Nos. 20-1931 / 20-1940

In the United States Court of Appeals for the Sixth Circuit

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

Plaintiffs-Appellees

v.

DANA NESSEL

Defendant

MICHIGAN SENATE,
MICHIGAN HOUSE OF REPRESENTATIVES

Intervenors-Appellants

– and –

REPUBLICAN NATIONAL COMMITTEE,
MICHIGAN REPUBLICAN PARTY

Intervenors–Appellants

On Appeal from Preliminary Injunction
Eastern District of Michigan
HON. STEPHANIE DAWKINS DAVIS
Civil No. 19-13341

§§

REPUBLICAN NATIONAL COMMITTEE AND MICHIGAN REPUBLICAN PARTY BRIEF ON APPEAL

Oral Argument Requested

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CORPORATE DISCLOSURE

Under Appellate Rule 26.1, Intervenors–Appellants Republican National Committee and Michigan Republican Party (the "**Republican Committees**") state that they are not subsidiaries or affiliates of any publicly owned corporation. No publicly traded company, not party to this appeal, is known to have a financial interest in the outcome of this appeal.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Under Appellate Rule 34, the Republican Committees request oral argument. This appeal involves important issues relating to federal preemption of a long-standing Michigan election law protecting against voter fraud and undue influence. Oral argument would assist the Court in resolving this appeal and the legal issues presented.

JURISDICTION

1. District court jurisdiction. The district court properly exercised jurisdiction over this 42 U.S.C. §1983 suit under 28 U.S.C. §1331.

2. Appellate jurisdiction. The Court has jurisdiction over appeals from interlocutory orders of the district courts in this circuit granting injunctions. 28 U.S.C. §1292(a)(1). The Eastern District of Michigan is within the Court's territorial jurisdiction. 28 U. S. C. §41. The Republican Committees have appealed from the district court's interlocutory order granting a preliminary injunction against Michigan's paid driver ban, Mich. Comp. Laws §168.931(1)(f) (the "**PI Order**"). PI Order, R.79, PageID#1624. They timely appealed within 30 days after entry of the PI Order. NOA, R.81, PageID#1628–1629; Fed. Rule App. Proc. 4(a)(1)(a). The Court exercised jurisdiction over this appeal in staying the preliminary injunction before the General Election (the "**Stay Order**"). Stay Order, 6th Cir. Doc. 28-2.

STATEMENT OF ISSUES

Under a long-standing election law, Michigan prohibits drivers from being paid for transporting ambulatory Michigan voters to the polls ("**paid driver ban**"). Mich. Comp. Laws §168.931. The district court enjoined enforcement of this ban shortly before the 2020 General Election after ruling that the ban is preempted by the Federal Election Campaign Act ("**FECA**"), 52 U.S.C. §30143.

I. This Court previously ruled that the Michigan Senate and Michigan House of Representatives ("**Legislature**") have standing on appeal to defend Michigan's paid driver ban, Mich. Comp. Laws §168.931(1)(f), when the Michigan Attorney General will not do so. Do the Republican Committees have standing on appeal, either independently or piggybacking off the Legislature?

District Court:	Not addressed
Republican Committees:	Yes
Plaintiffs–Appellees:	No

II. This Court stayed the injunction pending appeal, holding that the paid driver ban is likely not preempted by FECA. Should the Court reverse the district court's erroneous preliminary injunction to the paid driver ban?

District Court:	Not addressed
Republican Committees:	Yes
Plaintiffs–Appellees:	No

INTRODUCTION

Michigan, like every other state, has in place rules to promote and preserve order and integrity in its elections. These long-standing, commonsense rules are aimed at curbing voter fraud and ballot tampering, preventing undue influence in voting, and "safeguarding voter confidence" in the state's elections. *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 191–200 (2008). Michigan's law prohibiting payment for transporting third-party ambulatory Michigan voters to the polls (the "**paid driver ban**") is one such rule. Mich. Comp. Laws §168.931. The paid driver ban provides in full: "[a] person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election." Mich. Comp. Laws §168.931(1)(f). Although the paid driver ban has been on the books in some form for about 125 years, the district court ruled that the Federal Election Campaign Act ("**FECA**") preempted it. The district court erroneously construed FECA and intruded on Michigan's constitutional right to regulate its electoral processes. U.S. Const. art. I, § 4, cl. 1.

