UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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 JUDGE R. STEVEN WHALEN

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE MICHIGAN LEGISLATURE'S MOTION TO INTERVENE

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CONCISE STATEMENT OF THE ISSUES

The Michigan House of Representatives and Senate have moved to intervene in this case, which challenges two Michigan election laws: the Absentee Ballot Organizing Ban and the Voter Transportation Ban. Plaintiffs oppose the Legislature's Motion to Intervene for the following reasons:

1. The Legislature's request for intervention as of right should be denied because:

    a. it asserts only a generalized interest in enforcement of the laws, which is insufficient to demonstrate the substantial interest required to intervene;

    b. its interests are adequately protected by the Attorney General who is tasked with defending the State's interests in this lawsuit; and

    c. its belief that the Attorney General will not defend this case relies entirely on unfounded and inappropriate speculation.

2. The Legislature's request for permissive intervention should be denied because:

    a. it is untimely; and

    b. it will unduly delay this time-sensitive proceeding and unnecessarily and significantly multiply litigation costs, and it injects interbranch political disputes into a nonpartisan matter.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Coalition to Defend Affirmative Action v. Granholm, 501 F.3d 775 (6th Cir. 2007)

Jansen v. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990)

Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999 (6th Cir. 1999)

Planned Parenthood of Wisconsin, Inc. v. Kaul, 942 F.3d 793 (7th Cir. 2019)

Stupak-Thrall v. Glickman, 226 F.3d 467 (6th Cir. 2000)

INTRODUCTION

For many of the same reasons that the Court should deny the pending motion to intervene filed by the Michigan Republican Party and the Republican National Committee (the "Republican Organizations"), the Legislature's motion to intervene should also be denied. The motion is similarly premised on the assumption that Defendant Attorney General Dana Nessel cannot be trusted to represent the state's interests in defending the challenged laws because of her political party affiliation. *See* Dkt. 39 at 4, 6. But in the four months since Plaintiffs first filed this action, the Attorney General has vigorously defended it, moving to dismiss the case not once, but twice, and opposing a motion for preliminary and permanent injunction. The Legislature's belief that she will act to the contrary is supported by no evidence and is thus disproved by the very record in this case. The motion similarly fails to identify a specific, substantial legal interest that the Legislature uniquely has in the outcome of this case that could justify its intervention. Again, the Legislature's arguments here rest entirely on the Attorney General's party affiliation. But that is not, and has never been, sufficient to establish partiality. *Cf. Siefert v. Alexander*, 608 F.3d 974, 983 (7th Cir. 2010) (rejecting notion that a judge's affiliation with a political party is enough to create an appearance of bias); *Miracle v. Hobbs*, 333 F.R.D. 151, 156 n. 8 (D. Ariz. 2019).

Without a unique interest specific to *this case* or a reason to believe Defendant will not defend the laws challenged *here*¸ intervention is inappropriate. The Legislature's delay in seeking intervention also strongly weighs against intervention, as does the fact that its intervention will, without question, exponentially multiply the expense of this litigation and will unjustifiably delay resolution of the case. The Legislature promises as much in its motion, stating it will file additional motion to dismiss briefing and even seek to have the matter reassigned so the parties must start anew with a different judge. For all of these reasons, the motion for intervention should be denied.[1]

BACKGROUND

The Court is familiar with the procedural background of this case. After filing an initial complaint on November 12, 2019, the parties have now completed briefing on Plaintiffs' motion for preliminary and permanent injunction and Defendant's second motion to dismiss. Either motion may, as a practical matter, resolve the case.

As the Legislature makes references to, this case is one of three filed with Priorities as a plaintiff in Michigan challenging various aspects of the State's election laws. Priorities first sued the Secretary of State in federal district court to

[1] If the Court is inclined to consider the Legislature's suggestion that this matter be reassigned even in the absence of an affirmative motion to do so, Plaintiffs request an opportunity to oppose the reassignment as provided in Local Rule 83.11(b).

challenge laws that relate to election administration under federal law. Priorities then filed this lawsuit separately because the challenged laws are criminal statutes; therefore, the Attorney General is the most appropriate defendant. Priorities' subsequent suit against the Secretary was filed in state court because that lawsuit asks for injunctive relief based on state law, a claim that cannot be redressed in federal court under the *Pennhurst* Doctrine.

