UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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

Republican National Committee, Michigan Republican Party, Michigan House of Representatives, and Michigan Senate,

Intervenor-Defendants.

Civil No. 19-cv-13341

JUDGE STEPHANIE DAWKINS DAVIS

MAGISTRATE KIMBERLY G. ALTMAN

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs Priorities USA, Rise, Inc., and the Detroit/Downriver Chapter of the A. Philip Randolph Institute move for summary judgment to enjoin the enforcement of (1) the Transportation Ban codified at Michigan Compiled Laws § 168.931(1)(f); and (2) the Organizing Ban codified at Michigan Compiled Laws §§ 168.759(4), (5), (8). The undersigned counsel certifies that counsel communicated in writing with opposing counsel,

explaining the nature of the relief to be sought by way of this Motion and seeking concurrence in the relief; opposing counsel thereafter expressly denied concurrence.

Both statutes burden Plaintiffs' free speech and associational rights under the First Amendment of the U.S. Constitution. This Court has already determined that both statutes burden Plaintiffs' ability to engage in protected political speech and that exacting scrutiny therefore applies. *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 821 (E.D. Mich. 2020). To survive the exacting scrutiny standard, Defendants must produce actual evidence to support the State's purported interests in the statutes, and to demonstrate that the statutes are narrowly tailored to advancing those interests. *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382–86 (2021). Defendants have failed to demonstrate a compelling interest in either statute, much less that they are narrowly tailored to advance those specific interests. There is also no genuine dispute that the State has less intrusive alternatives available that would advance the State's interests. Defendants' assertions are also not sufficient to survive the *Anderson-Burdick* standard—which in any event does not apply despite Defendants' continued insistence to the contrary. *See Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780 (1982).

The undisputed evidence also demonstrates the Transportation Ban is unconstitutionally vague and the Organizing Ban is preempted by Section 208 of the Voting Rights Act.

On the record before the Court, Plaintiffs respectfully submit that summary judgment should be entered and both statutes permanently enjoined. Plaintiffs respectfully request that the Court do so in time for Plaintiffs to organize in advance of the rapidly-approaching August 2, 2022 primary election. Plaintiffs submit the attached brief and declarations in support of this Motion.

Date: March 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, 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.

LOCAL RULE CERTIFICATION

I, Amanda Beane, certify that this document and complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

Date: March 21, 2022

Respectfully submitted,

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MAGISTRATE JUDGE KIMBERLY G. ALTMAN

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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CONCISE STATEMENT OF THE ISSUES

Plaintiffs move for summary judgment and an order enjoining enforcement of two Michigan statutes that criminalize core political activity: (1) the Transportation Ban (MCL § 168.931(1)(f)), which prohibits Plaintiffs from paying anyone to provide rides for voters to the polls, and (2) the Organizing Ban (*id.* §§ 168.759(4), (5), (8)), which inhibits Plaintiffs' ability to assist voters with absentee ballot applications. Because both burden constitutionally-protected First Amendment activity, they are only constitutional if they are (1) justified by compelling state interests, and (2) narrowly tailored to advance those specific interests. In addition, the Transportation Ban is unconstitutionally vague, and the Organizing Ban is separately preempted by federal law. On the record before the Court, Plaintiffs respectfully submit that summary judgment should be entered and both of the Challenged Laws should be permanently enjoined.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

CASES

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Arkansas United v. Thurston, 2020 WL 6472651 (W.D. Ark. Nov. 3, 2020)

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United States v. Johnson, 576 U.S. 591 (2015)

STATUTES

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Mich. Comp. Laws §§ 168.759 (4), (5), (8)

I. INTRODUCTION

Plaintiffs Priorities USA ("Priorities"), Rise Inc. ("Rise"), and the Detroit/Downriver Chapter of the A. Philip Randolph Institute ("DAPRI") are non-profits whose missions include educating and turning out voters in Michigan. They challenge two Michigan criminal laws that burden their critical electoral organizing activities: the Transportation Ban (MCL § 168.931(1)(f)), which bans Plaintiffs from paying for rides to the polls for voters, and the Organizing Ban (*id.* §§ 168.759(4), (5), (8)), which inhibits their ability to assist voters with absentee ballot applications. This Court already held that these statues regulate protected political expression, and thus, exacting scrutiny applies. *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 821 (E.D. Mich. 2020). Under that standard, *Defendants* are required to produce evidence to support the State's purported interests in the Challenged Laws, as the Supreme Court clarified just last year. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021). They have not done so, and their vague assertions are not sufficient to meet their burden. Defendants' arguments are not even sufficient to satisfy the *Anderson-Burdick* standard, which Defendants continue to incorrectly insist applies (contrary to this Court's earlier rulings). The Court should resolve the remaining claims in Plaintiffs' favor on summary judgment. Plaintiffs respectfully request that the Court do so in time for Plaintiffs to organize in advance of the approaching August 2, 2022 primary election.

II. FACTS

A. Plaintiffs' Electoral Organizing Activities

Plaintiffs are three non-profit advocacy and service organizations, each working to educate, mobilize, and turn out voters in Michigan. Student-led Rise has funded "party to the polls" events on college campuses. Ex. 4, Supp. Decl. Max Lubin dated Mar. 17, 2022 ("Lubin Decl.") ¶¶ 8, 10. In other states, these events involve free and discounted rides to the polls with Lyft or Uber. *Id.* DAPRI is a local chapter of the labor-focused civil rights organization founded by iconic civil rights leaders A. Philip Randolph and Baynard Rustin. Ex. 5, Supp. Decl. Andrea Hunter dated Mar. 17, 2022 ("Hunter Decl.") ¶ 2. It has coordinated get-out-the-vote campaigns for ten years, using volunteers to transport voters and organize around absentee ballots. *Id.* ¶¶ 4, 5, 13, 14. DAPRI considers these efforts mission critical. *Id.* ¶¶ 4, 7. Priorities is a voter-centric advocacy and service organization that budgeted $150 million toward voter education and mobilization in Michigan and three other states in 2020 and anticipates a strong program in Michigan during the 2024 election cycle. Ex. 6, Supp. Decl. Guy Cecil dated Mar. 21, 2022 ("Cecil Decl.") ¶¶ 5, 8.

