UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

DANA NESSEL, in her official capacity as Attorney General of the State of Michigan,

Defendant

and

THE MICHIGAN SENATE, THE MICHIGAN HOUSE OF REPRESENTATIVES, THE MICHIGAN REPUBLICAN PARTY and THE REPUBLICAN NATIONAL COMMITTEE,

Intervening Defendants.
_____/

Case No. 19-cv-13341

Honorable Stephanie Dawkins Davis
Magistrate Judge Kimberly G. Altman

THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES' MOTION FOR SUMMARY JUDGMENT

The Michigan Senate and the Michigan House of Representatives ("the Legislature") move for summary judgment under Federal Rule of Civil Procedure 56 on Plaintiffs' four remaining counts, Counts II, IV, V, and VI. The Legislature relies on the arguments and authorities found in its accompanying brief in support.

As Local Rule 7.1(a) requires, the Legislature contacted Plaintiffs' counsel on March 2, 2022, to ask whether counsel would concur in the motion. Plaintiffs' counsel did not concur.

WHEREFORE the Legislature respectfully asks that this Court grant summary judgment in its favor and against Plaintiffs as to all remaining claims.

Respectfully submitted,

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Dated: March 21, 2022

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BRIEF IN SUPPORT OF THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES' RULE 56 MOTION FOR SUMMARY JUDGMENT

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1. Should this Court grant summary judgment on Plaintiffs' remaining claims where the record and undisputed facts show:

    a. Plaintiffs do not establish they have standing to bring their claims;

    b. Plaintiffs' First Amendment challenge to the Absentee Ballot Law (Count II) fails because, as the Court has already held, the law furthers substantial (indeed compelling) state interests and, at most, minimally burdens Plaintiffs' First Amendment rights;

    c. Plaintiffs' claim that the Absentee Ballot Law violates the Voting Rights Act and is therefore preempted (Count IV) fails because Plaintiffs:

        i. Are not "aggrieved persons" and therefore lack a private right of action under the act; and

        ii. Admit they have no evidence that any person has ever been denied access to voting by application of the act;

    d. Plaintiffs' First Amendment challenge to the Voter Transportation Law (Count VI) fails because, as the Sixth Circuit already held, the law furthers compelling state interests and undisputed facts show that, at most, it minimally burdens Plaintiffs' First Amendment rights; and

    e. Plaintiffs' vagueness challenge to the Voter Transportation Law (Counts V) fails because it presents pure questions of law, and, as this Court has already held, the law is "straightforward and unambiguous."

    The Michigan Legislature says **Yes.**
    This Court should say **Yes.**

CONTROLLING AND MOST APPROPRIATE AUTHORITY

52 U.S.C. § 10508

Fed. R. Civ. P. 56

Mich. Comp. Laws §168.759

Mich. Comp. Laws §168.931(1)(f)

Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021)

Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008)

Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016)

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TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)

STATEMENT OF MATERIAL FACTS

I. THE CHALLENGED LAWS

1. In 2019, Plaintiff Priorities USA filed this action challenging two provisions of Michigan's comprehensive scheme of voting laws. Ex. A, ECF No. 1. The complaint was later amended to add Rise and Detroit/Downriver Chapter of the A. Philip Randolph Institute ("DAPRI") as plaintiffs. Ex. B, ECF No. 17.

2. The first provision, Mich. Comp. Laws §168.759 (the "Absentee Ballot Law"), regulates who may distribute and return absentee ballot applications. It says a Michigan voter may apply for an absentee ballot in three ways:

> (a) By a written request signed by the voter.
> (b) On an absent voter application form provided for that purpose by the clerk of the city or township.
> (c) On a federal postcard application.

Mich. Comp. Laws §168.759(3).

3. The Absentee Ballot Law limits who may possess and return the voter's application to

> a member of the applicant's immediate family; a person residing in the applicant's household; a person whose job normally includes the handling of mail, but only during the course of his or her employment; a registered elector requested by the applicant to return the application; or a clerk, assistant of the clerk, or other authorized election official.

Mich. Comp. Laws §168.759(4).

4. The Absentee Ballot Law further provides that "[a] person who is not authorized in this act and who both distributes absent voter ballot applications to

absent voters and returns those absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor." Mich. Comp. Laws §168.759(8).

5. The second provision, Mich. Comp. Laws §168.931(1)(f) (the "Voter Transportation Law"), makes it a misdemeanor to "hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election." *Id.*

6. Many other Michigan laws regulate voting, too. Ex. C, ECF No. 79, PageID.1595, 1618.

II. THE PLAINTIFFS

7. Priorities USA is a "nonprofit, voter-centric progressive advocacy and service organization" whose "mission is to build a permanent infrastructure to engage Americans by persuading and mobilizing citizens around issues and elections that affect their lives." Ex. B, ECF No. 17, PageID.92 ¶ 7; Ex. D, Pls'. Resp. to Republican Committees' Interrogs., at 14.

