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' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Challenged Laws suppress Plaintiffs' protected First Amendment activities and violate their Due Process rights, threatening them with criminal prosecution by way of an unconstitutionally vague statute. Defendants have not shown that the Laws further the State's interest in combatting voter fraud—or further any interest that could justify their intrusion on Plaintiffs' constitutional rights, under any standard. Plaintiffs' motion for summary judgment should be granted.

II. ARGUMENT

A. Plaintiffs have standing.

Intervenors raise no new arguments regarding standing, and the Court should reject the arguments that they make again for the same reasons it has before. *See* ECF No. 175, PageID.6498; ECF No. 177, PageID.6743; *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 802–08 (E.D. Mich. 2020).

B. The Transportation Ban is unconstitutionally vague.

A law is unconstitutionally vague when a person of ordinary intelligence fails to understand its scope. *See Johnson v. United States*, 576 U.S. 591, 595 (2015); *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).[1] And, although Defendants

[1] The Attorney General argues *Chicago* is inapplicable because it concerned a loitering law. ECF No. 166, PageID.6391. But both the loitering law at issue in *Chicago* and the Ban at issue in this case are "criminal law[s] that contains no mens rea requirement" and "infringe[] on constitutionally protected rights." *City of*

understandably attempt to minimize it, the undisputed evidence is that multiple parties and witnesses in this action, including attorneys, professed widely different understandings of what conduct the Ban prohibits.[2] ECF No. 152, PageID.3459. Defendants contend that Plaintiffs have manufactured vagueness by posing "tough hypotheticals," but this is not so. ECF No. 177, PageID.6740; ECF No. 170, PageID.6448. Even Defendants' *own briefing* showed disagreement regarding the Ban's scope. ECF No. 152, PageID.3459. Moreover, the scenarios posed to witnesses were hardly outliers—they involved actual conduct Plaintiffs and others would like to engage in. ECF No. 152, PageID.3458 n. 5; ECF No. 154.

The Attorney General's argument that the Court should reject Plaintiffs' vagueness challenge because persons violating the Ban would likely receive a warning and not be charged, is misplaced. ECF No. 166, PageID.6395. Notably, the Attorney General has never officially announced this policy nor refused to prosecute; nor have any county prosecutors refused to prosecute. And the Attorney

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Chicago, 527 U.S. at 55. Both are thus subject to heightened scrutiny. *NAACP v. Button*, 371 U.S. 415, 432 (1963). The Legislature attempts to rewrite the standard, arguing Plaintiffs are "sophisticated" voter advocacy groups who should be able to decipher the Ban. ECF No. 170, PageID.6449. But that is not the law.

[2] The State objects to testimony by the Secretary of State's Rule 30(b)(6) witness on the interpretation of the Transportation Ban, claiming that this topic was not included in the deposition topics. But that is incorrect. The deposition topics listed "applicability of the Voter Transportation Ban." ECF No. 166-2, PageID.6418. Regardless, the witness testified regarding his individual understanding of the Ban, further evidencing that persons of ordinary intelligence ascribe the law different meanings, even if the testimony is not ascribed to the Secretary's office itself.

General is up for re-election soon; she cannot promise any successor would feel the same. In any event, the threat of official "warnings" by law enforcement officers for engaging in constitutionally-protected activities hardly addresses the problem.

Defendants also rely on inapplicable cases. In *United States v. Triumph Capital Group, Inc.*, 260 F. Supp. 2d 470, 476 (D. Conn. 2003), the court rejected an argument that a law that criminalized "corruptly" obstructing justice was unconstitutionally vague because it did not list the proscribed conduct, finding that the statute's scienter requirement (i.e., "corruptly") provided sufficient notice of what was prohibited. *Id.* at 476. No similar term curtails the reach of the Ban here, as evidenced by the wildly different interpretations presented to this Court. In *Grayned v. City of Rockford*, 408 U.S. 104, 112, 113 (1972), the Supreme Court acknowledged it was a "close" question, but ultimately determined that an anti-noise ordinance was not unconstitutionally vague because the ordinance's "announced purpose" made it clear. Vagueness was also "dispelled" by the ordinance's express limitations on what speech was prohibited, which restrained the degree of judgment afforded to police officers. *Id.* at 109, 113. In contrast, the Ban has no similar "announced purpose," and contains no limitation on what speech is prohibited.[3]

[3] The Republican Committees cite *Roberts v. Unimin Corp.*, which is not a vagueness case—it is about an indefinite term in a leasehold. 883 F.3d 1015, 1017 (8th Cir. 2018). The Attorney General cites cases defining the term "hire" but does not explain how this resolves the vagueness identified by Plaintiffs. ECF No. 166, PageID.6392; ECF No. 175, PageID.6507.

Defendants continue to characterize Plaintiffs' arguments about the Ban's vagueness as "hypothetical" concerns, but the record establishes that the lack of clarity is *in fact* chilling protected speech simply by the Ban remaining on the books. ECF No. 152, PageID.3459–3460.

