UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

DANA NESSEL,

Defendant,

and

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

Intervenors–Defendants.

Civil No. 19-13341

DAWKINS DAVIS, J.
ALTMAN, M.J.

MOTION FOR SUMMARY JUDGMENT BY THE REPUBLICAN COMMITTEES

Under Rule 56(a) of the Federal Rules of Civil Procedure, the Republican National Committee and the Michigan Republican Party ("**Republican Committees**") move for summary judgment on Plaintiffs' claims, in whole or in part, with prejudice.

On September 24, 2021, the Republican Committees filed a motion for judgment on the pleadings, which remains pending and is incorporated herein. ECF No.

115; ECF No. 124. Although their 12(c) motion is pending, to avoid any waiver or forfeiture of rights, the Republican Committees file the present motion according to the amended dispositive motion deadline.

Counsel for the Republican Committees sought concurrence under Local Rule 7.1 before filing this Motion. The Michigan House of Representatives and the Michigan Senate ("**Legislature**") and the Attorney General concur in the relief requested. Plaintiffs do not.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: March 21, 2022

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BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY THE REPUBLICAN COMMITTEES

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559 U.S. 460; 130 S.Ct. 1577; 176 L.Ed.2d 435 (2010)

QUESTIONS PRESENTED

1. Do Plaintiffs have standing to pursue their claims?

2. Should the Court grant summary judgment against Plaintiffs?

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiffs Priorities USA, Rise, Inc., and the Detroit/Downriver Chapter of the A. Philip Randolph Institute ("**DAPRI**") are get-out-the-vote organizations that wish to engage in prohibited electoral conduct in Michigan. See Am. Compl. ¶ 5 , ECF No. 17, PageID.90–91; Rule 26(f) Report ¶ VIII.A, ECF No. 109, PageID.1859.

2. Michigan law prohibits a person from offering to return an absentee ballot application ("**ABAs**"), and from returning an ABA to the local clerk unless that person is a member of the voter's immediate family or household, a mail carrier, or a registered Michigan voter ("**harvesting ban**"). See Mich. Comp. Laws § 168.759(4).

3. Michigan law prohibits a person from paying to transport voters to an election, except voters who are physically unable to walk ("**paid driver ban**"). See Mich. Comp. Laws § 168.931(1)(f).

4. A Michigan voter may return a written request or ABA to the voter's local clerk: (1) in person, (2) by mail, (3) email, (4) fax, (5) through in-person, mail, or other delivery by immediate family (including in-laws and grandchildren) or a person residing in the same household, and (6) if none of those methods are available, through in-person, mail, or other delivery by any registered elector. *Priorities USA* v. *Nessel*, 487 F. Supp. 3d 599, 615 (ED Mich. 2020) (citing Mich. Comp. Laws § 168. 759(4)–(6)).

5. There are over 8 million registered electors in Michigan. Ex. 1, Michigan Dept. of State, *Voter Registration Statistics*, https://perma.cc/YY7Y-4R9X.

6. Plaintiffs have not identified anyone covered by Section 208 of the Voting Rights Act, 52 U.S.C. § 10508, who were unable to receive help voting because of

the harvesting ban. Ex. 2, Pls.' Resp. to Republican Comms.' Interrog. No. 3.

7. Plaintiffs have not identified any ambulatory Michigan voters who were unable to reach the polls because of the paid driver ban. See *id.*, at Pls.' Resp. to Republican Comms.' Interrog. No. 2.

8. Fraud and incidents of corruption have occurred in elections. Ex. 3, Pls.' Ans. to the Republican Comms.' Req. for Admissions ("**RFAs**") Nos. 1–2.

9. The Republican Committees have identified multiple examples of fraud, corruption, or undue influence related to the absentee voting process in Michigan, see Ex. 4, Republican Comms.' Am. Ans. to Pls.' Interrog. No. 5, including these:

A. Trenae Rainey, a nursing home employee, was charged with three counts of election law forgery and three counts of forging her signature on ABAs after the 2020 General Election ("**G20**"). Rainey filled out ABAs on behalf of facility residents without contacting them and forged their signatures. She pleaded guilty to three misdemeanor counts of making a false statement in an ABA and was sentenced to two years' probation, with the first 45 days to be served in jail. Ex. 5, Register of Actions & Cert. of Conviction, *People* v. *Rainey*, No. 21-C210651-FY (37th Dist. Ct.) (Sabaugh, J.), (Feb. 23, 2022); Mukomel, AG Nessel, SOS Benson Provide Update on New Election Fraud Cases, Dept. of Atty. Gen. (Oct. 11, 2021).

B. Nancy Williams, a guardian for several legally incapacitated people, faces trial in five case on election fraud charges from the G20. She is accused of fraudulently submitting 26 ABAs to different clerks, seeking to have her wards' absentee ballots mailed directly to her. Williams is also accused of submitting voter registration applications for her wards without their knowledge, consent, or understanding. Ex. 6,

Registers of Action, *People* v. *Williams*, Nos. 22-117-FH, 22-211-FH, 22-274-FH, and 22-997-FH (3rd Jud. Cir.) (Van Houten, J.); *People* v. *Williams*, No. 21-M-765-FY (47th Dist. Ct.) (Arvant, J.); Mukomel, AG Nessel, SOS Benson Provide Update on New Election Fraud Cases, Dept. of Atty. Gen. (Oct. 11, 2021).

C. Armani Asad, an unsuccessful candidate for Hamtramck city council, was also charged with 14 counts of harvesting absentee ballots for a primary election in Hamtramck, Michigan ("**HP13**"). He pleaded guilty to one felony count of improper possession of an absentee ballot and was fined. *People* v. *Asad*, No. 13-009622-01-FH (3d Jud. Cir., Wayne Cty.) (Kenny, J.); Ex. 7, Register of Actions.

D. Mohammed Rahman was charged with five counts of harvesting absentee ballots for HP13. He pleaded guilty to one felony count of unlawful possession of an absentee ballot and was sentenced to probation. *People* v. *Rahman*, No. 14-004824-01-FH (3d Jud. Cir., Wayne Cty.) (Hathaway, J.); Ex. 8, Register of Actions.

E. Edward Pinkney, a community activist, was convicted of "giving valuable consideration to influence the manner of voting by a person, influencing a person voting an absent voter ballot, and three counts of possessing, returning, or soliciting to return an absent voter ballot." *People* v. *Pinkney*, 2009 WL 2032030, at *1 (Mich. Ct. App. Jul. 14, 2009) (citations omitted). He paid $5.00 to each person at a local soup kitchen in Benton Harbor, Michigan, who would fill out an absentee ballot for a 2005 runoff election. *Ibid.*

10. The Attorney General identified other instances of voter fraud, corruption, or undue influence related to the absentee process. Ex. 9, Attorney Gen.'s Ans. to Pls.' Interrog. No. 4.

11. Jonathan Brater, Director of the Michigan Bureau of Elections, testified as the representative of the Michigan Department of State to reports of illegal solicitation or return of ABAs in the cities of Flint, Sterling Heights, and Hamtramck. Ex. 10, Deposition of Jonathan Brater 69:9–73:9 (Dec. 10, 2021).

INTRODUCTION

This is an election law case. Plaintiffs challenge Michigan's harvesting ban and paid driver ban. Only four of their eight claims remain. Plaintiffs have abandoned Counts I and VIII, and the Court previously dismissed Counts III and VII.[1] The Republican Committees seek summary judgment on the surviving claims: Counts II and IV, which are First Amendment challenges to the two bans; Count IV, in which Plaintiffs claim that Section 208 of the Voting Rights Act preempts the harvesting ban; and Count V, in which Plaintiffs claim that the paid driver ban is vague and overbroad.

