UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al*., Plaintiffs v. JOCELYN BENSON, in her official capacity as the Secretary of State of Michigan, *et al.*, Defendants.	**Case No. 1:22-cv-00054** **Three-Judge Panel** **28 U.S.C. § 2284(a)**

PLAINTIFFS' OPPOSITION
TO THE MICHIGAN VOTERS' MOTION TO INTERVENE

INTRODUCTION

According to the seventeen individuals who seek to intervene in this action as defendants (collectively, the "Proposed Intervenors"), they wish "to defend the Commission's congressional map and help ensure that any changes to the map as a result of this lawsuit do not upend it altogether—and with it, the will of the voters who approved the Commission." (ECF No. 16, PageID.255). At no point, however, do they assert any interest other than an abstract concern with "voting in congressional districts that they believe to be fair and constitutional," (ECF No. 16, PageID.258), which is the same interest shared by every eligible voter in the State of Michigan (including Plaintiffs). They have, moreover, offered no justification whatsoever in support of the *ipse dixit* that their interest differs from the fourteen State Defendants already defending this action. But this Court need not take the undersigned's word for it. Counsel for the Proposed Intervenors have recently made these same points in a case pending in a sister district:

> *PILF claims it has a right to intervene to defend the challenged Virginia election laws largely based on PILF's purported general interests in "election integrity" and ensuring that state election laws are enforced. These generalized interests are insufficient under Fourth Circuit precedent, which does not permit intervention as of right upon concerns that would open court dockets to anyone and everyone. Moreover, the named [government] Defendants share both of these general interests and are more than able—indeed, are best suited—to defend them in this litigation.*
>
> The Elias Law Group, Opposition to Motion to Intervene,
> *Democratic Party of Virginia v. Brink*,
> No. 3:21-cv-756 (E.D. Va.)
> (ECF No. 25, PageID.218)

In that case, the Eastern District of Virginia agreed with the Elias Law Group and denied intervention, observing, first, that the group seeking intervention and the State "Defendants have effectively identical interests: upholding the constitutionality of Virginia's voting laws and safeguarding the integrity of Virginia's elections[,]" and, concluding, second, that the would-be intervenors had not made the requisite "strong showing of inadequacy" necessary for intervention. Order, *Democratic Party of Virginia v. Brink*, No. 3:21-cv-756 (ECF No. 36, PageID.360-362) (E.D. Va. Jan. 31, 2022). There is no daylight between the Eastern District of Virginia's reasoning and the analysis that should guide this Court's resolution of this motion.

Simply put, the Court should see this intervention request for what it is—a distraction by a well-connected political law firm interested only in further entrenching what it perceives to be a map that benefits the Democratic Party—and should treat it accordingly. Because the Proposed Intervenors have asserted no interest in the outcome of this lawsuit that differs from those of the State Defendants (*i.e.*, maintenance of Michigan's current congressional districts), they have not, and cannot, satisfy Rule 24(a)'s criteria for intervention as of right. And because their participation will be at best duplicative and at worst wholly disruptive to the time-sensitive proceedings currently pending before this three-judge court, their request for permissive intervention under Rule 24(b) should be denied.

ARGUMENT

I. THE INDIVIDUALS SEEKING INTERVENTION DO NOT SATISFY RULE 24(A)(2)'S CRITERIA TO INTERVENE AS OF RIGHT.

Rule 24(a) provides that, "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action[] and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Sixth Circuit has "interpreted Rule 24(a) as establishing four elements, each of which must be satisfied before intervention as of right will be granted[.]" *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000). They include: "'(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.'" *Id*. (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) and citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)).

Although Plaintiffs do not challenge the timeliness of the motion to intervene, the Proposed Intervenors cannot satisfy any of the other criteria necessary for intervention as of right. "'Failure to meet [any] one of the [four] criteria will require that the motion to intervene be denied.'" *Id.* (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)). For this reason, their request should be denied.

A. None of the individuals seeking intervention have any particularized, legally protectable interest in this action that could conceivably be impaired.

The sum total of Proposed Intervenors' asserted interests in this case is as follows:

> Here, Proposed Intervenors are registered Michigan voters who have voted previously and plan to vote again in federal congressional elections. Proposed Intervenors support and have an interest in voting in congressional districts that they believe to be fair and constitutional. If this Court orders Plaintiffs' proposed remedy and enjoins the Commission's congressional plan on the basis of Count II, Proposed Intervenors' congressional districts will be changed, possibly dramatically. As in *Miller*, without intervention, Proposed Intervenors may lose the opportunity to ensure that one or more electoral campaigns in Michigan are conducted under . . . terms that [they] believe[] to be fair and constitutional.

