

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, TOM BARRETT,
AARON BEAUCHINE, KATHY BERDEN,
STEPHEN DAUNT, GERRY
HILDENBRAND, GARY KOUTSOUBOS,
LINDA LEE TARVER, PATRICK
MEYERS, MARIAN SHERIDAN, MARY
SHINKLE, NORM SHINKLE, PAUL
SHERIDAN, BRIDGET BEARD, CLINT
TARVER,

Plaintiffs,

v

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

Defendant,

COUNT MI VOTE (d/b/a Voters Not
Politicians),

Intervening-Defendant.

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No. 1:19-cv-00614

HON. JANET T. NEFF

MAG. ELLEN S. CARMODY

**DEFENDANT SECRETARY OF
STATE'S MOTION TO
CONSOLIDATE**

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DEFENDANT SECRETARY OF STATE'S MOTION TO CONSOLIDATE

Defendant Secretary of State Jocelyn Benson asks this Court to consolidate a later-filed companion case, *Michigan Republican Party, et al v. Benson*, Case No. 19-00669, with the instant case pursuant to Fed. R. Civ. P. 42. Defendant states in support:

1. The instant case challenges the constitutionality of amendments to article 4, § 6 of the Michigan Constitution of 1963, which require the reestablishment of a commission to perform redistricting in Michigan.

2. Plaintiffs are fifteen individuals who are members of, or affiliate with, the Michigan Republican Party, and would like to apply to become members of the commission. Plaintiffs allege that they cannot do so, however, because they fall into one or more of eight categories of individuals disqualified from serving on the commission. Mich. Const. 1963, Art. 4, § 6(a)(b)-(c).

3. Plaintiffs claim these exclusions violate their First Amendment rights to speech and association by burdening their right to associate with the Michigan Republican Party or by treating them less favorably for their past or present association with the Republican Party.

4. Plaintiffs allege that the “exclusion of eight categories of Michigan citizens . . . from eligibility to serve on the Commission substantially burdens First Amendment rights by denying the benefit of state employment to individuals whose exercise of those rights triggers one of the eight excluded categories.” (R. 1, Compl., ¶ 59, PageID.26.)

5. Plaintiffs further claim that these amendments violate the Equal Protection Clause by excluding them from the commission “on account of their exercise of fundamental rights that are expressly protected by the First Amendment.” (R.1, Cmplt., ¶67, PageID.29.)

6. Plaintiffs filed this action on July 30, 2019 and filed a motion for preliminary injunction contemporaneously with the filing of their complaint.

7. On August 22, 2019, the Michigan Republican Party (MRP) and five individuals who are members of, or affiliated with, the MRP filed a related lawsuit; *Michigan Republican Party, et al v. Benson*, Case No. 19-00669. The case was assigned to this Court.

8. Secretary Benson is the only named Defendant in both cases. Voters Not Politicians, a ballot proposal committee, is an intervening Defendant in both cases.

9. Case No. 19-00669 also challenges the constitutionality of the amendments to article 4, § 6 of the Michigan Constitution, including several of the exclusions targeted by Plaintiffs here.

10. The MRP Plaintiffs likewise allege violations of their First and Fourteenth Amendment speech and association rights, and their right to equal protection.

11. The MRP Plaintiffs argue that the amendments violate their rights by; (1) usurping the MRP’s right to identify who politically associates with the party, by allowing commission applicants to self-identify as affiliated with the MRP; (2)

burdening the individual plaintiffs associational rights by rendering them ineligible to serve on the commission based on their association with the MRP; (3) engaging in viewpoint discrimination by limiting commission membership to four commissioners each of the major political parties, whereas unaffiliated members will hold five seats; (4) restricting the speech rights of commission members and others by prohibiting speech regarding redistricting matters; and (5) treating unequally applicants to the commission who affiliate with a political party over unaffiliated applicants in that five seats on the commission are reserved for unaffiliated members, and only four seats each are reserved for the MRP and Democratic Party. (Complaint, Case No. No. 19-00669, PageID.15-24.)

12. The MRP Plaintiffs also filed a motion for preliminary injunction contemporaneously with their complaint.

13. Fed. R. Civ. P. 42(a) permits consolidation of cases where the actions involve common questions of law and fact.

14. These two cases involve common questions of law and fact regarding the constitutionality of article 4, § 6 of the Michigan Constitution, as amended. Defendant Benson therefore asks this Court to consolidate Case No. 19-00669 with the instant case.

15. Defendant Benson further submits that consolidation of the cases will promote judicial economy and the efficient resolution of these actions, which present important questions concerning the will of the People with respect to redistricting in

Michigan. And consolidation will not prejudice the parties in either action since neither case has advanced in any significant way since filing.

