

STATE OF MICHIGAN
IN THE SUPREME COURT

PROMOTE THE VOTE 2022

Supreme Court No. 164755

Plaintiff,

v.

THE BOARD OF STATE
CANVASSERS, JOCELYN BENSON,
in her official capacity as Secretary of State, and
JONATHAN BRATER, in his official capacity as
Director of Elections,

Defendants.

**THIS MATTER INVOLVES A
RULING THAT A PROVISION
OF THE CONSTITUTION, A
STATUTE, RULE OR
REGULATION, OR OTHER
STATE GOVERNMENTAL
ACTION IS INVALID.**

**PLAINTIFF PROMOTE THE VOTE 2022'S RESPONSE IN OPPOSITION TO
PROPOSED-INTERVENING DEFENDANT DEFEND YOUR VOTE'S
MOTION TO INTERVENE**

*****IMMEDIATE AND EXPEDITED CONSIDERATION BY
SEPTEMBER 8, 2022 REQUESTED*****

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2022*

Promote the Vote 2022 (“PTV22”), through counsel Clark Hill PLC, for its Response in Opposition to Proposed-Intervening Defendant Defend Your Vote’s (“DYV”) Motion to Intervene states as follows:

1. The Court should deny DYV’s eleventh-hour motion to intervene because DYV fails to satisfy the requirements for intervention as of right or permissive intervention and because the motion is not timely.

2. As to intervention as of right, MCR 2.209(A)(3) – which is what DYV moves under – sets forth the following requirements a party seeking to intervene must meet:

(3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

3. Stated differently, a proposed intervenor has the right to intervene (1) when the application to intervene is timely, (2) the party has an interest in the matter that may be impaired or impeded pending the disposition of the case, and (3) the existing parties will not adequately represent the nonparty’s interests. *Oliver v State Police Dep’t*, 160 Mich App 107, 115; 408 NW2d 436 (1987).

4. Michigan courts have not defined any particular factors to analyze the timeliness of an intervention motion. However, the Michigan Court of Appeals has held that a motion to intervene was timely when filed “before any proceedings or discovery had been taken.” *Karrip v Cannon Twp*, 115 Mich App 726, 731; 321 NW2d 690 (1982).

5. Here, DYV – despite describing itself as “the only entity who filed a timely challenge to PTV’s petition and presented oral argument through counsel at the Board of

Canvassers' meeting where it considered PTV's petition"¹ – waited five days to move to intervene and filed its motion and other papers at 4:23 p.m. on September 6. DYV knew this lawsuit would be forthcoming and indeed, PTV22 filed this lawsuit within 24 hours of the Board's August 31, 2022 meeting.

6. The proceedings were already well-underway by the time DYV sought to intervene. Indeed Defendants – through their counsel at the Attorney General's office – filed their responsive briefs by noon on September 7, 2022.

7. And given the upcoming ballot proofing and preparation deadlines, including the September 9 deadline for ballot wording for constitutional amendments pursuant to Article 12, Section 1 of the Constitution, PTV22 requested a decision by September 8, 2022.

8. Moreover, DYV's lack of diligence extends well beyond the five days it took to file its intervention papers. DYV and other opposing groups had months while the petition was in circulation to file a lawsuit raising these issues. And DYV waited more than a month after PTV22 submitted its signatures to file a suit raising these issues. It could have done so at any time and it simply sat on its hands.

9. Thus, given DYV's inexplicable delay in seeking to intervene and the upcoming deadlines, its request is not timely and should be denied.

10. More fundamentally, DYV has no interest to protect in this matter, so its request for intervention by right fails on this prong too. As DYV admits in its proposed brief, "[t]he only

¹ This is inaccurate. While not submitting a formal challenge, Secure MI Vote, through its counsel Robert Avers, appeared at the Board's August 31, 2022 hearing and spoke against certification and parroted a portion of DYV's alter-or-abrogate challenge. Mr. Avers also spoke against approval as to form at the Board's February 11, 2022 hearing on behalf of Secure MI Vote.

duty to ensure compliance with the alter-or-abrogate requirement lies with the petition sponsor (here, PTV).” (DYV Br. at 34.)

11. Thus, DYV cannot intervene by right because they have no interest in the obligation to comply with the alter-or-abrogate requirement.

12. Finally, there is no basis for DYV’s claim that its interests are not adequately represented. As DYV’s Brief clearly states, it “seeks to intervene in this case—either as of right or on a permissive basis—to raise the arguments it previously made in its challenge to PTV’s Petition, as well as those arguments raised at the August 31, 2022 meeting of the Board of State Canvassers.” (DYV Mot. at 5.) But DYV’s challenge and the oral argument are all before this Court and part of the record for the Court to review and consider.

13. DYV’s request for permissive intervention fails too.

14. MCR 2.209(B) governs permissive intervention and states as follows:

(B) Permissive Intervention. On timely application a person may intervene in an action

(1) when a Michigan statute or court rule confers a conditional right to intervene; or

(2) when an applicant’s claim or defense and the main action have a question of law or fact in common.

In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. (emphasis added)

15. For the reasons explained above, DYV’s motion to intervene is not timely and its intervention will unduly delay and prejudice the adjudication of the rights of the original parties, especially in light of the September 9, 2022 ballot wording deadline and given the fact that DYV waited too long to move to intervene and also given the fact that DYV could have brought a lawsuit at any time in the months while the petition was being circulated but chose not to do so.

16. Additionally, because DYV admits that the sole responsibility for ensuring compliance with the alter-or-abrogate requirement lies with PTV22 – *see* DYV Br. at 34 – there is no common claim or defense at issue

17. Thus, DYV’s request for permissive intervention fails on this basis too.

WHEREFORE, Plaintiff Promote the Vote 2022 respectfully requests that this Court **DENY** DYV’s Motion to Intervene.

Respectfully submitted,

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