These claims fail as a matter of law for the reasons stated below and in the pending motions for judgment on the pleadings.[2] Fact discovery has bolstered the Court's previous finding that the harvesting ban is "designed with fraud prevention as its aim and [that] it utilizes well-recognized means in doing so," *Priorities USA*, 487 F. Supp. 3d, at 614, and the Sixth Circuit's finding that "prohibiting paid vote-hauling is likely a reasonable, nondiscriminatory restriction justified by" preventing potential voter

[1] Order on Motion to Dismiss, ECF No. 59, PageID.1015; Rule 26(f) Report ¶ V.A at 3–4, ECF No. 109, PageID.1852–1853.

[2] Republican Comms.' Rule 12(c) Mot., ECF No. 115, PageID.1929–1946; Reply Brief for Republican Comms., ECF 124, PageID.2005–2015; Legislature's Rule 12(c) Mot., ECF No. 113, PageID.1883–1912; Reply Brief for Legislature, ECF No. 123, PageID.1997–2004; Attorney Gen.'s Concur., ECF No. 114, PageID.1913–1915.

fraud. *Priorities USA* v. *Nessel*, 860 F. Appx. 419, 422 n.3 (CA6 2021). Kimberly Westbrook Strach, the former Executive Director of the North Carolina State Board of Elections ("**Director Strach**"), has also opined that (1) absentee ballot harvesting restrictions protect the integrity of elections, and (2) absentee ballot safeguards provide opportunities to detect irregularities or fraud that could impact elections. Ex. 11, Report of Kimberly Westbrook Strach ("STRACH") ¶ 43 (Jan. 14, 2022).

For the reasons stated fully below, the Court should dismiss Plaintiffs' claims, in whole or in part, with prejudice.

LEGAL STANDARD

Summary judgment is proper "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. Rule Civ. Proc. 56(a). A material fact is one "that might affect the outcome of the suit," and a genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248; 106 S.Ct. 2505; 91 L.Ed.2d 202 (1986). "The mov[ant] bears the burden of showing that no genuine issues of material fact exist." *Rafferty* v. *Trumbull Cty., Ohio*, 915 F.3d 1087, 1093 (CA6 2019) (internal quotation and citation omitted).

ARGUMENT

I. Plaintiffs lack Article III standing.[3]

Standing is a threshold question in every case because it concerns subject-matter

[3] Although the Court ruled earlier that Plaintiffs sufficiently alleged standing at the pleadings stage for the remaining claims, *Priorities USA* v. *Nessel*, 462 F. Supp. 3d

jurisdiction. *Warth* v. *Seldin*, 422 U.S. 490, 498; 95 S.Ct. 2197; 45 L.Ed.2d 343 (1975). Without Article III standing, a court lacks subject-matter jurisdiction over the action. *Steel Co.* v. *Citizens for a Better Env.*, 523 U.S. 83, 101–02; 118 S.Ct. 1003; 140 L.Ed.2d 210 (1998).

Plaintiffs bear the burden of establishing standing "for each claim he seeks to press and for each form of relief that is sought," *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 734; 128 S.Ct. 2759; 171 L.Ed.2d 737 (2008) (cleaned up), and must "clearly allege facts demonstrating each element." *Ward* v. *Nat'l Patient Acct. Serv. Sols., Inc.*, 9 F.4th 357, 360 (CA6 2021) (cleaned up). On summary judgment, they cannot rely on "mere allegations" for each standing element, "but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *McKay* v. *Federspiel*, 823 F.3d 862, 867 (CA6 2016) (internal quotation and citation omitted).

A plaintiff must maintain standing throughout the lawsuit: the plaintiff "bears the burden of establishing standing as of the time he brought this lawsuit *and maintaining it thereafter*." *Carney* v. *Adams*, —U.S.—; 141 S.Ct. 493, 499; 208 L.Ed.2d 305 (2020) (emphasis added)). Although in *Memphis A. Philip Randolph Inst.* v. *Hargett*, 2 F.4th 548, 557 (CA6 2021), the Sixth Circuit suggested *Carney* is in tension with *Friends of the Earth, Inc.* v. *Laidlaw Env. Servs (TOC), Inc.*, 528 U.S. 167; 120 S.Ct. 693; 145 L.Ed.2d 610 (2000), there is no tension because *Carney* cited *FOE* for the

792, 806–07, 821 (ED Mich. 2020), it noted that they were "not yet held to a summary judgment standard." *Id.*, at 806. It is appropriate to reassess standing now that the case has reached that point.

proposition that "[t]he requisite personal interest that must exist at the commencement of the litigation must continue throughout its existence," *Carney*, 141 S.Ct., at 499 (quoting *FOE*, 528 U.S., at 189 (cleaned up)).

Plaintiffs assert standing only on their own behalf—*i.e.*, "direct organizational standing." See *Priorities USA*, 462 F. Supp. 3d, at 808–09. Thus, to establish standing, they must show an injury-in-fact to their organizations that is: (1) concrete, particularized, and actual or imminent; (2) fairly traceable to the defendant's challenged conduct; and (3) likely to be redressed by a favorable judgment. *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 338–40; 136 S.Ct. 1540; 194 L.Ed.2d 635 (2016). Plaintiffs offer three injuries, but none of them satisfies the *Spokeo* standard.

First, Plaintiff allege they have abstained from political expression proscribed by the challenged laws out of a credible fear of prosecution.[4] Their "fear" is contrived to manufacture standing. When this lawsuit was first filed, Priorities was the only plaintiff, and it expressed no fear of prosecution. It contended only that the laws would "frustrat[e] its mission" because Priorities would "have to expend and divert additional funds and resources in [get out the vote] ["]**GOTV efforts**["] … to combat the Bans' effects on Michigan citizens."[5] Only after the Attorney General pointed out that pre-enforcement standing requires a credible threat of prosecution[6] and after the Court invited an amended complaint in light of the Attorney General's motion,[7] did Priorities, joined

[4] Amended Compl. ¶ 27, ECF No. 17, PageID.99.

[5] Compl. ¶ 7, ECF No. 1, PageID.5.

[6] Motion to Dismiss, ECF No. 10, PageID.53–55.

[7] Order Regarding Motion to Dismiss, ECF No. 13, PageID.81–82.

then by Rise and DAPRI, file an amended complaint professing a fear of prosecution, which they based on a form letter rushed off to the Attorney General and Michigan's 83 county prosecutors seeking "assurance" that Plaintiffs would not be prosecuted if they violated laws they knew about and as to which they had previously pleaded their intent to fully comply. With few exceptions, the letters went unanswered.[8] The few prosecutors who responded mostly acknowledged receipt.[9] Only five responded substantively. Three merely declined to make any promises;[10] two conveyed that they would enforce the law.[11] Notably, both of those prosecutors are in rural northern Michigan—Wexford and Cheboygan counties—and none of the Plaintiffs has alleged that they ever have or intend to harvest ABAs or transport ambulatory voters to the polls in those counties. Allowing Plaintiffs to bluff through standing in this fashion would contravene "an essential … part of the case-or-controversy requirement of Article III." *Davis*, 554 U.S., at 733.[12]

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[8] Ex. 12, Pls.' Ltrs. to Atty. Gen. and Prosecutors that Went Unanswered.

