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

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

Intervenors-Defendants.

Civil No. 19-cv-13341

JUDGE STEPHANIE DAWKINS DAVIS

MAGISTRATE KIMBERLY G. ALTMAN

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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CONCISE STATEMENT OF THE ISSUES

Plaintiffs challenge 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 (MCL §§ 168.759(4), (5), (8)), which inhibits Plaintiffs' ability to assist voters with absentee ballot applications ("Challenged Laws"). Because both burden constitutionally protected First Amendment activity, they are only constitutional if Defendants show they are (1) justified by compelling state interests, and (2) narrowly tailored to advance those specific interests. Defendants have failed to meet this burden. 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 Defendants' motions for summary judgment should be denied, and summary judgment should be entered for Plaintiffs.

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CONTROLLING OR MOST APPROPRIATE AUTHORITY

CASES

Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021)

Arkansas United v. Thurston, 517 F. Supp. 3d 777 (W.D. Ark. 2021)

Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182 (1999)

City of Chi. v. Morales, 527 U.S. 41 (1999)

Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007)

League of Women Voters v. Hargett, 400 F. Supp. 3d 706 (M.D. Tenn. 2019)

Meyer v. Grant, 486 U.S. 414 (1988)

NAACP v. Button, 371 U.S. 415 (1963)

Northeast Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016)

OCA-Greater Houston v. Texas, 867 F.3d 604 (5th Cir. 2017)

Priorities USA v. Nessel, 462 F. Supp. 3d 792 (E.D. Mich. 2020)

Platt v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Supreme Court, 769 F.3d 447 (6th Cir. 2014)

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STATUTES

52 U.S.C. § 10508

MCL § 168.931(1)(f)

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

I. INTRODUCTION

The record establishes that the Challenged Laws serve no purpose beyond suppressing Plaintiffs' protected First Amendment activities. Defendants contend that the Challenged Laws further the State's interest in preventing voter fraud, but not only is there no evidence that supports that claim, Defendants fail to meet their burden of demonstrating that the Challenged Laws are narrowly tailored to that effect.[1] They also continue to misstate the applicable standards and fail to establish any genuine disputes of material fact. Defendants' motions for summary judgment should be denied and Plaintiffs' motion should be granted.[2]

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II. ARGUMENT

A. Plaintiffs have standing.

The Attorney General does not contest Plaintiffs' standing. *See* ECF No. 149. Intervenors, the Legislature and Republican Committees, alone make that argument, regurgitating arguments that the Court rejected at the motion to dismiss and

[1] The term "Defendants" encompasses, collectively, the originally named State Defendant Attorney General Dana Nessel (the "Attorney General"), Intervenor-Defendants the Republican National Committee and Michigan Republican Party ("Republican Committees"), and Intervenor-Defendants the Michigan House of Representatives and Michigan Senate (the "Legislature").

[2] Plaintiffs do not agree with the "undisputed" facts listed in paragraphs 8, 9, and 10 of the Republican Committees' motion for summary judgment to the extent the Republican Committees argue that the voter fraud incidents referenced implicate or support the State's interest in the Challenged Laws. ECF No. 154, PageID.4005. They do not.

preliminary stages. *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 802–07 (E.D. Mich. 2020); ECF No. 154, PageID.4008-4015; ECF No. 150, PageID.3205-3209. The Court was correct the first time around, and the record confirms that each Plaintiff has sufficiently demonstrated both present and imminent future injury.[3]

1. Plaintiffs sufficiently proved a credible threat of prosecution, although they need not do so to have standing.

As Plaintiffs have previously established, they are not required to prove that they face a credible threat of prosecution to have Article III standing where, as here, the Challenged Laws cause Plaintiffs ongoing and concrete injuries separate and apart from any threat of prosecution. *See* ECF No. 36, PageID.634-644; ECF No. 40, PageID.747-754. Thus, for instance, Plaintiffs' diversion of resources injuries are alone sufficient to confer standing. *See infra* Part II.A.2; *cf. Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (holding plaintiffs had standing in pre-enforcement First Amendment challenge because "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures *or* risk criminal prosecution") (emphasis added). Similarly, the fact that the Challenged Laws are chilling expressive conduct Plaintiffs would otherwise engage in (by banning that conduct outright) is sufficient to establish standing in and of itself. *See* ECF No. 40, pageID.752; *Meyer v. Grant*,

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[3] Only one plaintiff needs to demonstrate Article III standing. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

486 U.S. 414, 417 (1998) (First Amendment injury conferred standing); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 318, 376 (2010) (same).

