third, the Bennett Petitioners' interest in protecting their state-court judgment will be impaired if this litigation goes forward without their participation. Under the third intervention prong, a "would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Miller*, 103 F.3d at 1247. This burden is "minimal," and can be

satisfied if a determination in the action may result in “potential stare decisis effects.” *Id.*; *see also Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 900 (9th Cir. 2011) (“[I]ntervention of right does not require an absolute certainty that a party’s interest will be impaired”). As described above, if the Gonidakis Plaintiffs’ requested relief is granted, the Court will order implementation of maps that violate the Ohio Constitution, and which the Bennett Petitioners (successfully) objected to in the Ohio Supreme Court.

Fourth, neither the Gonidakis Plaintiffs nor the Defendant can adequately protect the Bennett Petitioners’ interest in this action. Proposed intervenors carry a minimal burden to show that the existing parties to this litigation inadequately represent their interests. *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000). A potential intervenor “need not provide that the [existing parties’] representation will in fact be inadequate, but only that it ‘may be’ inadequate. *Id.* (citations omitted); *see also Davis v. Lifetime Capital, Inc.*, 560 F. App’x 477, 495 (6th Cir. 2014) (“The proposed intervenor need only show that there is a potential for inadequate representation.”) (citation omitted). Again, the Gonidakis Plaintiffs seek the adoption of a General Assembly Plan that violates the Ohio Constitution, as the Bennett Petitioners have already successfully argued in the Ohio Supreme Court. And the Gonidakis Plaintiffs are directly or indirectly acting as a stalking horse for the Commission, who adopted that unconstitutional plan to begin with, and thereafter refused to pass a constitutional plan to replace it.

II. In the alternative, the Bennett Petitioners should be permitted to intervene based on common questions of law and fact.

Even if the Bennett Petitioners were not entitled to intervene as a matter of right, they are nonetheless entitled to intervene under Fed. R. Civ. P. 24’s permissive intervention provision. Under Fed. R. Civ. P. 24(b), the Bennett Petitioners may intervene in this action if they have “a

claim or defense that shares with the main action a common question of law or fact.” Further, “[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” This rule is to be construed liberally, and it excludes many of the requirements of intervention as of right. *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983). Here, the Bennett Petitioners have raised claims that share questions of fact and law with the action filed by the Gonidakis Plaintiffs, and Plaintiffs’ adjudication of their rights would not be delayed or prejudiced by Bennett Petitioners’ intervention, much less unduly so.

The Bennett Petitioners raise common questions of law and fact with the Gonidakis Plaintiffs in this action. First, the Bennett Petitioners’ complaint alleges that the prior General Assembly plan is malapportioned and therefore cannot be used in the upcoming election. Second, the Bennett Petitioners’ complaint makes factual allegations with respect to a central question raised by Plaintiffs’ complaint: namely, whether the state court proceedings have reached impasse. In their complaint, the Bennett Petitioners contend that no impasse has been reached, and that the ongoing state redistricting process may still produce a General Assembly plan that can be used in the upcoming election, and thus that this Court must defer to those proceedings. Finally, the Gonidakis Plaintiffs and the Bennett Petitioners raise a common question of law as to what the appropriate remedy should be in this case. While the Gonidakis Plaintiffs contend that this Court should step in immediately and order the adoption of the Second Commission Plan, the Bennett Petitioners argue that this Court should abstain pending resolution of this matter in state court and, in the event it ultimately acts, it must adopt a plan that complies with state and federal law, not the Second Commission Plan. A three-judge court in a case concerning redistricting in Wisconsin recently allowed permissive intervention by private parties in similar circumstances. *See Hunter*

v. Bostelmann, Nos. 21-cv-512, 21-cv-534, 2021 WL 4206654, at *1 (W.D. Wis. Sept. 16, 2021) (allowing permissive intervention where intervenor-plaintiffs raised claims that were “virtually identical” to those raised by plaintiffs, had filed a petition for an original action in the Wisconsin Supreme Court concerning the state’s redistricting maps, and sought a stay of federal proceedings pending disposition of the state supreme court case).

There is no discernible prejudice or delay that would result in granting the Bennett Petitioners permission to intervene in this matter. In fact, it would cause significant prejudice and delay to deny the Bennett Petitioners permission to intervene. This action concerns a single redistricting process that is already the subject of pending state court litigation. Failure to allow parties with an interest in the outcome of that process the opportunity to intervene will likely result in simultaneous and piecemeal litigation. It will also deny the Bennett Petitioners an opportunity to appeal a ruling contrary to their interests, including an order implementing the adoption of the Second Commission Plan. Plaintiffs, on the other hand, will in no way be delayed or prejudiced in allowing intervention.

CONCLUSION

For the reasons set forth above, the Bennett Petitioners respectfully request that this Court enter an order granting its Motion to Intervene in this proceeding and directing that their pleadings in intervention accordingly be filed.

Respectfully submitted,

s/ Donald J. McTigue

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** Motions for admission pro hac vice
forthcoming

Counsel for Bennett Petitioners

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 22nd Day of February, 2022.

s/ Donald J. McTigue
Donald J. McTigue (OH 0022849)