UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

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

Defendant,

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

Intervening-Defendants.
_____/

No. 19-13341

HON. STEPHANIE DAWKINS DAVIS

MAG. KIMBERLY G. ALTMAN

DEFENDANT ATTORNEY GENERAL DANA NESSEL'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

ARGUMENT

I. Plaintiffs' response fails to establish a valid facial challenge to the constitutionality of the Voter Transportation law.

Plaintiffs' response quotes from the Attorney General's—and the Intervenors'—briefs in a single combined response brief and focuses on various hypotheticals over whether and how the statute *could* or *might* apply, but their selective recitation of the Defendants' arguments overlooks the first point raised by the Attorney General: this is a facial challenge, not an as-applied challenge, and so Plaintiffs must demonstrate that the law is impermissibly vague in *all* of its applications. *Green Party v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012) (quoting *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates Inc.,*455 U.S. 489, 497 (1982)). Federal courts must construe challenged state statutes, whenever possible, so as "to avoid constitutional difficulty." *Id.* (quoting *Davet v. City of Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006)). Every reasonable construction must be resorted to in order to save a statute from unconstitutionality. *Id.* (quoting *Chapman v. United States*, 500 U.S. 453, 464 (1991)). Plaintiffs have not even attempted to demonstrate that the statute here is vague in all its applications and have instead chosen to rely entirely on hypothetical applications that have never occurred—in over 100 years of the statute's existence, not one person has ever been charged with violating the statute through any of the situations they describe. Plaintiffs' response does not appear to understand why the Attorney General

referred to the statute's purpose regarding "vote-hauling." (ECF No. 175, PageID.6507.) But the statute's application in that context—hiring people to transport voters and giving them some "walking around money"—is a non-vague and constitutional application of the statute. Because the statute is not vague in all its applications, Plaintiffs' facial challenge to the statute must fail.

Plaintiffs make brief reference to this Court's opinion on the motion to dismiss which cited to *Vill. of Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). However, the Court in *Hoffman Estates* also recognized that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." *Id.* at 498. The Voter Transportation law, at its essence, is an economic regulation that prohibits hiring people to perform one particular task. It is not a blanket prohibition on transportation of voters, and such transportation may be done in unlimited amounts as long as no one is being paid for the service.

Plaintiffs' response also doubles down on their argument that the word "hire" is too vague to be capable of being understood by citizens or law enforcement. However, Plaintiffs' argument seeks to prove too much, and if the word "hire" is deemed impermissibly vague then any other statute referring to "hiring" transportation would be called into question. *See, e.g.* Mich. Comp. Laws § 257.6(2) (defining "chauffer"); Mich. Comp. Laws § 257.7 (defining commercial

vehicle as including motor vehicles used for the transportation of passengers *for hire*); Mich. Comp. Laws § 256.531 (providing that it is unlawful to operate a motor vehicle on state highways and lock the doors while carrying passengers *for hire*); Mich. Comp. Laws § 288.691 (requiring a license or permit to haul cans to the owner or operator of a truck or vehicle used *for hire* to transport milk).

But again, this is a facial challenge; this Court does not need to assess whether the word "hire" could be unclear in some obscure potential scenario. Rather, it need only determine whether the statute is constitutional in the situation to which it is clearly intended to apply—bribing or coercing voters. While Plaintiffs have sought to isolate Mich. Comp. Laws § 168.931(1)(f) from the rest of the statute, it should not escape notice that subsection (a) through (e) all address various forms of bribing, soliciting bribes, or coercing voters by threatening to fire them from their jobs or excommunicate them from their church. The statutory scheme itself provides additional clarification on how the statute is meant to apply. Plaintiffs have failed to establish a viable facial challenge to the Voter Transportation law, and the Attorney General is entitled to judgment as a matter of law.

II. The Court should apply the *Anderson-Burdick* standard to Plaintiffs' claims, as the Sixth Circuit already did so on appeal.

