No. 20-1931

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

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

Plaintiffs—Appellees,

v.

DANA NESSEL,

Defendant—Appellant,

and

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

Intervenor-Defendants—Appellants,

Appeal from the United States District Court
for the Eastern District of Michigan in
Case No. 4:19-cv-13341 (Dawkins Davis, J.)

REPLY BRIEF FOR THE MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES

Oral Argument Requested

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Priorities raises several challenges to the Legislature's appeal. All these challenges fail.

I. The motions panel has already decided many of these issues.

The earlier motions panel decision in this case addressed and decided many of the questions that Priorities now raises. The effect of a motions panel decision is well-established:

> In the regular course of events, one panel of this court cannot overrule another panel's published decision. While the decisions of motions panels are generally interlocutory in nature (and, thus, not strictly binding upon subsequent panels), they do receive some measure of deference. Later panels cannot simply choose to disregard motions-panel decisions, and if a litigant wishes to challenge a motions panel's decision on a dispositive motion, the proper course of action is to request panel rehearing or rehearing en banc.

Wallace v. FedEx Corp., 764 F.3d 571, 583 (6th Cir. 2014) (cleaned up). So while it's true that the motions panel decision is "not strictly binding," it deserves deference. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 669 (6th Cir. 2020) (deferring to motions panel decision).

Priorities believes the motions panel decision is entitled to "little deference" because the emergency-relief standard is "less deferential" than "full merits consideration." Priorities's Br., p. 15. Priorities is right that the Court now reviews the district court's equitable-factors holdings for an abuse of discretion. *Wilson v. Williams*, 961 F.3d 829, 837 (6th Cir. 2020). But the Court reviews the two key issues here, Article III standing and likelihood of success, de novo—just as the

motions panel did. *See id.*; *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 752 (6th Cir. 2018). Thus, contrary to Priorities's assertion, this panel isn't viewing these issues through a "decidedly different lens." Priorities's Br., p. 28. The motions panel's holdings that the Legislature has standing and a "high" likelihood of success, *Priorities USA v. Nessel*, 978 F.3d 976, 985 (6th Cir. 2020), are entitled to full deference.

Nor does an expedited timeframe render the motions panel decision any less meaningful or less deserving of deference. *See* Priorities's Br., p. 16. Priorities's current arguments largely copy its October 2020 arguments. It offers no new evidence or law that would change the motions panel's analyses. Nor does it point to an argument or fact that the Court missed in its alleged haste. Priorities appears to argue that the Court would have seen things Priorities's way if it just had more time with Priorities's argument. But the motions panel had about two weeks to consider the Legislature's arguments and issued a thorough and well-reasoned opinion. While that ruling was expeditious, nothing indicates it was rushed. (After all, issues of life and death—as in death-penalty cases—are often decided on shorter timeframes.) This motions panel ruling deserves full deference.

II. The Legislature has standing.

Article III requires three elements: (1) an injury in fact; (2) a causal connection; and (3) a favorable decision will likely redress the injury. *Lujan v. Defs.*

of Wildlife, 504 U.S. 555, 560–61 (1992) (cleaned up). Only element (1) is at issue here. Priorities says the Legislature may not represent the State's interests and has no cognizable injury of its own. As this Court and the district court have already held, this is wrong.

A. The Legislature may represent the State's interest here.

Priorities argues that certain Michigan statutes restrict the defense of Michigan law to Michigan's Attorney General. Priorities's Br., p. 17. But while Mich. Comp. Laws §§ 14.28–29, 14.101 (the "Chapter 14 laws") *do* create a duty for the Attorney General to defend laws in certain instances or venues, nothing from that statute—either in its text or interpreting caselaw—says that this duty is exclusive. No Michigan authority even suggests that *only* the Attorney General may defend a Michigan statute.

Further, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), is inapplicable here. *See* Priorities's Br., pp. 17–18. *Bethune-Hill* held that the Virginia House of Delegates lacked standing because a Virginia statute explicitly made Virginia's Attorney General the state's "single voice" in litigation. *Id.* at 1952–53. That statute says: "All legal service in civil matters for the Commonwealth ... shall be rendered and performed by the Attorney General." *Id.* at 1952 (quoting Va. Code § 2.2–507(A)) (emphasis added). The Virginia statute's absolute language, "all legal service," explicitly restricts to Virginia Attorney General *all*

power to represent its state interests in court. Michigan's Chapter 14 statutes don't include anything like this absolutist and exclusionary language, which *Bethune-Hill* found dispositive. Further, the plaintiff in *Bethune Hill* was just one chamber of the Virginia Legislature and, thus, had no right to act. 139 S. Ct. at 1953–54. But here, the Legislature intervenor-defendants compose Michigan's entire legislative branch, which has a state-law interest in defending its statutes. *See League of Women Voters of Mich. v. Sec'y of State*, 957 N.W.2d 731, 739–40 (Mich. 2020) ("*LWV*").

