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,

Defendant.

NO. 19-13341

JUDGE STEPHANIE DAWKINS DAVIS

MAGISTRATE R. STEVEN WHALEN

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE BY THE MICHIGAN REPUBLICAN PARTY AND THE REPUBLICAN NATIONAL COMMITTEE

Pursuant to Federal Rule Civil Procedure 24 and Local Rule 7.1(e), the Michigan Republican Party ("MRP") and the Republican National Committee ("RNC") (collectively the "Applicants"), reply in support of its Motion to Intervene as party defendants in this case (R.33).

BUTZEL LONG, PC

By: /s/ Kurtis T. Wilder
Kurtis T. Wilder (P37017)
Steven R. Eatherly (P81180)
150 W. Jefferson, Suite 150
Detroit, Michigan 48226
(313) 225-7000
wilder@butzel.com
eatherly@butzel.com

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CONCISE STATEMENT OF THE ISSUE PRESENTED

I. Whether the Court should grant Applicants' motion to intervene as a matter of right pursuant to Rule 24(a)(2), or in the alternative, by permissive intervention under Rule 24(b) (R.33).

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Purnell v. Akron, 925 F.2d 941 (6th Cir. 1991)

Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005)

Drake v. Obama, 664 F.3d 774 (9th Cir. 2011)

League of Women Voters v. Johnson, 902 F.3d 572 (6th Cir. 2018)

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

Libertarian Party of Mich. v. Johnson, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012)

Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219 (6th Cir. 2011)

Rules

Fed. R. Civ. P. 24

ARGUMENT

Because courts broadly construe the rules governing intervention "in favor of potential intervenors," *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir.1991), Applicants meet the liberal standard for intervention and should be allowed to intervene under either Rule 24(a)(2) or 24(b).

I. APPLICANTS ARE ALLOWED TO INTERVENE AS A MATTER OF RIGHT

A. Applicants' motion to intervene is timely.

Plaintiffs filed their Amended Complaint 23 days before Applicants filed this motion. (R.17). Defendant's motion to dismiss was filed 9 days before this motion. (R.27). Briefing was not completed on Defendant's motion until after this motion was filed, and the Court has not ruled on the substantive merits of Defendant's motion.[1] Discovery has not begun. No scheduling order has been entered. A Rule 26(f) conference has not been held. Defendant points to no cases where intervention in the pre-discovery phase was not timely.[2]

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[1] Applicants sought permission to respond to Defendant's motion to dismiss and continue to seek permission to do so. (R.33, p.2).

[2] This Court has held that an intervention motion filed two months after the complaint, while the case remained in the pleading stage, was timely. *Live Nation Worldwide v. Hillside Prods.*, No. 10-11395, 2011 U.S. Dist. LEXIS 34405, at *16-17 (E.D. Mich. 2011); *U.S. v. Marsten Apts.*, 175 F.R.D. 265, 267 (E.D. Mich. 1997) (holding timely intervention where "the suit is still in the pretrial stage, and although some discovery has been taken the case is not significantly close to trial").

This case is distinguishable from cases cited by Plaintiffs in challenging timeliness.[3] In *League of Women Voters v. Johnson*, the court refused to allow state legislators and several Congressmen to intervene in a redistricting challenge for comparable reasons. No. 17-14148, 2018 U.S. Dist. LEXIS 136965 (E.D. Mich. 2018); 2018 U.S. Dist. LEXIS 57813, at *2-3. The state legislators never appealed this ruling, but the Congressmen did. The Sixth Circuit held that the lower court abused its discretion in refusing intervention, *Johnson*, 902 F.3d 572, 580 (6th Cir.2018), finding the vague concerns upon which the court relied to be "cursory" and "unsupported by the record." *Id.* Thus, *Johnson* actually bolsters the case for intervention.