(ECF No. 16, PageID.258-259) (citation omitted) (alteration in original).

That's it. If the one paragraph offered by the Proposed Intervenors is enough to satisfy Rule 24(a)'s "substantial legal interest" requirement, then every one of the roughly eight million registered voters in the State of Michigan has a similar right to intervene in this case. [1] That is not the law.[2]

Indeed, this case bears a striking resemblance to *Athens Lumber Co. v. Federal Election Commission*, 690 F.2d 1364 (11th Cir. 1982), a case cited favorably by the Sixth Circuit in *Michigan State AFL-CIO v. Miller*. *See* 103 F.3d 1240, 1246 (6th Cir. 1997). In *Athens Lumber*, the Eleventh Circuit found that a would-be intervenor who asserts an interest that "is shared with all . . . citizens concerned about the ramifications" of a law must be denied intervention under Rule 24(a). 690 F.2d at 1366. Simply put, an "interest [that] is so generalized . . . will not support a

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[1] Or, as counsel for the Proposed-Intervenors recently argued in a different case:

> [PILF's] purported interests in ensuring that state election administration laws are enforced and in election integrity . . . are highly generalized interests in which the Commonwealth Defendants not only share but have a more direct claim. . . . It is well settled that a proposed intervenor's interest must be distinct from an interest shared by the broader public.

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[2] When it suits their narrative in other pending litigation, counsel for the Proposed Intervenors tend to agree. *See supra* at 2.

claim for intervention of right." *Id*. (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464 (1982); *Piedmont Heights Civic Club v. Moreland*, 83 F.R.D. 153 (N.D. Ga. 1979); *United States v. ITT Corp.*, 349 F. Supp. 22 (D. Conn. 1972), *aff'd sub nom., Nader v. United States*, 410 U.S. 919 (1973)). The Proposed Intervenors, however, can muster no more than what the Eleventh Circuit found lacking in *Athens Lumber*.

Indeed, even *Miller* itself, the case upon which the Proposed Intervenors rely the heaviest, cannot support the weight they foist upon it. In *Miller*, the Sixth Circuit held that the Michigan Chamber of Commerce had the right to intervene as a defendant in a case brought by several labor unions against the Michigan Secretary of State. *See* 103 F.3d at 1243–44. At issue in *Miller* were several provisions of Michigan's Campaign Finance Act, and the plaintiff labor unions argued that "the Chamber's interest [w]as remote, consisting of nothing more than a desire to see a law enforced against someone else." *Id.* at 1245. The Sixth Circuit conceded that "the intervention issue" was "a close one," but allowed intervention based on the following "particularly compelling facts":

> (1) The Chamber was "a vital participant in the political process that resulted in legislative adoption of the [law at issue] in the first place";
>
> (2) It was "a repeat player in Campaign Finance Act litigation";
>
> (3) It was "a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing"; and
>
> (4) It was "an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs."

Id. at 1246-47.

The Proposed Intervenors in this case, in contrast, have argued only that they "are registered Michigan voters who have voted previously and plan to vote again in federal congressional elections." (ECF No. 16, PageID.258). They have offered no additional interests

whatsoever beyond those shared by the entirety of the Michigan electorate, let alone anything resembling the "particularly compelling facts" that nudged *Miller* into the realm of a "close" case for intervention. *Id*. at 1245, 1247.

Even if they had, they provide nothing but the most abstract of generalities to suggest that their interests might be impaired by this lawsuit. The alpha and omega of their argument is this: "If this Court orders Plaintiffs' proposed remedy and enjoins the Commission's congressional plan on the basis of Count II, Proposed Intervenors' congressional districts will be changed, possibly dramatically." (ECF No. 16, PageID.258-259). Given their apparent agreement that the Commissioners' maps violate the one-person, one-vote rule of Article I, Section 2, (*see* ECF No. 16-2 (moving to dismiss Count II only); ECF No. 16-3 (asserting affirmative defenses as to Count II only)), it stands to reason that the Proposed Intervenors know that the Commissioners' map must change (indeed, for the Proposed Intervenors in overpopulated districts, changing the maps will benefit them). Their suggested "impairment," then, is no more than their counsel's concern that a constitutionally drawn map will make winning elections more difficult for their preferred candidates.[3]

B. The fourteen government defendants, including the Michigan Secretary of State and every one of the Commissioners who adopted the Chestnut map, adequately represent whatever abstract interest the individuals seeking intervention might have.