Two provisions of Michigan's Election Code stymie Plaintiffs' efforts, impeding their mission by threatening them with criminal penalties for engaging in constitutionally-protected electoral organizing activities. First, the Transportation

Ban (MCL § 168.931(1)(f)), which prohibits "hir[ing] a motor vehicle or other conveyance or caus[ing] the same to be done, for conveying voters, other than voters physically unable to walk, to an election." Second, the Organizing Ban (*id.* §§ 168.759(4), (5), (8)), which allows only registered Michigan voters to assist other voters with returning their absentee ballot applications (the "registration requirement") and bars requesting or soliciting to assist voters with returning their absentee ballot applications (the "solicitation ban").

B. Burdens on Plaintiffs' Electoral Organizing

The undisputed evidence confirms that the Challenged Laws prevent Plaintiffs from engaging in what this Court has already found to be "protected First Amendment activity," by limiting Plaintiffs' electoral organizing activities. *Priorities USA*, 462 F. Supp. 3d at 821.

First, the Transportation Ban burdens Plaintiffs' ability to successfully organize rides-to-the-polls events by prohibiting them from hiring drivers and vehicles for this purpose. Hunter Decl. ¶¶ 10–12; Lubin Decl. ¶¶ 22–25, 30. Providing for voter transportation to the polls is a common and critical organizing tactic for organizations that seek to encourage people to exercise their right to vote. Hunter Decl. ¶ 7; Lubin Decl. ¶ 28; ECF No. 22-8, PageID.238-241, Decl. of Nse Ufot Decl. ("Ufot Decl.") ¶¶ 2-11. These campaigns are especially crucial in cities like Detroit, where private transportation is expensive and public transit is limited or

unreliable. Hunter Decl. ¶ 6.

Michigan is the only state in the nation with a law strictly criminalizing transportation of voters. Ex. 7, Expert Rep. of T. Sugrue at 8 ("Sugrue Rep."). Due to the Ban, rides-to-the-polls organizers like Plaintiffs are limited in Michigan. The number of voters they can transport is diminished, and with it the opportunities for political engagement and interaction with those voters. Hunter Decl. ¶¶ 10–12; Ufot Decl. ¶¶ 5-6, 9-11; Lubin Decl. ¶¶ 21, 28. For example, the Ban prevents Plaintiffs from renting vehicles or leveraging existing resources or partners like The Detroit Bus Company and Uber—requiring them to expend resources recruiting and training individual volunteer drivers. Hunter Decl. ¶¶ 11, 12; Lubin Decl. ¶¶ 30–31. Rise refrains from hosting "party at the polls" events and partnering with other organizations to fund transportation to the polls in Michigan because of the Ban. Lubin Decl. ¶¶ 8, 10, 32.

The Transportation Ban is also unconstitutionally vague. Although its terms prohibit "hir[ing] a motor vehicle or other conveyance or caus[ing] the same to be done, for conveying voters, other than voters physically unable to walk, to an election," it does not define the words "hire" or "physically unable to walk," and multiple parties *in this case* interpret it differently. *See infra* IV.A. Election employees and officials, too, have different views of what is prohibited and what is permissible. *Id.* Plaintiffs are left to guess (at the peril of criminal prosecution) at the

law's parameters. *Id.* This ambiguity deters Plaintiffs from engaging in electoral organizing activities that may—or may not—implicate the Ban, out of fear of prosecution. *Id.*

The Organization Ban's solicitation ban burdens DAPRI's get-out-the-vote efforts, making it more difficult for it to affect change through voter mobilization. To advance its mission, DAPRI educates eligible Michigan citizens about how to register and the methods of voting available to them, including absentee voting. Some voters find it difficult to navigate the process of requesting an absentee ballot without assistance. DAPRI would offer to return voters' applications but for the solicitation ban. Hunter Decl. ¶¶ 15–17. Because it cannot do so, the solicitation ban harms DAPRI's ability to fully effectuate its goals. *Id.* ¶¶ 15–19. The Ban's registration requirement also burdens DAPRI by narrowing the pool of people it can deploy to assist voters. *Id.* ¶ 17.[1]

C. Voter Fraud, Coercion, and Intimidation is Rare

The State argues that the Challenged Laws advance its interests in combatting voter fraud and coercion, detecting and prosecuting fraud and irregularities, and ensuring that absentee ballot applications are properly delivered. ECF No. 70,

[1] Defendants have not disputed the verity of the facts articulated in Plaintiffs' declarations. *See* ECF Nos. 22-4, 22-5, 22-6. Although they had the opportunity to do so, none of the Defendants deposed any of the witnesses that Plaintiffs identified in their witness lists. *See* ECF Nos. 119, 127.

PageID.1209, PageID.1230-1231; ECF No. 68, PageID.1172, PageID.1175, PageID.1187-1188; ECF No. 113, PageID.1906; ECF No. 27, PageID.412, PageID.420, PageID.475.

None of this finds support in the record. Instead, the undisputed evidence establishes that widespread voter fraud or coercion has never existed in Michigan. No Michigander *has ever* been charged with violating either of the Challenged Laws, and neither actually operates to prevent voter fraud or coercion. *See infra* at IV.B.

Plaintiffs served discovery requests on the Attorney General, the Michigan Republican Party and Republican National Committee ("Republican Intervenors"), the Michigan House of Representatives and Senate (the "Legislature") (together, "Defendants"), and Secretary of State requesting information relating to the applicability and enforcement of the Challenged Laws, and any evidence of fraud, corruption, or undue influence that would have been implicated by the same. Exs. 8–13. All failed to identify even a single instance where anyone was charged with violating the Challenged Laws. Exs. 8–13. The very few incidents of purported voter fraud and coercion identified in the discovery responses implicated entirely different laws. Exs. 8–13; *see infra* IV.B.3.a.

Similarly, Plaintiffs deposed the Attorney General, Secretary, the Executive Director of the Election Department, and an employee from the Secretary's office who the Attorney General identified as its lone witnes. *See* ECF Nos. 117, 120, 128,

129. Plaintiffs asked each whether they were aware of (1) any instances where a person was charged with violating the Challenged Laws, (2) any investigations into any alleged violation of the Challenged Laws, or (3) any evidence of voter fraud or corruption relating to third-parties providing a voter with assistance in applying for absentee ballots or transportation to the polls. None identified anything beyond the few incidents of purported fraud identified in the discovery responses, which as noted, implicated entirely different laws. Exs. 8–13; *see infra* IV.B.3.a.