B. **Applicants have substantial legal interests.**

Demonstrating the existence of a substantial interest "is not an onerous task." *Coal. to Defend*, 240 F.R.D. at 375. A proposed intervenor "need not have the same

[3] *Coal. to Defend Affirm. Action v. Granholm* rejected an intervention motion filed after a time-sensitive cross-claim by a codefendant had already been resolved. 240 F.R.D. 368, 372 (E.D. Mich. 2006). *Stupak-Thrall v. Glickman* involved an intervention motion filed 7 months after plaintiffs' complaint, 5 months after plaintiffs' amended complaint, after discovery, and only 2 months before dispositive motions were due. 226 F.3d 467, 473 (6th Cir.2000). There is no reason to fear the "intractable procedural mess that [the Seventh Circuit feared] would result" from having both the State Legislature and Attorney General claiming to represent the state's interests in *Planned Parenthood of Wis. v. Kaul* (non-binding case) because Applicants do not seek to join Defendant in representing the state's interests, but seek to protect their organizational interests, as well as those of Republican candidates and voters. 942 F.3d 793, 801 (7th Cir.2019).

standing necessary to initiate a lawsuit." *Providence Baptist Church v. Hillandale Comm.*, 425 F.3d 309, 315 (6th Cir.2005).

Courts have recognized "competitive standing"—a higher bar than a proposed intervenor's substantial interest—when political parties or candidates have a substantial interest in preventing change to the structure of a competitive electoral environment. *See Shays v. FEC*, 414 F.3d 76, 85 (D.C.Cir.2005); *Nader v. FEC*, 725 F.3d 226, 228 (D.C.Cir.2013); *Drake v. Obama*, 664 F.3d 774, 782-84 (9th Cir.2011) (citing multiple cases recognizing "competitor standing").[4]

Plaintiffs contend that the *Shays* and *Nader* plaintiffs had a substantial legal interest only "because the regulations ... challenge[d] ... *unlawfully altered* [the competitive landscape]." (R.43, p.6 (emphasis in original)). Plaintiffs assume that the challenged statutes are unconstitutional—Applicants contend these are constitutionally valid laws. If Applicants are correct, then Defendant's settlement or failure to adequately defend the challenged laws could result in Defendant exceeding

[4] Applicants are not "afraid to include" practices prohibited by the challenged laws. (R.43, p.4). Applicants, who must run campaigns with limited resources, have a competitive interest in protecting against compulsion to expend those resources on practices that the Legislature has barred. Further, one specific behavior identified by Plaintiffs, "Michigan citizens ... driv[ing] eligible, lawful voters to the polls," does not appear barred by MCL 168.931(1)(f). The uncertainty this demonstrates counsels in favor of abstaining from deciding Plaintiffs' claims until a Michigan court can clarify the scope of the challenged Michigan election laws. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (stating that *Pullman* abstention is appropriate "when state law is unclear and a clarification of that law would preclude the need to adjudicate the federal question.").

her authority, usurping the legislative function, and illegally altering the competitive electoral environment. *See* No. 17-14148, ECF No. 235 ("[Secretary] Benson lacks the authority—absent the express consent of the Michigan Legislature, which she lacks—to enter into the Proposed Consent Decree."). Just as the Court should assume that Plaintiffs would be successful on their claims when assessing their standing, so too should the court assume that the challenged laws are valid when assessing Applicants' interests in maintaining the current legal structure of the competitive environment. *Bond v. U.S.*, 564 U.S. 211, 218-19 (2011) (warning against the conflation of the standing inquiry and the merits of the claim).

Plaintiffs rely on *Northland Family Planning Clinic v. Cox*, 487 F.3d 323 (6th Cir.2007) (R.43, p.7), but this case more closely resembles *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir.1997). There, the court reversed the lower court's denial of intervention, finding the Chamber of Commerce had a valid interest in "maintaining the election system that governed [its] exercise of political power, a democratically established system that the district court's order had altered." *Id.* at 1246. Applicants too are "repeat player[s]" in Michigan elections, are "significant part[ies] which [are] adverse [to the plaintiff groups] in the political process," and are among the entities directly regulated by the challenged provisions. *Id.* at 1246-47; *Northland* 487 F.3d at 345 ("If the statute…regulated [intervenor] or its members, [intervenor] would likely have a legal interest[.]"). Defendant confirms

these statutes "are intended to protect voters from political parties, their candidates, and others, who would improperly seek to manipulate or influence their vote." (R.42, p.7).