Even if the Proposed Intervenors could demonstrate that they have a substantial legal interest at risk of impairment by this case (and to be sure, they cannot), they have not, and cannot, show that the State Defendants will fail to adequately defend those interests. The Proposed Intervenors "bear[ ]the burden of demonstrating inadequate representation[,]" *Meyer Goldberg,*

[3] As the U.S. Supreme Court held in *Rucho v. Common Cause*, such a claim "present[s] political questions beyond the reach of the federal courts." 139 S. Ct. 2484, 2506–07 (2019).

Inc. v. Goldberg, 717 F.2d 290, 293 (6th Cir. 1983), which means they "must overcome the presumption of adequate representation that arises when," as here, "they share the same ultimate objective as a party to the suit." *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005) (citing *Bradley v. Milliken,* 828 F.2d 1186, 1192 (6th Cir. 1987)). "An applicant for intervention fails to meet his burden of demonstrating inadequate representation 'when no collusion[,]'" adverse "'interest[s]," or failure "'in . . . fulfillment of [a] duty'" is shown. *Bradley*, 828 F.2d at 1192. "A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation." *Id*.[4]

The Sixth Circuit has disallowed intervention as of right when, for example, "[t]he relief requested by the proposed intervenors and the State of Michigan in their respective pleadings is nearly identical[.]" *United States v. Michigan*, 424 F.3d at 444. Indeed, roughly a month ago, the Sixth Circuit reiterated that intervention as of right is inappropriate "where, as here, the 'proposed intervenors have not identified any separate arguments unique to them that they would like to make.'" *Sierra Club v. United States EPA*, No. 21-3057, 2022 U.S. App. LEXIS 577, at *4 (6th Cir. Jan. 7, 2022). The Proposed Intervenors, however, have upped the ante by asserting a lone argument that belongs *exclusively* to State Defendants.

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[4] In another lawsuit, the Proposed Intervenors' counsel agreed:

> When a proposed intervenor shares their ultimate objective with that of an existing party, the existing party's representation is presumptively adequate and rebuttable only if the intervenor can show clearly adverse interests, collusion, or nonfeasance. . . . This burden is heightened when the existing party with whom the intervenor shares their ultimate objective is a government agency.
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> The Elias Law Group, Opposition to Motion to Intervene, *Democratic Party of Virginia v. Brink* No. 3:21-cv-756 (E.D. Va.) (ECF No. 25).

Specifically, their cursory partial motion to dismiss asserts an argument under the *Pennhurst* Doctrine, which is a principle of state sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). And although they are mistaken—Count II is not foreclosed by *Pennhurst*—it remains true that the only entities who have a *Pennhurst* argument to assert are the entities that Plaintiffs have already sued—the Michigan Secretary of State and the Commissioners. *See, e.g., Gragg v. Ky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002). At a minimum, the State Defendants are the entities most likely to vigorously defend their own sovereign immunity, and the Commissioners are the State Officials most likely to vigorously defend the congressional voting boundaries that they drew. Put bluntly, the Proposed Intervenors have nothing whatsoever to add to this case (except an inevitable distraction) and their failure to even try to show how the current Defendants will fail to adequately represent them is enough, standing alone, to quickly dispense with their motion to intervene.

Here, "[t]he views of the" Proposed Intervenors and the State "Defendants are in complete accord," *Stupak-Thrall*, 226 F.3d at 476: they both think that Plaintiffs have it wrong. For this reason, any assertion that the Proposed Intervenors "must intervene to protect their 'different' concerns is unsupported." *Id*. If this Court rules in favor of the State Defendants (and it should not), then the Proposed Intervenors' "concerns [will be] met perfectly—no more and no less." *Id*. Accordingly, the Proposed Intervenors are not entitled to intervene in this case as of right.

II. BECAUSE THE INDIVIDUALS SEEKING INTERVENTION HAVE NOTHING TO ADD AND WILL UNDOUBTEDLY DELAY RESOLUTION OF THESE TIME-SENSITIVE PROCEEDINGS, THE COURT SHOULD DENY THEIR PERMISSIVE-INTERVENTION REQUEST.