[9] Ex. 13, Pls.' Ltrs. to Prosecutors, Resps. that Only Acknowledged Receipt.

[10] Ex. 14, Pls.' Ltrs. to Prosecutors, Resps. that Declined to Make any Promises.

[11] Ex. 15, Pls.' Ltrs. to Prosecutors, Resps. that Indicated the Prosecutors would Enforce the Law.

[12] Plaintiffs note a letter that Priorities USA sent to Secretary Benson, copied to the Attorney General, laying out its concerns with the challenged laws. Am. Compl. ¶ 30, ECF No. 17, PageID.100; see also Letter from Marc Elias, Counsel for Priorities USA, to Jocelyn Benson, Sec'y of State of the State of Michigan, with copy to Dana Nessel, Atty. Gen. for the State of Michigan, ECF No. 22-10, PageID.246–252. Neither Secretary Benson nor General Nessel responded to the letter. Plaintiffs cannot rely on this letter for a threat of imminent prosecution as Priorities USA only asked

Yet, even if the Court were to credit their asserted fear, standing requires more. There must exist a credible "threat" of "imminent" prosecution:

> One recurring issue in our cases is determining when the *threatened* enforcement of a law creates an Article III injury. When an individual is subject to such a *threat*, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. Instead we have permitted pre-enforcement review [when] *threatened enforcement* [*was*] *sufficiently imminent*. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible *threat* of prosecution thereunder.

Susan B. Anthony List v. *Driehaus*, 573 U.S. 149, 158–59; 134 S.Ct. 2334; 189 L. Ed. 2d 246 (2014) (cleaned up) (emphases added). See also *McKay*, 823 F.3d, at 867. Plaintiffs' letters refer only to "anticipated electoral activity in Michigan *in 2020*."[13] Thus, Plaintiffs are asking the Court not only to relax the rigorous inquiry that must be undertaken, but to also accept that allegations tied specifically to a completed election are enough to maintain standing *for all future elections*. Facially, that is not consistent with the proof of continuous standing required under *Carney*.

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the Attorney General to opine on the constitutionality of the challenged laws—nothing about Priorities USA planning to engage in conduct prohibited by the challenged laws for the 2020 elections, let alone the 2022 elections.

[13] See Ex. 2, Pls.' Resp. to Republican Comms.' Interrog. No. 5; Ex. 12, Letter from Kevin J. Hamilton, Counsel for Plaintiffs, to Dana Nessel, Attorney General for the State of Michigan (Jan. 11, 2020); see, e.g., *id.* at Letter from Christopher Bryant, Former Counsel for Plaintiffs, to Prosecuting Attorney for Oscoda Cty. ("I am writing … regarding certain activities that Priorities USA plans to engage in leading up to and on the day of the 2020 elections").

Second, Plaintiffs allege that the challenged laws frustrate their missions of, and efforts in, educating, mobilizing, and turning out Michigan voters.[14] But, at most, Plaintiffs have identified a mere "organizational interest in [a] problem" insufficient to confer standing because they have produced no evidence that the challenged laws have frustrated their mission. *Sierra Club* v. *Morton*, 405 U.S. 727, 739; 92 S.Ct. 1361; 31 L.Ed.2d 636 (1972). Indeed, this Court found that "[P]laintiffs can still educate the public about registering to vote absentee and answer questions about this process." *Priorities USA*, 487 F. Supp. 3d, at 614 (decided after the Court's standing ruling). And nothing prohibits Plaintiffs from mailing or handing out blank ABAs. Nor does the paid driver ban prohibit them from providing free transportation to the polls. Plaintiffs were asked to produce "[a]ll records evidencing that the challenged laws have frustrated [their] mission … to present date[,]"[15] but produced precisely nothing regarding the 2022 elections. Moreover, it is not clear how their alleged frustration of missions would be redressed by invalidating the challenged laws in all applications when Plaintiffs are still free to engage in their missions and are minimally burdened. See *Shelby Advocates for Valid Elections* v. *Hargett*, 947 F.3d 977, 982 (CA6 2020) (discussed below).

Finally, Plaintiffs allege they have diverted resources in GOTV and voter education efforts and must expend employee and volunteer time to ensure compliance with the challenged laws.[16] But once again, Plaintiffs have provided no evidence as to what

[14] Amended Compl. ¶ 24, ECF No. 17, PageID.98.

[15] Ex. 16, Pls.' Resp. to Republican Comms.' Request for Production of Records ("**RFP**") No. 5.

[16] Amended Compl. ¶¶ 25–26, ECF No. 17, PageID.98-99.

resources were diverted and how.[17] Plaintiffs were asked to produce "records evidencing that the challenged laws have … required [them] to expend additional resources and employee time to educate your employees, volunteers, and partners about the challenged laws … to present date."[18] Rise and DAPRI were also asked to produce "records evidencing that the challenged laws affected [their] plans … to increase the engagement of college students in the electoral process in Michigan … to present date."[19] In response to both requests, Plaintiffs have produced no evidence showing diverted resources relating to the 2022 elections.

This case is akin to *Shelby Advocates*, where the Sixth Circuit found that the plaintiff voting rights group had failed to demonstrate organizational standing on its diversion of resources theory. 947 F.3d, at 982. The plaintiff claimed that past election administration problems had caused it to divert resources from its other activities. *Id.*, at 979, 981. This claim failed as "[a]n organization can no more spend its way into standing based on speculative fears of future harm than an individual can." *Id.*, at 982. The court further found that the plaintiffs' diversionary actions of bringing litigation and spending resources "to address the voting inequities and irregularities" nationwide did not divert resources from its mission as that was its mission. *Ibid.* Like *Shelby*

[17] See Ex. 2, Republican Comms.' Interrog. No. 7 (asking Plaintiffs: "what additional resources did the challenged laws cause you to expend (*e.g.*, money, the time of employees and volunteers, etc.) in Michigan," and "what was the magnitude of the additional resource (*e.g.*, how much additional money did you spend, how much additional time did employees and volunteers need to expend, etc.) in Michigan?").

[18] Ex. 16, Republican Comms.' RFP No. 5.

[19] *Id.*, at Republican Comms.' RFP No. 8.

Advocates, Plaintiffs have not been injured because their alleged diversionary actions—unsupported by evidence—were taken in furtherance of their missions. And any favorable judgment would not redress their ongoing missions and volitional expenditures.

II. Plaintiffs' challenges to the paid driver ban fail as a matter of law.

A. The paid driver ban is neither vague nor overbroad.

Plaintiffs admitted on appeal that "[t]here is no ambiguity in the Voter Transportation Law's statutory language,"[20] and have conceded that vagueness is a pure question of law.[21] For the reasons set forth in the Republican Committees' pending motion for judgment on the pleadings,[22] the Court should once again find that the paid driver ban is "relatively straightforward and unambiguous," *Priorities USA*, 487 F. Supp. 3d, at 621, and dismiss Plaintiffs' vagueness or overbreadth challenge.

B. The paid driver ban is constitutional.

Plaintiffs bring a facial challenge to the paid driver ban claiming it violates their First and Fourteenth Amendment speech and associational rights.[23] Facial challenges are generally disfavored. See *id.*, at 609. "A facial challenge … is an effort to invalidate the law in each of its applications, to take the law off the books completely." *Speet* v. *Schuette*, 726 F.3d 867, 871 (CA6 2013) (internal quotations omitted). A law impli-

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[20] Appeal Brief for Plaintiffs, *Priorities USA* v. *Nessel*, No. 20-1931 (CA6 Apr. 16, 2021), Doc. 44, p. 47.

