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 Attorney General of the State of Michigan,

Defendants

and

THE MICHIGAN SENATE, THE MICHIGAN HOUSE OF REPRESENTATIVES, THE MICHIGAN REPUBLICAN PARTY and THE REPUBLICAN NATIONAL COMMITTEE,

Intervening-Defendants.
_____/

Case No. 19-13341

HONORABLE STEPHANIE D. DAVIS
MAGISTRATE R. STEVEN WALEN

THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR A STAY PENDING APPEAL

Despite Plaintiffs' contrary arguments, the Michigan Legislature is authorized to defend the statutes at issue in this litigation and has standing to appeal this Court's preliminary injunction of Mich. Comp. Laws § 168.931(1)(f).

Plaintiffs' cases are distinguishable. To argue that the Legislature lacks

standing to appeal, Plaintiffs rely primarily on two cases: *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) and *Democratic National Committee v. Bostelmann*, Nos. 20-2835, 20-2844 (7th Cir. Sep. 29, 2020). Both are distinguishable.

In *Bethune-Hill*, a single chamber of Virginia's bi-cameral legislature asserted standing to defend a redistricting plan. The U.S. Supreme Court determined that the single chamber lacked standing because the Virginia Constitution allocates redistricting authority to the Virginia "General Assembly," and the Virginia House of Delegates "constitutes only a part" of the assembly. *Id.* at 1953.

The Supreme Court distinguished *Bethune-Hill* from *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015), "in which the Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission. *Id.* "Just as individual members lack standing to assert the institutional interests of a legislature," said the Court, "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 1953–1954. Here, where the Legislature is acting as one to defend its interest in upholding a validly enacted law, they have standing to proceed. *See also Committee on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755, 767 (D.C. Cir. 2020) ("[T]o challenge the judicial invalidation, the

Senate and House of Delegates would have needed to act together, akin to the circumstances of *Arizona State Legislature*, in which the Court recognized the standing of the Arizona House and Senate—acting together—to challenge a referendum.") (cleaned up).

The Seventh Circuit's recent decision in *Wisconsin State Legislature v. Bostelmann* is also readily distinguishable. Nos. 20-2835, 20-2844 (7th Cir. Sep. 29, 2020). There, the Seventh Circuit dismissed the Legislature's appeal from a decision enjoining Wisconsin's absentee ballot receipt deadline. *Id.* The panel's analysis hung on its understanding that the Wisconsin Legislature was representing the interest of the state, combined with a recent Wisconsin Supreme Court holding that the Legislature could not represent the state. *Id.* Neither factor exists here. As explained below, the Legislature is representing its interest in the constitutionality of its statutes (and voting laws in particular). And the Michigan Supreme Court has never rejected the Legislature's ability to represent its interests in this capacity.

The better approach is that of the Fourth Circuit in *N. Carolina State Conference of NAACP v. Berger*, 970 F.3d 489 (4th Cir. 2020). In *Berger*, the Fourth Circuit focused its attention on the *bicameral* representation, allowing the North Carolina Legislature to intervene in defense of the state's election laws, noting that the facts required a holding consistent with *Arizona State Legislature*. *Id.* at 500 ("[T]he Proposed Intervenors represent the entirety of the bicameral legislative

branch in North Carolina which makes this matter comparable to *Arizona State Legislature*"). Here, the Michigan Legislature is similarly situated.

Plaintiffs also cite *Tennessee ex rel. Tenn. Gen. Assembly v U.S. Dep't of State* for the proposition that "individual legislator plaintiffs cannot bring suit for an alleged institutional injury." 931 F3d 499, 511 (6th Cir. 2019). *See* ECF No. 88, PageID.1698. Of course, the Legislature, as a bicameral body comprised of two chambers moving together, is totally different from "individual legislator plaintiffs." And, in fact, a close analysis of *Tennessee General Assembly* shows that it actually supports the Legislature's claim of standing. Consistent with *Tennessee General Assembly*, "[a] legislative body may, in some circumstances, sue as an institutional plaintiff if it has suffered an institutional injury." *Tenn. Gen. Assembly*, 931 F.3d at 499 (citing *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2664). An institutional injury "constitutes some injury to the power of the legislature as a whole rather than harm to an individual legislator." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016). As explained below, the Legislature has an institutional interest.