C. The Challenged Laws violate the First Amendment.

Defendants fail to meet their burden to demonstrate the Challenged Laws further the State's interest in preventing fraud under any standard. They advance only a few fresh arguments, none of which are compelling.[4]

At the outset, the Attorney General argues the lack of prosecutions does not indicate a lack of State interest in the Challenged Laws, since Attorney General Nessel allows people to correct their behavior before filing charges. ECF No. 166, PageID.6403. But Defendants can only point to a single incident where this occurred, and the Attorney General has never announced this as an official policy. In any event, the law's lengthy history of dormancy is strong evidence that it does not actually advance a state interest. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021); ECF No. 177, PageID.6749.

With respect to the Transportation Ban, Defendants argue that allowing get-out-the-vote organizations to hire transportation increases the risk of fraud, ECF No.

[4] Plaintiffs do not revisit the applicable standard or rehash how the Challenged Laws burden Plaintiffs; those issues have already been thoroughly addressed. *See* ECF No. 152, PageID. 3447-3449, 3462-3465; ECF No. 175, PageID.6510-6511.

177, PageID.6748, but cite nothing in support. Get-out-the-vote organizations can currently provide transportation for voters so long as they do not "hire" transportation, yet fraud in Michigan remains rare, and there is no evidence of fraud resulting from get-out-the-vote organizations providing voter transportation. None of the Defendants have shown that allowing paid transportation will result in fraud.

Defendants' arguments with respect to the Organizing Ban fare no better. The Republican Committees argue that the instances of absentee fraud support the State's interest in the Ban even if the State did not pursue charges under it. But the Ban was not implicated in the incidents referenced because none of the individuals "solicited" to return voters' applications. ECF No. 152, PageID.3470-3471 n.8; ECF No. 154, PageID.4005-4006 (stating defendants filled out applications without the voters' knowledge). The Republican Committees also assert the Ban protects Michiganders from "badgering" by get-out-the-vote volunteers (ignoring that they are exercising First Amendment rights), but cite no caselaw suggesting this interest is sufficient to meet exacting scrutiny nor evidence that, absent the Ban, Michiganders would be bombarded by voter advocacy groups.[5] ECF No. 177, PageID.6752.

Defendants argue the State has an interest in preventing the (admittedly)

[5] The Republican Committees otherwise resort to characterizing Plaintiffs' arguments as calling Michiganders "dimwitted." ECF No. 154, PageID.4028. Hardly. Whether voters decide to ask Plaintiffs for assistance is not a measure of their intelligence. Voters may simply not realize Plaintiffs can assist.

virtually non-existent fraud in Michigan, but there is no evidence that *these Laws* further the State's interest in preventing even the rare instances of fraud in Michigan.

D. The Organizing Ban is preempted by Section 208.[6]

Defendants attempt to downplay the value of *Arkansas United v. Thurston*, by positing that it was issued "quickly" before the 2020 election.[7] No. 20-CV-5193, 2020 WL 6472651, at *4 (W.D. Ark. Nov. 3, 2020). But the federal court's decision was thorough, *id.,* and it reiterated its conclusions months later. *Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 794 (W.D. Ark. 2021). The Attorney General also argues that the statue in *Arkansas United* is dissimilar to the Organizing Ban, ECF No. 166, PageID.6405, but the Arkansas decision turned on the language of Section 208, not the statute at issue. *See Arkansas United*, 2020 WL 6472651, at *4.

E. *Purcell* is not applicable.

This is not a case in which there is "inadequate time to resolve the factual disputes," which is what the Court cautioned against in *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam). Nor does *Purcell* establish a per se rule against

[6] Defendants again argue Plaintiffs lack standing to pursue their Section 208 claim, but as Plaintiffs have explained, this argument lacks merit. ECF No. 152, Page ID.3447-3449; ECF No. 170, PageID.6456.

[7] Plaintiffs are not making a "motion to reconsider," as the Legislature asserts—this Court's findings regarding Section 208 were preliminary. *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 620 (E.D. Mich. 2020); ECF No. 170, PageID.6455. The case the Legislature cites regarding filing successive motions for summary judgment is inapplicable. ECF No. 170, PageID.6455.

enjoining voting laws in an election year. *See United States Student Ass'n Found. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008) (denying stay of injunction issued three weeks before election day). *Purcell* simply urges courts to consider whether a last-minute change is likely to sow widespread voter confusion, undermine confidence in the election, or create an insurmountable burden on election officials. 549 U.S. at 5–6. There is no evidence of any of that here. An injunction will not require the State to make a single change to its election procedures. *Cf. Merrill v. Milligan*, 142 S. Ct. 879, 881 n.1 (2022) (Kavanaugh, J., concurring) ("How close to an election is too close may depend in part on . . . how easily the State could make the change[.]").

III. CONCLUSION

Plaintiffs submit that their motion for summary judgment should be granted.

Date: April 25, 2022

Respectfully submitted,

s/Marc E. Elias

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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.

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).

Date: April 25, 2022

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