UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA,
RISE, INC., and
DETROIT/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.



**REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY THE REPUBLICAN COMMITTEES**

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***Cases***

***Other Authority***

## REPLY[1]

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

Focusing almost entirely on their asserted standing to bring a VRA preemption claim, Plaintiffs ignore the substantive defect in the claim: they have identified no voter covered under §208 who has been unable to receive voting assistance due to the harvesting ban. ECF No. 154-3, PageID.4049–4050. This lack of evidence "is notable in that for other cases challenging limits on who may assist with ballots, the challengers provided [such] evidence[.]" *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 620 (E.D. Mich. 2020).

### II. The paid driver ban is not void for vagueness.

The Court previously ruled that the paid driver ban is "relatively straightforward and unambiguous." *Id.* at 621. Plaintiffs weakly contend this ruling was limited to campaign spending and does not affect their vagueness claim. ECF No. 175, PageID.6505. Yet the Court "juxtaposed the state and federal laws, demon-



[1] Plaintiffs did not supply a counterstatement of material facts as required under the Court's practice guidelines. Mot. Practice ¶F (Dawkins Davis, J.). In a footnote—without record citations—Plaintiffs deny only some of the facts proffered by the Republican Committees; they do not address any of the facts proffered by the Legislature or Attorney General. ECF No. 175, PageID.6497. Uncontested facts are deemed admitted. Mot. Practice ¶F.

Also, Plaintiffs have not established Article III standing. Their supplemental declarations, ECF Nos. 152-3, 152-4, 152-5, filed the same day as this motion, do not overcome the rule in *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020), that "an organization can no more spend its way into standing based on speculative fears of future harm than an individual can."

strated their respective scopes, and evaluated the extent to which they are in tension." *Priorities USA*, 487 F. Supp. 3d at 621 (cleaned up). The Court fully analyzed the paid driver ban, defined "hire," and stated what the law prohibits. *Ibid.* Plaintiffs' admission on appeal that "[t]here is no ambiguity in the Voter Transportation Law's statutory language" supports this conclusion. ECF No. 154, PageID.4015. The Court's analysis of the ban undeniably "establishes *minimal* guidelines to govern law enforcement." *Chicago v. Morales*, 527 U.S. 41, 60 (1999) (cleaned up) (emphasis added).

Plaintiffs further try to manufacture ambiguity over the meaning of "vote-hauling"—a term not found in the ban. The Sixth Circuit found that the ban is "assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling.'" *Priorities USA v. Nessel*, 978 F.3d 976, 983 (6th Cir. 2020). "When evaluating the vagueness of a statute, the Court will look to the entire *text of the statute* to determine whether the requisite certainty exists." *Pickelman v. Mich. State Police*, 102 F. Supp. 2d 765, 770 (E.D. Mich. 2000) (cleaned up) (emphasis added).



Finally, while contending it is Defendants who are "desperately try[ing] to manufacture certainty" for the paid driver ban, Plaintiffs ignore that this law has been on the books for over 125 years without any question as to what was prohibited until they brought this lawsuit raising endless hypotheticals.

## III. The challenged laws are constitutional.

The Republican Committees have thoroughly briefed why the *Anderson-Burdick* framework should apply to Plaintiffs' First Amendment claims, ECF No. 154, PageID.4016–4017, 4024–4025; ECF No. 177, PageID.6744–6745, but the

challenged laws nevertheless would survive exacting scrutiny properly applied.

As an initial matter, Plaintiffs misstate the exacting scrutiny standard. ECF No. 175, PageID.6509. Exacting scrutiny "require[s] a fit that is not necessarily perfect, but reasonable," *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014), and "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 814 (E.D. Mich. 2020) (cleaned up). The challenged laws burden Michigan voters and GOTVs minimally, if at all. ECF 154, PageID.4017–4018, 4028–4029. "[T]he right to vote … and the right to associate … through the ballot are [not] absolute." *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992).

Plaintiffs also downplay the Court's emphasis on dynamic circumstances that existed early in the pandemic when it applied exacting scrutiny. ECF No. 175, PageID.6510. Given their facial challenge, however, it was (and remains) improper to apply their claims to the Covid context or limit review of the laws' application to Plaintiffs alone. *See United States v. Stevens*, 559 U.S. 460, 473 (2010); *Educ. Media Co. at Virginia Tech, Inc. v. Insley*, 731 F.3d 291, 298 n.5 (4th Cir. 2013) ("[A] court considering a facial challenge is to assess the constitutionality of the challenged law without regard to its impact on the plaintiff asserting the facial challenge."). Plaintiffs' facial challenge brings with it a heavy burden: they must show that ***every*** application of the laws is invalid. They have not done that.[2]



[2] Plaintiffs cite a recent Detroit Free Press article to argue that conversations about absentee voting are critical when questions about the integrity of absentee voting continue—quoting ***one voter's*** view on absentee voting. ECF No.

### A. The paid driver ban satisfies any level of scrutiny.

Plaintiffs wrongly contend there is no evidence that the paid driver ban prevents fraud and undue influence. ECF No. 175, PageID.6512. "[A] statute can be a prophylactic rule intended to prevent the potential for fraud where enforcement is otherwise difficult." *Priorities USA*, 978 F.3d at 984. Although it is often difficult to show that prophylactic rules deter fraud and undue influence, we have the recent example of the Attorney General serving a cease-and-desist letter on a Hamtramck city councilman who was offering to pay to drive people to the polls for the 2020 General Election. ECF No. 154-10, PageID. 4145–4147; ECF No. 154-25, PageID.4851–4856; Ex. 25, Hagaman-Clark Depo. Exhibit 7. Such warnings are an effective means of enforcing the paid driver ban.