When Defendant Attorney General publicly refused to defend the paid driver ban on appeal, the Michigan Senate and Michigan House of Representatives (collectively "**Legislature**") and the Republican Committees both appealed the district court's injunction. On appeal, the Legislature moved to stay the injunction before the General Election. This Court granted the stay, holding that the paid driver ban is likely not preempted by FECA and that the balance of equities weighs in favor of staying the district court's order. The Republican Committees ask the

Court to rule once again that the district court's FECA preemption analysis was wrong and to reverse the preliminary injunction.

STATEMENT OF THE CASE

Plaintiffs–Appellees Priorities USA; RISE, Inc., and the Detroit/Downriver Chapter of the A. Philip Randolph Institute challenge long-standing election laws in Michigan that (1) prohibit strangers from soliciting and returning AV ballot applications from Michigan voters, Mich. Comp. Laws §168.759 ("**harvesting ban**"), and (2) the paid driver ban at issue on appeal. Am. Compl., R.17, PageID#90–91. On January 28, 2020, Plaintiffs moved for a preliminary injunction to enjoin both the harvesting ban and paid driver ban for the August Primary Election and the November General Election. PI Mot., R.22, PageID#139–140; PI Brief, R.22-1, PageID#146.

The Republican Committees successfully intervened to defend the challenged laws and protect their competitive interests. Mot. to Intervene, R.33, PageID#498–500; Order Granting Mot. to Intervene, R.60, PageID#1026. Specifically, the district court found that the Republican Committees' competitive interests were sufficient for intervention because this case involves the "integrity of Michigan's election laws." Order Granting Mot. to Intervene, R.60, PageID#1026. The Legislature also successfully intervened to defend the challenged laws. Legislature's Mot. to Intervene, R.39, PageID#697–698; Order Granting Mot. to Intervene, R.60, PageID#1026. The hearing on Plaintiffs' motion for a preliminary injunction was held on July 14. Transcript, R.78, PageID#1516.

Two months passed after the preliminary injunction hearing. On September 17, the district court partially granted Plaintiffs' motion for a preliminary injunction. PI Order, R.79, PageID#1572; *Priorities USA* v. *Nessel*, —F. Supp. 3d—;

2020 WL 5742432 (ED Mich. Sept. 17, 2020). Although the court ruled that Plaintiffs' challenges to the harvesting ban were unlikely to succeed on the merits, and thus denied injunctive relief relating to the harvesting ban, PI Order, R.79, PageID1610, 1624, it ruled that FECA preempts the paid driver ban because FECA allows corporations to "spend money on providing transportation to the polls as part of their get-out-the-vote ["**GOTV**"] efforts." *Id.*, at PageID#1616. The court further concluded that the paid driver ban does not prevent voter fraud or similar offenses. *Id.*, at PageID#1618.[1]

After the district court enjoined the paid driver ban, Defendant Attorney General publicly announced that she would not appeal the ruling or defend the enjoined law for the 2020 General Election, citing the need for voters and local clerks to have "certainty." Notice of Concurrence, R.86, PageID#1674.

The Legislature filed its notice of appeal and then moved for a stay pending an appeal in the district court. Legislature's NOA, R.80, PageID#1625–1626; Mot. to Stay, R.84, PageID#1633–1634. On September 24, the Republican Committees filed their own notice of appeal and joined the Legislature's motion to stay the injunction. NOA, R.81, PageID#1628–1629; Notice of Concurrence, R.86, PageID#1668–1684. The district court declined to stay the injunction pending appeal. Order Denying Mot. to Stay, R.92, PageID#1766.

[1] Because the district court enjoined the paid driver ban based on preemption, it declined to address Plaintiffs' additional challenges to the law. PI Order, R.79, PageID#1624.

