UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA, RISE, INC., and THE DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE,

Plaintiffs,

v.

DANA NESSEL, in her official capacity as the Attorney General of the State of Michigan,

Defendant.
_____/

Case No. 3:19-CV-13341

HON. STEPHANIE DAWKINS DAVIS
MAGISTRATE R. STEVEN WHALEN

REPLY IN SUPPORT OF THE MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 24

INS v. Chadha, 462 U.S. 919 (1983)

Mich State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)

Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell, 467 F.3d 999, 1007 (6th Cir. 2006)

Trbovich v. UMW, 404 U.S. 528, 538 (1972)

The Legislature seeks intervention to ensure that the Plaintiffs' claims meet with a vigorous defense. The Attorney General did not file a response to this intervention motion, but Plaintiffs seek to exclude the Legislature from this proceeding. Their motive for doing so is self-evident. Plaintiffs plainly anticipate an easier, faster, and more advantageous outcome against Attorney General Nessel than against the Legislature. That expectation also can be seen in Plaintiffs' overarching strategy of arbitrarily fragmenting their allegations about Michigan's election-law framework into three separate lawsuits before three judges, spread across two fora, all of which reflects the same kind of procedural maneuvering underlying the opposition advanced here. Despite Plaintiffs' protestations otherwise, this is a concerted, thoroughly planned strategy to seek the path of least resistance.

The fact that Plaintiffs so vigorously oppose intervention is itself a strong indication that intervention is necessary and warranted. Moreover, that opposition is ultimately deficient under the applicable law. For the reasons stated here and in its motion, the Legislature respectfully asks that the Court affirm its right to intervene as a defendant in this matter or, in the alternative, allow it to intervene permissively.

I. The Legislature has a substantial interest justifying intervention.

Plaintiffs ignore the Sixth Circuit's heavy presumption in favor of finding an interest justifying intervention. "To satisfy [the impairment] 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. This burden is minimal." *Mich State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

Plaintiffs create a straw man by conflating two separate elements of the intervention inquiry. Rather than address the Legislature's particularized interest as the only body constitutionally vested with the authority and obligation to enact statutes to protect the purity of Michigan's elections, Plaintiffs suggest that the Legislature's interest depends on whether Attorney General Nessel opposes the law. But adequacy of representation is a separate element (and one, as explained below, that also justifies the Legislature's intervention).

With respect to the "interest" inquiry, the caselaw is clear: Legislative bodies have an interest in defending duly enacted statutes. *See INS v. Chadha*, 462 U.S. 919, 939 (1983) ("Congress is . . . a proper party to defend the constitutionality of § 244(c)(2)"); *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006) (Ohio Legislature had interest in preservation of Voter ID statute); *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991) (recognizing House of Representatives' ability to intervene to

defend alcohol-labeling statutes). The fact that intervention of a legislative body occurs with regularity—which even Plaintiffs do not refute—underscores that such a body has a substantial interest in defending duly enacted statutes.

Plaintiffs' reliance on *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019), is misplaced. Indeed, the Seventh Circuit Court of Appeals "assume[d] the Legislature has an interest" in the constitutionality of its statutes that might be impaired. *Id.* at 797. While the Seventh Circuit ultimately affirmed the district court's denial of intervention, that ruling was based on the "adequacy of representation" inquiry, under a more stringent rebuttable-presumption standard that the Sixth Circuit has never adopted. Thus, *Planned Parenthood* actually affirms, rather than rebuts, the Legislature's substantial interest in protecting its statutes.

II. Attorney General Nessel is not an adequate representative of the Legislature's interests.

Attorney General Nessel filed a motion to dismiss Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6), which remains pending. The Legislature agrees with the arguments advanced in the Attorney General's motion and will raise those arguments in a motion under Fed. R. Civ. P. 12(c) if permitted to intervene. The Attorney General's motion, however, omits additional dispositive legal arguments and therefore fails to blunt the Legislature's belief that Attorney General Nessel will not ultimately defend these election laws on the merits.

