

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

PRIORITIES USA, RISE, INC.,  
DETROIT/DOWNRIVER CHAPTER  
OF THE A. PHILIP RANDOLPH  
INSTITUTE,

No. 19-13341

Plaintiffs,

HON. STEPHANIE DAWKINS  
DAVIS

v

MAG. R. STEVEN WHALEN

DANA NESSEL, in her official  
capacity as the ATTORNEY  
GENERAL OF THE STATE OF  
MICHIGAN,

Defendant.

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**DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO  
CONSOLIDATE**

## **CONCISE STATEMENT OF ISSUES PRESENTED**

1. Whether consolidation should be denied where the new action is identical to the instant case, was filed after the Plaintiffs had already amended their complaint, and serves no legitimate purpose?

## **CONTROLLING OR MOST APPROPRIATE AUTHORITY**

*Authority:*

Fed. R. Civ. Proc. 42

## STATEMENT OF FACTS

This case was originally filed by Plaintiff Priorities USA on November 12, 2019, and it alleged constitutional violations concerning two separate statutes. (R.1, Cmplt, PageID #1-18). On December 4, 2019, the Court entered a stipulated order granting a two-week extension for Defendant Michigan Attorney General Dana Nessel to respond to the complaint. (R.6, Stip. Dec. 5 Order, PageID #25-26). On December 20, Attorney General Nessel filed a motion to dismiss on grounds that Priorities USA lacked standing because it lacked an injury-in-fact, and also that the complaint failed to demonstrate that the statutes violated any constitutional rights.

On December 23, 2019, this Court entered an order *sua sponte* in which the Court essentially invited Priorities USA to amend its complaint within 21 days if doing so would address the issues raised in the motion to dismiss. (R.13, Dec. 23 Order, PageID #81-82). On January 9, 2020, the Court entered a stipulated order granting Priorities USA a two-week extension, making their response or amended complaint due on January 24, 2020. (R.15, Jan. 9 Order, PageID #84-85).

On January 23, 2020, the parties stipulated to another extension for Priorities USA to respond to the motion to dismiss or file an amended complaint, which was entered by the Court on January 27. (R.16, Jan. 27 Order, PageID #86-87). The order granted two additional business days, making the deadline January 28, 2020.

On the morning of January 27, 2020, Priorities USA's counsel sought concurrence in a motion to consolidate an as-yet-unfiled new complaint with this case. (Ex. A, 1/27/2020 e-mail). Counsel did not provide a copy of the proposed new civil action. (Ex. A). In response, Defense counsel questioned the need for a second lawsuit. (Ex. A.). Plaintiffs' counsel did not provide a copy of the proposed new action or offer any explanation for the necessity of filing a new, identical complaint, instead thanked defense counsel for their "input." (Ex. A).

Priorities USA filed an amended complaint on January 27, 2020, which added two new plaintiffs—Rise, Inc. and the Detroit/Downriver Chapter of the A. Philip Randolph Institute (DAPRI)—new allegations (increasing from 39 to 97 paragraphs), and four new legal claims. (R.17, Am. Cmplt, PageID #88-128). On the same day, the identical plaintiffs (Priorities USA, Rise, Inc., and DAPRI) filed a separate complaint

against the same defendant, Attorney General Nessel, raising identical allegations and identical legal claims (E.D. Mich Case No. 2:20-cv-10211, *Priorities USA v. Nessel*). Plaintiffs immediately moved to consolidate the new lawsuit with this case. (R.20, Motion to Consolidate, PageID #131-134). Plaintiffs continue to offer no explanation for the redundant pleading other than a vague reference to doing so “out of an abundance of caution to ensure that new allegations were considered in the court’s assessment of standing.” (R.20, PageID #132).

## ARGUMENT

### **I. Fed. R. Civ. Proc. 42 does not permit consolidation of redundant actions that create unnecessary cost and delay.**

Plaintiffs cite to Fed. R. Civ. P. 42(a) and argue that consolidation is allowed if two actions “involve a common question of law or fact.” (R.20, PageID #132). But Plaintiffs’ recitation of the Rule is incomplete, and Rule 42 merely permits consolidation while also allowing Courts to enter orders to avoid costs and delays:

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.**

(Emphasis added). Far from avoiding unnecessary costs or delays, the filing of an identical complaint can only add confusion, duplication, and costs to this litigation.