Nor is there any evidence that the Transportation Ban was enacted to prevent voter fraud or coercion. Plaintiffs' expert Dr. Thomas Sugrue, professor of history and social and cultural analysis at New York University with a particular expertise in contemporary American history, found "no evidence that the paid transportation of voters to the polls was ever a problem, a source of corruption, or a threat to the purity of the electoral process in Michigan." Sugrue Rep. at 3, 46. The first version of what would become the Ban was imported from a British law that aimed to "limit campaign expenditures and to *suppress the vote*, particularly of the poor to whom the franchise had recently been extended." *Id.* at 2, 10 (emphasis added).

Dr. Sugrue also found no evidence that any voter fraud has ever been addressed or prevented by any version of the Transportation Ban since its enactment. *Id.* at 47. Dr. Sugrue noted that in the 1890s, even minor allegations of voter fraud and political corruption received special attention in the press, thus, allegations of

paid transportation of voters to polling places would almost certainly have been the subject of intense press attention. *Id.* at 16–17. Yet, he found nothing. *Id.* at 47.

The truth is, voter fraud of any kind is exceedingly rare, in Michigan and throughout the country. This conclusion is well supported by the expert report of Dr. Michael Herron, professor of quantitative social science at Dartmouth College. Ex. 14, Expert Rep. of M. Herron ("Herron Rep.") at 3. Dr. Herron drew on his extensive experience studying, analyzing, and publishing about voter fraud in the United States for decades. *Id.* at 5–10; Ex. 15, Dep. of Michael Herron, Ph.D., dated Feb. 7, 2022 ("Herron Dep.") 22:12–22:17. Dr. Herron also reviewed media reports, scholarly literature, third-party databases, and discovery to identify all known instances of voter fraud, or alleged voter fraud, in Michigan between 2012 and 2021. *Id.* at 2. Dr. Herron conservatively estimated that these incidents made up between 0.00011–0.00026 percent of approximately 32.4 million votes cast during that period. *Id.* He described those few instances as "idiosyncratic" and concluded they "reflect neither widespread nor systematic voter fraud." *Id.* at 2.

Defendants have not produced any evidence that creates a genuine issue of material fact regarding Drs. Herron's or Sugrue's conclusions. The Republican Intervenors provided a report by Kimberly Westbrook Strach. Ex. 16, Expert Rep. of K. Strach dated Jan. 14, 2022 ("Strach Rep."), but it does not engage with or dispute Dr. Herron's or Dr. Sugrue's research, analysis, or conclusions. *Id.* Many of

her conclusions are so broad and ill-defined to be ultimately meaningless. For example, Ms. Strach opines that undefined "safeguards" are, generally, necessary to protect the electoral process. *Id.* at 20–26. *See* Pls. Daubert Mot. to Exclude the Opinions and Test. of Kimberly Westbrook Strach, Mar. 21, 2022 ("Strach Daubert Mot."). Ms. Strach's Report also fails to establish (or even explain) how North Carolina's history with absentee voter fraud bears any relevance to this case, which concerns two Michigan laws. *See* Ex. 17, Expert Rebuttal Rep. of M. Herron ("Herron Rebuttal Rep.") at 9–14. As Dr. Herron notes in his Rebuttal Report, North Carolina in reality is a true outlier, such that using it to draw conclusions about voter fraud in Michigan creates a statistical sampling error that makes the comparison fundamentally unreliable. *Id.* at 14–16. Moreover, the instance of fraud that Ms. Strach relies on so heavily *was* detected and prosecuted—at least in part because of reports from voters, not because of any particular "safeguard," further undermining her point about the efficacy of safeguards generally, or the Organizing Ban in particular. Ex. 18, Dep. of Kimberly Westbrook Strach dated Feb. 9, 2022 ("Strach Dep.") at 79:20–79:25.[2]

In other words, the evidence establishes that there is no genuine issue of material fact on this point: the Challenged Laws were not enacted to and have never

[2] Plaintiffs have separately moved to exclude Ms. Strach's reports on the grounds that she is not qualified to offer the opinions she does offer, and her methodology—to the extent she uses any—is unreliable. *See generally* Strach Daubert Mot.

operated to prevent any type of voter fraud or protect the integrity of Michigan's elections. To the contrary, the undisputed evidence is that the Transportation Ban was a voter suppression measure. And the undisputed evidence establishes that both laws are operating to chill protected political activity by Plaintiffs.

D. Procedural History

Plaintiffs filed this action challenging the constitutionality of the Challenged Laws in November 2019.[3] *See* ECF Nos. 1, 17. Plaintiffs then moved for preliminary injunctive relief and the Attorney General moved to dismiss. ECF Nos. 22, 27. The Court permitted the Legislature and the Republican Intervenors to intervene to defend this lawsuit with the Attorney General. ECF No. 60, PageID.1026-1027.

In May 2020, the Court granted in part and denied in part the Motion to Dismiss, finding Plaintiffs sufficiently pleaded claims that (1) both Challenged Laws violate their free speech and associational rights under the First Amendment (Counts II and VI); (2) the Transportation Ban is unconstitutionally vague and overbroad (Count V); (3) that the Voter Transportation Law was preempted by the Federal Election Campaign Act ("FECA") (Count VIII); (4) the Organizing Ban is preempted by Section 208 of the Voting Rights Act (Count IV); and (5) the Organizing Ban is unconstitutionally vague and overbroad (Count I). *Priorities USA*,

[3] The original Complaint was brought solely by Priorities. It was later amended to add Rise and DAPRI as Plaintiffs. The operative complaint is the Amended Complaint, filed on January 27, 2020. ECF No. 17.

462 F. Supp. 3d at 810–822. The Court also held that the Challenged Laws regulate protected political expression and, thus, exacting scrutiny applies. *Id.* at 803–08, 812. The Court dismissed two of Plaintiffs' claims, Counts III and VII, which alleged violations of the right to vote under the Fourteenth Amendment. *Id.* at 808–09.

In September 2020, the Court granted Plaintiffs' Motion for Preliminary Injunction in part and enjoined the Transportation Ban, finding Plaintiffs were likely to succeed on their federal preemption claim.[4] *Priorities USA*, 487 F. Supp. 3d at 625. The Sixth Circuit stayed the injunction before the November 2020 election. *Priorities USA v. Nessel*, 978 F.3d 976, 985 (6th Cir. 2020). The Sixth Circuit later reversed the preliminary injunction and remanded the case. *Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. July 20, 2021).

Upon remand, both sets of Intervenors filed motions under Rule 12(c) that largely recycle the already-rejected arguments made in the Attorney General's original motion to dismiss. *See* ECF Nos. 113, 115. Those motions remain pending. The parties proceeded to discovery on the schedule set by the Court. *See* ECF No. 110, PageID.1872. Discovery is now closed. *See* ECF No. 139.

