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 VOTERS NOT POLITICIANS' MOTION TO INTERVENE

In a tacit admission that they have neither Article III standing[1] nor any interest different than that of the State Defendants currently involved in this case,[2] Voters Not Politicians ("VNP") has sought permissive intervention from this Court. Its threadbare request is premised entirely on the following: "[B]y participating in this lawsuit as an intervenor-defendant, VNP will be able to offer its expertise and insights as the drafter and primary sponsor of the amendment that created the Commission as the Court considers the issues raised by the Plaintiffs' Complaint." (ECF No. 22, PageID.355.) In their view, allowing their participation "would ensure that the distinct interests of the People are represented as the case moves forward." (ECF No. 22, PageID.354-355).

[1] *See* ECF No. 22, PageID.353 ("Notably, in the Sixth Circuit, an intervenor need not establish Article III standing for permissive intervention.") (citations omitted).

[2] *See* ECF No. 22, PageID.354 ("In a motion seeking permissive intervention, the proposed intervenor need not demonstrate that the existing Defendants will inadequately defend this case; that requirement applies only to parties seeking intervention as of right.") (citations omitted).

The problem for VNP, however, is threefold. First, Plaintiffs have not challenged the Michigan Constitutional Amendment that created the Commission or the structure of the Commission itself, and VNP's role as drafter and primary sponsor of the Amendment provides them with no relevant expertise regarding the questions raised—*i.e.*, whether the Commissioners' work complies with the federal constitution. Second, as registered and active voters who reside throughout the State, Plaintiffs themselves are in a far better position to represent "the distinct interests of the People" than any "non-profit advocacy association." (ECF No. 22, PageID.352). Third, VNP's proposed Motion to Dismiss and Answer set out the same basic arguments that the State Defendants will undoubtedly assert (*i.e.*, sovereign immunity and failure to state a claim), proving conclusively that VNP's participation will inevitably be redundant and accomplish nothing more than slowing down a case that, for all the reasons previously articulated (and recognized by this Court, (*see* ECF No. 24, PageID.422-423), necessitates expedition.[3]

As described at greater length below, *see infra* at 3-5, VNP cannot satisfy the minimum requirements to trigger the Court's permissive-intervention discretion. But if it had, the Court should nonetheless exercise its discretion to decline VNP's attempt to invite itself into these proceedings. This case in general, and the *de facto* dispositive briefing in particular, are already well underway. Given the certainty needed by the Michigan Electorate before the 2022 election cycle proceeds much further, VNP's participation will accomplish nothing but unnecessary complication and prejudice.

LEGAL CRITERIA FOR PERMISSIVE INTERVENTION

Rule 24(b) provides, that, "[o]n timely motion, the court may permit anyone to intervene

[3] *See also* Plaintiffs' Motion for Expedited Oral Argument. (ECF No. 25, PageID.424-430).

who . . . has a claim or defense that shares with the main action a common question of law or fact."[4] "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 438, 445 (6th Cir. 2005). 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).

ARGUMENT

In VNP's view, its "defense clearly shares common questions of law and fact with the main action" because:

> As the drafters of the constitutional amendment that created the Commission and the primary supporters of the ballot initiative that approved it, VNP obviously has a strong interest in ensuring that the Commission functions as intended and that efforts to undermine its authority or undo the purpose of the amendment are curbed. VNP's defense of the Commission's use of the constitutional redistricting criteria in the priority in which they were enshrined into the Michigan Constitution by the amendment is critical to its mission to ensure that the People of the State of Michigan continue to have a voice in the decisions that shape their government and a separate representative in this case as it moves forward.

(ECF No. 22, PageID.354 (emphasis omitted).) This argument, however, flops for at least two separate reasons. The first is that VNP misunderstands the case Plaintiffs have brought. The issues raised turn on whether the Commissioners' work complies with the federal constitution. For that reason, the role VNP played in helping create the Commission provides it with no "expertise"

[4] Plaintiffs do not challenge the timeliness of VNP's motion.

relevant to the issues actually being litigated, which means that its purported "strong interest" has little in "common" with the issues that the Court is tasked with resolving.

VNP's more glaring error, however, is that 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). And VNP's proposed answer and proposed motion to dismiss demonstrate that they have nothing to offer other than arguments that will indeed "substantially mirror" those of the State Defendants. The former includes textbook affirmative defenses that any State Defendant would raise (*e.g.*, subject-matter jurisdiction, failure to state a claim). (*See* ECF No. 22-3,PageID.416-417). The latter advances, primarily, an argument that *only* State entities—*not* "non-profit advocacy association[s]," (ECF No. 22, PageID.352)—can assert (sovereign immunity). *See, e.g., Gragg v. Ky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002). (*See also* ECF No. 22-2, PageID.372-375.)

If VNP were allowed to intervene, 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." *Kirsch*, 733 F. App'x at 279 (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). Indeed, given the "government's adequate representation, the case for permissive intervention diminishes or disappears entirely." *Va. Uranium, Inc.*, 2015 U.S. Dist. LEXIS 141459, at *11 (quoting *Tutein v. Daley*, 43 F. Supp. 2d 113, 131 (D. Mass. 1999) (citation omitted)). The Court need proceed no further to deny VNP's request.

But even if VNP could satisfy the rudiments for permissive intervention, the administrative burdens exacted by VNP's participation far exceed whatever negligible benefit their superfluous participation would offer. This Court has already granted Plaintiffs' motion to expedite consideration of its preliminary-injunction motion, (*see* ECF No. 24), and in light of recent developments regarding the *Purcell* Doctrine at the U.S. Supreme Court, *see Merrill v. Milligan* and *Merrill v. Caster*, Nos. 21A375 and 21A376 slip op. (U.S. Feb. 7, 2022), Plaintiffs have asked the Court to expedite the proceedings even more, (*see* ECF No. 25, PageID.424-430). Ten Plaintiffs, fourteen State Defendants (including the Michigan Secretary of State), and deep teams of lawyers on both sides are working to ensure that this case will resolve quickly 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 duplicative arguments offered by VNP in its proposed answer and proposed motion to dismiss, 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 VNP's 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*. Accordingly, Plaintiffs respectfully request that the Court decline to allow VNP to participate as permissive intervenors.

[5] *See* Filing for Office, Mich. Dept. of State, Bureau of Elections at 3 (Jan. 2022) https://www.michigan.gov/documents/sos/Filing_for_Office_Partisan_Offices_2022_719292_7.pdf (last visited Feb. 2, 2022).

CONCLUSION

For the foregoing reasons, VNP's motion to intervene should be denied.

February 10, 2022

Respectfully submitted,

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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 1,409 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

/s/ Charles R. Spies
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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

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