Priorities argues that the Legislature has no "legal basis" to litigate on the State's behalf. Priorities's Br., p. 19. Federal courts use state jurisprudence to understand state legislatures' right to litigate. *See Karcher v. May*, 484 U.S. 72, 82 (1987) (relying on New Jersey Supreme Court decisions to hold that the New Jersey Legislature had legislative standing). This makes sense. Because the Michigan Constitution created the Michigan Legislature, the extent of its powers, including its authority to prosecute lawsuits, necessarily flow from Michigan's constitutional system. The Michigan Supreme Court therefore sets the limits of the Legislature's power.[1] *See Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 515–16 (6th Cir. 2019) (examining in depth Tennessee caselaw to decide whether Tennessee's legislature had standing to file a lawsuit regarding a refugee resettlement program).

[1] Because the Michigan Supreme Court, not the Governor, decides the Legislature's right to intervene, Governor Snyder's policy reasons for vetoing legislation that would have codified legislative standing are irrelevant here. *See* Br., p. 18–19.

Contrary to Priorities's arguments, there *are* legal bases for the Legislature's standing. The motions panel identified some of them. *Priorities*, 978 F.3d at 981–82 (citing Mich. Const. art 2, § 4, and *Mich. All. for Retired Americans v. Sec'y of State*, ___ N.W.2d ___, 2020 WL 6122745, at *3 (Mich. Ct. App. Oct. 16, 2020) ("MARA")). And just a few months ago, the Michigan Supreme Court held that when the Attorney General abdicates her duty to defend statutes, the Legislature is injured and may intervene to defend that law:

> More importantly, failure to permit the Legislature's intervention in such circumstances would enable the executive branch to nullify the Legislature's work by declining to contest a lower-court ruling that a challenged statute is unconstitutional, thereby precluding any ultimate judicial determination of the issue. An executive's nondefense of statutes thus poses grave risks to our constitutional structure. It also greatly disrupts the proper functioning of our adversary system. In these circumstances, as our Court of Appeals recently observed, "[t]he Legislature, as elected representatives of the citizens of Michigan, is essentially taking the place of defendants in this case to ensure an actual controversy with robust contrary arguments." In light of these considerations, we agree the Legislature has a sufficient "interest in defending its own work" and can fill the breach left by the Attorney General. Therefore, when 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.

LWV, 957 N.W.2d at 739–40 (cleaned up).[2] Notably, this portion of *LWV* explicitly adopted the motions panel's decision on this very point. *See id.* at 739 n.9 (quoting *Priorities*, 978 F.3d at 980–81).

[2] It isn't clear whether a legislature replacing an absent attorney general does so to represent the state's interests or its own interests. Some imply that is the state's

Despite extensively quoting *LWV* in its brief, Priorities says this *LWV* holding doesn't apply here; it thinks the preliminary injunction is not a "*final* judgment" or "'*ultimate* judicial determination'" and, thus, the Attorney General is still defending the law below. Priorities's Br., p. 21 (quoting *LWV*, 957 N.W.2d at 739). This argument lacks authority and ignores practical realities. First, no Michigan authority says that legislative standing exists only once there is a "final judgment." If this were true, the Legislature would never have standing to participate in the trial-court phase of a case. That is clearly wrong. And remember that the Michigan Supreme Court took the quoted language from the motions panel decision granting the Legislature standing. *See LWV*, 957 N.W.2d at 739 (quoting *Priorities*, 978 F.3d at 980–81, n.9). This Court used the same "ultimate judicial determination" language

interests. *See, e.g.*, *Priorities*, 978 F.3d at 980 (saying that, as in *United States v. Windsor*, 570 U.S. 744, 762 (2013), the lower court's injunction as to a "duly enacted statute" injured "the State of Michigan … in its sovereign capacity"—an injury taken up by "both houses of the Michigan Legislature now act[ing] in concert"). This conceptual approach makes sense given that the legislature effectively substitutes for the attorney general, who was defending the state's interests. *See LWV*, 957 N.W.2d at 740 (explaining that in such a case "[t]he Legislature, as elected representatives of the citizens of Michigan, *is essentially taking the place of [the Attorney General]* to ensure an actual controversy with robust contrary arguments" (quoting *MARA*, 2020 WL 6122745, at *3) (emphasis added)). But other descriptions cite the legislature's unique legislative interests. *See, e.g.*, *LWV*, 957 N.W.2d at 740 ("[W]hen the Attorney General does not defend a statute against a constitutional challenge," the Legislature itself "is aggrieved and, upon intervening, has standing to appeal[.]"). Here, this question is largely academic; both conceptual frameworks result in the same conclusion—the Legislature has standing.

just a few months ago to show how the Legislature has standing; it can't now use that language to take standing away.

