UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA,

Plaintiff,

v.

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State,

Defendant.
______________________________/

Case No. 3:19-CV-13188

HONORABLE ROBERT H. CLELAND
MAGISTRATE ANTHONY A. PATTI

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 claims asserted by Plaintiff Priorities USA meet with a vigorous defense. Notably, Secretary Benson did not oppose the Legislature's motion, either before its filing or via any response since. Nor has she made any statement affirming her intention to provide that vigorous defense herself, or otherwise allayed the Legislature's concerns as to her commitment to defend the statutes at issue.

Only the Plaintiff seeks to exclude the Legislature from this proceeding. Its motive for doing so is self-evident. Plaintiff plainly anticipates an easier, faster, and more advantageous outcome against Secretary Benson than against the Legislature. That expectation also can be seen in Plaintiff's overarching strategy of fragmenting its 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 Plaintiff's protestations otherwise, this is a concerted, thoroughly planned strategy to seek the path of least resistance.

The fact that Plaintiff so vigorously opposes 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.

Plaintiff ignores 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).

Plaintiff creates a straw man by conflating two separate elements of the intervention inquiry. Rather than address the Legislature's particularized interest in the defense of duly enacted election-law statutes required by the Michigan Constitution, Plaintiff suggests that the Legislature's interest is dependent on whether Secretary Benson 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 Plaintiff's own authorities demonstrate—underscores that such a body has a substantial interest in defending duly enacted statutes.

Plaintiff's 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 different standard than the Sixth Circuit requires here. So *Planned Parenthood* actually affirms, rather than rebuts, the Legislature's substantial interest in protecting its statutes.

II. Secretary Benson is not an adequate representative of the Legislature's interests.

After the Legislature filed its motion to intervene and Plaintiff filed its response, Secretary Benson filed a motion to dismiss based on Plaintiff's lack of standing and because its claims are not ripe. The Legislature agrees with these legal stances and would have raised these arguments in a motion under Fed. R. Civ. P. 12(c) after intervening.

The Secretary's motion, however, does not blunt the Legislature's well-founded belief that Secretary Benson will not defend these duly enacted election laws on the merits. Secretary Benson's motion to dismiss contains purely procedural arguments; it takes no position on the substance of the election-law framework.

This Court need only look to Secretary Benson's recent track record in election-law litigation to see that she "may not adequately represent" the Legislature's interest, which is all that the law requires. Despite Plaintiff's characterization of Secretary Benson's prior litigation as mere "disagreements" over settlement strategy, multiple courts expressly recognized Secretary Benson's refusal to defend Michigan law. In the Redistricting Litigation, the court stated that "Defendant Secretary of State Jocelyn Benson has 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). Likewise, Michigan Court of Claims Judge Cynthia Diane Stephens recently observed in an election-law case against Secretary Benson that "[p]roceeding without [the Legislature's] advocacy, this case would lack anyone supporting the legislation." *League of Women Voters v. Benson*, Case No. 19-000084-MM (Mich. Ct. of Claims, Sept. 27, 2019), at 9.

And, though Plaintiff derides the Legislature as unnecessarily heightening the politicization of this dispute, its words ring of too much protest. The confluence of Plaintiff's own political alignment with both Secretary Benson and Attorney General

Nessel, along with their public statements about declining to defend laws with which they disagree, creates a fair reason to doubt the adequacy of their representation. The absence of a strong statement that they intend to defend the merits here amplifies that reasonable doubt. And Plaintiff's 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. Plaintiff's arguments depend on importing a burden-shifting rebuttable presumption employed in the Seventh Circuit. *See generally Planned Parenthood*, 942 F.3d 793. In the Sixth Circuit, however, the threshold is still "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.*

Even Plaintiff ultimately agrees that intervention is appropriate where the current representative has failed in fulfilling its duty. (ECF No. 11, p 20 of 29). It merely insists that showing has not yet been met, and that the Legislature should wait until Secretary Benson has specifically stated that she will not defend this

particular statute, in this particular lawsuit. As detailed above, the Legislature believes that there already is more than enough basis to doubt the adequacy of the Secretary's representation here.

But the Legislature also disagrees that waiting until a later stage, when the inadequacy of the defense has been fully manifested, would be appropriate. When the Legislature employed that approach in the Redistricting Litigation, the plaintiff argued—as Plaintiff here surely would—that the motion to intervene was too late. Instead of the current hypothesizing that work would be multiplied by, e.g., duplicative questioning at depositions, Plaintiff assuredly would argue that it would be prejudiced by the need for additional discovery that could more efficiently have been accomplished if the Legislature had been a party earlier. This Court should not give credence to such flexible positions.

III. Intervention now will expedite and streamline these proceedings.

Plaintiff argues that the Legislature should not be permitted to intervene because its involvement will create undue delay. Not so. Indeed, the Legislature's involvement at this stage will *avoid* the undue delay occasioned by later involvement.

Plaintiff relies on distinguishable cases in which intervention was sought at or near the end of discovery, or would have required extensive new discovery on ancillary issues. *See, e.g., League of Women Voters of Mich.*, 2018 WL 3861731

(end of discovery); *U.S. v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (end of discovery and requiring new discovery on regulatory issue). Here, the Legislature has sought intervention at the outset of the case precisely to avoid the type of undue delay and duplication of proceedings that Plaintiff now projects onto it. Rather than delaying the case, the Legislature's intervention now will expedite the case.

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,

BUSH SEYFERTH PLLC
Attorneys for the Michigan Senate and the Michigan House of Representatives

By: /s/ Patrick G. Seyferth
Patrick G. Seyferth (P47475)
Roger P. Meyers (P73255)
Michael K. Steinberger (P76702)
100 W. Big Beaver Rd., Ste. 400
Troy, MI 48084
(248) 822-7800
seyferth@bsplaw.com
meyers@bsplaw.com
steinberger@bsplaw.com

Dated: December 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2019, 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 (P47575)