16. On September 10, 2019 Defendant Benson sought concurrence from Plaintiffs' counsel and counsel for VNP with respect to this motion. Plaintiffs' counsel and counsel for VNP concur in Defendant's motion to consolidate.

WHEREFORE, for the reasons set forth above, and in the memorandum filed contemporaneously with this motion, Defendant Secretary of State Jocelyn Benson requests that this Court grant her motion to consolidate Case No. 19-00669, with the instant case.

Respectfully submitted,

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Dated: September 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

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**DEFENDANT SECRETARY OF
STATE JOCELYN BENSON'S
MEMORANDUM IN SUPPORT
OF MOTION TO CONSOLIDATE**

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capacity as Michigan Secretary of State,

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**DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S
MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE**

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether the instant case should be consolidated with *Michigan Republican Party, et al v. Benson*, Case No. 19-00669 under Federal Rule of Civil Procedure 42(a).

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir.1993)

STATEMENT OF FACTS

Plaintiffs filed the instant lawsuit on July 30, 2019. (R. 1, Compl., PageID.1-49.) Contemporaneously with the complaint, Plaintiffs moved for a preliminary injunction. (R. 4, Mtn. & Brf. For PI, PageID.53-154.) On August 12, 2019, Count MI Vote (d/b/a “Voters Not Politicians”), filed a motion to intervene as a Defendant in this case. (R. 11. Mtn to Intvn., PageID.167-169.) While Defendant Benson did not oppose VNP’s motion to intervene, (R. 20, Def’s Resp to Mtn to Intvn., PageID.240-241), Plaintiffs opposed the motion, (R. 22, Plfs’ Resp to Mtn to Intvn., PageID.247-261.)

Defendant Benson submitted a pre-motion conference request on August 19, 2019 seeking permission to file a motion to dismiss the complaint in lieu of filing an answer, (R. 16, PageID.229-232), and filed a motion to extend the time for filing a responsive pleading the next day. (R. 17, PageID.233-234.) This Court issued an order on August 22, 2019, granting Defendants’ motion to extend time, but advising the parties that it wanted to resolve the motion to intervene before addressing either the motion for preliminary injunction or the pre-motion conference request, and holding those matters in abeyance. (R. 19, Order, 8/22/19, PageID.237-239.)

This Court thereafter granted VNP’s motion to intervene on August 28, 2019, (R. 23, PageID.262-265), and VNP filed its answer to the complaint on August 29, 2019. (R. 24, VNP Answer, PageID.266-305.) On September 4, 2019, VNP filed a response in support of Defendant’s pre-motion conference request and joined in requesting permission to file a motion to dismiss. (R. 25, PageID.306-311.)

On August 22, 2019, the Michigan Republican Party (MRP) and five individuals who are members of, or affiliated with, the MRP filed a related lawsuit; *Michigan Republican Party, et al. v. Benson*, Case No. 19-00669, and a motion for preliminary injunction. The *MRP* case was assigned to this Court. On September 5, 2019, VNP moved to intervene as a defendant in that case. (R. 12, Case No. 19-00669, PageID.112-114.) The next day, the Court granted VNP's motion to intervene. (R. 15, Case No. 19-00669, Order 9/6/19, PageID.171.) Defendant Benson thereafter filed a pre-motion conference request seeking permission to file a motion to dismiss the *MRP* complaint in lieu of filing an answer, (R. 17, Case No. 19-00669, PageID.173-176), and filed a motion to extend the time for filing a responsive pleading. (R. 18, Case No. 19-00669, PageID.177-178.)

On September 10, 2019, Defendant Benson sought concurrence from Plaintiffs' counsel and counsel for VNP with respect to this motion. Plaintiffs' counsel and counsel for VNP concur in Defendant's motion to consolidate. Defendant Benson accordingly moves to consolidate the *MRP* case with the instant case under Fed. R. Civ. P. 42.

ARGUMENT

I. Defendant Benson's motion to consolidate should be granted where the two cases involve common questions of law and fact, and where consolidation will promote judicial economy and will not prejudice the parties.

A. Standards for granting consolidation under Rule 42(a).

Consolidation is governed by Fed. R. Civ. P. 42(a):

If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

“Whether cases involving the same factual and legal questions should be consolidated for trial is a matter within the discretion of the trial court[.]” *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (citing *Stemler v. Burke*, 344 F.2d 393, 396 (6th Cir. 1965)). “A court may issue an order of consolidation on its own motion, and despite the protestations of the parties.” *Cantrell*, 999 F.2d at 1011 (citing *In re Air Crash Disaster at Detroit Metro. Airport*, 737 F. Supp. 391, 394 (E.D.Mich.1989)). A trial court making a decision to consolidate must consider:

“[W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.”