[21] Reply Brief for Plaintiffs on Motion to Expedite, ECF No. 25, PageID.359.

[22] Republican Comms.' Rule 12(c) Mot., ECF No. 115, PageID.1929–1930; Reply Brief for Republican Comms., ECF 124, PageID.2009.

[23] Amended Compl., at Count VI, ECF No. 17, PageID.122–124.

cating the right to expression may be invalidated on a facial challenge if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U.S. 460, 473; 130 S.Ct. 1577; 176 L.Ed.2d 435 (2010). "Because plaintiffs have advanced a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion." *Ohio Dem. Party* v. *Husted*, 834 F.3d 620, 627 (CA6 2016) (cleaned up). Plaintiffs have not met their heavy burden to invalidate all applications of these long-standing laws.

1. The paid driver ban satisfies the *Anderson-Burden* framework.

The Sixth Circuit found that *Anderson-Burdick* applies to the First Amendment challenge to the paid driver ban and that this claim would likely fail. *Priorities USA* v. *Nessel*, 860 F. Appx., at 422 n.3 ("We generally evaluate First Amendment challenges to state election regulations using the *Anderson-Burdick* framework" (cleaned up)).[24]

Anderson-Burdick is tailored to the regulation of election mechanics. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190; 128 S.Ct. 1610; 170 L.Ed.2d 574 (2008). It applies where a state election law allegedly burdens voting. See Republican Comms.' Rule 12(c) Mot. at n.3, ECF No. 115, PageID.1932; see also *Kowall* v. *Benson*, 18 F.4th 542, 546–47 (CA6 2021) ("[c]ourts use *Anderson-Burdick*[ ] … to assess

[24] Although the Court previously ruled that exacting scrutiny applies to Plaintiffs' First Amendment challenge to the paid driver ban, Order on Motion to Dismiss, ECF No. 59, PageID.1003, the Republican Committees have fully briefed why the Sixth Circuit's application of the *Anderson-Burdick* framework binds the Court. Republican Comms.' Rule 12(c) Mot., ECF No. 115, PageID.1931–1932; Reply Brief for Republican Comms., ECF No. 124, PageID.2011-2013.

election-related ballot-access and freedom-of-association claims.").[25] The analysis entails three steps: (1) determining the burden at issue, *Thompson v. Dewine*, 959 F.3d 804, 808 (CA6 2020); (2) considering the state's justifications for the restrictions, *Kishore* v. *Whitmer*, 972 F.3d 745, 750 (CA6 2020); and (3) assess whether the state's restrictions are constitutionally valid given the strength of its proffered interests, *Schmitt* v. *LaRose*, 933 F.3d 628, 641 (CA6 2019). "Laws imposing severe burdens on plaintiffs' rights are subject to strict scrutiny, but lesser burdens trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.*, at 639 (cleaned up).

The Sixth Circuit found that the paid driver ban "is likely not a severe burden on [Plaintiffs'] rights because it does not appear to result in 'exclusion or virtual exclusion' from the ballot." *Priorities USA*, 860 F. Appx., at 422 n.3 (quoting *Libertarian Party of Ky.* v. *Grimes*, 835 F.3d 570, 574 (CA6 2016)). The court also found that "[t]he state's interest in preventing potential voter fraud is an important regulatory interest," and "prohibiting paid vote-hauling is likely a reasonable, nondiscriminatory restriction justified by that interest." *Ibid.* (comparing *Ohio Dem. Party*, 834 F.3d, at 631, and

[25] See *Amacher* v. *Tennessee*, No. 3:21-cv-00638, 2021 WL 5015803, at *7 (MD Tenn. Oct. 10, 2021) (applying *Anderson-Burdick* to a First Amendment challenge to Tennessee's requirement that municipal elections be nonpartisan, and following current Sixth Circuit law that "the *Anderson-Burdick* framework applies generally to restrictions on First Amendment rights imposed by election laws." *Id.*, at *7 n.11 (relying on *Thompson*, 959 F.3d, at 808 n.2); see also *League of Women Voters of Mich.* v. *Secretary of State*, —Mich.—; —N.W.2d—; 2022 WL 211736, at *18 (2022) (applying *Anderson-Burdick* in striking down Michigan's requirement that paid petition circulators file a signed affidavit before circulating any petition indicating that he or she is a paid circulator).

Crawford, 553 U.S., at 198–99). The court concluded that the paid driver ban "does not appear to pose an unconstitutional burden." *Ibid.* "'[E]ven assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to' warrant invalidating the paid driver ban altogether." *Ibid.* (quoting *Crawford*, 553 U.S., at 199–200).

Plaintiffs have not identified a single ambulatory voter who could not secure transportation to the polls or has been unable to vote because of the paid driver ban.[26] Absent such need, it is unclear as to how Plaintiffs are burdened by the ban, if at all. And the ban does not prohibit them from providing free transportation to the polls.

2. The paid driver ban withstands exacting scrutiny.

Before the Sixth Circuit's rulings, the Court previously found that exacting scrutiny applies to Plaintiffs' First Amendment challenge to the paid driver ban as their "conduct regulated by the [law] is protected political expression," relying on *Meyer* and *Buckley*.[27] If the Court disregards the Sixth Circuit's ruling and continues to apply exacting scrutiny, the paid driver ban would still pass muster. Exacting scrutiny "requires a substantial relation between the [challenged law] and a sufficiently important governmental interest." *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 366–67; 130 S. Ct. 876; 175 L. Ed. 2d (2010) (cleaned up). Exacting scrutiny "require[s] a fit that is not necessarily perfect, but reasonable." *McCutcheon* v. *Federal*

[26] See Ex. 2, Plaintiffs' Resp. to Republican Comms.' Interrog. No. 2.

[27] Order on Motion to Dismiss, ECF No. 59, PageID.1003; see also *Meyer* v. *Grant*, 486 U.S. 414; 108 S.Ct. 1886; 100 L.Ed.2d 425 (1988) and *Buckley* v. *American Const. Law Foundation, Inc.*, 525 U.S. 182; 119 S.Ct. 636; 142 L.Ed.2d 599 (1999).

Election Comm'n, 572 U.S. 185, 218; 134 S.Ct. 1434; 188 L.Ed.2d 468 (2014). To withstand exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1* v. *Reed*, 561 U.S. 186, 196; 130 S.Ct. 2811; 177 L.Ed.2d 493 (2010).

There can be no doubt that protecting the purity of elections is a sufficiently important government interest—indeed, it is a constitutional command. Providing for the time, place, and manner of holding federal elections is an explicit duty assigned to state legislatures under Article I, Section 4, of the U.S. Constitution—*i.e.*, doing so is not optional—and the Michigan Legislature must perform this duty so as "to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting" under Article II, Section 4(2), of the Michigan Constitution.

The Sixth Circuit has already recognized the state's interest in protecting against fraud and undue influence in enacting the paid driver ban. The ban "is one provision among several others in the statute intended to prevent fraud and undue influence," which is "assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling.'" *Priorities USA* v. *Nessel*, 978 F.3d 976, 983–84 (CA6 2020). And "[t]he state's interest in preventing potential voter fraud is an important regulatory interest." *Priorities USA*, 860 F. Appx., at 422 n.3. "Ensuring that every vote is cast freely, without intimidation or undue influence, is … a valid and important state interest." *Brnovich* v. *Democratic Nat'l Comm.*, 594 U.S.—; 141 S. Ct. 2321, 2340; 210 L. Ed. 2d 753 (2021). The paid driver ban is "a prophylactic rule intended to prevent the potential for fraud where enforcement is otherwise difficult," *Priorities USA*, 978 F.3d, at 984,

by keeping money out of the hands of drivers who may be tempted to use those funds to bribe voters, while still letting third parties facilitate the transportation of voters to the polls, to most voter registration sites or election officials' offices, and spend money to do so (*e.g.*, they may purchase vehicles, buy fuel, etc.). The law expressly targets the payment of money for transportation to the polls, not the actual transportation of voters to the polls.