Second, by failing to appeal the preliminary injunction—and specifically the likelihood-of-success holding—the Attorney General has abandoned her duty to defend the voter-transportation law. In election-law cases like this, the preliminary-injunction motion effectively acts as the summary-judgment motion: the district court sees all possible facts, considers all possible arguments, and decides who has the superior legal theory. These cases require no fact discovery or damages assessments, and the plaintiffs seek only that laws or executive-branch policies be declared unconstitutional or unlawful. They are pure legal analysis. The court's decision on the likelihood-of-success factor is thus functionally dispositive. *See Schmier v. Justs. of the Cal. Supreme Ct.*, No. 09-cv-2740, 2009 WL 2246205, at *5 (N.D. Cal. July 27, 2009) (noting that denial of a preliminary injunction "effectively ends this case"); Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 13-D ("The ruling on the application for a preliminary injunction often effectively ends the case."). In short, in cases like this one, the real battle is fought at the preliminary-injunction phase. *See* 28 U.S.C. § 1292(a) (allowing appeals from preliminary injunctions, thereby implicitly recognizing that preliminary injunctions are, in some ways, like final judgments).

Here, the parties fully briefed and argued all the facts and legal merits of Priorities's claims during the preliminary-injunction phase. The district court accepted Priorities's legal arguments. The Amended Complaint's remedies seek only a declaration that the voter-transportation law is invalid and an injunction of the same. RE 17, PageID# 127–128. The district court had thus already awarded Priorities one of its remedies and shortly awarding the other was inevitable. This is why the Attorney General abdicated her role when she refused to appeal the preliminary injunction (and nested likelihood-of-success holding). Given the district court's holding, the only realistic way to save the voter-transportation law was to appeal. But the Attorney General refused. Far from "ably defending" the voter-transportation law or constituting "litigation strategy," Priorities's Br., p. 20, this choice to not appeal was total surrender in all but name. Under *LWV*, the Legislature thus has standing to defend the voter-transportation law. 957 N.W.2d at 739–40.

B. The Legislature may represent its own unique interests here.

But even if the Legislature can't represent the state's interests, it certainly has interests of its own at stake. Again: state law generally determines the extent of a party's rights. This is especially true with governmental entities created by a sovereign state's constitution. And the Michigan Supreme Court has recognized that the Legislature has an "interest in defending its own work" and therefore suffers "a concrete and particularized injury" when a court rejects its arguments that certain

portions of a state law are constitutional. *LWV*, 957 N.W.2d at 739–40 (cleaned up). Several Michigan state and federal courts have said the same. *See Priorities USA v. Benson*, 448 F. Supp. 3d 755, 764 (E.D. Mich. 2020) ("[T]he Legislature has an interest in the preservation and constitutionality of the laws governing the State."); RE 54-1, *Priorities USA v. Benson*, Case No. 19-191-MZ (Mich. Ct. of Claims March 31, 2020) (saying the Legislature has "significant interest in ensuring the validity of … its statutes"). In *MARA*, the court held that the Legislature "certainly has an interest in defending its own work.'" 2020 WL 6122745, at *3 (quoting *League of Women Voters of Michigan v. Secretary of State*, 948 N.W.2d 70, 75 n.4 (Mich. 2020) (McCormack, C.J., dissenting)). This is particularly true when the "Legislature is defending the constitutionality … of its statutes" or the manner of future elections. *Id.* Further, the Legislature's posture here is identical to its posture in *LWV*: a defendant intervenor arguing on appeal that a state law is valid after the Attorney General refused to do so.

The Legislature has a particularly strong interest in its election laws. *Id.* ("The Legislature—which is a body that is subject to these election procedures and as elected officials of the citizens of this State—undoubtedly has a significant interest in the instant appeal."); *see also Benson*, 448 F. Supp. at 764 ("The collection of elected officials constituting the Legislature will be affected in a way unlike the average population. Michigan's voting procedures determine how elected

representatives are selected. … This is not a situation where the interest of the Legislature is only peripherally relevant[.]"); *see also Powell v. McCormack*, 395 U.S. 486, 548 (1969) ("Unquestionably, Congress has an interest in preserving its institutional integrity."). And Michigan's Constitution confirms the Legislature's unique interest in election laws by commanding the Legislature—and the Legislature alone—to enact laws that "preserve the purity of elections" and "guard against abuses of the elective franchise." *See* Mich. Const. art. 2, § 4(2); *Priorities USA v. Nessel*, Case No. 2:19-CV-13341, 2020 WL 2615504, *11 (E.D. Mich., May 22, 2020) ("The Legislature's interest in this case is sound as it stems from its constitutional mandate to 'enact laws … to preserve the purity of elections.'"). The Michigan Court of Appeals said it was difficult to picture an institution with stronger interests than the Legislature in the disposition of its election laws. *MARA*, 2020 WL 6122745, at *3.