On appeal, the Legislature sought supersedeas from this Court. Mot. to Stay, Doc.16-1. In a published order, this Court stayed the injunction before the 2020 General Election. *Priorities USA v. Nessel*, 978 F.3d 976, 979 (CA6 2020). *First*, the Court ruled that the Legislature has standing on appeal to defend the paid driver ban when the State's Attorney General will not. *Id.*, at 979–82. *Second*, the Court ruled that Plaintiffs are not likely to prevail in showing that FECA preempts the paid driver ban. *Id.*, at 982–85. It found that the paid driver ban is aimed at preventing voter fraud, specifically "vote-hauling." *Id.*, at 983–84. After reciting the FECA preemption clause, the Court highlighted that the Federal Election Commission's ("**FEC**") preemption regulation expressly permits state laws to prohibit "false registration, voting fraud, theft of ballots, *and similar offenses*." *Id.*, at 983 (quoting 52 U.S.C. §30143 and 11 C.F.R. §108.7(c)(4)) (emphasis in original). This Court further found that the Legislature would be irreparably harmed without the stay before the General Election and that a stay benefits the public interest. *Priorities USA*, 978 F.3d, at 985. The dissent disagreed, opining that the Legislature lacks standing on appeal and that FECA preempts the paid driver ban. *Id.*, at 985–90 (COLE, C.J., dissenting).

The Republican Committees moved to consolidate the separate appeals, which none of the parties opposed. Mot. to Consol., 6th Cir. Doc. 16, pp. 1–3. The Court granted the motion and consolidated the appeals on January 28, 2021. Order, 6th Cir. Doc. 32-2, p. 1.

SUMMARY OF THE ARGUMENT

I. The Republican Committees have standing on appeal.

The Republican Committees have standing derivative from the Legislature's established standing—or "piggyback standing." See *Diamond* v. *Charles*, 476 U.S. 54, 64 (1986). Alternatively, they have their own standing to appeal. Intervenors, like any other party, normally have the right to appeal from adverse judgments. *Cherry Hill Vineyards, LLC* v. *Lilly*, 553 F.3d 423, 428 (CA6 2008). The district court permitted the Republican Committees to intervene because they compete with Plaintiffs for votes and this case involves the "integrity of Michigan's election laws." Order Granting Mot. to Intervene, R.60, PageID#1026. Courts have recognized "competitive standing" when political parties or candidates would be exposed to a broader range of permissible competitive tactics by a change to the structure of a competitive electoral environment. See *Shays* v. *Federal Election Comm'n*, 414 F.3d 76, 85 (DC Cir. 2005). The injunction unfairly impacts the Republican Committees, their candidates, their voters, and their own institutional interests by fundamentally changing the structure of the competitive environment in Michigan.

II. Michigan's paid driver ban is not preempted by FECA.

This Court correctly ruled that the paid driver ban is likely not preempted by FECA. A "strong presumption" exists against FECA preemption. *Karl Rove & Co.* v. *Thornburg*, 39 F.3d 1273, 1280 (CA5 1994). The district court's preemption analysis is erroneous for two reasons.

First, the paid driver ban is not the sort of state law subject to preemption under FECA. As this Court stated, the paid driver ban is "assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling.'" *Priorities USA*, 978 F.3d, at 983–94. The FECA preemption clause specifies that the "rules prescribed under" FECA also preempt state law. 52 U.S.C. §30143(a). But FECA does ***not*** supersede state laws "[p]rohibiti[ng] false registration, voting fraud, theft of ballots, and similar offenses." 11 C.F.R. §108.7(c)(4). Because the paid driver ban aims to prevent voter fraud and undue influence, it falls within this express exception to preemption.

Second, the FEC regulations that Plaintiffs rely on for preemption should not be interpreted as preempting the paid driver ban. See 11 C.F.R. §§114.3(c)(4)(i), 114.4(d)(1). These regulations do not create an affirmative right to provide paid transportation services, but merely clarify that federal law does not prohibit such services. These regulations leave the states free to choose for themselves whether to proscribe such threats to the integrity of the electoral process.

Although the Republican Committees' success on the merits should dictate the outcome, see *Bailey* v. *Callaghan*, 715 F.3d 956, 958 (CA6 2013), the remaining preliminary injunction factors also weigh against injunctive relief. The state suffers an irreparable injury when it has been enjoined by a federal court from effectuating statutes enacted by representatives of its people. *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012). At the same time, Plaintiffs will suffer no legally relevant harm if the injunction is reversed; they have failed to identify a single voter who has been unable to secure transportation to the polls because of the paid driver ban. Because

FECA does not preempt the paid driver ban, the Court should not disrupt "the will of the people" by enjoining long-standing Michigan election law.

