STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES,

Plaintiffs-Appellants,
v

JOCELYN BENSON

Defendant-Appellee.

LEAGUE OF WOMEN VOTERS OF MICHIGAN, MICHIGANERS FOR FAIR AND TRANSPARENT ELECTIONS, HENRY MAYERS, VALERIYA EPSHTEYN, and BARRY RUBIN,

Appellants/Plaintiffs,
v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant-Appellee.
_____/

Supreme Court No. 160908

Court of Appeals No. 351073

Court of Claims No. 19-000092-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

Consolidated with:

Supreme Court No. 160907

Court of Appeals No. 350938

Court of Claims No. 19-000084-MM

DEFENDANT-APPELLEE SECRETARY OF STATE JOCELYN BENSON'S RESPONSE IN OPPOSITIONTO THE SENATE AND HOUSE'S MOTION TO INTERVENE IN CASE NO. 160907

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STATEMENT OF FACTS

On May 23, 2019, the League of Women Voters of Michigan (LWV), Michiganders for Fair and Transparent Elections, Henry Mayers, Valeriya Epshteyn, and Barry Rubin (LWV) filed a lawsuit, Court of Claims No. 19-000084-MM. The LWV Plaintiffs challenged the constitutionality of many of the amendments made by PA 608 that were addressed in OAG 7310.

Instead of seeking to intervene as a defendant in the pending action by LWV, on June 5, 2019 the Legislative Plaintiffs filed their own complaint for declaratory relief, Court of Claims No. 19-000092-MZ, against Secretary Benson seeking a declaration that the amendments made by PA 608 are constitutional.[1]

On July 3, 2019, the Court of Claims consolidated the Senate and House case with the action brought by the LWV Plaintiffs, Case No. 19-000084-MZ. Although neither LWV nor the Legislative Plaintiffs followed consolidation with a motion to intervene in each other's cases, LWV and the Legislative Plaintiffs filed motions for summary disposition in each other's cases, as permitted by the Court of Claims.

On July 8, 2019, the LWV Plaintiffs filed a motion for summary disposition in Case No. 19-000084-MM. In her August 19, 2019 response, Secretary Benson argued consistent with the analysis set forth in OAG 7310, meaning that she conceded certain amendments were unconstitutional, but defended those amendments upheld as constitutional in OAG 7310.

[1] On the same day, the Legislative Plaintiffs also filed a complaint for mandamus in the Court of Appeals against Secretary Benson, COA Docket No. 349225, but that action has since been dismissed.

On July 29, 2019, the Legislative Plaintiffs filed a motion for summary disposition in Case No. 19-00092-MZ. Secretary Benson filed her response to that motion on August 19, 2019 as well. (Def's App'x, pp 001-030, Resp to MSD w/o exs). As in the *LWV* case, Secretary Benson argued consistently with the analysis set forth in OAG 7310. *Id.*

The Court of Claims heard the motions for summary disposition in the consolidated cases on September 16, 2019. From the bench, the court ruled that the Legislative Plaintiffs did not have standing to bring their action (Case No. 19-00092), but that they would be allowed to participate as amicus curiae in Case No. 19-000084. The court partially ruled from the bench, concluding that the 15% signature distribution requirement and the petition checkbox requirement were unconstitutional but took the remaining arguments under advisement. The court suggested that the parties agree to an order preserving the status quo, which would continue the effect of OAG 7310 pending appeal. Counsel for LWV and Secretary Benson stipulated to such an order, and it was entered by the court on September 24, 2019. (Def's App'x, p 031-032, 9/24/19 Order).

On September 27, 2019, the court issued its opinion and order in the consolidated cases. (Pls' Merits Brf, Ex B, 9/27/19 Opinion). In the LWV's case, the trial court granted summary judgment in favor of LWV regarding the claims as to the 15% signature distribution requirement and the petition check-box requirement. The court denied summary judgment as to the petition affidavit requirement, which was contrary to both LWV's and Benson's arguments. Finally,

the trial court denied summary disposition as to several other amendments affecting the form of petitions and the collection of signatures and granted summary disposition in favor of Secretary Benson regarding those statutes. In the instant case, Court of Claims No. 19-000092, the trial court held that the Legislative Plaintiffs lacked standing to bring their case and dismissed their claims but accepted their filings as amicus curiae.