III. LEGAL STANDARD

"The question on summary judgment is whether the moving party has

[4] As explained in the parties' Rule 26(f) report and Response to the Republicans 12(c) Motion, Plaintiffs do not intend to pursue their claims under FECA, or their vagueness challenge to the Organizing Ban. ECF No. 109, PageID.1852–1853.

demonstrated that the evidence available to the court establishes no genuine issue of material fact such that it is entitled to a judgment as a matter of law." *Dobrowski v. Jay Dee Contractors, Inc.*, 571 F.3d 551, 554 (6th Cir. 2009). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact. *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002). To successfully defeat a motion for summary judgment, a factual dispute must be "significantly probative" and *not* "merely colorable," grounded in "the mere existence of a scintilla of evidence," based on "metaphysical doubt as to the material facts," or irrelevant. *Kraft v. United States*, 991 F.2d 292, 296 (6th Cir. 1993) (first and second quotes); *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 564 (6th Cir. 2003) (third and fourth quote); *see also St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). The moving party is also entitled to summary judgment when the nonmoving party "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In the First Amendment context, Defendants bear the burden at trial to produce evidence to support the State's asserted interests. *Bonta*, 141 S. Ct. at 2386. Thus, if Defendants are unable to make such a showing, Plaintiffs are entitled to summary judgment.

IV. ARGUMENT

A. The Transportation Ban is unconstitutionally vague.

The Transportation Ban criminalizes the act of "hir[ing] a motor vehicle" to transport voters to the polls unless those voters are "physically unable to walk." MCL § 168.931(f). It provides no further guidance on what it means to "hire" a motor vehicle, nor does it further define "physically unable to walk." Any criminal law that is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement" violates the Due Process Clause of the Fourteenth Amendment. *See United States v. Johnson*, 576 U.S. 591, 595 (2015). To determine whether a law is unconstitutionally vague, courts ask whether it "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999) (noting a statute may be vague "even if [the] enactment does not reach a substantial amount of constitutionally protected conduct"). The undisputed evidence indicates that it is not at all clear what the Ban prohibits, and no ordinary citizen would understand what conduct it punishes.

When a criminal law affects political expression, as the Transportation Ban does, *Priorities USA*, 462 F. Supp. 3d at 816–17, the "standards of permissible statutory vagueness are strict." *NAACP v. Button*, 371 U.S. 415, 432 (1963); *id.* at 438 ("Precision of regulation must be the touchstone in an area so closely touching

our most precious freedom."). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433. Criminal statutes that touch on political expression are scrutinized more closely because "[t]he threat of sanctions may deter [the exercise of First Amendment rights] almost as potently as the actual application of sanctions." *Id.*[5] Thus, the Ban must be subjected to a heightened constitutional inquiry.

In the context of the Transportation Ban, the term "hire" is impermissibly vague. *Doe v. Cooper*, 842 F.3d 833, 843 (4th Cir. 2016) (concluding that term "regularly scheduled" was unconstitutionally vague because the statute did not explain what "regular" meant in context); *Lytle v. Doyle*, 326 F.3d 463, 469 (4th Cir. 2003) ("[T]he vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning . . . but rather about what specific conduct is covered by the statute and what is not.") (citations omitted). It is unclear whether "hire" encompasses reimbursing a driver for gas money spent driving a voter to the polls, paying a rideshare company, or renting a van service to take voters to the polls. It is also unclear whether a rideshare company could offer voters free or discounted rides.

Briefing and testimony in this case demonstrates this very confusion. The Attorney General, Secretary, and Intervenors, disagree with each other about the

[5] In fact, DAPRI and Rise have refrained from expanding their rides to the polls events in Michigan out of fear of running afoul with the Transportation Ban. Hunter Decl. ¶¶ 10–12; Lubin Decl. ¶¶ 8, 10, 11–25, 30, 31.

meaning of the Ban:

- The Attorney General initially argued that the Ban only prohibits providing transportation as "quid pro quo" for voters' support of particular candidates or ballot proposals. ECF No. 30, PageID.488. But the Legislature explicitly *disagreed* with the Attorney General's "quid pro quo" argument, calling it inconsistent with the statutory language. *See* ECF No. 68, PageID.1187.
- The Attorney General believes the Ban prohibits an organization from offering drivers gas money, but the Secretary was unsure whether such conduct would be prohibited. Ex. 19, Dep. of Danielle Hagaman-Clark, Dec. 9, 2021 ("Hagaman-Clark Dep.") 56:01–56:03, 60:14–21; Ex. 20, Dep. of Jonathan Brater, Dec. 10, 2021 ("Brater Dep.") 44:10–45:06.
- The Attorney General believes the Ban prohibits ride share companies from offering free and discounted rides to the polls, but the Secretary was unsure. Hagaman-Clark Dep. 62:08–62:15; Brater Dep. 46:19–47:05.
- The Attorney General offered conflicting interpretations regarding whether the Ban prohibits paying for another voter's Uber ride to the polls, taking the position in briefing that this *would* be allowed, but testifying later it *would not be* allowed. *Compare* ECF No. 26, PageID.480-481 (Ban may appear to prohibit "the innocuous situation of a parent arranging and paying for an Uber to take a daughter at college to the polls . . . But that is not what the Michigan

Legislature intended") *and* Hagaman-Clark Dep. 57:01–04, 61:13–62:06 (testifying to the opposite effect). The Secretary agreed with the Attorney General's latter position that the Ban prohibits paying for another voter's Uber (and presumably disagrees with the Attorney General's prior inconsistent position). Brater Dep. 43:01–44:08.

- The Attorney General also offered conflicting interpretations regarding whether an organization could rent a van that came with a driver to take voters to the polls. *Compare* ECF No. 26, PageID.480–481 (Ban may appear to prohibit "a church hiring a van and driver to take parishioners to the polls. But that is not what the Michigan Legislature intended.") *and* Hagaman-Clark Dep. 57:01–06, 61:13–62:06 (testifying that the same conduct would be prohibited under the Ban). The Secretary believes the Ban prohibits such conduct. Brater Dep. 43:13–44:08.

Similarly, the Transportation Ban does not define "physically unable to walk." The provision's plain language suggests that only those voters who literally cannot walk may be transported to the polls via hired motor vehicles. But the Attorney General has suggested these words also apply to those who are blind, have epilepsy, or some other motor control ailment. *See* ECF. No. 10, PageID.76.

Nothing could better illustrate the problem than this morass of tangled, inconsistent, and shifting "explanations" of what the law does or does not cover.