ARGUMENT

I. The Republican Committees have standing on appeal, either by piggybacking off the Legislature or independently on their own.

Plaintiffs contend that the Republican Committees lack standing on appeal. Response to Leg. Mot. to Stay, R.88, PageID#1698–1699. A party's standing is a question of law reviewed de novo. *American Federation of Govt. Employees* v. *Clinton*, 180 F.3d 727, 729 (CA6 1999).

A. The Republican Committees have piggyback standing.

Intervening parties have derivative standing to appeal if another party with standing appeals. See *Diamond*, 476 U.S., at 64 (dismissing the appeal for want of jurisdiction because the intervenor-defendant lacked jurisdiction and could not piggyback off the state as it did below because the state had declined to appeal from the adverse decision; had the state appealed, so too could the intervenor).

The Court has already ruled that the Legislature has standing. "The State of Michigan is injured in its sovereign capacity by its inability to enforce its duly enacted statute." *Priorities USA*, 978 F.3d, at 980. With the Attorney General refusing to defend the paid driver ban on appeal, "[d]enying the legislature standing to defend its own law would allow the state executive to nullify a state statute without any ultimate judicial determination." *Id.*, at 980–81. "Michigan law authorizes its legislature, both houses acting in concert, to defend a state election law in court when the attorney general will not." *Id.*, at 981–82. See also *League of Women Voters of Mich.* v. *Secretary of State*, —Mich.—; 2020 WL 7765755, at *8 (2020) ("[W]hen the Attorney General does not defend a statute against a

constitutional challenge by private parties in court, the Legislature is aggrieved and, upon intervening, has standing to appeal."). The district court's injunction additionally "does the legislature institutional injury in its own right." *Priorities USA*, 978 F.3d, at 982. So long as the injunction is in effect, the Legislature "cannot enact any enforceable laws that even *regulate* hired voter transportation for federal elections." *Ibid.* (emphasis in original).[2] These injuries translate into Article III standing.

Because the Legislature has standing on appeal, the Republican Committees have derivate standing to appeal as well.

B. Alternatively, the Republican Committees have independent standing to appeal.

An intervenor, like any other party, normally has the right to appeal an adverse trial court judgment if it has Article III standing. *Cherry Hill Vineyards, LLC* v. *Lilly*, 553 F.3d 423, 428 (CA6 2008). To have standing, a party must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, —U.S.—; 136 S.Ct. 1540, 1547 (2016). The Republican Committees easily meet these requirements.

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[2] The completion of the 2020 General Election does not impact this Court's previous legislative standing analysis. The Legislature continues to be injured by Defendant's refusal to defend the paid driver ban on appeal and further the district court's preliminary injunction remains in effect (albeit not in force).

The district court's injunction has caused the Republican Committees an injury-in-fact. In the electoral setting, changes to the structure of a competitive environment are "routinely" accepted as establishing "competitive standing." Political parties and candidates have a substantial interest in preventing change to the structure of a competitive electoral environment. See *Shays* v. *Federal Election Comm'n*, 414 F.3d 76, 85 (DC Cir. 2005); *Nader* v. *Federal Election Comm'n*, 725 F.3d 226, 228 (DC Cir. 2013); *Drake* v. *Obama*, 664 F.3d 774, 782–84 (CA9 2011) (citing multiple cases recognizing "competitor standing"). After all, "the rights of their members to vote," "their overall electoral prospects," and "diver[sions] of their limited resources to educate their members" are at stake. *Issa* v. *Newsom*, Civ. No. 20-1044; 2020 WL 3074351, at *3 (ED Cal. Jun. 10, 2020). See also, *e.g.*, *Ohio Democratic Party* v. *Blackwell*, Civ. No. 04-1055; 2005 WL 8162665, at *2 (SD Ohio Aug. 26, 2005) ("[T]here is no dispute that the Ohio Republican Party had an interest in the subject matter of this case, given the fact that changes in voting procedures could affect candidates running as Republicans and voters who were members of the Ohio Republican Party."); *Smith* v. *Boyle*, 144 F.3d 1060, 1063 (CA7 1998) (finding that the Illinois Republican Party had standing regarding the election rules).