The Legislature has an interest in this case. The Legislature is representing its own interest in the continued enforcement and constitutionality of the election laws at issue. As Judge Cleland recently recognized in a nearly identical case, "[a]lthough the Executive Branch . . . is tasked with enforcing the law and providing the primary defense against lawsuits directed at the State, the Legislature has an

interest in the preservation and constitutionality of the laws governing the State." *Priorities USA v. Benson*, 448 F. Supp. 3d 755, 764 (E.D. Mich. 2020). Judge Cleland emphasized the Legislature's unique *institutional* interests in the strict enforcement of voting laws in particular:

> The collection of elected officials constituting the Legislature will be affected ***in a way unlike the average population***. Michigan's voting procedures determine how elected representatives are selected. . . . This is not a situation where the interest of the Legislature is only peripherally relevant and where the main contests in the case have no effect on that interest. [*Id.* at 764–65]

In addition, the Michigan Constitution specifically impels the Legislature—and no other body of government—to enact laws that "preserve the purity of elections" and "guard against abuses of the elective franchise" creating further, distinct institutional interest. 1963 Mich. Const., art. 2, § 4(2)

The Legislature is authorized to defend this case. Plaintiffs make hay of the lack of a formal resolution about this litigation. This is a red herring. Whether to hold such a vote is a legislative prerogative that courts should not second guess, something Michigan courts have established. *Hammel v. Speaker of House of Representatives*, 297 Mich. App. 641, 646; 825 N.W.2d 616, 619 (2012) ("A general challenge to the governing procedures in the House of Representatives is not appropriate for judicial review.")

Moreover, both houses of the Legislature have plenary authority over their rules and operations. See 1963 Mich. Const., art. 4, § 16. Both chambers' rules and

policies, in turn, ultimately authorize the chambers' leaders, through the chambers' legal counsel, to defend this case. For instance, the official, published policy relating to Legal Counsel for the Michigan House of Representatives says that its attorneys "ultimately represent the House as an institution." Ex. __. And the Office of Legal Counsel is authorized to "[r]epresent the House in relation to any anticipated or pending civil or criminal claim" and to "[r]etain outside counsel" for any matters the Office of Legal Counsel is permitted to handle.

In addition, contrary to Plaintiffs' implication, the statutory authorization for the Attorney General to defend Michigan laws is not exclusive. That is, nothing in Michigan law suggests that *only* the Attorney General can represent the constitutionality of Michigan's laws. Indeed, Mich. Comp. Laws § 14.28 says that "[t]he attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party." There is no doubt that this provision lists the Attorney General's duty, but nothing here suggests that another entity like the Legislature is forbidden from appearing in its own right in court.

Nobody will defend statutes if not the Legislature. If this Court rejects the Legislature's standing, then there was *never* a justiciable case because the two sides of the "v"—Plaintiffs on the one side and Attorney General Nessel on the other—are not truly adverse. In similar circumstances, the Supreme Court has declared that no controversy exists where both sides seek the same result. *See Moore v. Charlotte-*

Mecklenburg Bd. of Ed., 402 U.S. 47, 47-48 (1971) (dismissing case when both sides argued that a law was constitutional and should be upheld). Plaintiffs now hope to disqualify the only adversarial party so that they can win by default based on a friendly scrimmage with the attorney general.

Plaintiffs' view is fundamentally inconsistent with the American legal system. Absent standing for the Michigan Legislature, every single Michigan law on the books is at stake. It may be laws that one party dislikes today; it will surely be laws the other party dislikes tomorrow.

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For the reasons explained here and in its initial brief, the Michigan Legislature respectfully requests that this Court grant its emergency motion to stay this Court's injunction while this important election issue is resolved on appeal.

Respectfully submitted,

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Dated: October 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 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
Patrick G. Seyferth