These recent decisions from all levels of Michigan's state and federal courts are consistent with United States Supreme Court precedent. The Court recognized a legislative body's interest in defending duly enacted laws in *INS v. Chadha*, 462 U.S. 919, 939 (1983). *See also Karcher*, 484 U.S. at 75 (noting a legislature's right to intervene to defend legislation). Indeed, cases recognizing a legislative body's interest in defending statutes are legion. *See Ne Ohio Coalition for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir.

2006) (recognizing the Ohio Legislature's right to intervene and defend Voter ID statute when interest "potentially" diverged from defendant Secretary of State); *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991) (recognizing the House of Representatives could intervene to defend alcohol-labeling statutes); *In re Benny*, 812 F.2d 1133, 1135 (9th Cir 1987) (recognizing Congress's right to intervene to defend Bankruptcy Act); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3rd Cir. 1986) ("There is no dispute that the Congressional intervenors were proper parties for the purpose of supporting the constitutionality of the [statute].").

Further, if the Legislature must show a disruption of its ability to pass laws, the motions panel correctly held that the Legislature has done so. It noted that "[w]hile the injunction is in effect, Michigan's legislature cannot enact any enforceable laws that even *regulate* hired voter transportation for federal elections." *Priorities*, 978 F.3d at 982. Although the district court's language does not explicitly forbid the Legislature from exercising its legislative authority to pass new laws regarding hired voter transportation, this total prohibition is the injunction's practical effect.

Priorities tries to make hay of the lack of a formal resolution about this litigation. Priorities's Br., pp. 26–27. This is a red herring. Priorities fails to identify any authority *requiring* a resolution for the Legislature to defend a legal action. This

is unsurprising, given that whether and how the Legislature authorizes litigation is a legislative prerogative that courts cannot judicially review or second guess. *See Hammel v. Speaker of House of Representatives*, 825 N.W.2d 616, 619 (Mich. Ct. App. 2012) ("A general challenge to the governing procedures in the House of Representatives is not appropriate for judicial review.").

Moreover, both chambers of the Legislature have plenary authority over their rules and operations. *See* Mich. Const. art. 4, § 16. Both chambers' rules and policies, in turn, ultimately authorize the chambers' leaders—through the chambers' legal counsel—to defend this case. For example, Michigan House of Representative Rules 5, 6, and 7, *available at* https://bit.ly/3u7zSFx, and Michigan Senate Rule 1.117(a), *available at* https://bit.ly/3fFdkXC, designate the speaker as presiding officer and chief administrator and the majority leader as chief administrator of their respective chambers. The chambers' leading officers and chief administrators, who a majority of chamber members elect, may direct legislative litigation. Further, the published, official policy relating to Legal Counsel for the House of Representatives says that its attorneys "ultimately represent the House as an institution." Legislature's Reply Brief, Sixth Cir. Dkt. 24, pp. 18–19. And the House's Legal Counsel is authorized to "[r]epresent the House in relation to any anticipated or pending civil or criminal claim" and "[r]etain outside counsel" for any matters the Office of Legal Counsel is permitted to handle. *Id.* at 3.

In sum, the Legislature has standing to press this appeal.

III. The Court should vacate the preliminary injunction.

A. Priorities cannot show a likelihood of success on the merits.

1. FECA doesn't preempt the voter-transportation ban.

Priorities argues that "FECA has broad preemptive effect." Priorities's Br., p. 32. But as the Legislature already explained, courts interpret FECA's preemption language narrowly even though that language may appear broad. Legislature's Br., pp. 18–20 (citing cases); *see also Dewald v. Wriggelsworth*, 748 F.3d 295, 301 (6th Cir. 2014) (FECA has "narrow preemptive effect"); *Janvey v. Democratic Senatorial Campaign Comm.*, 793 F. Supp. 2d 825, 844 (N.D. Tex. 2011), aff'd 699 F.3d 848 (5th Cir. 2012) (saying Congress gave "no signs of intending to effect a wide-ranging preemption of all state and local laws that might peripherally touch on an election"). This argument also ignores this Court's repeated statement that there is a "presumption against preemption." *Id.* at 16–18 (quoting cases). While these two principles don't end the analysis, they make Priorities's task much harder.

The Legislature's opening brief synthesized many cases to show that FECA isn't aimed at laws governing all election spending but laws specifically governing "campaign finance." Legislature's Br., pp. 20–21. Priorities selectively quotes a few of those cases to conclude that FECA instead preempts laws "that directly regulate or are intended to influence election-related spending." Priorities's Br., p.