This Court previously held as much. *See Priorities USA*, 462 F. Supp. 3d at 802–07; *see infra* Part II.A.2. Defendants provide no reason to find otherwise. Instead, they rely on cases that are not on point. In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), and *McKay v. Federspiel*, 823 F.3d 862 (6th Cir. 2016), the courts analyzed the credibility of the threat of prosecution because it was unclear whether the laws at issue applied to the plaintiffs' conduct in the first instance. *See* ECF No. 30, PageID.641-642; ECF No. 40, PageID.752-753. As a result, the chill on expressive conduct was "subjective." *McKay*, 823 F.3d at 868. Here, the Challenged Laws squarely apply to the conduct Plaintiffs wish to engage in.

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In any event, the record also demonstrates that there is a credible threat of prosecution. The Attorney General and every other prosecutor in Michigan charged with enforcement of the Challenged Laws have had ample opportunity to disavow enforcement of them, but none have done so. ECF No. 17, Page.ID96-101; ECF Nos. 22-9–22-11. Attorney General Nessel has aggressively *defended* the laws' constitutionality throughout this litigation. Moreover, the Attorney General and all Michigan prosecuting attorneys have a duty to investigate and prosecute violations of Michigan election laws like the Transportation Ban and the Organizing Ban under Michigan Compiled Laws § 168.940. Under binding precedent, this is more than

sufficient to prove a credible threat of prosecution. *McKay*, 823 F.3d at 868–70 (holding threat of prosecution can be established by "a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff"); *Platt v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Sup. Ct.*, 769 F.3d 447, 450–53 (6th Cir. 2014) (relying on citizen petition provision and state's refusal to disavow enforcement of the challenged statutes to find credible threat).

2. The Challenged Laws directly injure Plaintiffs.

Intervenors also recycle arguments that Plaintiffs lack organizational standing, but again, the Court already rejected these arguments, and Intervenors provide no reason to revisit that decision. *See Priorities USA*, 462 F. Supp. 3d at 807 ("[P]laintiffs meet the injury-in-fact standard, based on a diversion of resources."). Courts have routinely recognized that "a voting law can injure an organization enough to give it standing 'by compelling [it] to devote resources' to combatting the effects of the law that are harmful to the organization's mission." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019) (quoting *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd,* 553 U.S. 181 (2008)). And Intervenors' claim that there is no "evidence" of diversion of resources is simply wrong. Plaintiffs provided specific evidence of the ways in which the Challenged Laws have required expenditures of resources, frustrated their missions, and bar them from engaging in protected expressive conduct in support of their own motion

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for summary judgment. ECF Nos. 152-03–152-05. For example, DAPRI "must spend time and resources educating [its] members and volunteers about [the Challenged Laws]." ECF No. 152-4, PageID.3512. Similarly, Rise "expend[s] additional resources and employee time to educate its employees, student organizers, grant recipients, and volunteers in Michigan about what conduct is and is not permitted under the Bans." ECF No. 152-3, PageID.3497-3498. As a result, Rise's CEO has had "less time and energy … to focus on [his] essential roles as CEO to fundraise, develop [Rise's] strategy, and manage [Rise's] team." *Id.* The "fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Crawford*, 472 F.3d at 951.

The Legislature takes the position that any expenditures Plaintiffs are making do not confer an injury because they are aligned with their existing missions, but that misstates the law. ECF No. 150, PageID.3209. In fact, the Legislature misreads *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), which affirmatively *rejected* this theory. In doing so, the Seventh Circuit explained, "a voting law can injure an organization enough to give it standing by compelling [it] to devote resources' to combatting the effects of the law that are harmful to the organization's mission." 937 F.3d at 950; *id.* at 952 (holding that three voter advocacy organizations had standing to challenge a voter purge based on non-residency because it would require them "to increase the time or funds (or both)

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spent on certain activities to alleviate potential harmful effects of" the challenged statute). *See Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (finding that organization that helped homeless voters had standing to challenge change in law that required it to shift focus of its voter-education and get-out-the-vote programs); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (upholding organizational standing for non-profit based on "not large" injury resulting from extra time spent educating voters about new Texas voting law instead of organization's normal get-out-the-vote activities); *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (finding that organizations had standing based on additional resources spent assisting people with voter registration who should have been registered through public benefits offices); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1267 (N.D. Ga. 2019) (collecting cases holding that "having general get-out-the-vote activities and voter-education programs as part of each Plaintiffs' mission does not undermine the Plaintiffs' ability to demonstrate standing.").[4]

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Finally, each Plaintiff provides testimonial evidence establishing that the

[4] This case is unlike *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir.), *cert. denied*, 141 S. Ct. 257 (2020), cited by Republican Committees, where the organizational plaintiff pled "only backward-looking costs" and spent resources based on "speculative fears of future harm." Plaintiffs provide undisputed evidence of forward-looking costs, undertaken to ensure compliance with the Challenged Laws at the expense of other activities. *See supra* pp. 2-5.