The transportation of voters to the polls is also an impressionable time. It will likely be the last time a voter could be exposed to electioneering before voting. See Mich. Comp. Laws §168.744 (prohibiting campaigning within 100 feet of polling place entrances). When asked about Uber or Lyft providing discounted rides to voters, Brater testified—in both his individual capacity and as the representative of the Michigan Department of State—that there is a "concern that hiring a motor vehicle to drive people to the polls could be part of an effort to wield undue influence." Ex. 10, Brater Depo. 49:11–50:17. Plaintiffs' proposed expert, Thomas J. Sugrue, PhD, contends that vote-hauling cannot be an effective means to bribe voters because of the secret ballot, Ex. 17, Report of Sugrue (Dec. 17, 2021) ("SUGRUE") ¶ 30, but Secretary Benson settled a lawsuit in May 2019 by agreeing that voters could photograph their own ballots (known as a "ballot selfie"). *Crookston* v. *Benson*, No. 1:16-cv-01109 PageID.1008–1016 (WD Mich. May 8, 2019). The Department of State's EDO guidance memorializes this settlement, providing: "[w]hile in the voting booth only, voters may use a camera or cell phone to take a photograph of their voted ballot." Ex. 18, Election Officials' Manual, Ch. 11, p. 39. It is easy to envision a vote-hauling scheme that circumvents the secret ballot where a paid driver bribes a voter to vote for

a certain candidate, party, or measure, the voter takes a ballot selfie, and the paid driver (satisfied with the voter's vote) pays the agreed-upon bribe. Ultimately, the secret ballot is not a failsafe, and the Legislature has authority to deter such schemes, including by criminalizing paid transportation on the front-end.

The paid driver ban is nondiscriminatory and, if anything, only minimally burdens Plaintiffs' First Amendment rights. The law applies across the board to anyone seeking to pay for transporting voters, with a limited carve out for allowing paid transportation of non-ambulatory voters. Mich. Comp. Laws § 168.931(1)(f). Any attempt to distinguish between ambulatory and non-ambulatory voters would shift the focus on burden to voters, which the Court rejected. See *Priorities USA*, 462 F. Supp. 3d, at 809 (dismissing Count VII). It bears repeating that Plaintiffs (or anyone else, as this is a facial challenge) are free to provide free transportation to *all voters* to the polls. The strength of the state's important interests in preventing vote-hauling and undue influence satisfies any minimal burden on Plaintiffs' First Amendment rights. See *Reed*, 561 U.S., at 196. And the paid driver ban does not "result in exclusion or virtual exclusion from the ballot." *Priorities USA*, 860 F. Appx., at 422 n.3 (cleaned up).

III. Plaintiffs' challenges to the harvesting ban fail as a matter of law.

A. The harvesting ban is constitutional.

Plaintiffs allege that the harvesting ban facially violates the First and Fourteenth Amendments because it impermissibly infringes on Plaintiffs' speech and associational rights.[28] The Court ruled that the harvesting ban is constitutional "whether [it]

[28] Amended Compl., at Count II, ECF No. 17, PageID.114–116.

applies exacting scrutiny or a rational basis standard of review ...." *Priorities USA*, 487 F. Supp. 3d, at 612. Discovery has bolstered that the harvesting ban serves the state's constitutional and important regulatory interests of preserving election integrity and preventing fraud in the absentee voting process, including at the application stage.

1. The harvesting ban does not infringe on protected First Amendment political speech or associational rights.

The harvesting ban does not unconstitutionally infringe on protected speech because the process of returning an ABA or requesting to return an application is neither "inherently expressive" nor inextricably entwined with protected speech.[29] See *Rumsfeld* v. *Forum for Academic & Inst. Rights*, 547 U.S. 47, 66; 126 S.Ct. 1297; 164 L.Ed.2d 156 (2006). Nonexpressive conduct does not acquire First Amendment protection whenever combined with protected speech. See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 297–98; 104 S.Ct. 3065; 82 L.Ed.2d 221 (1984); *Rumsfeld*, 547 U.S., at 66; *United States* v. *O'Brien*, 391 U.S. 367, 376; 88 S.Ct. 1673; 20 L.Ed.2d 672 (1968). Section 759 does not restrict Plaintiffs' freedom to educate voters about how to request ABAs or vote absentee. Mich. Comp. Laws §168.759. It bears only on Plaintiffs' ability to engage in certain conduct relating to the mechanism of the return of ABAs: their desire to return ABAs after soliciting or requesting to return them—conduct most akin to the non-discretionary act of delivering mail. The har-

[29] The Republican Committees acknowledge that the Court previously rejected this argument. *Priorities USA*, 487 F. Supp. 3d, at 610–12. Since September 2020, other courts however have found that similar election administration laws like the harvesting ban do not implicate protected speech (discussed *infra* at 20–21), and the Republican Committees assert this argument to preserve on appeal.

vesting ban regulates the mechanics of the absentee voting process, specifically the application stage. It does not regulate an elector's ability to vote absentee or any individual or organization's right to engage in political speech.

Lichtenstein v. *Hargett*, —F. Supp. 3d—; 2021 WL 5826246 (MD Tenn. 2021), is persuasive on this point.[30] The court dismissed the plaintiffs' First Amendment challenge to a Tennessee election law that prohibits a "person who is not an employee of an election commission" from "giv[ing] an application for an absentee ballot to any person," Tenn. Code Ann. § 2-6-202(c)(3). *Id.*, at *1, 8. The court held that exacting scrutiny did not apply because Tennessee's law—which is more encompassing than Michigan's harvesting ban—does not restrict expressive conduct. The harvesting ban, like the Tennessee law, "leaves open a very wide swath of conduct, prohibiting just one very discrete kind of act," specifically soliciting or requesting to return ABAs. *Id.*, at *6. The court also concluded that "even if [the conduct prohibited by the Tennessee law] is within [the] scope of the First Amendment, [the prohibited conduct] is not 'core' political speech, so *Meyer-Buckley* (with its strict scrutiny standard) does not apply." *Ibid.* It then held that the Tennessee law survives both a rational-basis review and a rational-basis "plus" review under *Anderson-Burdick*. *Id.*, at *7–8.[31]

[30] See Supp. Auth. by Republican Comms., ECF No. 132, PageID.2043–2044.

[31] Plaintiffs' responded in opposition to the Republican Committees' notice of supplemental authority for *Lichtenstein*, arguing that the Tennessee law is different than Michigan' harvesting ban by highlighting examples of protected speech that the court found the Tennessee law did not proscribe. ECF No. 133, PageID.2111–2114. Plaintiffs' attempt to distinguish these laws ignores that this Court has found that the harvesting ban leaves open First Amendment protected activity, such as "educat[ing]

Similarly, in *DCCC* v. *Ziriax*, 487 F. Supp. 3d 1207, 1223 (ND Okla. 2020), the court found Oklahoma's absentee ballot harvesting prohibition "prohibit[s] specific conduct and do[es] not appear to prohibit or criminalize the plaintiffs' speech, voter education efforts or publications, or efforts to get out their members' votes." The court further found that "completing a ballot request for another voter, and collecting and returning ballots of another voter, do not communicate any particular message" and "[t]hose actions are thus not expressive …." *Id.*, at 1235. Accordingly, the court dismissed the First Amendment challenge to Oklahoma's similar ballot harvesting prohibition. *Id.*, at 1235, 1237. These cases are persuasive, and the Court should similarly conclude that the harvesting ban does not infringe on the First Amendment.