Priorities USA, 462 F. Supp. 3d at 817–18 ("Defendant's very argument illustrates why plaintiffs have plausibly set forth facts demonstrating the Transportation Law may be unduly vague."). Since people of ordinary intelligence—including lawyers, election officials, legislators, and representatives of the Attorney General and Secretary—disagree as to what conduct the Ban punishes, it is (by definition) unconstitutionally vague. *See Ricks v. D.C.*, 414 F.2d 1097, 1103 (D.C. Cir. 1968) (witnesses voiced "widely differing interpretations" of word "loitering," which was "further evidence[e]" of a statute's vagueness); *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 277 (4th Cir. 2019) (pointing to various interpretations from courts in other jurisdictions of the term "common drunk" and "habitual drunkard" in criminal statute as evidence it was unconstitutionally vague). The potential for arbitrary prosecution due to this is constitutionally impermissible where—as here—it chills protected First Amendment activities. *See City of Chi.*, 527 U.S. at 52.

B. The Challenged Laws violate the First Amendment.

Independent from the issue of vagueness, the Challenged Laws unconstitutionally infringe upon Plaintiffs' First Amendment rights. Neither Ban can withstand the exacting scrutiny standard applicable to Plaintiffs' First Amendment claims, because (1) Defendants cannot show that either Ban advances any State interest (much less a compelling one); and (2) there is no genuine dispute that the State has less intrusive alternatives that advance whatever interests the State may

have in these statutory restrictions. Even under the standard articulated in *Anderson Burdick*, the Challenged Laws are unconstitutional. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1982).

1. The Challenged Laws burden political speech and exacting scrutiny applies.

This Court already determined that the Transportation Ban regulates protected political speech because it regulates the "act of spending money to transport voters to the polls" and "regulates rides-to-the-polls efforts . . . a common organizing activity for political organizations." *Priorities USA*, 462 F. Supp. 3d at 816–17. By impeding Plaintiffs' ability to organize rides-to-the-polls, the Transportation Ban hinders Plaintiffs' ability to encourage and facilitate voters in exercising their fundamental rights and building political power. Hunter Decl. ¶¶ 10–12; Lubin Decl. ¶¶ 10, 30, 11–25; Ufot Decl. ¶¶ 2-11.

Likewise, the Organizing Ban infringes upon Plaintiffs' efforts to persuade Michigan voters to vote, burdening their ability to affect change through political mobilization. Convincing and assisting individuals with exercising their right to vote and building political strategy is core political expression. As the Court previously found, "it is difficult to distinguish the political speech at issue here" from the speech in cases where courts (including the Supreme Court) have applied exacting scrutiny to government restrictions on aspects of electoral organizing. *Priorities USA*, 462 F.

Supp. 3d at 814 (collecting cases).

The Court was also correct when it held that the exacting scrutiny standard applies, because both Bans burden protected political expression. *Id.* at 810–12 (citations omitted) (holding that laws like the Challenged Laws are where "the First Amendment has its fullest and most urgent application," warranting application of exacting scrutiny). The Supreme Court applied this standard most recently in *Bonta*, emphasizing that exacting scrutiny requires not just a compelling interest, but also narrow tailoring between the challenged law and the state's asserted interest, and that courts must closely review the state's evidence in applying this test. 141 S. Ct. at 2383–86; *see also Meyer v. Grant*, 486 U.S. 414, 426 (1988) (considering evidence proffered by state in support of government interest when applying exacting scrutiny to Colorado's ban on payments for circulators of initiative petitions). The Court also reiterated that the burden to demonstrate that a challenged law is narrowly tailored is on the defendants. *Bonta*, 141 S. Ct. at 2386 (placing burden on state defendant to demonstrate challenged law satisfied exacting scrutiny).

In their 12(c) Motions, Intervenors assert that the *Anderson-Burdick* standard applies instead. ECF No. 113, PageID.1902; ECF No. 115, PageID.1931. In support, Intervenors rely upon a cursory footnote in the Sixth Circuit's decision reviewing the Court's preliminary injunction order, in which the appellate panel stated, "[w]e 'generally evaluate First Amendment challenges to state election regulations' using

the *Anderson-Burdick* framework." *Priorities USA*, 860 F. App'x at 422 n.3. But this is, at best, dicta, does not amount to the law of the case, and is itself not supported by the precedent upon which Intervenors rely. *See* ECF No. 121, PageID.1976-1997 (discussing why the footnote is not binding on this Court). Intervenors' contention that the footnote is a "fully considered ruling on an issue of law," has no merit. ECF No. 124, PageID.2013. The only claim at issue in that appeal was Plaintiffs' claim that the Transportation Ban was pre-empted by FECA (a claim Plaintiffs are no longer pursuing, ECF No. 109, PageID.1852-1853). This is no "definitive" conclusion, nor is it law of the case. It is classic dicta.

Intervenors also incorrectly assert that Plaintiffs' reliance on *Bonta* is misplaced. ECF No. 123, PageID.2002; ECF No. 124, PageID.2015. They argue the case is inapposite because it involved compelled disclosure, and this case does not. ECF No. 123, PageID.2003; ECF No. 124, PageID.2014. Nowhere in *Bonta,* however, did the Court suggest that its holding is so narrow. In fact, the Court noted that the exacting scrutiny standard is broadly applicable in the First Amendment context and is not limited to election cases. *Bonta*, 141 S. Ct. at 2383 ("[E]xacting scrutiny is not unique to electoral disclosure regimes. To the contrary, *Buckley* derived the test from *NAACP v. Alabama* itself, as well as other nonelection cases.") (citations omitted). Intervenors also argue that the law at issue in *Bonta* "compelled speech and chilled association" but the laws here "only minimally burden" Plaintiffs.

See ECF No. 124, PageID.2015. But this Court already found Plaintiffs sufficiently alleged the Challenged Laws impose a burden on Plaintiffs, and the undisputed evidence now establishes as much. *Priorities USA*, 462 F. Supp. 3d at 819.

2. The Transportation Ban does not survive exacting scrutiny.

a. The Ban does not advance the State's interests.