Challenged Laws (1) frustrate their missions, *see* ECF No. 152-5, PageID.3517-3518; ECF No. 152-3, PageID.3501-3502, 3497-3503; ECF No. 152-4, PageID.3508, 3511, 3513, and (2) infringe on protected speech and associational activities they would otherwise undertake, *see* ECF No. 152-5, PageID.3516-3519; ECF No. 152-3, PageID.3498, 3501; ECF No. 152-4, PageID.3508-3512. For all these reasons, Intervenor's challenge to Plaintiffs' standing should be rejected.

B. The Transportation Ban is unconstitutionally vague.

In response to multiple examples of disagreement and uncertainty about the meaning of the Transportation Ban among Michigan's own election officials, Defendants desperately try to manufacture certainty. Each argument is a red herring, and none overcomes the undisputed evidence that people of ordinary intelligence do not understand what the law means, rendering it unconstitutionally vague.

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First, the Legislature, again, incorrectly characterizes the relevant inquiry. ECF No. 150, PageID.3223. The question is *not* the extent to which the Transportation Ban burdens the rights of voters, *id.*, but whether the law "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"). To determine whether a challenged law fails to establish such standards, courts consider whether the meaning

of the law would be clear to a person of ordinary intelligence. *See Johnson v. United States*, 576 U.S. 591, 595 (2015); *Hill v. Colorado*, 530 U.S. 703, 732 (2000). And when, as here, a criminal law affects political expression, it is subject to heightened constitutional scrutiny. *Priorities USA*, 462 F. Supp. 3d at 816–17.

Second, the Legislature oddly argues Plaintiffs "disavowed" the protections of the First Amendment by asserting that their vagueness challenge is a "due process" challenge and disagreeing with the applicability of a specific First Amendment case cited by the Legislature. *See* ECF No. 150, PageID.3223. The Legislature misunderstands the applicable constitutional framework. Vagueness challenges implicate the Due Process Clause *and* the First Amendment where a law (like this one) regulates First Amendment protected speech. *Priorities USA*, 462 F. Supp. 3d at 812, 817; *see also City of Chi.*, 527 U.S. at 52–64 (determining statute criminalized speech protected by the *First Amendment* and was subject to strict scrutiny and striking down statute under the *Due Process Clause*). That hardly makes any and all First Amendment caselaw applicable. The Legislature cited a First Amendment case, *Crawford v. Marion County Election Board*, in their 12(c) Motion. 553 U.S. 181 (2008); ECF No. 113, PageID.1901. Plaintiffs explained that *Crawford* is not applicable because it is a right-to-vote case with a distinct framework and analysis, but in no way "disavowed" the protections of the First Amendment. *See* ECF No. 121, PageID.1990. The First Amendment applies and

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requires heightened scrutiny because the Ban regulates Plaintiffs' First Amendment protected conduct. *Priorities USA*, 462 F. Supp. 3d at 817.

Third, Defendants rely on the Court's characterization of the Ban as "relatively straightforward and unambiguous," taking this statement out of context. This statement was made specifically with respect to the Ban's limitation on campaign spending, not in the context of Plaintiffs' vagueness claim. *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 621 (E.D. Mich. 2020), *rev'd and remanded*, 847 F. App'x 419 (6th Cir. 2021). The Republican Committees' argument that Plaintiffs "admitted" the Ban is unambiguous, ECF No. 154, PageID.4015, is similarly taken out of context. Plaintiffs were only addressing the Ban's application to campaign expenditures, explaining it prohibits "spending money to hire a motor vehicle to transport voters . . ." Ex. 3, Appeal Brief for Plaintiffs, *Priorities USA v. Nessel*, No. 20-1931 (6th Cir. Apr. 16, 2021), p. 47.[5] And while the Attorney General argues the Sixth Circuit "did not appear" to find the Ban ambiguous, Plaintiffs' vagueness claim was not before that court. ECF No. 149, PageID.2364 (citing *Priorities USA v. Nessel*, 978 F.3d 976, 983, 985 (6th Cir. 2020)).