8. Rise is a nonprofit organization whose "mission is to build political power within the student and youth population, which is achieved by empowering and mobilizing students as participants in the political process." Ex. D at 15. Since 2018, Rise has paid approximately 42 student organizers at Michigan colleges to accomplish its objectives. *Id.* at 13.

9. DAPRI is a nonprofit whose members assist "in voter registration,

political and community education, lobbying, legislative action, and labor support activities" to achieve "human equality and economic justice." *Id.* at 16.

10. Each Plaintiff regularly spends significant resources on voter and staff education regarding voting and intends to do so in the future. Ex. E, ECF No. 22-4 (Cecil Decl.), PageID.203–04 at ¶ 4; Ex. F, ECF No. 22-6 (Lubin Decl.), PageID.221 at ¶ 14; Ex. G, ECF No. 22-5 (Hunter Decl.), PageID.211 at ¶ 11 and PageID.213 at ¶ 17.

III. PLAINTIFFS' REMAINING ALLEGATIONS

11. Plaintiffs began this case with eight claims; only four remain:

a. Count II asserts that the Absentee Ballot Law "violates speech and associational rights protected by the First and Fourteenth Amendments." Ex. B, ECF No. 17 at PageID.114.

b. Count IV asserts that the Absentee Ballot Law is preempted by Section 208 of the Voting Rights Act, 52 U.S.C. § 10508. *Id.* at PageID.118.

c. Count V asserts that the Voter Transportation Law is "unconstitutionally vague and overbroad." *Id.* at PageID.121.

d. Count VI asserts that the Voter Transportation Law "violates speech and associational rights protected by the First and Fourteenth Amendments." *Id.* at PageID.122.

12. Fraud and corruption occur in American elections and the State of Michigan "has an interest in maintaining the integrity of elections by prohibiting, policing, and prosecuting fraud, corruption, and undue influence in elections[.]" *See*

Ex. H, Pls. Resp. to Republican Committees' First Reqs. for Admission, at 7.[1]

13. There is no evidence of recent prosecutions undertaken for violations of the Voter Transportation Law. *See* Ex. J, Attorney General's Response to Plaintiffs' Interrogatories at 4–7.

14. Priorities contacted 83 Michigan county prosecutors to ask if they would enforce the Absentee Ballot Law against Priorities under specified circumstances; none of the prosecutors threatened enforcement. *See* Ex. D at 10.

15. Plaintiffs do not allege that they have ever collected absentee ballots in past elections and allege only unspecified intentions to do so in the future. *See id.* at 8; Ex. E, ECF No. 22-4 (Cecil Decl.), PageID.205 at ¶ 12; Ex. G, ECF No. 22-5 (Hunter Decl.), PageID.213 at ¶ 18; Ex. F, ECF No. 22-6 (Lubin Decl.), PageID.225 at ¶ 26.

16. Plaintiffs cannot identify a single individual who has been unable to receive assistance in completing or returning their ballot application due to the Absentee Ballot Law. *See* Ex. D at 7.

[1] Plaintiffs' expert Dr. Michael Herron admits that, while "rare," voter fraud does occur in Michigan elections. *See* Ex. I, Dep. of Dr. Michael Herron at 56:9-10. The Attorney General stated that there have been recent investigations, prosecutions, and at least one conviction in Michigan for violations related to applications for absentee voter ballots. *See* Ex. J at 4–7; Ex. K, Oct. 11, 2021 Attorney General and Secretary of State Press Release (providing an update on "the outcome of three investigations related to attempted voter fraud, which resulted in charges against all three individuals").

17. Plaintiffs cannot identify a single individual who could not secure transportation to the polls or otherwise could not vote due to the Voter Transportation Law. *See id.* at 5-6.

LEGAL STANDARD

A district court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "This language compels summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020).[2] "The party must identify specific facts, as opposed to general allegations, establishing the element. Just as a plaintiff may not rely on conclusory allegations to proceed past the pleading stage, so too a plaintiff may not rely on conclusory evidence to proceed past the summary-judgment stage." *Id.* "The mere existence of some alleged factual dispute" does not defeat a summary-judgment motion if the factual dispute is immaterial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A fact is "material" when, under relevant substantive law, its resolution may govern the suit's outcome. *Id.* at 248.

