

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

PHILIP M. O'HALLORAN, M.D., BRADEN
GIACOBAZZI, ROBERT CUSHMAN,
PENNY CRIDER, and KENNETH CRIDER,

Plaintiffs,

Case No. 22-000162-MZ

v.

Hon. Brock A. Swartzle

JOCELYN BENSON, in her official capacity
as Secretary of State for the State of Michigan
and JONATHAN BRATER, in his official
capacity as Director of the Michigan Bureau of
Elections,

Defendants.

RICHARD DEVISSER, MICHIGAN
REPUBLICAN PARTY, and REPUBLICAN
NATIONAL COMMITTEE,

Plaintiffs,

Case No. 22-000164-MZ

v.

Hon. Brock A. Swartzle

JOCELYN BENSON, Secretary of State,
in her official capacity, JONATHAN
BRATER, Director of Elections, in his
official capacity,

Defendants.

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**DEVISSER PLAINTIFFS' 10/18/2022 RESPONSE IN OPPOSITION TO
DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE'S
10/13/2022 MOTION TO INTERVENE AS DEFENDANT OR, IN THE ALTERNATIVE,
PARTICIPATE AS AMICUS CURIAE**

Plaintiffs Richard DeVisser, the Michigan Republican Party, and the Republican National Committee (the "DeVisser Plaintiffs"), by and through their attorneys, Dickinson Wright PLLC, state as follows in support of their Response in Opposition to the Detroit/Downriver Chapter of the A. Philip Randolph Institute ("DAPRI")'s 10/13/2022 Motion to Intervene as Defendant or, in the alternative, Participate as Amicus Curiae:

1. The Court should deny DAPRI's eleventh-hour motion to intervene. While DAPRI seeks intervention both as of right and by way of permissive intervention, DAPRI fails to satisfy the requirements under either avenue for intervention. Likewise, even DAPRI's proposed involvement as an amicus could be denied because its papers were filed *after* the true parties in interest filed their merits briefing, and also because those papers are duplicative both of arguments raised by the Defendants and the policy considerations raised by amicus the Michigan Democratic Party ("MDP").

2. As an initial matter, DAPRI's motion should be denied because it failed to comply with Court of Claims Local Rule 2.119(A)(2), which provides that "[t]he moving party must affirmatively state that he or she requested opposing counsel's concurrence in the relief sought on

a specified date, and that opposing counsel has denied or not acquiesced in the relief sought, and therefore, that it is necessary to present the motion.” DAPRI, however, did not request the DeVisser Plaintiffs’ concurrence in the relief sought through its motion, and therefore its motion should be denied on those grounds alone. See also MCR 2.115(B) (providing that “on the court’s own initiative, the court may . . . strike all or part of a pleading not drawn in conformity with these rules.”).

3. Further, DAPRI’s motion must be denied (as DAPRI had to acknowledge) because its “intervention is barred by the Michigan Court of Appeals’ decision in *Council of Organizations & Others for Education about Parochialism v State*, 321 Mich App 456, 909 NW2d 449 (2017). According to *Council of Organizations*, because DAPRI is a private party, this Court does not have jurisdiction to grant this motion to intervene. *Id.* at 468.” DAPRI 10/13/2022 Motion to Intervene as Defendant or, In the Alternative, Participate as Amicus Curiae, Pg. 1. If state legislators acting in their individual capacities cannot intervene as defendants in the Court of Claims, then a private party such as DAPRI cannot intervene as a defendant in the Court of Claims, either.

4. To the extent that DAPRI claims to reserve its “right to intervene on appeal,” the DeVisser Plaintiffs oppose the notion that a private party such as DAPRI has any “right” to intervene on appeal when the court from which that appeal originated lacked subject matter jurisdiction over that same private party’s claims or defenses in the first instance.