The Legislature's motion represents the second attempt by Republican controlled organizations to intervene in this lawsuit. The first, filed shortly before the Legislature filed its motion, was initiated by the Republican Organizations. To the extent that the issues and legal arguments overlap, Plaintiffs refer the Court to their response in opposition to that motion, filed on March 4, 2020 which is incorporated by reference. Dkt. 43.

LEGAL STANDARD

The legal standard governing this motion is the same applicable to the Republican Organization's motion to intervene. Dkt. 43 at 8-9.

ARGUMENT

I. The Legislature is not entitled to intervene as of right.

The Legislature's motion fails to satisfy any of the four requirements for intervention as of right. *First*, it does not identify a substantial legal right that will be impaired absent intervention. *Second*, it does not point to a single statement, act,

or litigation decision relating to this lawsuit that suggests the Attorney General will not adequately protect the Legislature's generalized interest in enforcing the law, as is her duty to do, *see* Mich. Comp. Laws §§ 14.28, 14.29. And, *third*, the Legislature sat on its request to intervene for four months as the case progressed and its intervention at this point would prejudice Plaintiffs and the public at large.

A. The Legislature fails to identify a substantial legal interest that will be impaired absent intervention.

The Legislature's motion identifies two interests in this case, but neither constitutes a substantial legal interest sufficient to support intervention as of right. First, the Legislature contends that it has an interest in the outcome of this lawsuit because its members have to compete in elections that are governed by Michigan's election laws, including the challenged laws. *See* Dkt. 39 at 16. This interest is no different from the one asserted by the Republican Organizations in their separate motion to intervene, and is insufficient to support intervention for the same reasons Plaintiffs previously identified. *See* Dkt. 43.

Second, the Legislature's asserted interest in upholding the constitutionality of the laws passed by the body, Dkt. 39 at 15-16, is nothing more than a generic interest in the enforcement of the laws and, under Sixth Circuit precedent, is not a substantial legal interest supporting intervention. *See Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780-82 (6th Cir. 2007) (official proponent of

ballot initiative could not intervene); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 343-46 (6th Cir. 2007) (same); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005) (same). "[A] public law, after enactment, is not the [legislature's] any more than it is the law of any other citizen or group of citizens" who are governed by it, and a legislature's interest in defending a law is no less generic than the interests of other citizens in seeing laws enforced. *Newdow v. U. S. Congress*, 313 F.3d 495, 499-500 (9th Cir. 2002) (rejecting U.S. Senate's argument that it had a significant, protectable interest in defending a statute it passed because that interest only constituted "generalized harm").

The Legislature argues that it is especially positioned to intervene here because the lawsuit involves Michigan's election laws and the Legislature has specific authority to promulgate laws related to elections. *See* Dkt. 39 at 16. While it is true that the Legislature is vested with authority to *legislate* in this area, Michigan's Constitution makes equally clear that it is *not* permitted to act in an *executive* function. Mich. Const. Art. 3 § 2; *cf.* Veto Message from Governor, 2018 Journal of the House Addenda 3028-29 (Mich. Dec. 28, 2018) (vetoing law that would have granted Legislature automatic right to intervene as an inappropriate infringement on executive authority). Michigan Law specifically vests Defendant,

the Attorney General of the State of Michigan, with the authority to defend challenges to Michigan's laws. Mich. Comp. Laws §§ 14.28, 14.29.

Finally, the Legislature suggests it has an interest in defending the constitutionality of the challenged laws because, as a Democrat, the Attorney General simply cannot be trusted to do so. That argument is at odds with the actual record in this litigation (something the Legislature simply ignores). And the argument does not find any support in the case law. The Legislature cites a number of cases allowing legislative intervention, but—critically—in each of those cases the executive charged with enforcing the law had *refused* to provide a defense.[2] Here, Defendant has vigorously defended the laws, filing two motions to dismiss, asserting every possible argument in favor of an immediate dismissal of Plaintiffs' case, and opposing the motion for preliminary and permanent injunction. Dkts. 10, 27, 30.

[2] *See Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 1999) ("NEOCH") (allowing intervention for appeal where Secretary declined to appeal); *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991) (explaining that the U.S. House of Representatives was allowed to intervene previously because the defendants had admitted that the challenged statutes were unconstitutional); *In re Benny*, 812 F.2d 1133, 1135 (9th Cir. 1987) (allowing intervention of the U.S. Congress when the Department of Justice agreed with the plaintiff that the statute was unconstitutional); *Ameron, Inc. v. U. S. Army Corps of Eng'rs*, 787 F.2d 875, 888, n.8 (3d Cir. 1986) (U.S. Congress had standing to intervene because the Army defendant took the position that the challenged statute was unconstitutional under certain circumstances); *Windsor v. United States*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011) (allowing intervention by the House when the defendant Department of Justice "made clear that it w[ould] not defend the constitutionality" of the challenged statute).

