UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

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

Defendant

and

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

Intervening Defendants.
_____/

Case No. 19-cv-13341

Honorable Stephanie Dawkins Davis
Magistrate Judge Kimberly G. Altman

THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

The legal defects with Counts II and VI, Plaintiffs' First Amendment challenges to the Absentee Ballot and Voter Transportation Laws, have been briefed ad nauseum. The Legislature thus relies on its arguments in ECF Nos. 113, 123, 150, and 170 for those issues. There are, however, points warranted in reply to Plaintiffs' summary-judgment opposition.

I. Plaintiffs concede the Legislature's statement of facts and offer none of their own.

A party asserting that a fact is genuinely disputed "must support" that assertion. Fed. R. Civ. P. 56(c)(1). And, under this Court's practice guidelines, "[a]ny proffered fact in the movant's Statement of Material Facts that is not specifically contested will, for the purpose of the motion, be deemed admitted." Plaintiffs' opposition brief omits any Counterstatement of Material Facts and—in a footnote—takes issue (without "support") with only three paragraphs in the Republican Committees' motion. *See* ECF No. 175, PageID.6497. Therefore, Plaintiffs admit *all* the Legislature's factual assertions.

This means Plaintiffs admit Michigan's "interest in maintaining the integrity of elections by prohibiting, policing, and prosecuting fraud, corruption, and undue influence in elections." ECF No. 150, PageID.3201, ¶ 12. No further debate can be had about the "State's purported interest" or supposed lack of evidence of that interest. *See, e.g.*, ECF No. 175, PageID.6512. All that remains is the importance of that interest—which the Supreme Court and Sixth Circuit already established—and

argument about tailoring and burdens. And Plaintiffs' admission of fact paragraphs 15, 16, and 17 dooms the latter. *See* ECF No. 150, PageID.3202–03 (Plaintiffs never collected absentee ballots and have only unspecified intentions to do so; they can identify no individuals unable to receive assistance or transportation due to the challenged statutes). It is now beyond dispute that Plaintiffs seek an advisory opinion on statutes they simply do not like.

II. Plaintiffs fail to establish standing.

Plaintiffs' rebuttal of the Legislature's standing arguments is ineffective. They start by saying the Court "rejected" those arguments at the motion-to-dismiss stage, ECF No. 175, PageID.6497–98, but ignore that mere allegations no longer suffice.

To support their "credible threat of prosecution" theory, they resort to misconstruing *McKay v. Federspiel*, 823 F.3d 862 (6th Cir. 2016), cherry-picking a quotation about cases *McKay* distinguished. *See* ECF No. 175, PageID.6500. This, despite extensive discussion of factors found in *McKay* that were more concrete than those found here and *still* failed to support standing under that theory. *See McKay*, 823 F.3d at 869–70. Plaintiffs identify no actual threat of prosecution at all, much less a credible threat of imminent prosecution.

To support their "diversion of resources" theory, Plaintiffs mention on repeat that "slight" and "not large" expenditures can be enough, ECF No. 175, PageID.6501–02, apparently recognizing they offer only generic assertions in place

of specific additional expenditures. They then string-cite a cascade of cases (mostly from other circuits) involving either mere allegations at the motion-to-dismiss phase or genuine evidence of diverted resources. *See id.*

None of that helps them, however, because the constitutional requirements "would be eviscerated if an advisor or organization can be deemed to have Article III standing merely by virtue of its efforts and expense to advise others how to comport with the law." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014). Even the case they insist the Legislature misread, *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), explains it is "additional or new burdens" such as a strategy "overhaul" that can create standing, not changes that affect "only the content" of training. *Id*. at 955.

Here, Plaintiffs' own evidence betrays them (as do their alterations). For example, DAPRI's declaration really said, "we must spend time and resources educating our members and volunteers about these laws. We require 16 hours of training . . . to make sure they understand Michigan election law, including the Transportation Ban and the Organizing Ban." ECF No. 152-4, PageID.3512. The response brief embellishes that into "time and resources educating [its] members and volunteers about [the Challenged Laws]." ECF No. 175, PageID.6501 (alterations in original). Even if the declaration had made the statement Plaintiffs now contend, it would not matter: Plaintiffs are merely concerned with the content of training they

would be providing regardless. That makes them precisely the sort of "armchair observer[s]" that *Fair Elections* found to lack standing. *See* 770 F.3d at 460.

