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

MICHAEL GONIDAKIS, et al.,
Plaintiffs,

v.

FRANK LAROSE, in his official capacity,
Defendant,

and

SENATOR VERNON SYKES and HOUSE MINORITY LEADER ALLISON RUSSO, in their capacities as members of the Ohio Redistricting Commission,
Proposed Intervenors-Defendants.

Case No. 2:22-cv-773

Chief Judge Marbley

Magistrate Judge Deavers

Reply in Support of Motion of Senator Vernon Sykes and House Minority Leader Allison Russo to Intervene as Defendants

The plaintiffs make four arguments in opposing intervention. None is persuasive.

First, they claim that 28 U.S.C. § 2284(b)(1) strips this Court of "authority to rule on a motion to intervene before notifying the Chief Judge of the 6th Circuit to appoint a three-judge panel." Opp. 2. But the only case they cite in support, *Shapiro v. McManus*, makes clear that "a three-judge court is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." 577 U.S. 39, 44–45 (2015) (quoting *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 (1974)). Thus, unless this Court determines that this case is currently justiciable, there is no requirement to convene a three-judge court—and hence no impediment to granting intervention (as the plaintiffs themselves implicitly acknowledge by not contesting other pending intervention requests). That is particularly true given that Senator Sykes and Leader Russo seek to intervene in part to argue why a three-judge court is not required.

Second, the plaintiffs fault Senator Sykes and Leader Russo for failing to attach an answer to their motion. Sykes and Russo addressed this point in their motion, and the plaintiffs have no coherent response. They note that only a "prejudicial failure" to attach a pleading will not be excused, Opp. 3, but they make no attempt to show any prejudice here. Although they say that they "have not yet had the opportunity to consider and formulate a response to any fully developed arguments from Senator Sykes and Leader Russo," *id.*, they don't say that they've been *harmed* by that. And how could they? The motion flags the basic arguments that Sykes and Russo intend to make on justiciability, some of which have since been made by another set of proposed intervenors. That is more than can be said of the named defendant so far. Equally important, the plaintiffs will have the opportunity to consider and respond to the more detailed arguments at the same time that they are responding to the arguments made by the named defendant and other intervenors.[1]

Third, even though the plaintiffs do not deny that Senator Sykes and Leader Russo have an interest in this action—and that the action directly threatens that interest—the plaintiffs take the position that Sykes and Russo have no right to intervene because they are adequately represented by the "existing parties." *Id.* But the only "existing" defendant is Secretary LaRose. And both he and his counsel are taking a diametrically opposite position from Sykes and Russo in the ongoing Ohio Supreme Court litigation that this case is designed to short-circuit. That conflict comfortably satisfies the "minimal" showing required by Rule 24(a)(2): "that representation of [the proposed intervenors'] interest 'may be' inadequate"—not that it is necessarily inadequate. *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007–08 (6th Cir. 2006).

[1] The plaintiffs claim that Senator Sykes and Leader Russo promised to submit a proposed pleading shortly after their motion. What they actually said is that their "defenses will be set forth in more detail in filings to be submitted shortly." Mot. 3 n.1. The plaintiffs then amended their complaint and, at last week's status conference, asked that the Local Rule 65.1(a) conference be delayed a few days to allow proceedings in the Ohio Supreme Court to continue to unfold. Sykes and Russo are prepared to submit filings in accordance with any schedule adopted by the Court.

The plaintiffs also claim that Senator Sykes' and Leader Russo's interests are adequately represented by other proposed intervenors. Proposed intervenors, however, are not "existing parties" under Rule 24(a)(2), and the plaintiffs should not be permitted to dictate how their opponents' interests are protected by deciding which intervention motions to contest. Moreover, the other proposed intervenors' interests are not identical to the interests of Sykes and Russo (as illustrated by the fact that they too have separate counsel in the Ohio Supreme Court—and even sought contempt sanctions against the respondents, including Sykes and Russo). Sykes and Russo have a distinct perspective as the only two Democratic Commission members. They represent constituents in districts drawn by these maps; they voted against the map the plaintiffs are seeking to install; and they have produced their own map as an alternative. Further, even if their interests might now be broadly aligned with other intervenors, that does not mean that they will remain aligned throughout this litigation. And whereas the other proposed intervenors lack access to the latest developments inside the Commission—which they say has "hampered" their ability to represent their interests—Sykes and Russo are well positioned to be able to respond quickly to protect their interests and the interests of their constituents and all voters of Ohio. *See* Petitioners' Objections, *Bennett v. Ohio Redistricting Comm'n*, No. 2021-1198, at 4 (filed Jan. 25, 2022). So even if the other proposed intervenors were "existing parties," their representation of their own interests, at the very least, "may be inadequate" to protect the interests of Sykes and Russo.

At any rate, only intervention of right under Rule 24(a)(2) expressly requires inadequacy of representation. Permissive intervention under Rule 24(b) does not. Under Sixth Circuit precedent, Senator Sykes' and Leader Russo's unique interests plainly support permissive intervention in this scenario. *See League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 577–80 (6th Cir. 2018).

Fourth, the plaintiffs argue that allowing Senator Sykes and Leader Russo to intervene would delay the proceedings, making permissive intervention inappropriate. That is not true. Sykes

and Russo filed their intervention motion before any counsel for any defendant even entered an appearance, and briefing will occur on the same schedule regardless. Even if the plaintiffs might be required to respond to additional arguments, that does not mean that the *proceedings* will be delayed—much less "unduly" delayed, which is what Rule 24(b) says. And given that "timeliness is a particularly weighty concern" in this context, "allowing intervention now"—when the other intervention requests are also being decided—"may very well prove more efficient for all involved" than potentially having to confront it again in the future. *Id.* at 580.

A final point. The plaintiffs oppose intervention under Rule 24(b)(2) as well. They give one reason: because the "Commission is no longer a party." Opp. 5. But that isn't the question. As Senator Sykes and Leader Russo explained in their motion, Rule 24(b)(2) is satisfied because the plaintiffs' claims are based on the orders (or lack thereof) of the Commission of which they are members—not because the Commission was a defendant. That is just as true now as it was then.

Respectfully submitted,

/s/ Jonathan E. Taylor

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March 3, 2022

CERTIFICATE OF SERVICE

I certify that on March 3, 2022, I filed this reply through this Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Jonathan E. Taylor
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