Defendants have asserted that the Transportation Ban curbs voter fraud and undue influence, but they have not carried their burden of showing the Ban furthers these purported interests. *Priorities USA*, 462 F. Supp. 3d at 814 (Defendants must show that the Ban has a "substantial relationship to a sufficiently important governmental interest"); *see also Bonta*, 141 S. Ct. at 2386; *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 725 (M.D. Tenn. 2019). In fact, the undisputed evidence demonstrates that: (1) the Ban *was not* enacted to prevent voter fraud or coercion; (2) it prohibits conduct that is completely unrelated to voter fraud and coercion; (3) the State has never charged anyone with violating the Ban to deter voter fraud; and (4) there is zero evidence of fraud associated with transporting voters in Michigan. Plaintiffs are entitled to summary judgment.

The *first* point is addressed *supra* at II.B. (discussing Dr. Sugrue's Report and findings about the Ban's origins).

The evidence also demonstrates the *second* point: that the conduct prohibited by the Ban goes way beyond activity reasonably tethered to the State's interest in

combatting voter fraud and coercion.[6] *See supra* IV.B.2.b. The lines that the Ban draws (wherever they actually are), are also nonsensical in general and specifically as it relates to the State's purported interests. According to one of the varying interpretations offered by the Attorney General, private bus or car companies would be able to exercise their First Amendment right to engage in get-out-the-vote efforts by directing their drivers to use their vehicles to transport voters to the polls, but an organization like Plaintiffs would be unable to "hire" that same private bus or car company to perform the exact same service. *See* ECF. 10, PageID.55. This nonsensical distinction demonstrates the disconnect between the Ban and the State's asserted interest in preventing voter fraud and coercion. There is no evidence to suggest that paying drivers, renting cars, or otherwise paying money to convey voters to the polls would contribute to corruption any more or less than using employee or volunteer drivers. *Cf. Meyer*, 486 U.S. at 426 (refusing to accept unsupported allegation that paid petition circulators are more likely to engage in corrupt behavior than volunteers motivated entirely by an interest in the outcome).

Third, as discussed, the State has never charged any person with violating the Ban. Neither the Attorney General nor the Secretary is aware of a *single incident*

[6] The only evidence put forth regarding absentee ballot application fraud is a report by Ms. Strach, which does not address the Transportation Ban or fraud associated with transportation—and of course relates to *North Carolina, not Michigan*. Strach Dep. 117:25–118:05; Strach Daubert Mot. at 13–17.

where the State charged any person with violating the Ban. Hagaman-Clark Dep. 71:05–72:01; Brater Dep. 56:15–57:02. Intervenors have similarly not uncovered any instances where the State has charged any person with violating the Ban. Dr. Sugrue found no evidence that anyone has ever been charged with violating Michigan's various bans on voter transportation. Sugrue Rep. at 3. Under the Supreme Court's decision in *Bonta*, this is strong evidence that the State's interest is not being served by the Ban. *See Bonta*, 141 S. Ct. at 2387 ("The need for [the law] is particularly dubious given that California . . . did not rigorously enforce the disclosure obligation until 2010").

Fourth, incidents of voter fraud of *any kind* in Michigan are rare. Herron Rep. at 2; *see supra* II.C. More specifically, there is no evidence that fraud has ever been associated with the transportation of voters to the polls in Michigan, or that the Ban has ever prevented voter fraud. Sugrue Rep. at 47. Defendants produced no evidence to refute Drs. Herron's and Sugrue's conclusions.

In fact, there is no evidence that the Transportation Ban is doing *anything* besides deterring First Amendment protected conduct. On this record, the question of whether the Ban advances the State's interest in preventing voter fraud or coercion is simply not in material dispute: it does not. *See Bonta*, 141 S. Ct. at 2386 (finding evidence did not show the challenged regulation advanced the state's "investigative, regulatory or enforcement efforts"); *Washington Post v. McManus*, 944 F.3d 506,

520–523 (4th Cir. 2019) ("without direct evidence (or anything close to it) of meddling on news sites, Maryland [] failed to show that this purported threat is likely or imminent enough to justify the Act's intrusive preventative measures").

b. Less intrusive means would advance the State's interests.

Less intrusive means than the Transportation Ban would advance the State's interests in combating voter fraud and coercion. *See Bonta*, 141 S. Ct. at 2387 (pointing to existence of "less intrusive alternatives" that might similarly advance the state's interests); *Buckley v. Am. Const'l Law Found., Inc.*, 525 U.S. 182, 204–05 (1999) (relying on alternatives in place to prevent fraud in striking down a restriction on political expression); *Meyer*, 486 U.S. at 427 (same).

Michigan already has criminal laws that address voting fraud, several of which already address the State's interest in preventing bribery and quid pro quo.[7] But Michigan is the *only* state with this restrictive of a voter transportation law. *See* Sugrue Rep. at 8. "Souls-to-the-polls" programs that include hired voter transportation are a key component of get-out-the-vote efforts in other states. *See* Ufot Decl. ¶¶ 2-11. Yet, even in the absence of strict transportation bans in other

[7] It is a misdemeanor to "receive, agree, or contract for valuable consideration" for "[v]oting or agreeing to vote, or inducing or attempting to induce another to vote, at an election." MCL § 168.931(b)(i). "It is a felony to bribe a voter." *Id.* § 168.932(a). And, it is a misdemeanor to promise or receive something of value for deciding whether and for whom to vote. *Id.* § 168.931(1)(a), (b).

states, voter fraud in the United States is exceedingly rare. Herron Rep. at 3; Herron Dep. 79:05–82:12 ("If it were true that there was some feature of a state -- of some of the states about how they administer . . . their elections . . .[that prevents fraud] then we would expect to see variability across states in a systematic way. I don't see it. In fact, no one sees it, I would say."); *see also Bonta*, 141 S. Ct. at 2387 (noting California was "one of only three States to impose" restriction at issue, which made the need for it questionable).

In sum, the Transportation Ban cannot survive exacting scrutiny. It has little (if any) relationship to preventing Michigan's rare instances of voter fraud and coercion and lesser intrusive laws are already in place that criminalize the types of voter fraud that the State seeks to prevent. The Ban hinders Plaintiffs protected election-related speech, warranting "the First Amendment['s] . . . most urgent application." *Priorities*, 400 F.Supp.3d at 810–11 (citations omitted).

3. The Organizing Ban does not survive exacting scrutiny.

a. The Ban does not advance the State's interests.