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Fourth, the Legislature and Attorney General's argument that Plaintiffs have

[5] Republican Committees largely rest on their motion for judgment on the pleadings, and Plaintiffs rely on their Opposition to the same. ECF No. 115, PageID.1929-1930 (Republican Committees' 12(c) Mot.); ECF 124, PageID.2009 (reply in support); ECF No. 121, PageID.1990-1992 (Plaintiffs' opposition).

only identified "unfounded" concerns about the "speculative vagueness of the law," ECF No. 149, PageID.2364; ECF No. 150, PageID.3224, is at odds with the undisputed evidence. The record establishes that DAPRI and Rise have *in fact* refrained from expanding their rides to the polls events out of fear of running afoul with the Ban. ECF No. 152-4, PageID.3508-3509; ECF No. 152-3, PageID.3497-3503. The lack of clarity prevents Rise from providing college students with free transportation to the polls in Michigan. ECF No. 152-3, PageID.3499-3502.[6] *See Priorities USA*, 462 F. Supp. 3d at 817–18 (stating it is "simply not clear" whether Plaintiffs can partner with "Uber to transport a voter" or "an employee can provide rides to the polls while earning a salary or being paid hourly"). The Attorney General's contention that Plaintiffs' fears that they will be prosecuted for refunding drivers' gas money is "unfounded" is more than a little ironic, given the Attorney General's prior statement in her deposition that this precise conduct *would* violate the Ban. *See* ECF No. 152-18, PageID.3862, 3864; ECF No. 152-4, PageID.3509 (DAPRI believes the Ban does not allow it to refund drivers' gas money). The cases cited by the Legislature dismissing vagueness challenges that only alleged "remote" and "speculative" vagueness are therefore inapposite. ECF No. 150, PageID.3224.

Fifth, the Attorney General points to the dictionary definition of "hire" as

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[6] Rise has no intention of deviating from their policy of paying all student organizers because, otherwise, Rise would be at odds with its mission of decreasing college students' financial burden. ECF No. 152-3, PageID.3491-3492, 3496, 3499.

evidence of the Ban's clarity. *See* ECF No. 149, PageID.2362. But here, as demonstrated by the briefing in this case, that definition is not worth the paper it is printed on, since no one agrees how that definition applies in real life in the context of this Ban. ECF No. 152, PageID.3459.

Finally, the Attorney General asserts the Ban's meaning is clear, contending it was enacted to prevent "vote hauling." ECF No. 149, PageID.2367. The Attorney General does not explain how this supposed intent solves the Ban's vagueness problem. In any event, the record establishes that the meaning of the term itself is broadly ambiguous, offering no more clarity as to the breadth of the law's reach. Even the Attorney General does not seem to confidently land on a definition. Instead, she simply lists some examples of what "vote hauling" "can be." ECF No. 150, PageID.3221-3222. This only further proves the law's vagueness. As Dr. Sugrue explained, the term "vote hauling" is a "vague and historically anachronistic" term that is sometimes used to refer to the *legal* transportation of voters. Ex. 4, Sugrue Dep. 54:04–55:05; ECF No. 152-6, PageID.3558. The Attorney General's argument accordingly invites several immediate questions: Would "vote hauling" encompass 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? Would it criminalize a rideshare company offering voters free rides? The Attorney General never addresses these questions, and the Secretary of State, the Legislature, the

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Republican Committees, and Plaintiffs disagree or are unsure of whether the Ban prohibits these activities. This is the very definition of unconstitutional vagueness.

For the Legislature's part, it effectively throws up its hands, arguing that it could never be expected to come up with a sufficiently clear statue because it is "condemned" to words. ECF No. 150, PageID.3224. But the Constitution demands *precision* when the Legislature attempts to regulate constitutionally protected speech by threatening it with criminal sanctions. *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("*Precision* of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (emphasis added).

In sum, Plaintiffs have established that they are refraining from constitutionally protected activities because of the Transportation Ban, and Defendants have all offered wildly different interpretations of what the Ban prohibits. ECF No. 152-4, PageID.3508-3509; ECF No. 152-3, PageID.3497-3503; ECF No. 152, PageID.3458-3460 (detailing Defendants' conflicting interpretations of the Transportation Ban). In the face of these undisputed facts, the Court should find that the Transportation Ban is unconstitutionally vague.

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C. The Challenged Laws violate Plaintiffs' free speech and associational rights.

Defendants recycle arguments—previously rejected—that Plaintiffs' First Amendment claims should be considered under the *Anderson-Burdick* standard rather than exacting scrutiny and focus on the burden imposed by the Challenged

Laws. *See* ECF No. 149, PageID.2351, PageID.2364-2365; ECF No. 150, PageID.3210; ECF No. 154, PageID.4016 n.24. The Court previously applied exacting scrutiny, and it should do so again. *Priorities USA*, 462 F. Supp. 3d at 814, 818. Under that standard, the Court asks first whether the Challenged Laws burden political expression. *Id.* If they do (to any degree), Defendants must prove that they "bear[] a substantial relationship to a sufficiently important governmental interest" and are "narrowly tailored" toward those ends. *See Priorities USA*, 462 F. Supp. 3d at 814, 818; *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383, 2386 (2021). Neither Challenged Law can survive under this standard—or, for that matter, the *Anderson-Burdick* sliding scale. Defendants are not entitled to summary judgment. Plaintiffs are.

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1. The Challenged Laws burden political expression.