Here, under the district court's injunction of the paid driver ban—which is not limited to the 2020 General Election—the Republican Committees and their candidates must face "a broader range of competitive tactics than [state] law would otherwise allow." *Shays*, 414 F.3d, at 86. The injunction "fundamentally alter[s] the environment in which [they] defend their concrete interests (e.g., … winning

reelection)." *Ibid.* The Republican Committees will need to reassess and reallocate resources for future elections because of the broader range of competitive tactics authorized under the injunction.

The injunction also requires the Republican Committees to "devot[e] resources away from other tasks and toward researching, or educating voters about, the" new rules created by the preliminary injunction, which the Republican Committees believe "to be unlawful." *One Wis. Inst., Inc.* v. *Thomsen*, 198 F. Supp. 3d 896, 910 (WD Wis. 2016). While these diversions of resources are substantial given Michigan's electoral importance, even "slight," unestimated costs would be sufficient to confer standing because "standing … requires only a minimal showing of injury." *Crawford* v. *Marion Cty. Election Bd.*, 472 F.3d 949, 951 (CA7 2007), aff'd, 553 U.S. 181, 189, n. 7 (2008).

These injuries are traceable to this litigation and the district court's injunction, entered at Plaintiffs' request. This Court can redress these injuries by reversing the injunction. Accordingly, the Republican Committees satisfy all three elements of Article III standing.

II. The district court erroneously enjoined Michigan's paid driver ban under federal preemption grounds.

This Court reviews a district court's grant of a preliminary injunction for abuse of discretion, "subjecting factual findings to clear-error review and examining legal conclusions de novo." *Thompson* v. *DeWine*, 976 F.3d 610, 614–15 (CA6 2020). "Questions of federal preemption of state law generally are considered

questions of law subject to de novo review." *GTE Mobilnet of Ohio* v. *Johnson*, 111 F.3d 469, 475 (CA6 1997). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. Michigan's paid driver ban is not preempted by FECA.

The district court erred for two reasons in finding that FECA preempts Michigan's paid driver ban.

First, the ban is not the sort of state law subject to preemption under FECA. Because the ban aims to prevent voter fraud and undue influence, it falls within an express exception to FECA's preemption clause. 11 C.F.R. §108.7(c)(4).

Second, the FEC regulations that Plaintiffs rely on for preemption should not be interpreted as preempting the paid driver ban because they do not create an affirmative right to provide paid transportation services. Rather, they merely clarify that federal law does not prohibit such services. These regulations leave the states free to choose for themselves whether to proscribe such electoral tactics as potential threats to the integrity of the electoral process.

1. The paid driver ban—which protects against voter fraud—is not preempted by FECA.

The district court erroneously read the FECA preemption clause, 52 U.S.C. §453, in the broadest possible manner, which is not supported by any caselaw.

When analyzing preemption, courts "should be narrow and precise, to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Downhour* v. *Somani*, 85 F.3d 261, 266 (CA6 1996). "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) (cleaned up). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress's enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted. "Under the *expressio unius* principle, when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Millsaps* v. *Thompson*, 259 F.3d 535, 546–47 (CA6 2001). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 77 (2008).

Plaintiffs' FECA preemption challenge does not warrant the extraordinary relief Plaintiffs seek. See *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (recognizing that preemption is disfavored in areas traditionally regulated by the state). The FECA preemption clause states: "the provisions of this Act, and the rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to federal office." 52 U.S.C. § 453. Although at first glance

§453 appears to have an exceedingly broad scope, a "strong presumption" exists against FECA preemption. *Karl Rove & Co.* v. *Thornburg*, 39 F.3d 1273, 1280 (CA5 1994). "[C]ourts have given [§]453 a narrow preemptive effect in light of its legislative history." *Id.*

For example, Congress did not intend criminal sanctions under FECA to substitute for all other possible criminal sanctions, including under state law. See *Dewald* v. *Wriggelsworth*, 748 F.3d 295, 298 (CA6 2014) (ruling that state courts applied clearly established law reasonably in concluding that FECA did not preempt Michigan's laws prohibiting election fraud). Throughout this litigation, Plaintiffs have failed to cite any caselaw stating that FECA preempts state criminal laws targeting election fraud, such as Michigan's paid driver ban.