5. MCR 2.209(A) requires that DAPRI’s motion to intervene be a “timely application.” DAPRI cites *Karrip v. Cannon Twp.* as supporting its position that “its application is timely because it follows within two weeks of the filing of this suit, before any significant action has been taken.” DAPRI Brief in Support of 10/13/22 Motion, Pg. 1-2 (citing 115 Mich. App. 726, 731, 321 N.W.2d 690 (1982)). But *Karrip* supports exactly the opposite because here “a right to

intervene should [have been] asserted within a reasonable time and laches or an unreasonable delay is a proper reason to deny intervention . . . [because Court Ordered] proceedings [in this case] . . . had [already occurred].” *Karrip*, 115 Mich. App. at 731, 321 N.W.2d 690. DAPRI’s application is not timely because its motion was filed *after* the parties filed their merits briefing. Indeed, the DeVisser Plaintiffs filed their Verified Complaint on September 30, 2022, and the Court ordered expedited merits briefing on October 3, 2022, with Defendants’ Response to the Court’s show cause Order due on October 11, 2022, and Plaintiffs’ respective Responses due on October 13, 2022. The DeVisser Plaintiffs, however, were not served with DAPRI’s papers until *after* the DeVisser Plaintiffs had filed their merits briefing on October 13, 2022. Thus, DAPRI failed to act with sufficient diligence, its motion is not timely, and it should be denied accordingly.

6. Aside from the fact that DAPRI delayed seeking intervention until after the parties completed their merits briefing, DAPRI fails to satisfy the requirements for intervention as of right under MCR 2.209(A). DAPRI has not articulated: (1) that its claimed interest in training and assisting poll watchers is sufficiently related to the “transaction which is the subject of th[is] action,” (2) “that the disposition of [Plaintiffs’] action[s] may as a practical matter impair or impede [DAPRI’s] ability to protect that interest,” and (3) that DAPRI’s interest is not adequately represented by existing parties.

7. DAPRI does not claim any interest relating to election challengers, which is the sole subject of the DeVisser Plaintiffs’ lawsuit. The Legislature has expressly granted election challengers protections and duties under the Michigan Election Law whereas poll watchers have only limited equivalent rights and duties. The supposed interest of DAPRI is not a true interest sufficiently related to the issues raised by the DeVisser Plaintiffs here. Nothing in DAPRI’s papers suggest that its watchers would no longer be able to do what they are entitled to do under state law

if the DeVisser Plaintiffs prevailed on the merits. Therefore, DAPRI will not be prejudiced by any potential outcome of the DeVisser Plaintiffs' lawsuit.

8. Again, the disposition of the DeVisser Plaintiffs' action will not impair or impede DAPRI's ability to protect its supposed interest in training and supporting poll watchers. As stated above at ¶¶6-7, the interest that DAPRI seeks to protect is not the same interest related to the transaction that is the subject of the DeVisser Plaintiffs' Verified Complaint. The DeVisser Plaintiffs contest the ability of Defendants to unlawfully limit and restrict the legal rights of election challengers. No matter the result of the DeVisser Plaintiffs' lawsuit, it will not affect DAPRI's ability to train and support poll watchers. Even if the DeVisser Plaintiffs prevail on the merits, there would be no negative implications to poll watchers. In fact, should the DeVisser Plaintiffs prevail on the merits, then some or all of the overlapping legal rights that exist between poll watchers and election challengers—challenged by the DeVisser Plaintiffs as being unlawfully curtailed—would actually increase for poll watchers.

9. DAPRI's alleged interest is adequately represented by existing parties. This is evident in the fact that DAPRI's proposed brief raises nothing that has not already been addressed in Defendants' 30 pages of briefing and accompanying affidavit and the MDP's amicus. Moreover, while DAPRI claims that it seeks to defend the rights of poll watchers, in reality, its arguments parrot the Defendants' papers that are actually opposed to the legal rights of both poll watchers and election challengers. Again, what exactly is the interest that DAPRI seeks to protect? It seems apparent that DAPRI merely wants to protect the Defendants' interests, as it has not put forth arguments or positions not already spoken for by the Defendants' papers.

10. DAPRI likewise cannot be allowed permissive intervention under MCR 2.209(B) because, again, its motion to intervene was not timely for the same reasons explained above at ¶5.

Additionally, DAPRI has also failed to show that its “claim or defense and the main action have a question of law or fact in common.” MCR 2.209(B)(2). This is because DAPRI has not articulated a “claim or defense,” but is instead merely arguing that it has been prejudiced by this suit. There can be no prejudice, however, when DAPRI has not stated a valid interest. No matter the outcome of the DeVisser Plaintiffs’ lawsuit, the legal rights of poll watchers will not be curtailed further than the state has already unlawfully attempted. Thus, DAPRI’s motion must be denied.

WHEREFORE, the DeVisser Plaintiffs respectfully request that this Court deny DAPRI’s Motion to Intervene as Defendant.

Dated: October 18, 2022

Respectfully submitted,

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