By impeding Plaintiffs' ability to organize rides-to-the-polls, the Transportation Ban hinders Plaintiffs' ability to associate with voters to encourage and facilitate their exercise of their fundamental rights and to build political power. ECF No. 152-4, PageID.3508-3509; ECF No. 152-3, PageID.3495-3503; *Priorities USA*, 462 F. Supp. 3d at 816–17. Likewise, the Organizing Ban infringes upon Plaintiffs' free speech activities, impeding and burdening their efforts to persuade Michigan voters to vote, and their ability to affect change through political mobilization. Republican Committees rehash their argument that the Organizing

Ban does not infringe on protected speech. ECF No. 154, PageID.4022-4024. They are wrong. ECF No. 121, PageID.1972-1973. Unlike the law challenged in *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1235 (N.D. Okla. 2020), the Organizing Ban specifically prohibits solicitation to collect absentee ballot applications—not just collection itself—*per se* implicating the communication of "a particular message." And notwithstanding Defendants' assertions to the contrary, this Court previously found that the burden imposed by the Ban is "not slight." *Priorities USA*, 487 F. Supp. 3d at 614.[7] Exacting scrutiny applies to Plaintiffs First Amendment claims.

As Plaintiffs have explained in detail, the Court correctly applied exacting scrutiny at the motion to dismiss and preliminary-injunction stage, and Defendants provide no reason to revisit that approach. *See Priorities USA*, 462 F. Supp. 3d

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[7] Republican Committees' footnote explaining that "the circumstances regarding Covid-19 have improved" has no bearing on the level of scrutiny that applies to Plaintiffs' claims. ECF No. 154, PageID.4024-4025 n.32. Plaintiffs filed their Amended Complaint in January 2020, before the pandemic. *See* ECF No. 17. More importantly, this Court's observation about the circumstances in which it was considering Plaintiffs' motion for preliminary injunction was not dispositive to its conclusion "that there is little difference between discussions about whether to register to vote and whether to register to vote absentee." *Priorities USA*, 487 F. Supp. 3d at 612. Nor are conversations about absentee voting any less "critical" now, when false claims about the integrity of absentee voting continue. *See, e.g.*, Dave Boucher et al., *Trump Hammers at False Claims of Voter Fraud in Return to Michigan*, Detroit Free Press (April 2, 2022), https://www.freep.com/story/news/politics/2022/04/03/donald-trump-holds-rally-macomb-county/7208593001/ (describing April 2, 2022 rally in Michigan and voter's desire to "do away with mail-in voting despite Michigan voters overwhelmingly approving a constitutional amendment to allow no-reason absentee voting in 2018").

at 810–19; *Priorities USA*, 487 F. Supp. 3d at 612; ECF No. 121, PageID.1974-1982.

Moreover, any issue that Defendants take with the applicability of *Bonta*, since it is a compelled disclosure case, is irrelevant: this Court properly applied exacting scrutiny to Plaintiffs' First Amendment claims *before Bonta* was decided, relying on *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), which are *not* compelled disclosure cases. *See Priorities USA*, 462 F. Supp. 3d at 811. *If* anything, since the Court's earlier decisions, there is more reason to consider whether *strict* scrutiny might instead be the proper standard, but there is no convincing basis to alleviate Defendants' burdens for Plaintiffs' core First Amendment claims. *See, e.g.*, *League of Women Voters of Fla., Inc. v. Lee*, No. 4:21-cv-0186, 2022 WL 969538, at *6 (N.D. Fla. Mar. 31, 2022) (applying *Bonta* to reject exacting scrutiny in favor of strict scrutiny to evaluate First Amendment challenge to law regulating speech in elections context); *see also Gaspee Project v. Mederos*, 13 F.4th 79, 84–85 (1st Cir. 2021) (explaining "[r]egulations that burden political speech must typically withstand strict scrutiny" and that "disclosure and disclaimer regimes are cut from different cloth" in part because such requirements "impose no ceiling on campaign-related activities" and do not "prevent anyone from speaking") (quoting *Citizens United*, 558 U.S. at 366).

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2. The Transportation Ban does not survive exacting scrutiny.

The record is devoid of evidence that the Transportation Ban is narrowly tailored to the State's purported interest in preventing voter fraud. This is fatal. Defendants have failed to meet their burden to produce any evidence connecting the Ban with the prevention of fraud. Indeed, the Attorney General confirms there are no known instances of anyone ever being charged under the Ban. ECF No. 149, PageID.2365. The Attorney General states that the "only record coming close to an enforcement of the [Transportation Ban] was the cease-and-desist letter to a Hamtramck city council candidate" where complaints "suggested" that the candidate was "paying workers" to drive people to the polls. ECF No. 149, PageID.2365. Notably, the Attorney General's office was not able to corroborate that the councilmember did in fact attempt to hire drivers, and issued a cease-and-desist letter before any illegal activity would have occurred. Ex. 5, Hagaman-Clark Dep. 73:25–74:13; 75:07–75:11; 75:17–75:22; 76:05–77:08. Plaintiffs' expert Dr. Sugrue confirmed that he found *no evidence* that the Ban currently prevents or has ever prevented (in its 130-years' history) voter fraud. ECF No. 152-6, PageID.3567.