[2] Unless otherwise noted, all internal quotations and alterations have been omitted and all emphases added.

ARGUMENT

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021). The United States Constitution vests states with the authority to regulate the time, place, and manner of federal elections. U.S. Const. art. 1, § 4, cl. 1. Given that, this Court and the Sixth Circuit's rulings in this case, and the undisputed material facts, summary judgment is appropriate on all remaining claims.

First, the record confirms that Plaintiffs—three *organizations*—lack standing. They cannot assert the rights of voters, and their insubstantial claims of threatened enforcement and diverted resources do not create a case and controversy.

Second, as to Plaintiffs' First Amendment challenge to the Absentee Ballot Law (Count II), the undisputed facts confirm what the Court has already said: that the Absentee Ballot Law promotes compelling government interests and, at most, minimally burdens Plaintiffs' expression.

Third, as to Plaintiffs' claim that the Absentee Ballot Law violates and is thus preempted by Section 208 of the Voting Rights Act (Count IV), Plaintiffs are not even arguably "aggrieved persons" under that act and thus lack any cause of action under it. Plaintiffs also admit they are not aware of a single voter who has been unable to vote due to the Absentee Ballot Law and thus have no evidence that it substantially burdens any Michigan voter's rights.

Fourth, Plaintiffs' First Amendment challenges to the Voter Transportation Law (Counts VI) fail because, as the Sixth Circuit already said, the law furthers compelling state interests and, at most, minimally burdens Plaintiffs' First Amendment rights.

Finally, Plaintiffs' vagueness challenge to the Voter Transportation Law (Count V) presents a pure question of law. This Court and the Sixth Circuit have already held the law to be "straightforward and unambiguous." *Id.* at 621. Given the Court's previous rulings, and with no facts at issue, the Court should grant summary judgment.

I. Plaintiffs cannot prove standing for purposes of summary judgment.

"For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 2208. "And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press[.]" *Id.*

To establish standing, a plaintiff must show (1) an injury in fact; (2) a causal connection between the injury and the offending conduct; and (3) a likelihood a favorable decision will redress the injury. *Id.* at 2203. These same elements apply to organizational standing. *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir.

2014). The Court has already ruled that Plaintiffs cannot assert the rights of voters—they cannot claim injury based on claimed harm to voters or an alleged burden on voters' rights. *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 808 (E.D. Mich. 2020) (rejecting argument that the organizational Plaintiffs may sue based on "difficulties that the persons who their organizations target for outreach have in voting"). Thus, Plaintiffs may establish standing based only on a direct injury to themselves.

An injury in fact must be concrete and particularized, and actual or imminent, not conjectural. *Lujan v. Defenders of Wildlife*, 504 US 555, 560 (1992). A future harm may suffice if it is "certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). The Court originally denied the Attorney General's motion to dismiss on this point because Plaintiffs alleged two theories of standing: a credible threat of prosecution and diversion of resources. But mere allegations or pleadings do not suffice at the summary-judgment phase, and the record supports neither of the earlier theories.

Pre-enforcement review. A plaintiff challenging a statute on First Amendment grounds satisfies the injury-in-fact requirement if it shows "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and there is a "credible threat of prosecution." *Susan B. Anthony List*, 573 U.S. at 159.

This Court's earlier ruling applied this theory of standing to only two of

Plaintiffs' remaining claims: the First Amendment challenges in Counts II and VI. *See Priorities USA*, 462 F. Supp. 3d at 805 (noting this special theory of standing exists for "pre-enforcement challenges in First Amendment cases"). This is because standing "is not dispensed in gross" but must be shown for each claim independently. *TransUnion*, 141 S. Ct. at 2208. And on non-First Amendment claims, a hypothetical refusal to enforce a law is insufficient to support standing under the "credible threat of prosecution" theory. *See Nat. Rifle Assoc. v. Magaw*, 132 F.3d 272, 293–94 (6th Cir. 1997) (plaintiffs who called government agents and were told "the questioned activity could subject them to federal prosecution" did not have standing because "the threat of prosecution" was "still abstract, hypothetical, and speculative").

Even regarding the two First Amendment claims, the organizational Plaintiffs have no injury in fact under this theory because they face no credible threat of prosecution. The record has no evidence that Plaintiffs have violated or have been threatened with prosecution under either law. Plaintiffs offer only vague indications that they intend to engage in activities that may violate these laws. And the record contains no evidence of ***any*** Voter Transportation Law prosecutions against ***anyone***. "Where there is no expectation of enforcement," there is likely no "credible threat of prosecution." *Johnson v. D.C.*, 71 F. Supp. 3d 155, 160 (D.D.C. 2014). "Persons having no fears of state prosecution except those that are imaginary or speculative, are not . . . appropriate plaintiffs[.]" *Younger v. Harris*, 401 U.S. 37, 42 (1971).