Section 453 further incorporates by reference "rules prescribed under" FECA. Plaintiffs selectively quote the FEC preemption regulation, arguing that the paid driver ban is a "[l]imitation on contributions and expenditures" regarding federal elections. 11 C.F.R. §108.7(b)(3). Subsection (b) sets forth three types of laws about campaign finance: the sources of funding and reporting on its collection and distribution. "By *ejusdem generis*, the kind of state regulations contemplated as preempted likely do not include restrictions on … transporting voters to the polls." *Priorities USA*, 978 F.3d, at 983.

Subsection (c) further emphasizes that FECA does not supersede state laws for the "[p]rohibition of false registration, *voting fraud*, theft of ballots, *and similar offenses*." 11 C.F.R. §108.7(c)(4) (emphases added). The paid driver ban has long preserved the integrity of Michigan's elections, specifically to protect voters against

undue influence and to prevent quid pro quo arrangements when money is exchanged. The law is "assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling.'" *Priorities USA*, 978 F.3d, at 983. As this Court explained, "[v]ote-hauling can be a classic form of bribery—paying a voter to 'haul' himself or herself (and maybe immediate or extended family) to the polls to vote." *Ibid.* See also Hasen, *Vote Buying*, 88 Calif. L. Rev. 1323, 1328, n. 25 (Oct. 2000) ("A related practice is paying 'street money' to 'haulers' and 'flushers' to get out the vote … No doubt, some of the money paid to these haulers and flushers ends up in the hands of voters."). Further, the paid driver ban "is one provision among several others in the statute intended to prevent fraud and undue influence." *Priorities USA*, 978 F.3d, at 984. "Moreover, the law was enacted in a way and at a time such that we can infer no invidious intent on the legislature's part." *Ibid.* Thus, because the paid driver ban aims to prevent voter fraud, it is expressly *not* preempted by the FEC preemption regulation, 11 C.F.R. § 108.7(c)(4).

Besides the Stay Order, this Court has previously accepted the narrow reading of the FECA preemption provision. In *Dewald*, the Court held that the Michigan Court of Appeals' conclusion that FECA did not preempt Michigan's criminal fraud law was a reasonable application of clearly established law. *Dewald*, 748 F.3d, at 303. There, Dewald filed a state court appeal challenging his fraud convictions for unlawful diversion of campaign contributions through PACs. The Michigan Court of Appeals upheld the convictions, rejecting his argument that FECA preempted his state-law charges. *Id.*, at 298; cf. *People* v. *Dewald*, 267 Mich. App. 365, 375 (2005). On habeas review, the district court found preemption by

applying principles derived from cases unrelated to FECA. *DeWald*, 748 F.3d, at 299–300.

This Court reversed, seemingly endorsing the state appellate court's narrow interpretation of the FECA preemption provision. It explained, "The Michigan Court of Appeals' observation that courts have given [§]453 a narrow preemptive effect in light of its legislative history is a reasonable one." *Id.*, at 302. This Court further relied on the FEC regulation exempting state laws prohibiting "false registration, *voting fraud*, theft of ballots, *and similar offenses*" from preemption under FECA. *Id.*, at 302 (emphases in original). Although the case did not address "voting fraud in the traditional sense of someone casting a ballot under false pretenses[,]" it involved "the fraudulent acquisition of money by an individual purporting to represent a federally registered PAC." *Id.*, at 302. Under this Court's approach in *Dewald*, the district court erred in concluding that FECA preempts a state law aimed at preserving the integrity of the electoral process, even when it targets variations of "voting fraud in the traditional sense." *Id.*[3]

[3] In *Krikorian* v. *Ohio Elections Comm'n*, No. 10-103, 2010 WL 4117556 (SD Ohio Oct. 19, 2010), the plaintiff argued that FECA preempted the state statute to the extent it regulates a federal election. After analyzing caselaw narrowly interpreting FECA preemption, the court held that the federal preemption claim was not facially conclusive to avoid *Younger* abstention. *Id.*, at *10, *12. The court distinguished *Bunning* v. *Kentucky*, 42 F.3d 1008, 1012 (CA6 1994), which preempted a Kentucky campaign finance statute and prevented the Registry of Election Finance from investigating polling expenditures made by a federal PAC. *Bunning* was distinguishable because it involved "state law related to campaign financing—an area in which FECA has often been found to preempt state law." *Krikorian*, 2010 WL 4117556, at *11.