33. But the cases Priorities ignores (e.g., *Krikorian* and *Thornburgh*) show this characterization is overbroad.

Priorities argues that the voter-transportation law expressly conflicts with 11 C.F.R. § 114.3(c)(4)(i) and § 114.4(d)(1). Priorities's Br., p. 34. But the Legislature already explained in detail that the voter-transportation law doesn't conflict with these regulations because corporation employees or volunteers may still provide transportation. Priorities has no response.

2. The voter-transportation ban is an anti-fraud measure.

Priorities focuses its § 108.7(c)(4) argument on the definition of "provide for" and "prohibit." *Id.* at 43–45. It unhelpfully defines "provide for" as "make provision for" and "prohibit" as to explicitly "forbid." *Id.* at 44. These definitions are not only inaccurate; they actually support the Legislature's position. First, the full quotation from Justice Thomas's dissent defining "provide for" begins with the qualifier, "[w]hen applied to documents such as a contract." *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 112 (1993) (Thomas, J., dissenting). The voter-transportation law isn't a contract, so *John Hancock* is inapplicable. Second, the precise meaning of the phrase "provide for" varies tremendously between statutes. *See Rake v. Wade*, 508 U.S. 464, 473–74 (1993) (listing several distinct definitions for "provide for" when it appeared in different provisions). What these cramped definitions miss is that "provide for" has a

forward-looking connotation and, thus, can include taking "precautionary measures." *Appalachian States Low-Level Radioactive Waste Comm'n v. Pena*, 126 F.3d 193, 197 (3d Cir. 1997) (quoting *Webster's Dictionary*); *see also Merriam-Webster's Online Dictionary*, https://bit.ly/3eGThbX (last accessed May 12, 2021) (defining "provide for" as "to cause (something) to be available or to happen in the future"). And Priorities itself defines "prohibit" as, in part, to "severely hinder." Priorities's Br., p. 45. Together, then, § 108.7(c)(4)'s plain language exempts precautionary statutes that severely hinder voter fraud or similar activity. By prohibiting all vote-hauling—and thus ensuring that no third-party can legally buy a vote under the guise of providing a ride—the voter-transportation law does exactly that.

One proposition Priorities misses is that a statute may target fraud even if it applies mostly to conduct that is not intrinsically fraudulent. Priorities argues, for example, that the voter-transportation law isn't fraud-related because paying for voter transportation doesn't usually "implicate fraud." *Id.* at 35. But anti-fraud statutes often sweep much wider than just preventing fraud. *Semler v. Ore. State Bd. of Dental Examiners*, 294 U.S. 608, 613 (1935) (upholding laws targeting deceptive medical advertising because "[t]he legislature was entitled to consider the general effects of" deceptive advertising and, "if these effects were injurious … to counteract them by a general rule" applying to honest statements as well). This is

doubly true here, where Const, art. I, § 4, broadly empowers Michigan to regulate elections. The Legislature agrees that the voter-transportation law doesn't *directly* criminalize fraud; but one effect of prohibiting *all* third-party voter-transportation payments is that all masquerading vote-hauling is criminalized, too. Priorities responds that the voter-transportation law can't target vote-buying because other Michigan statutes do the same. *Id.* at 36, 50. But it doesn't matter that other statutes criminalize pure vote-buying—multiple statutes can target the same misdeed. *See United States v. Carman*, 577 F.2d 556, 568 (9th Cir. 1978).

Priorities's arguments require the Court to both check its common sense at the door and ignore common knowledge about elections and human interactions. For example, Priorities argues that the purpose of the voter-transportation law is "simply to limit election-related spending." Priorities's Br., p. 35. This is facially absurd. There is always a *why* behind such statutes. Priorities later admits this by offering its own *why* for the voter-transportation law (1890s Republican voter suppression). *Id.* at 52.

The Court can better explain this statute using common sense and common knowledge. *See Pac. Gas & Elec. Co. v. F.E.R.C.*, 44 F. App'x 170, 172 (9th Cir. 2002) (saying the "ultimate guide" to legislative intent or purpose is "common sense"); *see also In re Lang*, 600 N.W.2d 646, 650 (Mich. Ct. App. 1999) (saying courts must "use common sense" to "constru[e]" statutes); 2A Sutherland Statutory

Construction § 45:12 (7th ed.) ("[A] statute should not be read in an atmosphere of sterility, but in the context of what actually happens when humans fulfill its purpose."). It's common knowledge that today's election atmosphere is often cutthroat and unscrupulous—just as it was in the 1890s. It is thus apparent that prohibiting third parties from paying for voter transportation is calculated to stop vote-hauling and undue influence.[3]

Consider the following example of how these principles work together. TSA prohibits liquid containers with more than 3.4 oz. Common sense and a passing awareness of air travel tells the reasonably informed traveler that this rule ultimately targets potential liquid explosives. Attempts to carry liquid explosives into the airport are exceedingly rare. Nevertheless, all agree that the liquid rule is rightly categorized as a safety or security measure. Yet under Priorities's reasoning, the liquid rule can't be considered a safety or security measure because, first, breaking the liquid rule isn't a per se security threat and, second, the TSA separately prohibits weapons and explosive materials. Similarly, the voter-transportation law may be categorized as a voter-fraud-or-similar-offenses measure.