This Court need only look to recent election-law cases to see that Attorney General Nessel "may not adequately represent" the Legislature's interest, which is all that the law requires. In her role as the representative of Secretary Benson, Attorney General Nessel has repeatedly refused to defend Michigan law. In the Redistricting Litigation for instance, the Court noted that Secretary Benson and Attorney General Nessel had "elected not to defend" the existing structure despite initial signals to the contrary. *League of Women Voters v. Benson*, Dkt. No. 2:17-CV-14148 (ECF No. 237). The Legislature's initial motion details other incidents in which the Attorney General has conceded or offered only token resistance, in lieu of protecting Michigan's election laws.

Though Plaintiffs deride the Legislature as unnecessarily politicizing this dispute, its words ring of too much protest. To be sure, the confluence of the lead Plaintiff's own political alignment with Attorney General Nessel's raises concern about her likelihood of providing a full defense. But it is her public statements about declining to defend laws with which she disagrees and her recent history in following through on those promises that cements the doubts about the adequacy of her representation. And Plaintiffs' serial filings with alternating courts and defendants appear aimed at creating an environment in which no less-than-committed defense can prosper.

At bottom, the applicable legal standard supplies the correct answer here. The prospective intervenor need only show that the representation of its interest "***may*** be inadequate." *Trbovich v. UMW*, 404 U.S. 528, 538, n.10 (1972) (emphasis added); *Michigan State AFL-CIO*, 103 F.3d at 1247. Plaintiffs' position depends on importing into this Circuit a burden-shifting rebuttable presumption employed in the Seventh Circuit. *See generally Planned Parenthood*, 942 F.3d 793. And even there, the legitimacy of the heightened standard is questioned. *See Id.* at 807 ("First, the standard is incompatible with the text of the rule. . . . Second, the origins of the gross-negligence/bad-faith standard are deeply flawed. The standard is the product of errant doctrinal creep and has no solid foundation.") (Sykes, J, concurring).

In the Sixth Circuit, however, the threshold to show inadequate representation remains "minimal." *Michigan State AFL-CIO*, 103 F.3d at 1247. "One is not required to show that the representation will in fact be inadequate. For example, it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.* The Legislature easily meets this threshold.

III. The Legislature's Intervention is Timely.

Plaintiffs' argument that the Legislature's motion is untimely is contrary to the law and facts, and rings of "gotcha"-gamesmanship. The Legislature moved to intervene in the first-filed of this trio of companion cases, and stated in that motion

its intent to intervene in the other cases after that decision—a proper deference to the Court with the first-filed case. It was only Plaintiffs' futile rush to the altar in this case that required the Legislature's swift action. In the first-filed case, Plaintiffs suggested that the Legislature was *too early*; now Plaintiffs say the Legislature is *too late*. *See* Case No. 3:19-CV-13188, ECF No. 11, p 21.

If this case has "advanced rapidly," as Plaintiffs suggest, it is only because of Plaintiffs' transparent attempt to leapfrog this case in front of its first-filed companion case before Judge Cleland. Indeed, though the same lead counsel filed both cases and both involve Michigan's absentee-ballot-related election laws, Plaintiffs only deemed *this* case worthy of a "Motion to Expedite." Why?

In any event, Plaintiffs misrepresent the advanced stage of this case. No scheduling conference has taken place and no scheduling order has been issued. Indeed, the Court denied Plaintiffs premature attempt to begin discovery, holding that it would decide initial dispositive motions "before developing a discovery, briefing, and trial schedule on the merits . . . ." Plaintiffs point to no cases where a motion to intervene at this stage of the case is untimely.

CONCLUSION

For the reasons explained here and in its motion to intervene, the Legislature respectfully asks that the Court allow it to intervene in this matter to protect its interests in the integrity of Michigan's election-law framework and to ensure a full

and fair adjudication of this matter on the merits, following a truly adversarial process.

Respectfully submitted,

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Dated: March 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2020, I electronically filed the foregoing with the Clerk of the Court using the ECF System, which will send notification to all ECF counsel of record.

By: /s/ Patrick G. Seyferth
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