2. The FEC carve out regulations relied on by Plaintiffs do not preempt the paid driver ban.

The district court fundamentally erred in its preemption analysis. Federal statutes that decline to regulate or prohibit certain conduct generally lack the same preemptive scope of statutes that affirmatively or expressly permit and protect such conduct. See, *e.g.*, *Sprietsma* v. *Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 65, 67 (2002) (rejecting argument that the Coast Guard's decision not to adopt a federal regulation requiring propeller guards on motorboats preempted state common law tort claims against manufacturers);[4] see also *Chamber of Comm. of U.S.* v. *Whiting*, 563 U.S. 582, 607 (2011) (ROBERTS, C.J.) (cleaned up) ("Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives …."). This is particularly true when the state statute addresses a different concern than the allegedly preempting federal regulation. See *Pacific Gas & Elec.* v. *State Energy Res. Cons. & Dev. Comm'n*, 461 U.S. 190, 219 (1983) (Nuclear Regulatory Commission regulations establishing certain requirements for nuclear power plants did not preempt a state law establishing a moratorium on new nuclear plants, since the purpose of the federal law was ensuring safety, while the purpose of the state law was promoting economic

[4] See also, *e.g.*, *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 383–84 (1983) (holding that, even though the Federal Power Commission affirmatively declined to regulate wholesale power rates charged by rural power cooperatives, its decision did not preempt states from doing so); *Fednav, Ltd.* v. *Chester*, 547 F.3d 607, 620–21 (CA6 2008) (holding that Michigan's permit requirement under the Ballast Water Statute, Mich. Comp. Laws §324.3112(6), was not implicitly preempted by federal environmental statutes).

development). Here, FECA addresses concerns over the effect and influence of unlimited campaign spending in politics, *Buckley* v. *Valeo*, 424 U.S. 1, 24 (1976), while the paid driver ban aims to prevent or deter election fraud. The district court erroneously found that the FEC regulations, 11 C.F.R. §§114.3(c)(4)(i), 114.4(d)(1), "expressly permit corporations like plaintiffs to spend money on providing transportation to the polls as part of their [GOTV] efforts." PI Order, R.79, PageID#1616. To the contrary, Sections 114.3(c) and 114.4(d) are not empowering regulations; they do not give a party any affirmative rights. These regulations merely carve out exceptions to FECA's broad prohibitions against corporations and labor unions making campaign contributions, expenditures, or electioneering communications. See 52 U.S.C. §30118(a); 11 C.F.R. §114.2(a). By creating an exception to that prohibition, Sections 114.3(c) and 114.4(d) simply leave corporate spending on voter transportation unregulated by federal law; they neither grant corporations an affirmative right to engage in such spending nor preempt state laws prohibiting it.

These carve out regulations must be read in context with FECA as a whole. "The language of a regulation must necessarily be interpreted in the context of its statutory origin." *Armstrong* v. *U.S. Fire Ins. Co.*, 606 F. Supp. 2d 794, 820 (ED Tenn. 2009). The district court wrongly held that FECA and its enacting regulations created an affirmative federal right protecting paid transportation to the polls in state and federal elections.

Moreover, Plaintiffs have presented no evidence that they intend to make disbursements related to paid transportation that are tied to a specific candidate or

party or "for the purpose of influencing any election for Federal office." 52 U.S.C. §30101(9)(A)(i). Therefore, any alleged disbursements for paid transportation would be non-expenditures, which are not regulated under FECA and prohibited under the paid driver ban. It would be absurd to conclude that federal law lets states prohibit paid transportation and other activities when performed by nonpartisans, but prevents states from reaching the same activities when performed by partisan actors—despite the greatest risk of improper pressure or intimidation of voters coming from partisans. See *United States* v. *Fitzgerald*, 906 F.3d 437, 447 (CA6 2018) ("[A]bsurd results are to be avoided … and courts should not construe a statute to produce an absurd result that we are confident Congress did not intend.") (cleaned up).