Priorities repeats these errors several more times. *See, e.g.*, Priorities's Br., p. 49. Ultimately, the Legislature often passes broad "prophylactic measures whose

[3] Priorities appears to agree that a reader may use common sense and common knowledge to infer statutory purposes as it later does that with Alabama and Louisiana statutes. Priorities's Br., pp. 41–42.

objective is the prevention of harm before it occurs." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978); *see also Matter of Jaques*, 281 N.W.2d 469, 473 (Mich. 1979) (adopting *Ohralik*); *United States v. Robel*, 389 U.S. 258, 270 (1967) (Brennan, J., concurring) ("Congress often regulates indiscriminately, through preventive or prophylactic measures[.]"). Prophylactic rules are especially appropriate when, in the Legislature's discretion, it is "not practical to require proof of improper intent." *First Golden Bancorporation v. Weiszmann*, 942 F.2d 726, 729 (10th Cir. 1991). Thus, courts should not second guess prophylactic laws aimed at fraud or corruption. *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209–10 (1982) (refusing to "second guess a legislative determination as to the need for prophylactic measures where [actual or apparent] corruption is the evil feared"). As the motions panel recognized, the Legislature designed the voter-transportation law to protect election integrity. *Priorities*, 978 F.3d at 984.

Priorities commits a textbook either-or fallacy by repeatedly acting like a statute that prohibits third parties from paying for voter transportation cannot simultaneously prevent voter fraud or similar offenses. *See, e.g.*, Priorities's Br., pp. 36, 45, 48. Rather than prohibit third party payments *or* fight fraud, the voter-transportation law does *both*. Priorities's false dichotomy underlies its entire preemption argument. A legislature may have multiple intents when passing a statute. *United States v. Marshall*, 736 F.3d 492, 500 (6th Cir. 2013) (noting

"several enumerated purposes"). And even if a statute doesn't facially prevent fraud, it can still do so in practice. In *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010), for example, the plaintiff ballot committee sued the state, arguing that publicizing its referendum petitions under Washington's Public Records Act ("PRA") violated the First Amendment. The Court held that the PRA effectuated Washington's compelling interest in "preserving the integrity of the electoral process." *Id.* at 197. Specifically, the PRA helped "root out fraud" and "fraudulent outcomes," and its disclosure requirements helped "*prevent* certain types of" difficult-to-detect fraud, like forgery or lying. *Id.* at 198 (emphasis added). Like the PRA, the voter-transportation law doesn't use words like "fraud" or facially criminalize fraud. But by criminalizing fraudulent vote-hauling, it prophylactically preserves election integrity. Indeed, although Priorities acts like spending money on voter transport and fraud are mutually exclusive, it elsewhere implicitly admits that an act may be both. Priorities's Br., p. 35; *see also id.* at 48 (saying the voter-transportation law "generally" targets non-fraudulent activity, implying it sometimes *does* target fraud).

Priorities repeats this either-or fallacy when it tries to separate vote-hauling into two categories: fraudulent vote hauling and innocent vote hauling. *Id.* at 48–49. It argues that "[s]pending money to hire a vehicle to transport voters to the polls and paying voters to vote a certain way are two highly distinct acts." *Id.* at 49. Not

always—not when a third-party gives a voter $300 to drive the voter and his family members to the polls with an understanding that the voter and family will cast their ballots for a particular candidate. In fact, the physical actions composing innocent vote hauling (as regulated by the voter-transportation law) overlap almost entirely with the physical actions composing fraudulent vote hauling. The *only* difference is the motivation (and related communication). The concept of vote-hauling assumes that giving a voter a ride and buying sometimes *aren't* separate. That functionally identical physical conduct is sometimes perfectly innocent and other times perfectly fraudulent is what makes vote-hauling so hard to prosecute and prevent. The cases Priorities cites confirm that vote-hauling isn't just vote buying—it's vote buying masquerading as a ride to the polls. *Id.* at 49–50.

Contrary to Priorities's argument, *id.* at 45–47, *Dewald* does not help them. *Dewald* says: "With voting fraud and similar offenses explicitly not preempted by the regulations, we find nothing unreasonable in the decision of the Michigan Court of Appeals to allow Dewald to be prosecuted for obtaining money under false pretenses, common-law fraud, and larceny by conversion." 748 F.3d at 302–03. But Priorities's entire preemption argument is built on the notion that exemption applies only to laws that explicitly and facially prevent election shenanigans. But *Dewald* saw enough play in § 108.7(c)(4)'s joints to exempt a crime (larceny) that

has *nothing* to do with elections or fraud. If § 108.7(c)(4) is flexible enough to exempt larceny by conversion, it certainly exempts the voter-transportation law.