Contrast Plaintiffs' speculative fears with what the Sixth Circuit has held is a credible threat of enforcement. In *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016), the court found a credible threat where the agency decided "there [was] probable cause for action" and sent the plaintiff a letter stating "a complaint had been filed against her" and asking her to respond to the allegations in writing. The Court held that "[a] state agency's probable cause finding provides a sufficient threat of enforcement to confer . . . preenforcement standing." *Id*. Here, unlike *Winter*, the state agencies either declined to offer an advisory opinion or did not respond at all. Nor have Plaintiffs shown that these prosecutors previously threatened enforcement. *See Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014) (finding a credible threat based on past threats). Instead, they come to court on nothing more than manufactured fear.

Expenditures. The Court also found Plaintiffs had sufficiently pled standing at the inception because they alleged generally that the organizations must "expend additional resources and employee time to educate their employees, volunteers, and partners about the Voter Transportation Ban and the Absentee Ballot Organizing Ban to avoid exposing them to criminal prosecution." *Priorities USA*, 462 F. Supp. 3d at 806. But the Court noted that, at the summary-judgment phase, the Plaintiffs would have to produce *actual* evidence of significant change in expenditures. *See id*.; *accord Fair Elections Ohio*, 770 F.3d at 460.

Plaintiffs fail to produce such evidence. Each Plaintiff says it already expends

significant resources to educate voters and staff about Michigan's voting laws. Plaintiffs' continuing advocacy will result in those same expenditures regardless of the outcome of this action because these two laws constitute only a tiny fraction of the many laws regulating voting. "It is not an injury to instruct election volunteers about absentee voting procedures when the volunteers are being trained in voting procedures already[.]" *Fair Elections Ohio*, 770 F.3d at 459–60. A party cannot manufacture standing from preexisting work, but must demonstrate a significant shift in its operations, activities or strategies. *Common Cause Indiana v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Plaintiffs offer neither evidence of any significant shift nor any reason to believe their education and advocacy would differ but for these laws.

Plaintiffs' failure to support either of their standing theories with actual evidence mandates summary judgment.

II. Counts II and IV: The Absentee Ballot Law does not violate Plaintiffs' First Amendment rights and is not preempted by the Voting Rights Act.

Plaintiffs have two surviving challenges to the Absentee Ballot Law: first, that it infringes on the organizational Plaintiffs' First Amendment rights and, second, that it conflicts with and is therefore preempted by the Section 208 of the Voting Rights Act. Both challenges fail.

A. Count II: The Absentee Ballot Law does not violate Plaintiffs' First Amendment rights.

This Court has said the standard governing Plaintiffs' First Amendment claims is exacting scrutiny. *See Priorities USA*, 462 F. Supp. 3d at 811; *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 612 (E.D. Mich. 2020). As the Legislature has explained in detail, given the Sixth Circuit decisions in this case, the Court should revisit this ruling. *See* ECF No. 113, PageID.1902–03.[3] But, even if the Court applies exacting scrutiny, summary judgment is appropriate.

The Court has already said as much in its order denying in part Plaintiffs' motion for a preliminary injunction: "whether the court applies exacting scrutiny or a rational basis standard of review, . . . the Absentee Ballot Law" survives. *Priorities USA*, 487 F. Supp. 3d at 612. The Court explained that the Absentee Ballot Law has a "substantial relationship to a sufficiently important governmental interest," the strength of which reflects "the seriousness of the actual burden on First Amendment rights." *Id.* The state interest here is election security and the prevention of potential fraud. *See Brnovich*, 141 S. Ct. at 2347 ("A State indisputably has a compelling interest in preserving the integrity of its election processes. Limiting the . . . persons who may handle early ballots to those less likely to have ulterior motives deters

[3] The Legislature has also explained why the law regulates non-expressive conduct, and does not genuinely implicate First Amendment concerns. *See* ECF No. 68, PageID.1167–76. The Legislature preserves and incorporates those arguments by reference here.

potential fraud and improves voter confidence."); *accord Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.").

The Court also recognized that the Absentee Ballot Law is Michigan's *only* statute protecting against "fraud or abuse in the application process on the front end[.]" *Priorities USA*, 487 F. Supp. 3d at 614. It does this by encouraging accountability and increasing the chance that persons collecting applications for absentee ballots are civic minded, known to the state, and subject to Michigan's subpoena power. *See id.* (explaining that the law is "designed to promote accountability on the part of those handling the applications and faith in the absentee-voting system"). These are "well-recognized means" of preventing absentee ballot fraud. *Id.* The Absentee Ballot Law (like the Voter Transportation Law) is a "prophylactic rule intended to prevent the potential for fraud where enforcement is otherwise difficult." *Priorities USA v. Nessel*, 978 F.3d 976, 985 (6th Cir. 2020).