It is entirely unclear what purpose the second lawsuit could possibly serve, and it seems like a solution in search of a problem. For their part, Plaintiffs state only that it was filed “out of an abundance of caution to ensure that new allegations were considered in the court’s assessment of standing.” (R.20, PageID #132). But caution about what? It is unclear what risk would prompt the need to file the same complaint twice.

Indeed, the Court had already invited an amended complaint to address the standing issues raised in the Attorney General’s motion to dismiss. There has been no indication that the Court would not consider Plaintiffs’ amended complaint. Regardless, if there were some defect in the amended complaint that would prevent the Court from considering the allegations, the same defect would be present in this identical separate complaint (filed with the Court on the same day as

the amended complaint) and would thus be subject to dismissal on the same grounds. Filing the same complaint twice would do nothing to force the Court's attention to any issues.

Moreover, consolidation of the duplicative filing would not be without consequence to the Court and Attorney General Nessel. Procedurally, consolidated cases are listed together in the caption, increasing the length of every pleading and filing with the Court. (See e.g. WD-Mich 1:19-cv-00614; 1:19-cv-00669). Also, notices would have to be sent in both the original and consolidated cases. *Id.* Consolidation of an identical complaint adds confusion and duplication to the Court's file—and the parties files—while providing absolutely no benefit to anyone.

Further, there are also unnecessary costs associated with consolidation in this circumstance. It should not escape the Court's attention that the Plaintiffs' claims are based on 42 U.S.C. § 1983, which—as the Court is aware—provides for the award of attorney fees to a prevailing party. Should Plaintiffs prevail, they may seek the costs of filing the second complaint, filing this motion, and all the subsequent

consolidation-related expenses. Rule 42 was clearly not intended as a vehicle for parties to multiply their billable costs.

Last, Fed. R. Civ. P. 11(b)(2) provides that by filing a pleading with the court, an attorney certifies that, “it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the costs of litigation.” There is no apparent legitimate purpose for simultaneously filing an amended complaint **and** an identical complaint with the same parties and claims as a separate action. Plaintiffs—despite a direct request—have offered no substantive explanation for this course of action. So it is fair to question Plaintiffs’ purpose. The plain effect of Plaintiffs’ duplicative filing would be to cause delay and increase costs while doing nothing to assist either the Court or the parties. Rule 42 should not be read to permit the consolidation of a complaint that appears to be in conflict with Rule 11.

### **CONCLUSION AND RELIEF REQUESTED**

For these reasons, Defendant Attorney General Dana Nessel respectfully requests that this Honorable Court deny Plaintiffs’ motion to consolidate and enter an order directing that the duplicative



complaint be dismissed, together with any other relief that the Court determines to be appropriate, including an award of costs and fees incurred in having to respond to this needless motion.

Respectfully submitted,

s/Heather S. Meingast  
Heather S. Meingast (P55439)  
Erik A. Grill (P64713)  
Assistant Attorneys General  
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P55439

Dated: February 7, 2020

### **CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

s/Heather S. Meingast  
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**DEFENDANT'S RESPONSE TO PLAINTIFFS'  
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**EXHIBIT LIST**

- A. Email exchange between Erik Grill and Sarah Prescott

**EXHIBIT A**

**Albro, Lisa (AG)**

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**From:** Sarah Prescott <prescott@spplawyers.com>  
**Sent:** Monday, January 27, 2020 11:28 AM  
**To:** Grill, Erik (AG)  
**Subject:** Re: Concurrence -- federal priorities matter?

Thanks Erik for helping without full staffing today. I am only on the Nessel matter, so yes, sorry but you got it right. I will specify more clearly next time. Thanks for your inputs here. Sarah

On Mon, Jan 27, 2020 at 11:27 AM Grill, Erik (AG) <[GrillE@michigan.gov](mailto:GrillE@michigan.gov)> wrote:

Hello, Ms. Prescott. Heather is out sick today, and asked that I respond to your e-mail.

Your e-mail doesn't specify which case it concerns, but since you reference the local federal rules, and since the lawsuit before Judge Cleland has already been amended, we're interpreting your e-mail to be referring to Priorities USA v. Nessel, 19-cv-13341 (E.D. Mich). If that is not correct, please let us know.