Priorities tries to show the purpose of Michigan's voter-transportation law by analyzing 1890s parliamentary debates. Priorities's Br., pp. 37–41. But English authorities aren't automatically persuasive. *Dykema v. Story & Clark Piano Co.*, 190 N.W. 638, 639 (Mich. 1922). And these specific debates are useless because they reveal *another country*'s unrelated discussions about a separate statute with its own unique legislative history. *Ussery v. Louisiana*, 150 F.3d 431, 436 (5th Cir. 1998) (holding that the legislative history of a separate, albeit closely related, statute was "entirely unpersuasive"); *Malloy v. Eichler*, 860 F.2d 1179, 1187 (3d Cir. 1988) (rejecting legislative history from "noncontemporaneous Congresses" and consisted of "references from the legislative histories of other laws"); *Loc. Div. 589, Amalgamated Transit Union, AFL-CIO, CLC v. Com. of Mass.*, 666 F.2d 618, 635 (1st Cir. 1981) (holding an analysis of other statutes unpersuasive because there were "different statutory objectives" and "a different legislative history"). Priorities doesn't show that similar motivations animated Michigan's voter-transportation law. .[4]

[4] Despite promising to produce "historical support" from Michigan that the voter-transportation law was a campaign-finance law, Priorities's Br., p. 36, Priorities fails to do so.

Priorities's attempt to analogize to Louisiana and Alabama laws backfires. Priorities's Br., pp. 41–42. Unlike Michigan's voter-transportation law, the Louisiana statute explicitly conditions enforcement on campaign-finance reports. *Id.* In short, if the Legislature wanted to associate its vote-hauling legislation with campaign-finance laws, it could have. That it didn't is further proof that the voter-transportation law isn't a campaign-finance law. Ultimately, these statutes are just examples of states' alternative policy decisions—they offer no indication of whether *Michigan's* voter-transportation law prevents voter fraud.

Finally, Priorities argues that the voter-transportation law was a voter-suppression tactic used by 1890s Republicans. Priorities's Br., p. 51. This is too sweeping an accusation to be useful—one based on bare partisanship unfit for a court. Further, the charge of Republican voter suppression doesn't hold up given that the voter-transportation law was modernized under Democrat Governor Gerhard Williams in 1954.

3. The Court may not affirm on alternative bases.

Priorities urges the Court to consider affirming on alternative grounds—namely its First Amendment claims. Priorities's Br., pp. 53–54. This is a complex issue and deserves more briefing than the parties offer here. If the Court wishes to explore this issue, it should order supplemental briefing. Otherwise, it can rely on

the Legislature's arguments on this point below. *See* Legislature's Resp. to Pls.' Mot. for a Preliminary Injunction, RE No. 68, pp. 24–35, PageID.1183–1194.

This Court analyzes a constitutional challenge to an election law under the *Anderson-Burdick* framework set out in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020). Under *Anderson-Burdick*, the Court first examines the regulation's burden on the right to vote. *Burdick*, 504 U.S. at 434. If the regulation imposes "reasonable nondiscriminatory restrictions" on the right to vote, a court applies rational basis review and "the State's important regulatory interests" generally "justify the restrictions." *Id.* (cleaned up). Strict scrutiny applies only when states impose severe restrictions, such as poll taxes. *Id.* Between these extremes, the *Anderson-Burdick* test creates an intermediate level of scrutiny. Where the burden on the right to vote is moderate, courts weigh that burden against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* (quoting *Anderson*, 460 U.S. at 789).

The voter-transportation law is reasonable and nondiscriminatory and doesn't burden Priorities's rights. Strict scrutiny doesn't apply here because there is nothing inherently expressive about transporting a voter, and the law is content-neutral and

doesn't restrict political speech. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013). Thus, rational-basis review is appropriate.

Michigan's crucial regulatory interests—including preventing fraud and undue influence—support the statute's constitutionality. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *see also Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (saying "the State has a *compelling* interest in preventing fraud"). These interests alone justify the voter-transportation law's minimal burden on Priorities. *See Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016). Further, legislation may be prophylactic, so the Legislature doesn't have to point to a spate of vote-hauling incidents to justify the law. *Burson v. Freeman*, 504 U.S. 191, 208 (1992). That Priorities's claim is a facial challenge also means it bears a "heavy burden of persuasion." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008). Priorities doesn't meet that burden here.