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Defendants throw out wildly speculative ways the Ban *could* prevent voter fraud, theorizing drivers could bribe voters to vote for a certain candidate and then utilize "ballot selfies" to confirm the transaction, or that drivers may otherwise "wield undue influence" over voters during an "impressionable time." ECF No. 154,

PageID.4020-4021; ECF No. 149, PageID.2366. But "[c]onjecture, speculation, surmise, misinformation, baseless, and fabricated concerns about voter fraud and election insecurity does not constitute competent evidence no matter whether one applies the rational basis or strict scrutiny standard." Ex. 6, *League of Women Voters of Ark. v. Thurston*, 60CV-21-3138, at 83–84 (Cir. Ct. Pulaski Cnty. Mar. 24, 2022) *stayed* No. cv-22-190 (Ark. Apr. 1, 2022). Defendants have no actual evidence to suggest these are legitimate concerns. *See generally* ECF Nos. 149, 150, 154 (Defendants' motions), 152-6, 153-13 (Plaintiffs' expert reports), 157 (Uber Technologies' amicus brief). Moreover, if such conduct occurred, it would violate several Michigan laws prohibiting bribing voters. ECF No. 152, PageID.3468-3469.

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Defendants also fail to explain how their conjecture of fraud is any more of a concern if a driver is "hired" as opposed to a volunteer. This alone is strong evidence that the Ban is not narrowly tailored. *See Meyer*, 486 U.S. at 426 (rejecting unsupported allegation that paid petition circulators are more likely to engage in corrupt behavior than a volunteer); *see also Bonta*, 141 S. Ct. at 2386 (placing burden on defendants to demonstrate narrow tailoring). The state hardly has a legitimate interest in adopting overly broad prohibitions whose only application would be to hypothetical scenarios that already violate existing law.

Finally, Defendants make much of the Sixth Circuit's statement that the Ban

was enacted to prevent "vote hauling." ECF No. 150, PageID.3221.[8] But this is not "law of the case." A preliminary injunction decision does not generally constitute the law of the case, except when there is a fully developed record. *Guillermety v. Sec'y of Educ. of U.S.*, 241 F. Supp. 2d 727, 731 (E.D. Mich. 2002) (citing *William G. Wilcox, D.O., P.C. Emps'. Defined Benefit Pension Tr. v. United States*, 888 F.2d 1111, 1113 (6th Cir. 1989)). The Sixth Circuit stressed exactly this recently, emphasizing that "the law-of-the-case doctrine may be inapplicable when the legal conclusions in a preliminary-injunction decision were based on an underdeveloped record, issued under time pressures related to the circumstances of the preliminary injunction at issue, or were otherwise not conclusively decided." *Daunt v. Benson*, 999 F.3d 299, 308 (6th Cir. 2021) (citing *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015)). The court asked "whether 'the appellate panel considering the preliminary injunction has issued a fully considered appellate ruling on an issue of law.'" *Id.* (quoting *Howe*, 801 F.3d at 740). Here, the appellate record was not only

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[8] The Attorney General cites a book by Professor Campbell, ECF No. 149, PageID.2360, but Professor Campbell is not an expert in this case and the book is inadmissible hearsay. *Parker v. Winwood*, 938 F.3d 833, 837 (6th Cir. 2019) (article published in Billboard Magazine was inadmissible hearsay); *Almond v. ABB Indus. Sys., Inc.*, No. C2-95-707, 2001 WL 242548, at *8 (S.D. Ohio Mar. 6, 2001) (magazine articles were "clearly inadmissible hearsay"), *aff'd,* 56 F. App'x 672 (6th Cir. 2003); *Okpara v. D.C.*, 174 F. Supp. 3d 6, 13 n.1 (D.D.C. 2016) (declining to consider book excerpt "because the excerpt is hearsay, the author of the book has not been offered or qualified to testify as an expert, and there is no evidence that [a party expert] relied on the excerpt in forming his expert opinion").

limited to the fast-moving preliminary injunction proceedings, but largely limited to the issue of FECA preemption, an issue that is no longer at play in this case. The Sixth Circuit did not have the full record that is now before this Court, which shows the Ban was not enacted to prevent fraud.[9] ECF No. 152-6, PageID.3523, 3566.