Id. (quoting *Hendrix v. Raybestos–Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985)) (citations omitted). “The party moving for consolidation bears the burden of demonstrating the commonality of law, facts or both in cases sought to be combined[.]” *Banacki v. OneWest Bank, FSB*, 276 F.R.D. 567, 571-72 (E.D. Mich. 2011) (citing *Young v. Hamric*, 2008 WL 2338606 at *4 (E.D. Mich.2008)).

B. Consolidation is merited here where this case and the *MRP* case involve common questions of law and fact.

The instant case challenges the constitutionality of amendments to article 4, § 6 of the Michigan Constitution of 1963, which require the establishment of a commission to perform redistricting in Michigan. Plaintiffs are fifteen individuals who are members of, or affiliate with, the Michigan Republican Party, and would like to apply to become members of the commission. Plaintiffs allege that they cannot do so, however, because they fall into one or more of eight categories of individuals disqualified from serving on the commission. Mich. Const. 1963, Art. 4, § 6(a)(b)-(c).

Plaintiffs' claim these exclusions violate their First Amendment rights to speech and association by burdening their right to associate with the Michigan Republican Party or by treating them less favorably for their past or present association with the Republican Party. Plaintiffs allege that the "exclusion of eight categories of Michigan citizens . . . from eligibility to serve on the Commission substantially burdens First Amendment rights by denying the benefit of state employment to individuals whose exercise of those rights triggers one of the eight excluded categories." (R. 1, Compl., ¶ 59, PageID.26.) Plaintiffs further claim that these amendments violate the Equal Protection Clause by excluding them from the commission "on account of their exercise of fundamental rights that are expressly protected by the First Amendment." (R.1, Cmpl., ¶67, PageID.29.)

The *MRP* case also challenges the constitutionality of the amendments to article 4, § 6 of the Michigan Constitution, including several of the exclusions

targeted by the *Daunt* Plaintiffs. The *MRP* Plaintiffs likewise allege violations of their First and Fourteenth Amendment speech and association rights, and their right to equal protection. The *MRP* Plaintiffs argue that the amendments violate their rights by; (1) usurping the *MRP*'s right to identify who politically associates with the party, by allowing commission applicants to self-identify as affiliated with the *MRP*; (2) burdening the individual plaintiffs associational rights by rendering them ineligible to serve on the commission based on their past association with the *MRP*; (3) engaging in viewpoint discrimination by limiting commission membership to four commissioners each of the major political parties, whereas unaffiliated members will hold five seats; (4) restricting the speech rights of commission members and others by prohibiting speech regarding redistricting matters; and (5) treating unequally applicants to the commission who affiliate with a political party over unaffiliated applicants in that five seats on the commission are reserved for unaffiliated members, and only four seats each are reserved for the *MRP* and Democratic Party. (R. 1, Compl., Case No. No. 19-00669, PageID.15-24.)

These two cases involve common questions of law and fact regarding the constitutionality of article 4, § 6 of the Michigan Constitution, as amended. With respect to the parties, the individual Plaintiffs in *Daunt* and *MRP* are all members of, or affiliate with, Plaintiff *MRP*. All of the individual Plaintiffs in both cases allege that they wish to apply to become members of the commission but claim that they will be barred as a result of one or more of the exclusions. Secretary Benson is the only named Defendant in both cases. Voters Not Politicians, a ballot proposal

committee, is an intervening Defendant in both actions. And both cases are assigned to this Court.

Substantively, both cases challenge the new amendments to article 4, § 6 of the Michigan Constitution, although the *MRP* Plaintiffs' challenge is slightly more extensive than that in *Daunt*. Regardless, the determination in both actions will turn on the application of traditional First and Fourteenth Amendment legal principles.

Procedurally, although the *MRP* case was filed a couple of weeks after *Daunt*, both cases are essentially at the same stage of litigation in that both have pending motions for preliminary injunctive relief, and Defendant Benson has requested permission to file motions to dismiss in both cases. The parties will not be prejudiced by consolidating the two cases in the early stages of litigation. Moreover, consolidation simply makes sense, because otherwise this Court will have two separate cases challenging the same state constitutional provisions and making similar arguments, proceeding on parallel tracks at the same time. Consolidation will promote judicial economy and the efficient resolution of these actions, which present important questions concerning the will of the People with respect to redistricting in Michigan. Consolidation also makes sense for appeal purposes, since it is quite likely that whichever party loses the preliminary injunction round in both of these cases will appeal to the Sixth Circuit Court of Appeals.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant Benson requests that this Court consolidate *Michigan Republican Party, et al. v. Benson*, Case No. 19-00669, with the instant case. As noted above, Plaintiffs' counsel and counsel for VNP concur in Defendant's motion to consolidate.

Respectfully submitted,

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Dated: September 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

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