2. If the First Amendment applies, the harvesting ban satisfies the *Anderson-Burdick* framework.

The Republican Committees acknowledge that the Court previously found Plaintiffs' First Amendment challenge to the harvesting ban should be reviewed under exacting scrutiny. *Priorities USA*, 487 F. Supp. 3d, at 612.[32] The harvesting ban, like the

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the public about registering to vote absentee and answer questions about this process," *Priorities USA*, 487 F. Supp. 3d, at 614, and that the law does not prohibit Plaintiffs from mailing and handing out blank applications to voters. Again, the harvesting ban "leaves open a very wide swath of conduct." *Lichtenstein*, 2021 WL 5826246 at *6.

[32] When deciding that exacting scrutiny applied, the Court emphasized that, "under the current circumstances … where [the] pandemic causes many Michigan voters, particularly those with certain underlying medical conditions, to question the safety of voting in person—discussions about whether and how to vote absentee are especially critical and certainly 'implicate[ ] political thoughts and expression' …." *Priorities USA*, 487 F. Supp. 3d, at 612. As a preliminary matter, nothing in the harvest-

paid driver ban, is a state election regulation. See, e.g., STRACH ¶ 87 ("Submitting an absentee ballot request or application form is the first step in the process of voting an absentee ballot."). Accordingly, *Anderson-Burdick* should apply to Plaintiffs' constitutional challenge to that law as well. See *Priorities USA*, 860 F. Appx., at 422 n.3.

Plaintiffs' First Amendment challenge to the harvesting ban fails under *Anderson-Burdick*. It is settled that the harvesting ban serves important regulatory interests, specifically preserving the integrity of elections and preventing fraud in the absentee voting process: the "[harvesting ban] is designed with fraud prevention as its aim and it utilizes well-recognized means in doing so." *Priorities USA*, 487 F. Supp. 3d, at 614. "[W]hile Michigan has a number of laws criminalizing interference with the absentee voting process, … none of these laws are primarily designed to reduce fraud or abuse in the application process on the front end, as opposed to simply punishing it after it occurs." *Ibid*. The state's interest is "particularly strong with respect to efforts

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ing ban prevents third-party organizations from discussing with voters how to vote absentee in Michigan. Since the Court's preliminary injunction order—nearly a year and half ago—the circumstances regarding Covid-19 have improved, Levin & Salisbury, *Fewer than 700 COVID-19 patients in Michigan hospitals as 7-day average of new cases remains at lowest level since summer*, MLive (Mar. 17, 2022), https://perma.cc/3GEX-FE58, vaccines and therapeutics that were not available before the G20 are now widely available, and a record number of absentee ballots were cast in Michigan and across the country in the G20, Johncox, *Few Michigan absentee ballots rejected amid record voter turnout in 2020 election*, Click on Detroit (Dec. 2, 2020), https://perma.cc/F6VK-BB54. Any alleged burden on Plaintiffs not being able to return or solicit to return voters' ABAs has diminished since that time. Regardless, though, because Plaintiffs bring only facial challenges, it is nevertheless improper to apply their First Amendment claim to the circumstances of Covid-19 or to limit the application of the harvesting ban to Plaintiffs alone. See *Stevens*, 559 U.S., at 473.

to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It drives honest citizens out of the democratic process and breeds distrust of our government." *Reed*, 561 U.S., at 197 (internal quotation and citation omitted). The Supreme Court expressed that "[o]ne strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Brnovich*, 141 S. Ct., at 2340.

The Court highlighted the greater susceptibility of fraud in the absentee voter context, *Priorities USA*, 487 F. Supp. 3d, at 613 (string citation), expressly referencing the Carter-Baker Report, *id.*, at 614 n.3.[33] "As the Carter-Baker Commission recognized, third-party ballot collection can lead to pressure and intimidation. And … a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct., at 2348. "Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence." *Id.*, at 2347. Director Strach relied on the Carter-Baker Report in concluding that the absentee process is susceptible to voter fraud, especially by interested third parties. See STRACH ¶¶ 74, 96 ("absentee by mail voting is an important and essential way for voters to exercise their sacred right to vote but it provides more logistical challenges and opportunities for

[33] Ex. 19, Report of the 2005 Commission on Federal Election Reform, *Building Confidence in U.S.* Elections (Sept. 2005) ("**Carter-Baker Report**").

fraud because it does not take place in a polling place with election officials and observers" and "acknowledg[ing] the apparent problem with an individual aligned with a candidate or political party handling voters' absentee ballots.").[34]

The same fraud concerns for absentee voting apply equally at the application stage. See *Priorities USA*, 487 F. Supp. 3d, at 614 n.3 ("[I]t logically follows that precluding [third-party] organizations from handling absentee voter applications may also limit the opportunities for fraud and abuse in the application process."). The Court correctly found that "the state's interests in preventing fraud and abuse in the absentee ballot application process and maintaining public confidence in the absentee voting process are sufficiently important interests and are substantially related to the limitations and burdens set forth in § 759." *Id.*, at 615.

Regardless of the Court's findings in support of the state's interests, for regulations that are not unduly burdensome—like the harvesting ban—a state is not required to prove "the sufficiency of the evidence" under *Anderson-Burdick*. *Ohio Dem. Party*, 834 F.3d, at 632. States are not required to submit "any record evidence in support of [their] stated interests." *Common Cause of Ga.* v. *Billups*, 554 F.3d 1340, 1353

[34] The Carter-Baker Report cites a Detroit Free Press article, where voter registration fraud was committed by GOTV organizations. Ex. 19, Carter-Baker Report, 46 n.59 (citing Ex. 20, Bell, *Campaign Workers Suspected of Fraud*, Detroit Free Press (Sept. 23, 2004)). The article explains how groups would pay workers a flat rate with bonuses for exceeding registration targets. This same financial incentive structure could apply to collecting ABAs. Former State Elections Director Christopher Thomas stated "[a]lthough there is little likelihood that phony registrations could be used to affect the outcome of an election because of safeguards in place, alleged fraud undermines confidence in the system and burdens local elected officials." *Ibid.*

(CA11 2009). They can even rely on "post hoc rationalizations" to justify an alleged burden placed on the right to vote. See *Mays* v. *LaRose*, 951 F. 3d 775, 789 (CA6 2020).

The Court previously found that the alleged burden imposed on Plaintiffs by § 759 is "not slight." *Priorities USA*, 487 F. Supp. 3d, at 614. The Republican Committees respectfully disagree. Plaintiffs' position requires the Court to accept that Michigan voters are too dimwitted to grasp that they can ask Plaintiffs' volunteer—who has just lawfully explained to them the options for returning an application—to return the ABA for them (assuming the volunteer is a registered Michigan voter). Plaintiffs may not have much confidence in the smarts of Michiganders, but that is hardly enough to sustain a constitutional challenge. Moreover, because Plaintiffs bring a facial challenge, the Court's focus cannot be solely on the law's impact on Plaintiffs (or even on GOTV organizations generally). See *Stevens*, 559 U.S., at 472–73. And the harvesting ban still allows Plaintiffs to engage in GOTV efforts: "[P]laintiffs can still educate the public about registering to vote absentee and answer questions about this process," *Priorities USA*, 487 F. Supp. 3d, at 614, and they may mail and hand out blank applications to voters. The ban also protects Michigan voters from being badgered at their door by pushy people pressing them to fill out a form that instant when the voter may wish to privately reflect on whether to vote absentee and, if so, whether to personally return the completed form or whether (and with whom) to entrust the important task of returning the ABA.