Plaintiffs do not argue that the State can never enact election laws to prevent voter fraud. But when the State does so in a way that impedes First Amendment activity, it must meet exacting scrutiny. Defendants also fail to address that, 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 Ban (which impinges on Plaintiffs' protected speech) would advance the State's interests.[10] *See Bonta*, 141 S. Ct. at 2386; *Buckley*, 525 U.S. at 204–05; *Meyer*, 486 U.S. at 427. The

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[9] Even the Supreme Court has reconsidered initial determinations of legislative intent in light of better legislative history. *E.g.*, *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 187 (1981) ("The [Court's] error is clear in light of our analysis above of the legislative history of the Taft-Hartley Act . . . .").

[10] The Legislature's citation to *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2340 (2021), is misplaced. *See* ECF No. 150, PageID.3216. In *Brnovich*, the Court's analysis of the state's anti-fraud rationale came in the context of a claim under Section 2 of the Voting Rights Act, in which the plaintiffs argued that Arizona's voting laws diluted minority voting power. *See Brnovich*, 141 S. Ct. 2321 at 2334. Plaintiffs' claims are constitutional, not statutory. And again, Plaintiffs do not claim a burden on the right to vote, but a burden on their speech and associational rights. Furthermore, the question before this Court is not whether states have an interest in preventing election fraud. It is whether the *laws at issue* constitute burdens on their First Amendment rights and do not "*bear[] a substantial relationship* to a sufficiently important governmental interest," *Priorities USA*, 462 F. Supp. 3d at 814 (emphasis added), or are not "narrowly tailored" toward those ends. *Bonta*, 141 S. Ct. at 2383, 2386.

Transportation Ban burdens protected speech, and Defendants have not carried their burden to show that it is narrowly tailored to prevent voter fraud.

3. The Organizing Ban does not survive exacting scrutiny.

The Organizing Ban does not survive exacting scrutiny for the same reason: Defendants have not met their burden to demonstrate the Ban is narrowly tailored to advance the State's interest in preventing fraud. *Priorities USA*, 462 F. Supp. 3d at 814; *see also Bonta*, 141 S. Ct. at 2386.

The Attorney General's and Republican Committees' motions for summary judgment attempt to justify the Organizing Ban by pointing to instances of purported fraud connected to absentee ballot applications generally, but these instances involved forgery, *not* the Organizing Ban. ECF No. 149, PageID.2355; ECF No. 154, PageID.4031-4032; ECF No. 152, PageID.3470-3471. The Republican Committees also identified instances related to absentee *ballots*, not absentee ballots *applications*. *Id.* at PageID.3471. The Legislature did not identify any instances of fraud in their Motion that support the State's interest in the Ban specifically.[11]

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[11] Republican Committees' assertion that the Organizing Ban "provide[s] a mechanism for facilities to limit access to groups associated with absentee by mail efforts" is inaccurate. ECF No. 154, PageID.4032. The Organizing Ban prohibits those groups from "soliciting" to return absentee ballot applications and prohibits certain persons (people not registered to vote in Michigan) from returning absentee ballot applications. It does not prohibit "groups associated with absentee by mail" from otherwise providing nursing home residents with assistance in applying to vote absentee. It simply limits what those groups *may say to* nursing home residents and who from those groups may return an absentee ballot, if requested.

Faced with a dearth of evidence that the Organizing Ban is narrowly tailored to prevent fraud, the Republican Committees lean heavily on Ms. Strach's testimony.[12] ECF No. 154, PageID.4033-4035. But Ms. Strach's testimony, based only on her time overseeing elections in North Carolina, is inadmissible or, at the least, entitled to little weight. *See* ECF No. 153. The Republican Committees argue that the "same fraud concerns for absentee voting apply equally at the application stage," but they provide no support for this statement beyond Ms. Strach's cursory statement of the same effect. ECF No. 154, PageID.4027; ECF No. 152-15, PageID.3781. This thin reed can hardly support the weight placed upon it. But even *if* concerns about voter fraud justified a law to guard against fraud during one stage of the voting process, it doesn't follow that the state could use that justification to enact *any and all* laws in the election context that burden protected speech. That is the purpose of "narrow tailoring." *See Bonta*, 141 S. Ct. at 2383–86.

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Defendants also ignore the most significant evidence establishing that the Organizing Ban is not justified by the state's interest: deposition testimony by the

[12] The Republican Committees also cite the sources Ms. Strach relied on in her Report directly in their Motion: a 17-year-old report from the Carter Baker Center ("Carter-Baker Report") and a Detroit Press article. ECF No. 154, PageID.4026, 4032-4032 n.39. For the same reasons articulated in Plaintiffs' Motion to Exclude Ms. Strach's testimony and Dr. Herron's Rebuttal Report, these sources do not constitute reliable evidence. ECF No. 153, PageID.3969-3971. In addition, if Ms. Strach's testimony is excluded, these sources would constitute inadmissible hearsay. *See supra* Fn. 8 (citing cases regarding hearsay of similar sources).