The Legislature cites *NEOCH* to argue that it has a substantial interest in intervening. Dkt. 39 at 5, 14. But comparison of this case to that one demonstrates just the opposite. In that case, the Attorney General of Ohio sought to intervene on behalf of the legislature and the State in a voting rights case brought against the Secretary of State. *NEOCH*, 467 F.3d at 1006. The Sixth Circuit found that intervention was appropriate because the Attorney General and the Secretary had divergent institutional interests. *Id.* at 1007. "[T]he Secretary's primary interest is in ensuring the smooth administration of the election, while the State and General Assembly have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced." *Id.* Contrast the situation with this case, where the Attorney General is already the named defendant and is actively and strongly defending the case, because she shares an identical interest to the proposed intervenors' interest in defending the validity of Michigan's laws and ensuring that those laws are enforced, especially given that the challenged laws are criminal laws which she is tasked with enforcing.

Accordingly, the Legislature has failed to demonstrate it has a substantial legal interest justifying its intervention in this case.

B. The Legislature fails to demonstrate the Attorney General inadequately represents its legal interest.

The Legislature "bear[s] the burden of demonstrating inadequate representation" to prevail on its motion to intervene. *Jansen v. City of Cincinnati*, 904 F.2d 336, 342-43 (6th Cir. 1990). Factors considered by courts evaluating the adequacy of representation include whether the proposed intervenors possess a substantial legal interest that is adverse to the defendant, whether the defendant has aggressively fulfilled her duty to defend this case, and whether there is evidence of collusion between plaintiff and defendant. *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 2019). The Legislature fails to demonstrate that any of these factors justify intervention.

As already discussed, the Legislature and Defendant share an identical legal interest in the outcome of this litigation; they do not have adverse interests. Defendant's affiliation with the Democratic Party does not change those institutional interests and it most assuredly does not render her unable to defend this lawsuit. Indeed, courts have denied intervention to legislative bodies, individual legislators, and other parties that attempt to invoke political affiliation as a proxy for adequate representation. *See, e.g., Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 796 (7th Cir. 2019) (affirming denial of motion to intervene as of right of Republican legislature, when defendant was a Democratic Attorney General, because "the

Legislature did not demonstrate that the Attorney General [wa]s an inadequate representative of the State's interest absent a showing he is acting in bad faith or with gross negligence"); *Miracle*, 333 F.R.D.at 156 ("Proposed Intervenors must do more than allege—and superficially at that—partisan bias" to establish that the defendant will not adequately represent their interests); *United States v. Alabama*, No. 2:06-cv-392-WKW, 2006 WL 2290726, at *5 (M.D. Ala. Aug. 8, 2006) (rejecting argument of proposed Democratic intervenors that the defendant would not adequately represent them because "the defendants are represented by a Republican Attorney General and the plaintiff is aligned with the Republican Party").

The Attorney General has vigilantly fulfilled her duty to defend this case and there is no evidence of collusion between Plaintiffs and Defendant. In an attempt to prove otherwise, the Legislature points to (1) two Facebook posts and (2) actions the Attorney General took in her role as representative of the State of Michigan in past litigation. Dkt. 39 at 18. The Facebook posts do not express any opinions on the challenged laws and have no bearing whatsoever on Defendant's ability to defend the laws challenged in this litigation. The settlement of *College Democrats at the University of Michigan v. Johnson*, No. 18-12722 (E.D. Mich.), is similarly

irrelevant. In fact, neither Plaintiffs nor Defendant were parties to that lawsuit.[3] The conduct of the parties in *that* lawsuit does not reflect on the possible conduct of the different parties in *this* one. And even if relevant, the settlement of a single case does not a pattern make, never mind the Legislature's failure to explain why that settlement was inappropriate.

The Michigan Legislature may not like Defendant's litigation strategy (although it is difficult to imagine what more the Attorney General could do), but that is not a justification for intervention as of right under Rule 24(a)(2)—otherwise, anyone with an interest aligned with any defendant could intervene in virtually any matter in a misguided attempt to simply litigate the case differently. *See Geier v. Sundquist*, No. 95-5844, 94 F.3d 644, at *2 (6th Cir. Aug. 14, 1994) (unpublished opinion) ("A mere disagreement over litigation strategy … does not, in and of itself, establish inadequacy of representation." (quoting *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)).