This leaves nothing to debate at summary judgment as far as state interests are concerned. Where the Supreme Court has found those interests *indisputable*, there is no need for evidence to prove such interests and no place for attempted rebuttals. *See Brnovich*, 141 S. Ct. at 2347; *see also Crawford*, 553 U.S. at 196 ("There is no

question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters . . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."). That issue, at least, is settled as a matter of law.

Regarding burdens, the only one alleged here is that prohibiting non-Michigan voters from offering to distribute and collect absentee ballot applications burdens Plaintiffs' expression. But as this Court has already held, the law leaves open many alternative avenues of expression (if Plaintiffs' desire to make couriers of themselves can be characterized as expression at all). Plaintiffs "can still educate the public about registering to vote absentee and answer questions about this process. Moreover, nothing in the law restricts plaintiffs from providing a pool of electors that can return the ballots for them when requested by voters."[4] *Priorities USA*, 487 F. Supp. 3d at 614–15.

Plaintiffs' response to the Intervenors' motions for judgment on the pleadings relied heavily on *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). Plaintiffs think *Bonta* requires Defendants to show "the type of fraud sought

[4] Indeed, examined closely enough, it becomes clear that what motivates the challenge here is a thinly veiled desire for Plaintiffs themselves to *handle* the applications—not merely to educate voters on options. But why would that be either a First Amendment issue or appropriate in any way? At best, it clashes with the accountability goals this Court already recognized. At worst, it brings to mind grotesque echoes of well-documented historical electoral abuses, such as watching to ensure people voted as they were told.

to be prevented (i.e., so-called 'vote hauling' and 'absentee ballot fraud') exists in Michigan, [that] less restrictive alternatives were available to the state in vindicating its interests, and whether (and how often) these laws have been enforced to further the state's interests." ECF No. 121, PageID.1983. But this interpretation is wrong.

Bonta involved a compelled disclosure regime, under which charitable organizations had to disclose to the state Attorney General's Office major donors' identities. *Bonta*, 141 S. Ct. at 2379. The petitioners—a conservative public interest law firm and a public charity—showed they had previously suffered threats and harassment and that donors, if made public, would likely face similar retaliation. *Id.* at 2380-81 (noting threats, harassing phone calls, intimidating and obscene emails, and pornographic letters). Notably, the Supreme Court found that, although California tried to justify its disclosure requirements as aiding fraud investigation, its interests were really "more in ease of administration," which "cannot justify the disclosure requirement." *Id.* at 2387.

In sum, *Bonta* imposed additional hurdles on the government in the context of First Amendment laws *compelling disclosures*. *See Bonta*, 141 S. Ct. at 2383–85 (requiring "*disclosure regimes* . . . be narrowly tailored to the government's asserted interest" and noting that "[t]he need for narrow tailoring was set forth early in our compelled disclosure cases"). The *Bonta* dissent, signed by three justices, emphasized this point about the plurality opinion:

> Although this Court is protective of First Amendment rights, it typically requires that plaintiffs demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored to the government's interests, never mind striking the law down in its entirety. Not so today. Today, the Court holds that *reporting and disclosure requirements* must be narrowly tailored even if a plaintiff demonstrates no burden at all. . . . [No matter what] *disclosure regimes must always be narrowly tailored*.

Bonta, 141 S. Ct. at 2392, 2398 (Sotomayor, J., dissenting).

Bonta does not establish a new categorical rule eliminating a plaintiff's burden when facially challenging a non-disclosure law. In those cases, like this one, the challenger still bears the burden of showing that the law "prohibits a substantial amount of protected speech in relation to its many legitimate applications." *See Virginia v. Hicks*, 539 U.S. 113, 123–24 (2003) (holding that the plaintiff's facial challenge failed where the *plaintiff* did not show, based on the record, that the rule prohibited "a 'substantial' amount of protected speech in relation to its many legitimate applications"). This is because "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech[.]" *Id.* at 124.[5]

Further, the law here *is* narrowly tailored. Even under exacting scrutiny, a law

[5] While Plaintiffs may desire, as part of their advocacy, to distribute or collect ballots or drive persons to the polls, they have brought *facial* overbreadth challenges. Their subjective desires alone cannot show the challenged laws impede most others—for whom collecting ballots or driving voters are not even arguably expressive conduct. *Bonta*, in contrast, involved (compelled) speech in all its applications.