B. Priorities doesn't show irreparable harm.

As the Legislature has shown, Priorities's evidence of harm concerned only the 2020 election; now that the election is over, Priorities can't show irreparable harm. Legislature's Br., pp. 31–33. Priorities doesn't address that argument on the merits. Instead, it tries a procedural dodge. Priorities argues that if the injunction is limited to the 2020 election, this "appeal is moot." Priorities's Br., p. 30. But the

Legislature isn't arguing that the *injunction* is limited to 2020; it agrees that the injunction has no "duration or end date." *Id.* Rather, it's arguing that Priorities's *evidence of irreparable harm* is limited to 2020. And if Priorities's evidence is limited to 2020, it can't show irreparable harm now. Finally, contrary to Priorities's argument, without imminent irreparable harm, the proper remedy is vacatur, not remand. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) ("Irreparable harm is an 'indispensable' requirement for a preliminary injunction[.]").

Priorities calls the Legislature's focus on Priorities's 2020 election evidence "narrow." Priorities's Br., p. 30. This characterization is self-damning. The Legislature focused on all the evidence Priorities offered. Any "narrow" focus therefore reflects a correspondingly narrow focus of Priorities's allegations. And although Priorities's briefing offers "assertions of harm," such assertions cannot form the basis of a preliminary injunction. To determine irreparable harm, a court looks to *facts*, not attorney assertions.

Priorities says the Legislature's cited cases are inapplicable because they deal with union elections instead of "perennial" governmental elections and trial-court level requests for preliminary injunctions, *id.*, but these differences don't matter. In all relevant aspects, union elections parallel governmental-official elections: at set intervals, and over a specific time period, eligible voters cast ballots to choose

leaders; contrary to Priorities's odd suggestion that union elections are "one-and-done," neither union officials nor governmental officials have life tenure; and each election occurs only once. And even if the Legislature's union-election cases aren't applicable, it cited multiple non-union cases standing for the same proposition. Legislature's Br., p. 33.

The Legislature didn't raise a laches argument, despite Priorities's claim to the contrary. Priorities's Br., p. 56–57. What the Legislature did raise, however, is that Priorities's failure to bring this lawsuit sooner indicates that Priorities isn't being irreparably harmed. Priorities responds that it "brought this suit at the earliest possible time"—in 2019 when Priorities Michigan and Rise began operations in Michigan *Id.* at 57. But news reports show that Priorities operated in Michigan well before 2019. *See* Beth LeBlanc, *Voting Group behind mystery requests in Michigan*, DETROIT NEWS, https://bit.ly/2R5AvSG, (Aug. 28, 2018) ("Priorities USA Foundation contracted a third party to send hundreds of public records requests to clerks throughout the state"); Craig Mauger, *Presidential Campaigns Ran Nearly $3 Million In TV Ads In Michigan In The Last Week*, MICHIGAN CAMPAIGN FINANCE NETWORK (saying that in 2016 "a Super PAC that supports Clinton, Priorities USA Action, spent another $285,244 on Michigan ads") (last accessed May 11, 2021).

And even if 2019 really was the start of Priorities's Michigan activity, it began in January or February 2019—10 months before Priorities filed suit. Lubin

Declaration, RE 22-6, PageID# 218–219 (saying Rise Inc. started in Michigan in January 2019); Raymond Arke, *Liberal super PAC Priorities USA announces $100 million plan for 2020 presidential election*, CENTER FOR RESPONSIVE POLITICS, https://bit.ly/3bjbIkX (quoting Priorities USA's chairperson in February 2019 saying its Michigan activity "start[s] now"). This isn't just quibbling over dates; the timelines matter. The Priorities appellees spent anywhere from 10 months to three years sitting on their rights without suing. This delay is strong evidence that the harm isn't anywhere near as irreparable as Priorities claims.

C. The balance of harms favors the Legislature.

The Legislature argued in its initial brief that the district court abused its discretion by failing to recognize that the injunction irreparably harms the Legislature. Legislature's Br., pp. 35–36. Priorities's brief ignores this point. This failure means that neither the district court nor Priorities accurately balance the injuries here.

Priorities's only public harm is the public interest in voting freely. Priorities's Br., pp. 55–56. But as the Legislature extensively showed in its initial brief, the other side of that coin is the public interest in enforcing validly passed election laws. Priorities doesn't show that one interest trumps the other. With public interest at the very least divided, no harm to Priorities, and irreparable harm to the Legislature, the balance of equities tilts in the Legislature's favor.

CONCLUSION

For these reasons, the Court should reverse the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Rules 32(a)(7)(B), (g) of the Federal Rules of Appellate Procedure, the undersigned certifies, relying on the word-processing system used to prepare the document, that this brief contains 6,498 words, including headings, footnotes, and quotations, but excluding the statement regarding oral argument, table of contents, table of authorities, signature block, designation of relevant district court documents, certificate of service, and this certificate.

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CERTIFICATE OF SERVICE

Under Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on May 21, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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