C. The Motion to Intervene is untimely.

Even if the motion to intervene did not suffer from the deficiencies discussed above, it should still be denied because it is untimely. In all instances, a motion to intervene must be timely. Timeliness is not measured in months but in the progress

[3] Defendant was involved in *College Democrats* but only in her role as attorney for the Secretary of State.

of the case before intervention is requested, the proposed intervenor's purpose and diligence in pursing intervention, and the prejudice to the parties created by any delay in intervening. *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011); *Jansen*, 904 F.2d at 340. Here, the Legislature's motion is not timely for three reasons.

First, the case has advanced rapidly, and its resolution is within sight. At this point, the Court has pending before it two fully briefed, dispositive motions including Defendant's second motion to dismiss and the motion on Plaintiffs' ultimate request for relief (a motion for preliminary and *permanent* injunction).

Second, the Legislature unduly delayed in seeking intervention until after the first motion to dismiss, after the amended complaint, after the motion to expedite, after the motion for preliminary injunction, after the case was transferred from Judge Goldsmith to Judge Dawkins, after the second motion to dismiss, and after the Rule 26 conference, and after discovery requests have been issued, despite the fact that it has known about the case since its inception. *See* Legislature's Motion to Intervene, *Priorities v. Benson*, No. 19-13188 (E.D. Mich. Nov. 17, 2019) Dkt. 7 at 7 (describing this lawsuit). Indeed, the Legislature first stated its interest in intervening in this suit back in November when it was first filed. *Id.* at 8. It identifies no reason for its delay. That delay, however, strongly militates against granting intervention.

See Stupak-Thrall v. Glickman, 226 F.3d 467, 478 (6th Cir. 2000); *Blount-Hill*, 636 F.3d at 285-86.

Third, the motion should not be granted because allowing intervention at this point would prejudice Plaintiffs, as well as the public at large. Plaintiffs have consistently explained the critical need for a speedy resolution of this case. *See* Dkt. 23, 25. For the reasons discussed in Plaintiffs' opposition to the Republican Organization's motion to intervene, *see* Dkt. 43 at 17-19, allowing intervention now would unnecessarily complicate and delay the proceedings. The Legislature has promised as much: it has promised to file an additional motion to dismiss (beyond the two that the Attorney General has already filed in this case) and suggests it would oppose any effort to settle. Dkt. 39 at 9-11. It also promises to seek reassignment of this case to an entirely different judge, if permitted to intervene. *See* Dkt. 39 at 11. The Legislature's delay in seeking intervention, coupled with its intended litigation strategy, exacerbates the prejudice that would follow to Plaintiffs if the motion to intervene is granted by diminishing the likelihood that the case will be resolved in advance of the next election. *See Serv. Emps. Int'l Union Local 1 v. Husted*, 515 F. App'x 539, 542 (6th Cir. 2013) (finding denial of permissive intervention appropriate where motion was filed after preliminary injunction briefing because delay would pose "a significant risk of upsetting the expedited schedule necessitated by the upcoming election").

II. The Court should deny permissive intervention.

The Legislature's request in the alternative for permissive intervention should also be denied. Here, the Legislature relies on the same arguments advanced to support intervention as of right, *see* Dkt. 39 at 21-22; but permissive intervention is inappropriate for the same reasons: the motion is not timely, the Legislature lacks a substantial legal interest in this action, and it has failed to demonstrate that the Attorney General inadequately represents any substantial legal interest. *See* Dkt. 43 at 19-21; *see Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 759 (6th Cir. 2018) ("The fact that Saginaw's position is being represented counsels against granting permissive intervention"). Moreover, as discussed above and in Plaintiffs' Opposition to the Republican Organizations' motion to intervene, the Legislature's involvement in this case would also complicate and extend litigation proceedings. *See id.* In sum, the Court should not allow the Legislature to intervene, where doing so would only delay and complicate these proceedings while providing no meaningful benefit to the Court, the existing parties, or the interests of justice.

CONCLUSION

For the reasons set forth above, the Michigan Legislature's Motion to Intervene should be denied.

Dated: March 12, 2020

Respectfully submitted,

By: /s/ Marc E. Elias

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

LOCAL RULE CERTIFICATION

I, Marc Elias, certify that this document and complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts).

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