need not be perfect. Although a law cannot "burden substantially more speech than is necessary to further the government's legitimate interests," it "need not be the least restrictive or least intrusive means of serving the government's interests." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). This Court has already held that (1) the absentee ballot process is susceptible to fraud; (2) the Absentee Ballot Law is designed to *prevent* rather than punish fraud and uses familiar means of doing so; (3) the Absentee Ballot Law is Michigan's only law intended to prevent absentee ballot fraud on the front end; (4) the law is "designed to promote accountability on the part of those handling the application and faith in the absentee-voting system"; and (5) the burdens on Plaintiffs' speech are limited and substantially relate to the government's interests. *Priorities USA*, 487 F. Supp. 3d at 612–15.

Compare again *Bonta*'s disclosure law. There was no discernible link between the claimed interest of preventing charitable fraud and what the law required: disclosing the identity of the charities' biggest donors. "And the State's interest in amassing sensitive information for its own convenience is weak." *Bonta*, 141 S. Ct. at 2389. "The lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience." *Id.* at 2387. The Court thus found that a "substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* None of these factors are present here.

Indeed, even assuming absentee ballot application fraud is rare,[6] *Brnovich* makes clear that a state may pass *prophylactic* laws to prevent the recognized risks attendant to absentee ballots. "Fraud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it. Election fraud has had serious consequences in other States . . . The Arizona Legislature was not obligated to wait for something similar to happen closer to home." *Brnovich,* 141 S. Ct. at 2348.

In sum, the law serves a compelling state interest and is narrowly tailored such that it does not impose a substantial burden on protected speech in comparison to its legitimate scope. The Court should grant summary judgment on Count II.

B. Count IV: Summary judgment is appropriate on Plaintiffs' Absentee Ballot Law preemption claim.

Count IV alleges that the Absentee Ballot Law "conflicts with and violates Section 208 of the Voting Rights Act[.]" Ex. B, ECF No. 17, PageID.118. Apart from the Article III standing issues discussed above, Plaintiffs have another threshold problem for this claim: they are not "aggrieved persons" who have a private right of action to bring that claim. And, even if they were, there is no evidence in the record that the Absentee Ballot Law substantially burdens a person's right to vote.

[6] *But see, e.g.*, Ex. K (detailing recent, absentee-ballot-fraud investigations by the Attorney General resulting in charges against the involved individuals).

1. ***Plaintiffs have no private right of action under Section 208 of the Voting Rights Act.***

Plaintiffs' Voting Rights Act claim is premised on Section 208, under which "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. Plaintiffs allege the Absentee Ballot Law "conflicts with and violates the [Voting Rights Act] and is thus preempted" because it limits who can distribute and collect absentee ballots. Ex. B, ECF No. 17, PageID.118.

It is hardly settled that a private right of action exists at all under Section 208. To the extent it does, such a private right extends *only* to "aggrieved persons." *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989). But Plaintiffs do not even allege that they are aggrieved persons. Rather, they are either trying to assert a claim on behalf of such persons—the "Michigan voters" allegedly "denied the voting assistance that Section 208 of the Voting Rights Act guarantees them," Ex. B, ECF No.17, PageID.121—or trying to invent a cause of action on behalf of would-be assistors. Neither path is viable.

That the organizational Plaintiffs lack a private cause of action to enforce Section 208 accords with more recent Supreme Court authority on statutory standing. In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118

(2014), the Supreme Court said a federal court presumes that even an explicit statutory cause of action "extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked" and "is limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Id*. at 129, 132. *Lexmark* affirms that Plaintiffs lack standing to enforce Section 208. The organizational Plaintiffs here are *not* voters, do not "require assistance" to vote, and cannot be given "assistance" to vote. They simply do not have the same interests as an actual voter.

Meanwhile, as the Court has already held, Plaintiffs cannot assert the rights of others who actually *are* voters—they can only assert their own rights. *See Priorities USA*, 462 F. Supp. 3d at 809. And their claimed diversion-of-resources injuries, even if they actually occurred, are not interests protected by the Voting Rights Act and are not injuries proximately caused by a claimed violation of the Voting Rights Act. *See Lexmark*, 572 U.S. at 133 (no proximate cause "if the harm is purely derivative of misfortunes visited upon a third person by the defendant's acts."). Where Plaintiffs are not in the class of persons covered by the statute, and their alleged injury is not protected by the statute, they simply lack standing to assert a claim under the Voting Rights Act. *See Roberts*, 883 F.2d at 621; *Kumar v. Frisco Indep. Sch. Dist.*, 443 F. Supp. 3d 771, 788 (E.D. Tex. 2020) ("Because the Court finds that Kumar may only represent himself, the Court must reject Kumar's attempts to assert standing on behalf of entire minority communities.").