Secretary of State's designee. That witness confirmed that the office chose not to even pursue an allegation that the Ban *may* have been violated, because allegations regarding the solicitation of absentee ballot applications are "hard to prove." ECF No. 152, PageID.3471. The State's lack of enforcement of the Organization Ban is strong evidence that the Ban does not support the State's asserted interest. *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.").

Even if the State's purported interests in preventing fraud were supported by the record (and they are not), less intrusive means than the Organizing Ban could—and already do—advance the State's interests. *See Bonta*, 141 S. Ct. at 2386; *Buckley*, 525 U.S. at 204–05; *Meyer*, 486 U.S. at 427. 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 laws, not the Organizing Ban. ECF No. 152, PageID.3471. Like the Transportation Ban, the Organizing Ban serves little purpose other than to squelch protected speech. Without evidence that the Ban serves the State's asserted fraud prevention interest, much less that it is narrowly tailored to do so, Defendants' motions should be denied.

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4. Even under *Anderson-Burdick*, the Bans are unconstitutional.

Even if this Court were to apply the *Anderson-Burdick* test to Plaintiffs' First Amendment claims, the Challenged Laws cannot survive. *See Burdick v. Takushi*,

504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983). The state's interests, to the extent they are advanced by either Ban, do not outweigh the significant burdens imposed on Plaintiffs. *See* ECF No. 152, PageID.3474-3475.

D. The Organizing Ban is preempted by Section 208.

Separate and independent from Plaintiffs' constitutional claims, the Organizing Ban is invalid because it is preempted by Section 208 of the Voting Rights Act.[13] First, contrary to the Legislature's suggestion, Congress clearly intended for private parties to enforce Section 208. "It would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action" while other provisions are not, "when all lack the same express authorizing language." *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (holding that "the existence of the private right of action under Section 2 … has been clearly intended by Congress since 1965"). Moreover, courts have repeatedly recognized a private right of action under Section 208.[14] Defendants, tellingly, identify no case that has ever rejected the availability of private Section 208 suits. And for good reason: there are none.

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[13] The Attorney General misunderstands Plaintiffs' claim and ignores the fact that the Organizing Ban not only bans solicitation to return absentee ballot applications, but also, even when a voter affirmatively requests assistance, allows (with limited exceptions) only registered voters in Michigan to assist other voters with returning their absentee ballot applications. *See* ECF No. 149, PageID.2356-2358.

[14] *See OCA-Greater Houston*, 867 F.3d at 607; *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020); *Arkansas United*, 517 F. Supp. 3d at 777.

Second, this Court already considered and rejected the argument that Plaintiffs lack standing to bring their Section 208 claim, explaining that all but their right-to-vote claims "rely on [Plaintiffs'] own rights and injuries as organizations." *Priorities USA*, 462 F. Supp. 3d at 808. In any event, "the Supreme Court has permitted organizations to bring suit in VRA claims." *Northeast Ohio Coal. for the Homeless*, 837 F.3d at 624 (citing *Alabama Leg. Black Caucus v. Alabama*, 575 U.S. 254, 268–71 (2015)); *see also Arkansas United*, 517 F. Supp. 3d at 794 (collecting cases finding organizational standing for voter assistance organizations forced to devote resources to counteract effects of state voting laws alleged to conflict with federal voting laws). And in *OCA-Greater Houston*, the Fifth Circuit found that an organization with a mission similar to that of Plaintiff DAPRI had standing to seek declaratory and injunctive relief based on allegations that a state voting law was preempted by the VRA. 867 F.3d at 610–14 (finding standing for organization with mission of turning out vote in a community with limited English proficiency).

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Indeed, the VRA was *intended* to confer standing to organizations like Plaintiffs. The Senate Report on the 1975 VRA amendments states that an aggrieved person "may be an individual *or an organization* representing the interests of injured persons." S. Rep. No. 295, 94th Cong., 1st Sess. 1, 40 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 806–07 (emphasis added). *See also Newman v. Voinovich*, 789 F. Supp. 1410, 1416 (S.D. Ohio 1992), *aff'd*, 986 F.2d 159 (6th Cir. 1993). The

Legislature's invocation of the "zone of interests" language in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014), is thus beside the point.

Turning to the merits, while the 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, as Plaintiffs have explained. ECF No. 152, PageID.3475–3478.

III. CONCLUSION

Accordingly, Defendants' motions for summary judgment should be denied.

Date: April 11, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 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, Marc Elias, certify that this document 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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