Section 759 further provides many ways for Michigan voters to return their written requests or form applications to the local clerk: (1) in person, (2) by mail, (3) email, (4) fax, (5) through in-person, mail, or other delivery by immediate family mem-

bers (including in-laws and grandchildren) or by a person residing in the same household, and (6) if none of those methods are available, through in-person, mail, or other delivery by any registered elector. *Id.*, at 615 (citing Mich. Comp. Laws §168.759 (4)–(6)). There are over 8 million registered electors in Michigan; the Court has the authority to take judicial notice of that fact and it should do so. Ex. 1; Fed. Rule Evid. 201. In other words, Michigan voters have over 8 million options for returning an ABA. The Secretary of State further sent every registered voter an ABA before the 2020 elections. *Davis* v. *Secretary of State*, 333 Mich. App. 588, 591; 963 N.W.2d 653 (2020) (so observing, except for locales where local clerks already planned to do this).

Through discovery, Plaintiffs have not identified a single voter "who … was unable to deliver his or her completed [ABA] to the appropriate clerk using any of the methods" in §759(6).[35] The harvesting ban, if anything, is minimally burdensome on Michigan voters and third-party organizations, such as Plaintiffs.

3. The harvesting ban withstands exacting scrutiny.

The harvesting ban serves important regulatory interests: preserving election integrity and preventing fraud in the absentee voting process. *Priorities USA*, 487 F. Supp. 3d, at 615. And the law, if anything, minimally burdens any alleged protected speech for a voter applying and returning an ABA given the numerous ways for Michigan voters to return their written requests or form applications to the local clerk. Third party organizations, such as Plaintiffs, also remain free to engage in GOTV efforts and educate voters regarding absentee voting. In fact, the Secretary of State has released

[35] Ex. 2, Plaintiffs' Resp. to Republican Comms.' Interrog. No. 1.

information about the "application process that civic groups or political parties might use to educate voters." Brater Depo. 26:8–12.

There is a reasonable fit between the harvesting ban and the state's important regulatory interests as the law "helps prevent certain types of … fraud otherwise difficult to detect," *Reed*, 561 U.S., at 198, such as might occur if a bad actor were to bully or fraudulently entice a voter into giving the bad actor the voter's application only for the bad actor to destroy or fail to deliver the application.[36] Investigating voter fraud in the absentee process presents unique enforcement and administrative challenges given the short time frame between the election and certifying election results. See STRACH ¶ 101 ("The small window of opportunity to detect irregularities and fraud during an election is compounded with the reality of the small number of resources to do the detecting."); see also Mich. Comp. Laws § 168.822 (county boards of canvassers must complete the canvass "at the earliest possible time and in every case no later than the fourteenth day after the election," and if they fail to do so, they must transmit their records to the state board of canvassers, which must certify the results within 10 days of receiving the records). Brater testified to the difficulty of enforcing the non-solicitation requirement and how law enforcement may prioritize investigations that are easier to prove. Ex. 10, Brater Depo. 77:20–78:6.

The "registered elector" requirement is important to maintain a credible possibility of prosecuting application fraud. "Election law violations typically carry low penalties and are hard to prosecute against local violators. Requiring the state to au-

[36] Brief for Repub. Comms. on Mot. Prelim. Inj., ECF No. 70, PageID.1231–1233 (examples of fraud by absentee voting, including in the application process).

thorize itinerant out-of-state [canvassers] could render enforcement ineffective." *Voting for Am., Inc.* v. *Steen*, 732 F.3d 382, 395 (CA5 2013); *Initiative & Referendum Inst.* v. *Jaeger*, 241 F.3d 614, 616 (CA8 2001) ("[t]he residency requirement … protect[s] the petition process from fraud and abuse by ensuring that circulators answer to the Secretary's subpoena power"). Strach testified that the registered elector requirement is "a tool that can be used to detect an irregularity should one occur … Information on individuals connected to the ballot can be helpful in the event of a problem or to answer a question to ensure that a ballot is counted." Ex. 11, STRACH ¶ 98. The "registered elector" requirement subjects the deliverer to the state's subpoena power, which acts as a deterrent against foul play and ensures that the voter's application is properly delivered and that voters are not disenfranchised. Moreover, besides the harvesting ban, Plaintiffs have identified no Michigan election law that would criminalize or prohibit a third party from failing to deliver a voter's completed ABA to the appropriate clerk.[37]

The Republican Committees have identified instances of voter fraud, corruption, or undue influence related to the absentee voting process, especially in nursing homes.[38] Trenae Rainey, a nursing home employee who filled out ABAs for residents without their knowledge, pleaded guilty to three misdemeanors for making false statements in applications.[39] *Supra* SOMF No. 9A. And, Nancy Williams, a guardian who

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[37] See Ex. 2, Pls.' Resps. to Republican Comms.' Interrog. No. 8.

[38] Ex. 4, Republican Comms.' Am. Answers to Pls.' Interrog. No. 5.

[39] This is not the first time Michigan has faced issues with absentee voter fraud or irregularities in nursing homes. In fall 2005, the Detroit News published an investigation into the mishandling of absentee ballots under former Detroit City Clerk Jackie

allegedly developed and implemented a plan to obtain and control absentee ballots for legally incapacitated persons in her care by submitting fraudulent applications, faces trial in four Wayne County cases and a fifth Oakland County case for election fraud charges from the G20. *Supra* SOMF No. 9B. Strach investigated numerous allegations of abuse with absentee ballots at nursing homes with vulnerable residents in North Carolina, concluding that prohibitions against soliciting voters to complete applications for absentee ballots, like Michigan's harvesting ban, provide a mechanism for facilities to limit access to groups associated with absentee by mail efforts. STRACH ¶ 71–72, 85–86.

Testimony from Michigan officials further demonstrates that the challenged laws are sufficiently tailored in protecting elections. The Attorney General believes "the laws … in place … prevent voter fraud, or attempt to prevent voter fraud."[40] She also "think[s] it would be easier" "for someone to coerce a voter into applying for an [absentee] ballot" "if the—the solicitation ban part of the absentee ballot application statute were eliminated . . ."[41] Lori Bourbonais, Director of the Election Administra-

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Currie, finding ballots cast by people registered to vote at abandoned and demolished buildings and a practice of hand-delivering absentee ballots from senior citizens and disabled voters that were filled out in private meetings with Currie's paid election workers. Ex. 21, Josar, et al., *Absentee Ballots Tainted?*, The Detroit News (Oct. 30, 2005). At one nursing home, three residents voted absentee in the 2005 primary but they could not name the incumbent Detroit mayor nor recalled having voting, and absentee ballots for the general election were sent to residents that were declared legally incapacitated and suffered from dementia and Alzheimer's. *Ibid.*

[40] Ex. 22, Deposition of Danielle Hagaman-Clark, Rule 30(b)(6) Deponent for the Attorney General, 44:11–13 (Dec. 10, 2021).