Defendants assert that the Organizing Ban advances the State's interests in preventing voter fraud and coercion, detecting and prosecuting fraud, and ensuring that absentee ballot applications are properly delivered, but fail to meet their burden of proving that the Ban furthers these interests. *Priorities USA*, 462 F. Supp. 3d at 814; *Bonta*, 141 S. Ct. at 2386; *see* ECF No. 70, PageID.1209, PageID.1230-1231;

ECF No. 68, PageID.1172, 1175, PageID.1187-1188; ECF No. 113, PageID.1906; ECF No. 27, PageID.412, 420, 475. The State has not identified a single instance in which the Ban was enforced. Voter fraud in Michigan is rare. The few instances of absentee ballot fraud identified do not implicate the Ban. The State's asserted interests in the Ban and Defendants' "support" for those interests fall flat. Given the dearth of evidence produced by Defendants, summary judgment is appropriate.

Throughout discovery, Plaintiffs repeatedly requested that Defendants identify even a *single instance* of fraud in Michigan that implicated the Organizing Ban. The Attorney General and Secretary identified instances of purported fraud in Michigan connected to absentee ballot applications, but none of those instances have resulted in convictions or charges under the Ban.[8] Intervenors identified a handful

[8] The Attorney General identified the following five incidents in her responses: (1) Rainey incident: involved forged signatures of nursing home residents on absentee ballot applications, which involved forgery, not "solicitation", Hagaman-Clark Dep. 104:06–104:11; (2) Williams incident: involved requesting absentee ballot applications on behalf of nursing home residents (some of whom were in a vegetative state), but Attorney General could not identify any conversations Williams had with those individuals that would have constituted "solicitation", *id.* 114:17–115:20, and it appeared forgery was at issue, *see* Ex. 22; (3) Clark incident: related to an absentee *ballot*, not absentee ballot applications, *id.* 117:02–117:21; and (4) Rotondo incident: charged with forging her daughter's signature on absentee ballot application, which again involves forgery, not "solicitation," Brater Dep. 85:09–86:06; and (5) Pappas incident: involved an investigation into someone requesting an absentee ballot application on behalf of a deceased person, Hagaman-Clark Dep. at 94:03–98:09. *See* also Ex. 8 (Attorney General Responses to Plaintiffs' Interrogatories); Exs. 21–24 (documents produced by the Attorney General regarding Rainey, Williams, Clark, and Pappas). The Attorney General referenced instances under investigation during her deposition that also appear to involve

of additional instances, but they dealt with absentee *ballots* rather than absentee ballots, not absentee ballot *applications* and thus would not have come within the Ban.[9]

No one identified a single instance where anyone has been charged with or convicted of violating the Organizing Ban. And while the Secretary has attempted to explain this away by asserting her office chose not to pursue an allegation that the Ban *may* have been violated, because allegations regarding the solicitation of absentee ballot applications are "hard to prove," Brater Dep. 77:12–77:24, this in itself calls the State's interest in the Ban into doubt. *See Bonta*, 141 S. Ct. at 2387 ("The need for [the law] is particularly dubious given that California . . . did not rigorously enforce the disclosure obligation until 2010").

Defendants argue that the Ban serves as a prophylactic to deter fraud and coercion, but they offer no relevant evidence in support of this claim. ECF No. 113, PageID.1906; ECF No. 27, PageID.421. Intervenors offer only Ms. Strach's Report, which draws on her experience investigating voter fraud in North Carolina to

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forgery, but could not provide additional detail. Hagaman-Clark Dep. 120:13–124:05; *see also* Brater Dep. 69:25–73:14 (listed potential incidents in Flint, Hamtramck and Sterling Heights but was unable to provide specific details, and agreed the incidents involved concerns beyond "just the solicitation or return of the application" to vote absentee).

[9] The Republican Intervenors identified the five instances already identified by the Attorney General, plus six additional instances (Ahmed, Asad, Mohammed, Pinkney, Rahman, and Parana) that all were related to absentee *ballots*, not absentee ballot *applications*. *See* Ex. 11.

conclude that absentee voting as a general matter is more susceptible to fraud. Strach Rep. at 2–19. Ms. Strach has not studied the administration of elections in Michigan, has no expertise in that subject and no foundation to offer any opinion with respect to Michigan. She is not qualified to testify about voter fraud in Michigan or whether any Michigan law might prevent voter fraud. Strach Daubert Mot. at 7–9. Her expert testimony was excluded due to her lack of qualifications in another case involving allegations of voter fraud. Strach Dep. 37:21–38:04. And, she produces misleading conclusions by cherry picking. Herron Rep. at 14–16 (discussing the statistical sampling error involved in "selecting the dependent variable"). Ms. Strach's Report is not "evidence on which the jury could reasonably" rely and the Court should give it no weight. *See Anderson*, 477 U.S. at 252.

Ms. Strach also concludes that the Organizing Ban *may* provide an opportunity for election officials to catch fraud. Strach Rep. at 20. Again, her only experience is from North Carolina, which has an absentee ballot application process markedly different than Michigan's, and she is not qualified to provide this opinion. Strach Daubert Mot. at 7–9. In any event, the undisputed evidence establishes that voter fraud in Michigan is exceedingly rare, a fact that Ms. Strach does not dispute (nor could she). Herron Rep. at 2; Strach Dep. at 120:10–120:15. The only factual evidence offered by Defendants relevant to Michigan shows that absentee ballot application fraud, in the rare instances when it does exist, is caught and prosecuted

through other procedures and laws, not the Organizing Ban.[10]

Finally, Defendants maintain that the Organizing Ban furthers the State's interest in ensuring that absentee ballot applications are delivered to the clerk's office and argue that non-registered voters might forget to turn them in. ECF No. 68, PageID.1175; ECF No. 27, PageID.421-422. Defendants have offered no evidence to support their theory.

Ultimately, the Ban hinders Plaintiffs' protected speech and Defendants have failed to establish any genuine dispute that it advances a State interest.

b. Less intrusive means would advance these interests.

Even if the State's purported interests in preventing fraud were supported by evidence in the record before the Court (and they are not), less intrusive means than the Organizing Ban, which impinges on Plaintiffs' protected speech, would advance the State's interests. *See Bonta*, 141 S. Ct. 2373, 2382; *Buckley*, 525 U.S. at 204–05; *Meyer*, 486 U.S. at 427. Michigan already has at least seven criminal laws that address voting fraud, several of which specifically relate to absentee voting.[11] These

[10] Ex. 11 at 6–7 (Ahmed, Asad, Mohammed, and Rahman pled guilty to unlawful possession of absentee ballots); *id.* at 7 (Pinkney was convicted of unlawful possession of absentee ballots); *id.* at 7–8 (Rotondo pled guilty to impersonating another voter); Ex. 23 (Clark was charged with impersonating another voter).