In short, the paid driver ban is not preempted by FECA, and accordingly, the district court erred in enjoining the law under federal preemption grounds.

B. The remaining preliminary injunction factors weigh against Plaintiffs.

The Republican Committees' success on the merits should dictate the outcome here. See *Bailey* v. *Callaghan*, 715 F.3d 956, 958 (CA6 2013) ("When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits will often be the determinative factor."). The remaining preliminary injunction factors also weigh against injunctive relief.

As to irreparable harm, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012). Enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature … would seriously and irreparably harm [the State]." *Abbott* v. *Perez*, —U.S.—; 138 S.Ct. 2305, 2324 (2018). Giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest. *Coalition to Defend Affirmative Action* v. *Granholm*, 473 F.3d 237, 252 (CA6 2006).

Conversely, Plaintiffs will suffer no legally relevant harm if the injunction is reversed. This Court stayed the preliminary injunction before the General Election, leaving intact the paid driver ban that has been a long-standing Michigan election law. *Priorities USA*, 978 F.3d, at 985. Plaintiffs admit they have known of these laws, as they have been active in Michigan in several election cycles and claim that the challenged election laws have caused them to adjust their behavior in prior election cycles. PI Brief, R.22-1, PageID#153–154. Plaintiffs throughout this litigation have failed to identify a single voter who has been unable to secure transportation to the polls due to the paid driver ban. Courts can only "provide relief to claimants … who have suffered, or will imminently suffer, actual harm." *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996).

Finally, as to public interest, "[i]t's in the public interest that we give effect to the will of the people 'by enforcing the laws they and their representatives enact.'" *Thompson*, 976 F.3d, at 619 (quoting *Thompson* v. *DeWine*, 959 F.3d 804, 812 (CA6 2020) (per curiam)). Because Michigan's paid driver ban is not

preempted by FECA, the federal court should not disrupt "the will of the people" by enjoining long-standing Michigan election law.

CONCLUSION

In sum, this Court should reverse the district court's preliminary injunction to Michigan's long-standing paid driver ban.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: March 17, 2021

/s/ Kurtis T. Wilder

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CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
COUNTY OF OAKLAND) §

This brief complies with the word limit in Appellate Rule 33(a)(7)(B)(ii). It contains 5,415 countable words.

This brief also complies with the typeface and typestyle requirements of Appellate Rule 32(a)(5)–(a)(6) because it has been prepared in 14-point Equity font, proportionally-spaced typeface, with exactly 28-point line spacing.

Dated: March 17, 2021

/s/ Kurtis T. Wilder
KURTIS T. WILDER

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND) §

On March 17, 2021, I caused Intervenors–Appellants Republican Committees' brief on appeal to be filed with the Clerk of the Court using the CM/ECF system, which will electronically service counsel of record with a Notice of Docket Activity under Sixth Circuit Rule 25(f)(1)(A).

There are no non-ECF participants in this case.

Dated: March 17, 2021

/s/ Kurtis T. Wilder
KURTIS T. WILDER

ADDENDUM

Under Sixth Circuit Rule 30(g), the Republican Committees designate the following district court records as relevant, including the exhibits attached to each document.

Docket No.	Description	PageID
01	Complaint	1–18
17	Amended Complaint	88–128
22	Motion for Preliminary Injunction (**"PI"**)	139–312
30	Nessel Opposition, PI	440–492
33	Republican Committees Motion to Intervene	498–566
59	Order Partially Granting Motion to Dismiss	961–1015
60	Order Granting Motion to Intervene	1016–1027
68	Legislature Opposition, PI	1155–1198
70	Republican Committees Opposition, PI	1202–1314
72	Plaintiffs Reply, PI	1319–1414
78	Transcript of PI Hearing	1516–1570
79	Judgment	1571–1624
80	Legislature Notice of Appeal	1625–1627
81	Republican Committees Notice of Appeal	1628–1630
84	Legislature Emerg. Mot. to Stay Pending Appeal (**"Stay Motion"**)	1633–1666
86	Republican Committees Notice of Concurrence to Stay Motion	1668–1685