Plaintiffs contend that concerns over paid-versus-volunteer drivers is speculative. ECF No. 175, PageID.6513. As a matter of election integrity, Michigan has prohibited paid transportation due to the threat of money "finding its way" to voters and the difficulty in enforcement. ECF No. 115, PageID.1935 (discussing Sixth Circuit vote-hauling cases); Hasen, *Vote Buying*, 88 Calif. L. Rev. 1323, 1328, n.25 (Oct. 2000) ("A related practice is paying 'street money' to 'haulers'

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175, PageID.6510. Nothing in the harvesting ban prevents GOTVs from discussing absentee voting with Michigan voters. It is also worth noting that the Republican Committees have proffered expert testimony *affirming* the importance of absentee voting and safeguarding that franchise. STRACH ¶96 ("[A]bsentee by mail voting is an important and essential way for voters to exercise their sacred right to vote[.]").

and 'flushers' to get out the vote … No doubt, some of the money … ends up in the hands of voters.").

The Sixth Circuit's rulings that the paid driver ban is aimed to prevent vote-hauling, *Priorities USA*, 978 F.3d at 983; *Priorities USA v. Nessel*, 860 F. Appx. 419, 422 (6th Cir. 2021), is law-of-the-case. *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) ("determinations of the court of appeals of issues of law are binding on both the district court on remand and the court of appeals upon subsequent appeal."). Guided by this Court's statutory analysis and the parties' extensive briefing, the Sixth Circuit had a sufficiently developed record to rule that the ban prevents fraud and undue influence—specifically vote-hauling. 978 F.3d at 984. It was not under time constraints when it reversed the preliminary injunction, having first stayed the injunction before reversing it nearly nine months later. Plaintiffs' reliance on *Daunt v. Benson*, 999 F.3d 299, 308–09 (6th Cir. 2021) is inapposite, where *Daunt* analyzed the law-of-the-case doctrine to the Sixth Circuit reconsidering *its own decisions on appeal*, not to a district court's post-remand proceedings.[3]



[3] The Court should reject Plaintiffs' suggestion that it reconsider its previous ruling "in light of better legislative history," ECF No. 175, PageID.6515, for at least three reasons: (1) the Sixth Circuit's ruling binds the Court as law-of-the-case; (2) Plaintiffs cite no legislative history out of Michigan for the paid driver ban; and (3) because the ban is unambiguous, there is no need to resort to legislative history. *Priorities USA*, 487 F. Supp. 3d at 621; *United States v. Woods*, 571 U.S. 31, 46 n.5 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when … the statutory text is unambiguous.").

### B. The harvesting ban satisfies any level of scrutiny.

The Court already ruled that the harvesting ban is constitutional "whether [it] applies exacting scrutiny or a rational basis standard of review[.]" *Priorities USA*, 487 F. Supp. 3d at 612. Defendants have identified multiple instances of fraud, corruption, or undue influence related to the absentee voting process in Michigan, including at the application stage and especially at nursing homes. ECF No. 154, PageID.4005–4006, PageID.4031–4032; ECF No. 154-10, PageID. 4145–4147. Jonathan Brater, for Michigan Department of State, testified to reports of illegal solicitation or return of absentee ballot applications ("**ABAs**") in Michigan. ECF No. 154-11, PageID.4220–4224. Director Strach further opined on the harvesting ban as a valuable safeguard. ECF No. 159-3, PageID.6179.[4]

Plaintiffs mischaracterize Brater's testimony about the difficulty of enforcing the harvesting ban as an admission that the state refuses to enforce it. Compare ECF No. 175, PageID.6518, with ECF No. 154-11, PageID.4227–4229 and Ex. 26, Brater Depo. Exhibit 5. That the Government may charge absentee voter fraud under other Michigan election laws does not nullify the ban or the interests it serves. Brater also explained that law enforcement may prioritize investigations that are easier to prove. ECF No. 154-11, PageID.4227–4229; see also STRACH ¶101.



[4] Plaintiffs challenge Director's Strach's opinion that the "same fraud concerns for absentee voting apply equally at the application stage," but this is in line with the Court's finding that "it logically follows that precluding [GOTVs] from handling [ABAs] may also limit the opportunities for fraud and abuse in the application process." *Priorities USA*, 487 F. Supp. 3d at 614 n.3.

The harvesting ban minimally burdens, if at all, Plaintiffs' GOTV efforts and provides many ways for voters to return ABAs to the local clerk. *Priorities USA*, 487 F. Supp. 3d at 614–15. Plaintiffs admit that the ban does not prohibit them from helping nursing home residents apply to vote absentee. ECF No. 175, PageID.6516. The non-solicitation provision only prevents them from badgering vulnerable populations, such as nursing home voters. STRACH ¶ 75, 85. Plaintiffs further have not identified a single voter who "was unable to deliver [a] completed [ABA] to the appropriate clerk using any of the methods" in § 759(6). ECF No. 154-3, PageID.4047–4048.

## CONCLUSION

For these reasons and those argued in the Republican Committees' opening brief, the Court should dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

BUTZEL LONG, P.C.

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