The Court should thus grant summary judgment on Count IV for lack of standing.

2. ***The Court has already read the Voting Rights Act to preempt the Absentee Ballot Law only if it substantially burdens the rights of Michigan voters; and there is no evidence of such a burden here.***

Even if Plaintiffs had standing to assert their Voting Rights Act claim, summary judgment is still appropriate because the record does not show that the Absentee Ballot Law has prevented any of them, or any other voter, from voting. The law is thus not "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Priorities USA*, 487 F. Supp. 3d at 617.

This Court has already ruled that of the three types of preemption—express, field, or conflict—Plaintiffs assert only conflict preemption, which occurs when a conflict of state and federal laws make "it is impossible for a party simultaneously to comply with both, or state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. This Court has ruled that the Voting Rights Act does not *actually* conflict with the Absentee Ballot Law: Section 208 says "certain specified voters . . . may be given assistance by *a* person of the voter's choice [but] does not say that a voter is entitled to assistance from *the* person of his or her choice or *any* person of his or her choice." *Id.* at 619.

The Court held that Plaintiffs can only succeed on this claim if they can prove that the Absentee Ballot Law is "an obstacle to the accomplishment and execution

of the full purposes and objectives of Congress." *Id.* at 617. This requires a showing of injury flowing from an "undue burden" imposed by the Absentee Ballot Law. *Id.* at 619. But, as the Court has already recognized, Plaintiffs have not shown evidence that "voters have been denied the person of their choice to assist them in the absentee ballot application process, let alone voters belonging to the class of individuals identified in § 208 (i.e., those requiring assistance due to blindness, disability, or inability to read or write)." *Id.* Nor have they done so during discovery. Plaintiffs still cannot identify a single individual who has been unable to receive assistance in completing or returning their ballot application due to the Absentee Ballot Law. *See* Ex. D at 7.

"Given the lack of evidence that any voters have been affected by the limits on their choice of assistance, there is no basis for the court to conclude that Michigan's law stands as an obstacle to the objects of § 208." *Priorities USA*, 487 F. Supp. 3d at 620. Summary judgment should be granted on the preemption claim.

III. Counts V and VI: The Voter Transportation Law does not violate Plaintiffs' First Amendment rights and is not unconstitutionally vague.

The Voter Transportation Law provides that "[a] person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election." Mich. Comp. Laws § 168.931(1)(f). Plaintiffs claim this statute violates their First Amendment rights and is unconstitutionally vague. Neither claim can survive summary judgment.

A. Count VI: The Voter Transportation Law does not violate Plaintiffs' First Amendment rights because it imposes a minimal burden and furthers compelling state interests.

Plaintiffs claim that the Voter Transportation Law "burdens core political expression and acts as a ban on political expenditures." Ex. B, ECF No. 17, PageID.122. This Court held that exacting scrutiny is the correct standard. *See Priorities USA*, 462 F. Supp. 3d at 812.[7] Summary judgment is appropriate even under that standard.

The Sixth Circuit has already decided that the statute is aimed at securing elections and preventing voter fraud, which are substantial—and indeed compelling—government interests. *See Priorities USA v. Nessel*, 860 F. App'x 419, 422 n.3 (6th Cir. 2021) ("The state's interest in preventing potential voter fraud is an important regulatory interest."); *accord Brnovich*, 141 S. Ct. at 2347. ("A State indisputably has a compelling interest in preserving the integrity of its election process.").

The Sixth Circuit also recognized that the Voter Transportation Law can be effective in preventing "vote hauling." *See Priorities USA*, 978 F.3d at 983 ("Vote-hauling can be a classic form of bribery—paying a voter to 'haul' himself or herself (and maybe immediate or extended family) to the polls to vote. It is also a usual sink

[7] Again, the Legislature respectfully disagrees for the reasons given in its motion for judgment on the pleadings and its opposition to Plaintiffs' motion for preliminary injunction. *See* ECF No. 68, PageID.1183–90; ECF No. 113, PageID.1902–06.

for election-day 'street money' or 'walking-around money.'"). There are multiple examples of vote-hauling just from our circuit. In *United States v. Adams*, 722 F.3d 788 (6th Cir. 2013), the defendants pooled money to pay electors to vote for certain candidates and were convicted under a Kentucky statute banning vote hauling. *Id.* at 798–99. And in *United States v. Turner*, No. CRIM. 05-02, 2005 WL 4001132, at *1 (E.D. Ky. Dec. 16, 2005), the defendants were charged with mail fraud for writing and distributing through middlemen blank checks "denoted for 'vote hauling'" to influence electors to vote for a certain candidate. *Id.* As the Sixth Circuit noted, without a statute like the Voter Transportation Law, prosecuting cases like these would be very "difficult" because other election fraud laws "requir[e] proof of a quid pro quo."' *Priorities USA*, 978 F.3d at 985. So, once again, a compelling state interest exists as a matter of law.