[11] It is a felony to forge a signature on an absentee ballot application. MCL § 168.759(8). It is a felony to mark, alter, or switch out an absentee ballot. *Id.* § 168.932(e). It is a felony to possess an absentee ballot belonging to another. *Id.* § 168.932(f). It is a felony to "[s]uggest or in any manner attempt to influence" a voter filling out an absentee ballot. *Id.* § 168.932(g), (h). It is a felony to bribe a voter. *Id.*

statutes have *actually been used* to prosecute rare instances of attempted absentee ballot fraud.[12] In addition, Michigan law specifically guards against absentee *ballot* fraud through a series of procedures, including by requiring that absentee *ballots* be delivered directly to the voter or mailed to the address at which the voters is registered. MCL §§ 168.761(3), (6). If a voter were to receive an absentee ballot in her name that she did not request, the voter could still vote in person at the polls and the unsolicited ballot would be cancelled. *Id.* § 168.769. A list of where and to whom absentee ballots were mailed is also public, so it can be reviewed by voters for accuracy. *Id.* § 168.760. The combination of these criminal laws and absentee ballot procedures strongly diminishes, if not eliminates, any need for the Ban.

For all of these reasons, the Organizing Ban cannot survive exacting scrutiny.

4. The Challenged Laws are also unconstitutional under *Anderson-Burdick*.

Finally, even if the less stringent standard articulated in *Anderson-Burdick* were applicable, as Defendants so stridently insist, the Challenged Laws would fail even that more flexible standard. *See* ECF No. 113, PageID.1902; ECF No. 115, PageID.1931. The State's interests, to the extent that these interests are at all

§ 168.932(a). It is a misdemeanor to promise or receive something of value for deciding whether and for whom to vote. *Id.* §§ 168.931(1)(a), (b). And, it is a misdemeanor to violate the any election law. *Id.* § 168.931(2).

[12] *See supra* IV.B.3.a.

advanced by either Ban, *see supra* IV.B, do not outweigh the significant burdens imposed on Plaintiffs. Accordingly, neither Ban can withstand scrutiny.

C. Section 208 preempts and supersedes the Organizing Ban.

Finally, the Organizing Ban conflicts with and violates Section 208 of the Voting Rights Act, 52 U.S.C. § 10508, and is thus preempted and invalid. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) ("[S]tate laws that conflict with federal law are without effect.") (citations and quotation marks omitted). Conflict preemption occurs where compliance with both a federal and state regulation is physically impossible, or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

While this Court preliminarily determined Plaintiffs were unlikely to succeed on their Section 208 claim, *Priorities USA*, 487 F. Supp. 3d at 619, the Court would be well within its rights to reconsider that analysis—and should. Section 208 states that "[a]ny voter who requires assistance . . . may be given assistance by a person of the voter's choice." 52 U.S.C. § 10508. The Court concluded the word "a" rather than "the" in Section 208 "suggests that some state law limitations on the identity of persons who may assist voters is permissible" and stated that the legislative history of Section 208 suggests Congress only intended to preempt state election laws that "unduly burden" the rights recognized in Section 208. *Priorities USA*, 487 F. Supp.

3d at 619. But while the statute uses the indefinite article "a" before "person of the voter's choice," it then lists *specific persons* who cannot assist the voter. 52 U.S.C. § 10508. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied." *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980).

Recently, the District Court for the Western District of Arkansas disagreed with this Court's interpretation of Section 208, holding it was "unconvinced that the use of the indefinite article 'a' evinces an intent by Congress to allow states to limit who may act as a voter assistor under § 208." *Arkansas United v. Thurston*, No. 5:20-CV-5193, 2020 WL 6472651, at *4 (W.D. Ark. Nov. 3, 2020) (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes.")). The court instead determined that Section 208 "provides certain voters with a federal right to choose who assists them with voting . . . and that states cannot constrict that right." *Id.* at *4 (citations omitted); *see Democracy Now N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 233–36 (M.D.N.C. 2020) (enjoining state law requiring voters who were patients in hospitals, clinics, and nursing homes to "rely on either a near relative, a legal guardian, or a [multipartisan assistance team] before they may choose any other person to assist them" in voting); *OCA-Greater Houst. v. Texas*,

867 F.3d 604, 614–15 (5th Cir. 2017) (Section 208 preempted Texas law restricting who may provide interpretation assistance to English-limited voters); *United States v. Berks Cty.*, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003) (Section 208 preempted law restricting who may provide language assistance to Spanish-speaking voters).

The Arkansas district court also held it was "of no significance that Plaintiffs are not themselves voters denied the protections of Section 208" since the organizational plaintiff had standing, contradicting this Court's concern that Plaintiffs had not identified a specific voter who has been affected by the Ban. *See Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 794 (W.D. Ark. 2021) (collecting cases regarding organizational standing and stating that organizations "establish[] standing by showing that the state's alleged violation of the federal law vis-à-vis voters required the organization to divert resources . . . The same is true here."). Plaintiffs have established standing "on [Plaintiffs'] own rights and injuries as organizations." *Priorities USA*, 462 F. Supp. 3d at 808. Indeed, "[t]he Supreme Court has permitted organizations to bring suit in VRA claims" based on their own injuries. *Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (citing *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 268–71 (2015)). Nonprofit organizations that are not meaningfully distinguishable from Plaintiffs have also brought successful Section 208 claims. *OCA-Greater Houston*, 867 F.3d at 612 (nonprofit organization conducting get-out-the-vote efforts

successfully challenged Texas law that forced the nonprofit to divert resources and "perceptibly impaired [its] ability to get out the vote among its members"); *see supra* II.A.

If voters who "require[] assistance to vote by reason of blindness, disability, or inability to read or write" are prevented from being "given assistance by a person of the voter's choice" in the context of "registration . . . or other action required by law prerequisite to voting," there is a violation of Section 208. 52 U.S.C. § 10508. Under the Organizing Ban, Michigan voters may only receive assistance in voting from a specific group of people: *registered Michigan voters*. They may not receive assistance from any of the thousands of other Michigan residents who are not registered voters, including Plaintiffs' members. *See* ECF No. 22-7, PageID.228-236, Decl. of Dr. Maxwell Palmer ¶ 6; Hunter Decl. ¶¶ 17–18. Section 208 accordingly preempts the Organizing Ban. The Court should consider its preliminary analysis of Section 208.

V. CONCLUSION

For the reasons stated, Plaintiffs respectfully submit that the Court grant summary judgment in Plaintiffs' favor.

Date: March 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, 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.

LOCAL RULE CERTIFICATION

I, Amanda Beane, certify that this document and complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

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