Rule 24(b)(1)(B) provides, that, "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." "Once these two requirements are established, the district court must then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine

whether, in the court's discretion, intervention should be allowed." *United States v. Michigan*, 424 F.3d at 445. In "[w]eighing the benefits and burdens of a permitted intervention, a court should ensure that the litigation will not 'becom[e] unnecessarily complex, unwieldy or prolonged.'" *Va. Uranium, Inc. v. McAuliffe*, No. 4:15-cv-00031, 2015 U.S. Dist. LEXIS 141459, at *11 (W.D. Va. Oct. 19, 2015) (citing *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994)). And where, as here, "intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes or disappears entirely." *Id*. (quoting *Tutein v. Daley*, 43 F. Supp. 2d 113, 131 (D. Mass. 1999) (citation omitted)).

In the Proposed Intervenors' view, their Proposed Answer and Proposed Partial Motion to Dismiss "raise defenses that are directly responsive to Plaintiffs' claims, and therefore share common questions of law and fact with Plaintiffs' claims." (ECF No. 16, PageID.260). As noted above, *supra* at 8, their Proposed Answer and Proposed Partial Motion to Dismiss advance arguments that the State Defendants are likely to raise (indeed, the State Entities are the *only* entities that can raise them). In other words, the Proposed Intervenors' arguments already mirror those that the State will assert, and the Sixth Circuit has "rejected the suggestion that a proposed intervenor seeking to submit a filing that 'substantially mirror[s] the positions advanced' by one of the parties has necessarily identified a common question of law or fact." *Kirsch v. Dean*, 733 F. App'x 268, 279 (6th Cir. 2018) (quoting *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 757 (6th Cir. 2018)). If the Proposed Intervenors' position were correct, then "'any party wishing to intervene to support one side of a lawsuit could simply reiterate the [positions] of that side and thus meet the 'common question' requirement." *Id*. (quoting *Bay Mills Indian Cmty.*, 720 F. App'x at 757). "'Permissive intervention,'" naturally, "'cannot be interpreted so broadly.'" *Id*. (quoting *Bay Mills Indian Cmty.*, 720 F. App'x at 757).

In recognition of this case's urgency, this Court has already granted Plaintiffs' motion to expedite consideration of its preliminary-injunction motion. (*See* ECF No. 24.) At present, ten Plaintiffs, fourteen State Defendants (including the Michigan Secretary of State), and a host of lawyers are working to ensure that this case will progress rapidly enough to provide Michiganders with certainty about their congressional districts before the April 19, 2022 deadline for congressional candidates to submit petitions to either the Secretary of State or the County Clerk's office.[5] Given the threadbare and redundant arguments already advanced by the Proposed Intervenors, it follows that "[t]he benefit, fairly perceived, from . . . intervention does not justify the burden." *Va. Uranium, Inc.*, 2015 U.S. Dist. LEXIS 141459, at *11-12. The State Defendants "adequately represent the [Proposed Intervenors'] interests," and the Proposed Intervenors' motion to dismiss will "merge[], in substance, with Defendants'." *Id*. Because "intervention would require additional rounds of responsive briefs, [and] overlapping matters raised in the motions already extensively briefed. . . .[t]he scales weigh against intervention." *Id*. The Court should therefore exercise its discretion to deny the Proposed Intervenors' request for permissive intervention.

CONCLUSION

For the foregoing reasons, the Proposed Intervenors' motion should be denied.

Dated: February 10, 2022

Respectfully submitted,

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[5] *See* Mich. Dept. of State Bureau of Elections, *Filing for Office: Partisan Elective Offices* at 9 (Jan. 2022) https://www.michigan.gov/documents/sos/Filing_for_Office_Partisan_Offices_2022_719292_7.pdf (last visited Feb. 9, 2022).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, in reliance on the word processing software used to create this Brief, that:

1. This Brief complies with the word-count limitation of W.D. Mich. LCivR 7.3(b)(i) because this Brief in support of a non-dispositive motion contains 3,071 words (including headings, footnotes, citations, and quotations but not the case caption, cover sheets, table of contents, table of authorities, signature block, attachments, exhibits, or affidavits).

2. The word processing software used to create this Brief and generate the above word count is Microsoft Word 2016.

Dated: February 10, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on February 10, 2022.

Dated: February 10, 2022

/s/ Charles R. Spies
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