And, to the extent the inability to hire vehicles to transport voters to the polls could be said to burden Plaintiffs' expressive rights,[8] that burden is extremely limited. Aside from hiring a vehicle to transport ambulatory voters to the polls, the law does not prohibit any of the myriad forms of voter engagement or advocacy. As the Sixth Circuit explained in staying this Court's preliminary injunction:

> There are other ways, without violating Michigan's statute, to take voters to the polls. Volunteers can drive voters for free. Generally

[8] To be clear, the statute does nothing to impede Plaintiffs from advocating to people that they should go vote. It merely precludes hiring paid transportation, which again is a ministerial act rather than expressive conduct.

> paid campaign workers—ones who are not specifically paid to take voters to the polls—may also fall outside the statute's ban, as might using cars that are commercially rented for many different campaign purposes, only some of which are to haul voters. So the organizations' resources will likely not go to waste. And with the expansion of mailed ballots in Michigan this year, there are likely fewer voters who need to be driven to the polls at all.
>
> These injuries also track the public interest, which lies in both fair elections—conducted with a minimum of fraud—as well as free elections—in which as many eligible voters can vote as desire to.

Priorities USA, 978 F.3d at 985. In short, Plaintiffs bear no significant burden.

The Court should grant summary judgment as to Count VI.

B. Count V: The Voter Transportation Law is not vague.

In Plaintiffs' opposition to the motions for judgment on the pleadings, they disavowed a First Amendment vagueness and overbreadth challenge and asserted their claim is simply "a due process challenge to a criminal statute." *See* ECF No. 121, PageID.1990 (arguing against applying First Amendment precedent to Count V). Plaintiffs frame their challenge not as whether it chills First Amendment rights, but simply whether, as a criminal law, "it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* They disclaim any "more stringent vagueness test" that may apply to laws abridging the freedom of speech. *See Priorities USA*, 487 F. Supp. 3d at 615.

A statute can be impermissibly vague for two reasons. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what

conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). This doctrine ensures that both those who enforce a statute and those who must comply with it know what is prohibited. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). It is not meant "to convert into a constitutional dilemma the practical difficulties" of crafting a law that is "general enough to take into account a variety of human conduct" yet specific enough "to provide fair warning." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). And because the legislature is "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Hill*, 530 U.S. at 733. Further, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Id.*

In *Hill*, the Court rejected a facial vagueness challenge to a statute that criminalized "knowingly approach[ing] within eight feet of another, without that person's consent, for the purpose of engaging in oral protest, education, or counseling." 530 U.S. at 732. The Court found that "the likelihood that anyone would not understand any of those common words seems quite remote," and the law gave "adequate guidance to law enforcement authorities." *Id.* at 732-33. Likewise, in *Grayned*, 408 U.S. at 108, the Court rejected a vagueness challenge to an ordinance that criminalized "willfully mak[ing] or assist[ing] in the making of any

noise or diversion which disturbs or tends to disturb the peace or good order of such school session," because it was "clear what the ordinance as a whole prohibit[ed]." *Id*. at 108, 110.

In light of these principles, and looking at the actual language of the statute, Plaintiffs' vagueness challenge to the law fails as a matter of law. The Voter Transportation Law provides, in full, that "[a] person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election." Mich. Comp. Laws § 168.931(1)(f). As in *Hill*, the likelihood is "quite remote" that anyone reading those "common words" would misunderstand them. 530 U.S. at 732. It is just as clear here as in *Grayned* "what the ordinance as a whole prohibits." 408 U.S. at 110. And this Court has already found as much, calling the law "relatively straightforward and unambiguous." *Priorities USA*, 487 F. Supp. 3d at 621. And both this Court and the Sixth Circuit have construed it as a matter of law. See *id.* at 607 and 621; Priorities USA, 978 F.3d at 983-84 (explaining precisely what the law means).

Where the statute is straightforward and unambiguous, and the Court has already held as much, the only thing left to do with the vagueness challenge of Count V is grant summary judgment against it.

CONCLUSION

For all these reasons, the Court should grant the Legislature's motion and

award summary judgment.

Respectfully submitted,

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