LWV filed a claim of appeal from their case in the Court of Appeals on October 7, 2019. (See Docket No. 350938). The Legislative Plaintiffs filed their claim of appeal arising out of their case on October 14, 2019. The two appeals were consolidated by order of the Court of Appeals. On November 5, 2019, LWV filed a bypass application in this Court, along with a motion for immediate consideration. The request for bypass was denied on December 18, 2019. (See MSC Case No 160492, 12/18/19 Order). However, this Court ordered the Court of Appeals to expedite resolution of the consolidated appeals and issue a decision by January 27, 2020. *Id.* The Court of Appeals followed with its own order setting forth an expedited briefing schedule in the appeals. (COA Order 12/20/19). Per this Court's order, the Court of Appeals issued its decision on January 27, 2020. (Pls' Brf, Ex A, 1/27/20 Opinions).

The Senate and House filed an application for leave to appeal in this Court from the Court of Appeals' decision in their appeal, Docket No. 351073, on February 3, 2020. LWV did not file an application for leave to appeal in this Court from the Court of Appeals decision in their appeal, Docket No. 350938. Per this Court's

February 4, 2020, Order, Secretary Benson, as Defendant-Appellee in Docket No. 351073, filed her answer in opposition to the Senate and House's application in MSC Case No. 160908. LWV also filed an answer in opposition to the Senate & House's application, although it is unclear what basis LWV has for doing so where they are not a party to the appeal.

On February 11, 2020, the Senate and House filed a motion to intervene in the *LWV, et al. v Benson* case.

ARGUMENT

I. The Senate and House's motion to intervene in *LWV, et al v Benson* should be denied where there is no pending appeal in which the Senate and House can seek to intervene.

When Secretary Benson stated in her answer opposing the Legislative Plaintiffs' application that she would not have opposed a motion to intervene, she meant a properly and timely filed motion. That is not the case here.

The Legislative Plaintiffs have moved to intervene in *LWV, et al v Benson*, docketed as Case No. 160907 in this Court. While this Court did assign a case number to the *LWV* case, the Plaintiffs in *LWV* have not sought leave to appeal in this Court.[2] Thus, there is no appeal pending before this Court in *LWV, et al v Benson*, arising out of the Court of Appeals' decision in Docket No. 350938. Without an active appeal in which to intervene, it appears the Legislative Plaintiffs' motion

[2] The Legislative Plaintiffs assert in their motion that after they filed their application for leave to appeal, this Court "promptly advised the Senate and House to also file a motion to intervene in the LWV case." (Mtn to Intervene, ¶ 13). Respectfully, there may have been some confusion as to whether both Court of Appeals docket numbers were being appealed, which is not the case.

must be denied as improper. A similar result occurred in *Federated Ins Co v Oakland Co Road Comm*, 475 Mich 286 (2006). There, the plaintiffs sued defendant Oakland County Road Commission to recover environmental clean-up costs. *Id.* at 289. The plaintiffs lost in the circuit court and the Court of Appeals affirmed. *Id.* The plaintiffs did not file an application for leave to appeal in this Court even though they lost on appeal. *Id.* Although the Attorney General had not been a party in the circuit court or in the Court of Appeals, "the Attorney General [ ] filed a timely application for leave to appeal in this Court as an intervening appellant." *Id.* This Court granted the application. *Id.*

In addressing the merits, this Court observed that "[r]esolution of whether this intervention and appeal are permissible implicates standing, the 'aggrieved party' concept, and what constitutes a justiciable controversy." *Id.* at 290. (citations omitted). Ultimately, this Court held that the Attorney General could not bring the appeal:

> The[ ] statutes purport to provide the Attorney General with the authority to prosecute, defend, and intervene in certain "actions." But, this case ceased to be an "action" when the losing parties below (plaintiffs) failed to file a timely application for leave to appeal in this Court. Once plaintiffs' deadline for filing a timely application for leave to appeal expired, the case ceased to be a justiciable controversy. [*Id.* at 294-295 (citations omitted).]

The Court observed that it is "not constitutionally authorized to hear nonjusticiable controversies," *id.*, and concluded "that there is no justiciable controversy because the Attorney General does not represent an aggrieved party and because neither of the losing parties below chose to file a timely application for leave to appeal. Under such circumstances, this Court does not have the authority

to hear the Attorney General's appeal." *Id.* at 297. The Court thus dismissed the appeal.