Thus, Applicants have interests sufficient to warrant intervention.

C. **Defendant will not adequately protect Applicants' interests.**

Defendant admits that Applicants burden in showing inadequacy of representation is "minimal" and a mere possibility of inadequate representation is sufficient. (R.42, p.7). Although Defendant presently shares the Applicants' objective: defending the constitutionality of the challenged provisions, (*Id.* at p.13; R.43, pp.7-8), respondents fail to engage with Applicants' arguments. Applicants have no expectation that Defendant will raise and defend their substantial interests (described above) as political parties with candidates and voters. *See Libertarian Party v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 at *3 (E.D. Mich. 2012) (holding that the Secretary of State "does not have an interest in raising and defending the distinct interests of the [MRP] in the enforcement of the Michigan sore loser statute.").

Applicants do not argue inadequate protection based on Defendant's party affiliation. Instead, Applicants demonstrated that Defendant has declined to enforce select laws in Michigan with which she disagrees, (R.33, p.15), supporting that Defendant's representation may ultimately prove inadequate. Defendant also

reserves the right to make a different determination about defending the challenged laws "later down the road" at any stage depending on case circumstances. **(Ex. A)**. For these reasons, the Court should allow Applicants to intervene as of right.

D. **In the alternative, the Court should grant permissive intervention.**

Applicants should alternatively be permitted to participate under Rule 24(b). *First,* as discussed above, Applicants' motion was timely. *Second*, respondents do not contest that Applicants seek to assert defenses that "share common questions of law [and] fact" with Plaintiffs' challenge of Michigan election laws. Rule 24(b)(3).

Finally, Applicants' intervention will neither delay litigation nor unduly prejudice the parties. Defendant argues against intervention to have her motion "heard and resolved as efficiently as possible with no unnecessary delay." (R.42, p.5). Applicants have committed to "submit all filings in accordance with whatever briefing schedules the Court imposes, simultaneously with Defendant unless ordered otherwise," (R.33, p.18), and remain prepared to work in any expedited schedule to prevent prejudice, including responding to Defendant's motion to dismiss.

Plaintiffs' argument that intervention "will significantly increase the volume and costs of discovery," (R.43, pp.1-2), is misplaced as Applicants' "defenses raise questions of law that are unlikely to require discovery or an evidentiary hearing." (R.33, p.18). Applicants' presence should not complicate discovery, if discovery is necessary or appropriate given the nature of Plaintiffs' claims.

Applicants reject Plaintiffs' claim that intervention would "introduce partisan politics into the case." (R.43, p.14). Some partisan political perception is inevitable in election law cases, particularly when Priorities USA, a Super PAC closely affiliated with the Democratic Party, is the lead plaintiff. Priorities has filed two other related lawsuits challenging Michigan election laws, and their lead counsel routinely touts the partisan political nature of his work for Priorities and other Democrat-affiliated groups. (**Ex. B**).

Plaintiffs' claimed prejudice as to timeliness carries little weight given that the Michigan Primary has come and gone with the challenged laws in place. Plaintiffs' urgency is exaggerated as the General Election is approximately eight months away with enough time for decision on the merits and any appellate proceedings. Therefore, the Court should alternatively grant Applicants' motion for permissive intervention.

CONCLUSION

In sum, Applicants request that the Court grant its motion to intervene (R.33).

BUTZEL LONG, PC

By: /s/ Kurtis T. Wilder
Kurtis T. Wilder (P37017)
150 W. Jefferson, Suite 150
Detroit, Michigan 48226
(313) 225-7000
wilder@butzel.com

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