Plaintiffs' response continues to urge the Court to apply exacting scrutiny, as Plaintiffs did during the preliminary injunction stage. But this argument fails to

address the Sixth Circuit's opinion in the appeal where it referred to the *Anderson-Burdick* standard in connection with the Voter Transportation law. *Priorities USA v. Nessel (Priorities II),* 860 Fed. Appx. 419, 422 n 3 (2021). Plaintiffs have elsewhere suggested this was dicta, but that argument is difficult to accept where the Sixth Circuit's use of a standard that was different than the one applied by this Court and was advocated by the defendants. For reasons previously stated in the Attorney General's principal brief, this is more aptly considered law of the case. But even assuming only for argument that the Sixth Circuit's statement was dicta, why would that mean this Court should ignore it? At an absolute minimum, the Sixth Circuit's use of *Anderson-Burdick* in this case offers useful insight into how that Court views challenges like the one Plaintiffs seek to raise here, and it is not the exacting scrutiny urged by Plaintiffs in their argument. The Sixth Circuit's opinion would thus be instructive and useful to this Court, even if it were not binding (as the defendants argue it is).

Anderson-Burdick is meant to apply where it is necessary to balance the competing interests of First Amendment protections and necessary regulation of elections. *See e.g. Daunt v. Benson,* 956 F.3d 396, 406-407 (2020) (describing *Anderson -Burdick* as a "flexible standard" for a court to "evaluate constitutional challenges to a state's election laws," including First Amendment claims); *see also Ohio Council 8 Am. Fedn. of State v Husted*, 814 F.3d 329, 334-335 (2016).

Again, *all* election regulations interact with political speech or association in some way, and this case is no different and does not require the application of a different standard.

A. The Voter Transportation law does not severely burden the Plaintiffs' rights to speech or association.

Despite months of discovery, Plaintiffs have offered little additional evidence to support the existence of severe burden on their right to political association. Plaintiffs' response cites to the declaration of Andrea Hunter, the president of DAPRI as demonstrating the burden. (ECF No. 175, PageID.6509, citing ECF No. 152, PageID.3508-3509.) But Ms. Hunter states in her declaration that DAPRI is already "very active" in helping to transport voters to polls "[b]y offering *free* transportation to the polls." (ECF No. 152-4, PageID.3506-3507, ¶5-6)(emphasis added.) Ms. Hunter acknowledges that DAPRI is free to engage in volunteer efforts transporting voters at no cost. The only burden cited by Ms. Hunter is based upon her "understanding" that the law bars renting vans (it is unclear whether she includes the hiring of a driver with the rental) or refunding gas money. (ECF No. 152-4, PageID.3509, ¶12.) But again, this is not an as-applied challenge, and Ms. Hunter does not aver that she or DAPRI has been threatened with prosecution in regards to costs associated with any volunteer efforts. Similarly, the declaration of Maxwell Lubin, CEO of Rise, Inc., only discusses the law's impact on plans to hire *paid* organizers to transport voters—not unpaid

volunteer efforts. (ECF No. 152-3, PageID.3498-3499, ¶22-23.) As discussed in the earlier briefs, the paid transport of voters has historically been tied to bribery and fraud, and the *paid* transportation of voters is the only thing prohibited by the statute. Thus, Plaintiffs are essentially claiming an unfettered constitutional right to hire people to transport voters to polls. Plaintiffs, however, have failed to support their arguments with legal authority establishing the existence of such a right.

B. The Absentee Ballot law does not severely burden Plaintiffs' rights to speech or association.

Plaintiffs do not appear to deny that people have engaged in fraudulent activity in connection with absent voter ballot applications. (ECF No. 175, PageID.6516.) The occurrence—indeed, the recent occurrence—of fraud involving absent voter ballot applications supports the existence of laws seeking to prevent or curtail fraud. Plaintiffs' response, however, attempts to move the goalposts, and their argument dismisses those recent charges because they involved slightly different acts of fraud than specifically prohibited by the Absentee Ballot law. This argument misses the point. If anything, these recent criminal cases underscore that absent voter ballot applications are a means that people will use to attempt fraud if they perceive an opportunity and a reason to do so. These cases clearly demonstrate Michigan's interest in regulating how third parties interact

with these applications—both in prohibiting fraud and in promoting voter confidence in the integrity of the absent voting system.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed above and in the earlier briefs, Defendant Attorney General Dana Nessel is entitled to judgment as a matter of law and Plaintiffs' amended complaint must be dismissed in its entirety with prejudice.

Respectfully submitted,

s/Erik A. Grill

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendant Nessel
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
P64713

Dated: April 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 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.

s/Erik A. Grill

Erik A. Grill (P64713)
Assistant Attorney General