In this case, Plaintiffs in the *LWV* case are the winners and not losers, but as in *Federated*, they did not file a timely application for leave to appeal in this Court. Thus, there is no "action" in which the Legislative Plaintiffs can seek to intervene for purposes of pursuing an appeal. The motion to intervene should be denied under *Federated*.

Regardless, the motion is also untimely. Under MCR 2.209, a motion for intervention as of right or by permission must be made "[o]n timely application." This court rule should be construed liberally "to allow intervention where the applicant's interests may be inadequately represented." *Neal v Neal*, 219 Mich App 490, 492 (1996). However, "intervention may not be proper where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action." *Neal*, 219 Mich App at 493, quoting *Precision Pipe & Supply, Inc v Meram Construction, Inc,* 195 Mich App 153, 157 (1992).

The Legislative Plaintiffs suggest that their motion is timely "[b]ecause the Appeals were consolidated, litigated together, and decided together, all parties are on notice of the other parties' interests and legal arguments." (Mtn to Intervene, ¶ 20). Setting aside the fact that there is no appeal to intervene in the *LWV* case, the Legislative Plaintiffs have not acted timely here.

This Court observed long ago that intervention is "an action by which a third party becomes a party in a suit pending between others." *Ferndale Sch Dist v Royal*

Oak Twp, 293 Mich 1, 12 (1940) (citation and quotation omitted). An intervener must pursue intervention in a timely manner. *Id.* Generally speaking, an intervener must take the case as he or she finds it and cannot delay the trial of the cause. *Id.* "[A]n intervention in the exercise of an intelligent discretion by the trial court, will not be granted where the intervener has been guilty of laches after knowledge of the pendency of the suit, if any part of the same is thereby retarded, rendered nugatory or changes the position of the original parties to their detriment, although the original action has not resulted in a judgment." *Id.* And when a motion discloses that "the applicant may have been sitting by during the entire period the suit was pending, watching the progress of events, waiting to see what would develop, and only after the end had been reached and he found the result to be unsatisfactory did he conclude to try his own hand," its denial will not be "reversed without a clear showing that it abused its authority." *Id.* at 13 (citation and quotation omitted).

The Legislative Plaintiffs have had plenty of time to properly move to intervene in the *LWV* case but failed to do so. They could have done so in the Court of Claims but did not. They could have done so in the Court of Appeals but they did not. And in fact, back on December 4, 2019, this Court essentially signaled to the Legislative Plaintiffs that they should be seeking to intervene when it instructed them to move to intervene in LWV's bypass application in that Court. (Mtn to Intervene, ¶ 11). Instead, they seek to do so now after LWV's case has concluded. Where neither the LWV Plaintiffs nor Secretary Benson have appealed to this Court

from Docket No. 350938, the Legislative Plaintiffs' attempt to disturb the result in that appeal is detrimental to its original parties—LWV and Secretary Benson. This Court should deny the motion as untimely.

Finally, the Legislative Plaintiffs' assertion that they are entitled to intervene because their interests were not adequately represented in the *LWV* case is unpersuasive. As discussed in Secretary Benson's answer to the application at pages 17-19, the Legislative Plaintiffs fully participated in the Court of Claims through briefing and argument, and fully briefed the issues in the Court of Appeals as well. Plaintiffs have been heard. Their continued complaining about the manner in which the cases were defended, i.e., consistent with OAG 7310, is likewise unavailing. Once Attorney General Nessel issued OAG 7310, the opinions contained therein established the legal position of the Attorney General, the Department of Attorney General, and Secretary Benson, as the requesting state officer. Had litigation commenced before issuance of the opinion, it is possible that it may have proceeded differently.[3] But that was not the chronology here. The motion to intervene should be denied.

[3] As the Legislative Plaintiffs note, sometimes an Attorney General may take a different legal position in a case than that of the client agency the Department of Attorney General is representing by intervening or participating as amicus curiae. See, e.g., *Protect Our Jobs v Board of State Canvassers*, 492 Mich 763 (2012); *Stand Up for Democracy,* 492 Mich 159 (2012); *Gary B., et al v Whitmer, et al*, Sixth Circuit Case Nos. 18-1855/1871. See also *Attorney General v Public Service Comm*, 243 Mich App 487 (2000).

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant-Appellee Secretary of State Jocelyn Benson respectfully requests that this Court deny the Legislative Plaintiffs' motion to intervene.

Respectfully submitted,

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