III. Plaintiffs' vagueness arguments are as flexible as their hypotheticals and equally unavailing.

Plaintiffs start their discussion of vagueness by attacking an argument the Legislature did not make. *See* ECF No. 175, PageID.6503 (accusing the Legislature of "incorrectly characteriz[ing] the relevant inquiry" as being about "burdens" on voters). From that inauspicious start, things only get worse.

Plaintiffs responded to the Legislature's still-pending motion for judgment on the pleadings by telling this Court that their vagueness claim was "not a right-to-vote challenge . . . but rather a due process challenge." ECF No. 121, PageID.1991. They went on to discuss typical due-process issues like "standards" to prevent "arbitrary deprivation of liberty interests" and the need for "ordinary people" to "understand what conduct is prohibited." *Id.* at PageID.1990–92. They said nothing about free speech or association. *Id.* Now, however, they insist "the First Amendment applies and requires heightened scrutiny." ECF No. 175, PageID.6505.

The Legislature never argued that a vagueness challenge cannot arise under the First Amendment. It merely pointed out that Plaintiffs have not pursued such a theory—likely because "hiring" a vehicle to transport others is neither speech nor association and nothing in the Voter Transportation Law impedes Plaintiffs from

both riding along and talking with voters on the way to the polls, if they wish.[1]

Meanwhile, in trying to cram the First Amendment back into the claim, Plaintiffs make *City of Chicago v. Morales*, 527 U.S. 41 (1999), the centerpiece of their argument. *See* ECF No. 175, PageID.6503–04 (asserting that *Morales* "determin[ed that] statute criminalized speech protected by the First Amendment . . ."). But *Morales* is *not* a First Amendment vagueness case: "The ordinance does not prohibit speech" or "any form of conduct that is apparently intended to convey a message" and "does not impair the First Amendment 'right of association' . . ." 527 U.S. at 53. *Morales* is a due-process case, period.[2]

Plaintiffs finally assert the Legislature "effectively throws up its hands . . . because it is condemned to words." ECF No. 175, PageID.6508. But the Legislature only quoted the Supreme Court to show why Plaintiffs' increasingly tortured hypotheticals and relentless indifference to the law's plain language do not make for a valid vagueness challenge. Trying to characterize that as surrender confirms they

[1] This is part of what makes Plaintiffs reliance on *NAACP v. Button* unwarranted. "Precision of regulation" makes sense in an area that actually "closely touch[es] our most precious freedoms." *See* 371 U.S. 415, 438 (1963). The statute at issue in *Button* directly regulated what NAACP staff could say in advising people about infringement of their civil rights, leading the Court to find the law unconstitutional as applied to the NAACP. *Id.* at 434. *Button* is simply inapposite.

[2] *Morales* also was the foundation of Plaintiffs' opposition where they initially construed their own claim as a due-process challenge. ECF No. 121, PageID.1990–91. This reinforces the concession from which they now retreat.

have no serious arguments left to make.

IV. Plaintiffs' preemption claim fails.

Plaintiffs argue they are a proper party to maintain a conflict preemption claim under Section 208 of the Voting Rights Act for a couple reasons: first, because other cases found standing (or aggrieved-person status) for other organizations "forced to devote resources to counteract effects of state voting laws"; and second, because an excerpt of legislative history refers to "an organization representing the interests of injured persons." ECF No. 175, PageID.6520.

Plaintiffs make the first argument, going to Article III standing, despite conceding they cannot identify a single person who has been unable to receive assistance with his or her absentee ballot application, much less been unable to vote. They build their entitlement to maintain this claim on spending unspecified money to fix a problem they have not seen and vague intentions to help injured people that they cannot identify. It is difficult to imagine a clearer attempt to "manufacture standing" by "inflicting harm on themselves based on their fears of hypothetical future harm." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

As to their second argument, Plaintiffs are not organizations "representing the interests" of voters. *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 809 (E.D. Mich. 2020). And Plaintiffs' cases add nothing to this question. *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), addressed only Article III standing. *Northeast*

Ohio Coalition for the Homeless v. Husted, 837 F.3d 612, 620 (6th Cir. 2016), involved Article III standing and was a challenge to Section 2, not 208; and that court had already held that NOOCH *could* assert its members' voting rights. Finally, *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), involved claims under Section 10 (precluding poll tax as a precondition to voting) asserted by persons required to pay registration fees to become party delegates—claims clearly within Section 10's "zone of interest."

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After much spilled ink, the one thing the parties apparently agree on, given their cross-motions for summary judgment, is that trial is unnecessary. The Court should grant the Legislature's motion for summary judgment.

Respectfully submitted,

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