[41] *Id.*, at 146:22–147:2.

tion Division, agreed "Michigan has effective processes for identifying and prosecuting fraud associated with third-party return of absentee ballot applications[.]"[42] Brater also agreed that "Michigan's statutes are also part of the safeguards that protect Michigan's elections."[43]

Plaintiffs have misrelied on *Americans for Prosperity Foundation* v. *Bonta*, 594 U.S.—; 141 S.Ct. 2373; 210 L.Ed.2d 716 (2021), since the Rule 16 conference. In *Bonta*, the Court held that narrow tailoring applies to the exacting scrutiny standard in the context of First Amendment challenges to compelled disclosure regimes. *Id.*, at 2383–85. *Bonta* did not hold that exacting scrutiny and narrow tailoring apply to *all* First Amendment challenges. It makes sense that the challenged laws in *Bonta*, which compelled speech and chilled association, would require a closer "fit" than the disputed laws here, which only minimally burden Plaintiffs' GOTV efforts. State election laws must also be given greater latitude due to the required "substantial regulation of elections if they are to be fair and honest …." *Storer* v. *Brown*, 415 U.S. 724, 730; 94 S.Ct. 1274; 39 L.Ed.2d 714 (1974). This Court should not, as a matter of first impression, expand *Bonta*'s narrow, context-specific holding to all First Amendment challenges viewed under exacting scrutiny.

4. Director Strach's expert testimony supports the state's interests for election safeguards such as the harvesting ban.

Director Strach opined on how the harvesting ban helps fulfil the Legislature's

[42] Ex. 23, Deposition of Lori Bourbonais, Director of the Election Admin. Div. of the Michigan Dept. of State, 118:1–8. (Dec. 8, 2021).

[43] Ex. 10, Brater Depo. 100:18–21.

constitutional obligation to "enact laws to … preserve the purity of elections … [and] guard against abuses of the elective franchise," Mich. Const. art. II, § 4(2), and how it assists in helping to detect, investigate, and prosecute cases of potential election fraud. Ex. 11, STRACH ¶ 40. Based on her many years of investigating voter fraud and administering statewide elections, Strach concluded that (1) absentee ballot harvesting restrictions protect the integrity of elections, and (2) absentee ballot safeguards provide opportunities to detect irregularities or fraud that could impact elections. *Id.*, at ¶ 43.

Strach also testified to her absentee voter fraud investigations with the North Carolina State Board of Elections ("**NCSBE**"), especially the North Carolina Ninth Congressional District race ("**CD-9**") ballot harvesting scheme in 2018.[44] The scheme was orchestrated by Leslie McCrae Dowless, on behalf of Republican nominee Mark Harris's campaign. Dowless would pay workers to collect voters' absentee by mail ("**ABM**") request forms and then workers would return to voters' addresses to illegally collect their absentee ballots. *Id.*, at ¶¶ 66–67.[45] Dowless' workers would collect absentee ballots often with no witness signatures and in some cases the ballots

[44] Ex. 24, Order, *In the Matter of: Investigation of Election Irregularities Affecting Counties within the 9th Cong. Dist.* (N.C. State Bd. of Elections, Mar. 13, 2019), https://perma. cc/25A6-76UE.

[45] Under pre-G20 North Carolina law, voters or near relatives could complete an ABM request form and personally deliver it to their county board of elections by hand or by mail. Unlike Michigan's harvesting ban, anyone could collect ABM request forms from voters and deliver them to the appropriate county board. STRACH ¶ 47. North Carolina prohibits *ballot* harvesting and restricts who can possess a voter's ballot: only the voter, a near relative, or the voter's verifiable legal guardian can possess the voter's ballot. Violations are a felony. *Id.*, at ¶ 52; see also N.C. Gen. Stat. §163-226.3(a)(6).

would not be voted. He further instructed workers to forge witness signatures on ballot return envelopes. *Id.*, at ¶ 68. Strach's investigation detected that Dowless's scheme involved more than 1,000 ABM request forms collected in two counties. *Id.*, at ¶ 69. It took Strach and the NCSBE years to uncover Dowless's ballot harvesting scheme, spanning at least from the 2016 general election. *Id.*, at ¶¶ 56–61. He was ultimately indicted for his schemes; his trial is scheduled for Summer 2022. *Id.*, at ¶ 70.[46]

From investigating CD-9 and other absentee ballot schemes, Strach concluded that "[s]afeguarding the application to vote by mail process is essential to protecting the entire [ABM] process." STRACH ¶ 83. Because Michigan's harvesting ban limits the scope of individuals who can legally possess an application and requires the voter to request for someone to deliver his or her application, Strach concluded "these safeguards together prevent schemes like … CD-9 because workers could not solicit voters to deliver their [ABM] application forms." *Id.*, at ¶ 84. It is not just bad actors or intentional fraud that disenfranchises voters; "[i]f a well-meaning worker forgets to mail or deliver timely the absentee ballot request or application of a voter, the voter is potentially disenfranchised." *Id.*, at ¶ 87. "Allowing [GOTV] groups to solicit voters to return their absentee ballot applications to the board of elections could result in intimidation or pressure on the voter that could lead to pressure and intimidation when the voter receives their ballot." *Id.*, at ¶ 90. Strach's expert opinions are consistent with the Court's finding that the harvesting ban acts as a proper safeguard for the absentee

[46] See also Ochsner, *McCrae Dowless, political operative at center of NC-9 scandal, pleads not guilty*, WBTV (Nov. 15, 2021), https://bit.ly/3L8jkGt (last accessed Mar. 21, 2022).

application process. See *Priorities USA*, 487 F. Supp. 3d, at 614.

B. The harvesting ban is not preempted by the Voting Rights Act.

The Court has already ruled that Plaintiffs are unlikely to prove that VRA § 208 preempts the harvesting ban. *Id.*, at 620. "Whether a federal law preempts state law is a legal question[.]" *Torres* v. *Precision Indus., Inc.*, 995 F. 3d 485, 491 (CA6 2021). Plaintiffs concede this point. Reply Brief for Plaintiffs on Motion to Expedite, ECF No. 25, PageID.359.

After analyzing the plain language of § 208, the Court ruled that "its language suggests that some state law limitations on the identity of persons who may assist voters is permissible." *Priorities USA*, 487 F. Supp. 3d, at 619. This is bolstered by legislative history. *Ibid.* The *only* limit imposed under the harvesting ban is that the person assisting the voter must be a registered Michigan voter. Mich. Comp. Laws § 168. 759(4). Again, the Court can take judicial notice there are more than 8 million registered voters in Michigan. When asked, Plaintiffs were unable to identify any "voter covered under Section 208 … who … has been unable to receive assistance in voting due to the harvesting ban" since August 1, 2018.[47] Nor do Plaintiffs have any "documents evidencing that the harvesting ban 'affects disproportionately Michigan citizens with disabilities.'"[48]

The harvesting ban is generally applicable, has many options for returning ABAs, and does not address the delivery of completed ballots by voters covered under § 208.

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[47] Ex. 2, Pls.' Resp. to Republican Comms.' Interrog. No. 3.

[48] Ex. 16, Pls.' Resp. to Republican Comms.' RFP No. 12.

See also *DSCC* v. *Simon*, 950 N.W.2d 280, 290–91 (Minn. 2020) (rejecting a similar § 208 preemption challenge to a Minnesota law prohibiting a voter agent from delivering or mailing completed absentee ballots for more than three voters in any election).

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

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