As to your first bullet point, we do not understand why you would need to file a new lawsuit including the same allegations, claims, and relief if you are already amending the current one to add new plaintiffs. Your e-mail refers to a desire to "ensure that new standing allegations are considered," but Judge Goldsmith already entered an order on December 23 in which the Court invited an amended complaint to address our 12b motion. Under the circumstances, the proposed new lawsuit seems duplicative, and we do not concur in the motion to consolidate.

Concerning electronic service, while we represent the defendant in regards to the current case, our representation does not extend to any new lawsuits, which would need to be filed and served in the normal process.

Also, as you might expect, we do not concur in a preliminary or permanent injunction, or in expedited consideration and discovery.

Lastly, regarding discovery, Attorney General Nessel is the only named defendant, and does not have possession, custody, or control of any of the described documents. However, I would expect that the documents listed would be incredibly voluminous, and their nexus to the claims in this case is not immediately clear. We would object to a production like this, and ask that you narrow the scope of the request. In any event, a protective order for confidential or personally identifiable information would be appropriate, and we can provide standard forms we use for that purpose.

Please feel free to contact me if you have any questions, or if you want to discuss any of these issues further.

Erik A. Grill

Assistant Attorney General

Civil Litigation, Elections, & Employment Division

517.335.7193

517.335.335.7640 (fax)



**From:** Sarah Prescott <[prescott@spplawyers.com](mailto:prescott@spplawyers.com)>

**Sent:** Monday, January 27, 2020 8:33 AM

**To:** Grill, Erik (AG) <[Grille@michigan.gov](mailto:Grille@michigan.gov)>; Meingast, Heather (AG) <[MeingastH@michigan.gov](mailto:MeingastH@michigan.gov)>

**Cc:** Beane, Amanda J. (Perkins Coie) <[ABeane@perkinscoie.com](mailto:ABeane@perkinscoie.com)>; Bryant, Christopher (Perkins Coie) <[CBryant@perkinscoie.com](mailto:CBryant@perkinscoie.com)>; Elgart, Courtney (Perkins Coie) <[CElgart@perkinscoie.com](mailto:CElgart@perkinscoie.com)>; Elias, Marc (Perkins Coie) <[MElias@perkinscoie.com](mailto:MElias@perkinscoie.com)>

**Subject:** Concurrence -- federal priorities matter?

Hello counsel,

Per local rule 7.1, I write to you for concurrence in the following motions and matters.

- First, Plaintiff Priorities USA intends to file an amended complaint adding at least one additional plaintiff. Concurrently, and out of an abundance of caution to ensure that new standing allegations are considered, Plaintiffs intend to file a new civil action with identical allegations, counts, and requests for relief. Plaintiffs intend to file a motion to consolidate the new civil action into the existing case under Federal Rules of

Civil Procedure 42 and Local Rule 83.11. Do you concur with this motion? Additionally, do you agree to accept service of process via email without extending the deadline for you to respond to the pleading in the newly filed civil action?

- Second, Plaintiffs intend to move in both cases for a preliminary and permanent injunction enjoining both of the challenged laws on all counts. Do you concur with this motion?
- Third, Plaintiffs intend to move for expedited consideration of the motion for preliminary injunction and for consolidation of the motion with a trial on the merits in order to ensure that the case is litigated, including with time for appellate review, well in advance of the 2020 general election. Do you concur with this motion?
- Fourth, Plaintiffs intend to request expedited discovery. Plaintiffs are specifically seeking: (1) a statewide list of precincts containing the addresses of polling places that were open in the 2018 general election; (2) a copy of the most up-to-date qualified voter file; (3) a statewide file of registered personal vehicles; and (4) a statewide file of driver's licenses. Each of the requested items is readily accessible, and to the extent that Defendant asserts a legitimate concern regarding confidentiality or use of the data, Plaintiffs are willing to enter into an appropriate protective order. Do you concur with this motion?

Please let us know your thoughts as soon as possible?

Best, Sarah

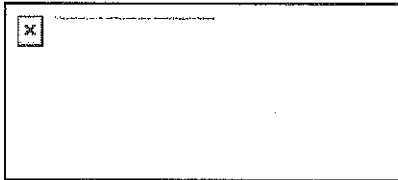
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