UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Priorities USA, Rise, Inc., and the Detroit/Downriver Chapter of the A. Philip Randolph Institute,

Plaintiffs,

v.

Dana Nessel, in her official capacity as Attorney General of the State of Michigan,

Defendant.

NO. 19-13341

JUDGE STEPHANIE DAWKINS DAVIS

MAGISTRATE JUDGE R. STEVEN WHALEN

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

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CONCISE STATEMENT OF THE ISSUES

Defendant Attorney General Dana Nessel has moved to dismiss the Amended Complaint of Plaintiffs Priorities USA, Rise, Inc., and the Detroit/Downriver Chapter of the A. Philip Randolph Institute, which challenges the Absentee Ballot Organizing Ban and Voter Transportation Ban, for lack of jurisdiction and failure to state a claim. The motion to dismiss should be denied for at least the following reasons:

1. Plaintiffs have standing to bring claims in their own right;

2. To the extent the prudential standing doctrine remains good law, Plaintiffs have satisfied prudential standing requirements;

3. This case is an appropriate declaratory judgment action; and

4. Plaintiffs have plausibly alleged, in eight distinct counts, that the challenged provisions are unconstitutional and preempted by federal law.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

Buckley v. Am. Const'l Law Found., Inc., 525 U.S. 182 (1999)

Buckley v. Valeo, 424 U.S. 1 (1976)

Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310 (2010)

Emily's List v. Fed. Election Comm'n, 581 F.3d 1 (D.C. Cir. 2009)

Havens Realty Corporation v. Coleman, 455 U.S. 363 (1982)

League of Women Voters v. Hargett, 400 F. Supp. 3d 706 (M.D. Tenn. 2019)

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)

Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992)

Meyer v. Grant, 486 U.S. 414 (1988)

Ne. Ohio Coal. for the Homeless ("NEOCH") v. Husted, 837 F.3d 612 (6th Cir. 2016)

NAACP v. Button, 371 U.S. 415 (1963)

Platt v. Bd. of Commissioners on Grievances & Discipline of the Ohio Supreme Court, 769 F.3d 447 (6th Cir. 2014).

Weber v. Heaney, 793 F. Supp. 1438 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993)

Statutes and Regulations

Michigan Compiled Laws § 168.931

Michigan Compiled Laws § 168.759

52 U.S.C. § 30143

11 C.F.R. § 108.7

11 C.F.R. § 114.3

11 C.F.R. § 114.4

INTRODUCTION

Michigan's Absentee Ballot Organizing Ban and Voter Transportation Ban directly and severely impact the right to vote.

Because these provisions target the persons and organizations who assist voters instead of directly proscribing the actions of voters themselves, Plaintiffs have standing. Indeed, Plaintiffs' Amended Complaint, Dkt. 17, identifies specific ways that the challenged laws injure Plaintiffs and impede their operations. Plaintiffs' allegations must be taken as true on a motion to dismiss and are more than sufficient to satisfy Article III's injury-in-fact standing requirement. The standing inquiry should end there. To the extent prudential standing doctrine remains sound law, it only applies to the two claims regarding undue burden on the right to vote and is satisfied.

Regardless of whether First Amendment scrutiny or *Anderson-Burdick* applies, Plaintiffs have plausibly alleged constitutional violations. Plaintiffs have also plausibly alleged that these provisions are preempted by federal law.

The Motion to Dismiss, Dkt. 27, should be denied.

BACKGROUND

Plaintiffs Priorities USA, Rise, and the Detroit/Downriver Chapter of the A. Philip Randolph Institute (the "Randolph Institute") challenge both the Voter

Transportation Ban (Mich. Comp. Laws § 168.931(1)(f)) and the Absentee Ballot Organizing Ban (Mich. Comp. Laws § 168.759(4), (5), (8)).

The **Absentee Ballot Organizing Ban** is comprised primarily of two parts: (1) a registration requirement that allows only persons who are registered voters in Michigan to assist voters with their absentee ballot applications, and (2) a solicitation ban which bans requesting or soliciting to assist voters with their absentee ballot applications. Mich. Comp. Laws § 168.759(4), (5), (8). Once a person has violated the solicitation ban, they are no longer allowed to possess an application. *Id.* § 168.759(8). Neither the registration requirement nor the solicitation ban applies to a member of a voter's household or immediate family. *Id.* § 168.759(4).

The **Voter Transportation Ban** provides that "[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). Dkt. 22-1 at 12-19 (describing the challenged laws).

LEGAL STANDARD

When a defendant challenges the factual existence of subject matter jurisdiction, the court has broad discretion to weigh and consider evidence to "satisfy itself as to the existence of its power to hear the case." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994) "[A] trial court has wide discretion to allow affidavits,

documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).

At the motion-to-dismiss stage, the Court is "required to draw all reasonable inferences in favor of [Plaintiffs]." *Courtright v. City of Battle Creek*, 839 F.3d 513, 520 (6th Cir. 2016). Plaintiffs need only provide a complaint that "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Plaintiffs easily have done so here.

ARGUMENT

I. This Court has jurisdiction.

Defendant raises three jurisdictional arguments in her motion to dismiss: (1) Plaintiffs have not alleged a cognizable injury for the purposes of Article III standing, Dkt. 27 at 23-28; (2) Plaintiffs lack prudential standing to assert the rights of individual voters (this argument is only applicable to two of eight claims), Dkt. 27 at 28-31; and (3) the Court lacks jurisdiction to enter a declaratory judgment. Dkt. 27 at 52–53. Each of these arguments fails.

A. Plaintiffs have Article III standing.

When multiple plaintiffs bring the same claims and seek injunctive relief, only one plaintiff needs to demonstrate Article III standing. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ.*,

584 F.3d 253, 261 (6th Cir. 2009). Here, each plaintiff has demonstrated multiple theories of standing.

1. Plaintiffs are injured-in-fact because the challenged laws require them to divert resources.

Plaintiffs have alleged that the challenged laws will (1) frustrate their mission, Dkt. 17 ¶¶ 7–17, 24; (2) require them to divert resources from other programming, Dkt. 17 ¶ 25; and (3) require them to expend employee and volunteer time to ensure compliance with the challenged laws, Dkt. 17 ¶¶ 25–26. These allegations are more than sufficient to confer standing. "[O]n a motion to dismiss[,] [the court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

Where an organizational plaintiff alleges that it must expend additional funds, reallocate resources from its other activities due to a defendant's unlawful conduct, or dedicate personnel time to address a law, courts have found that such injuries satisfy the Article III requirements. The cases on this point are innumerable.[1]

[1] *See, e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350–51 (11th Cir. 2009) (finding standing where the NAACP had to divert its activities from taking citizens to the polls to helping voters obtain photo IDs); *Scott v. Schedler*, 771 F.3d 831, 836–39 (5th Cir. 2014) (finding standing because a single organizational officer dedicated time to an effort); *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (finding organization's anticipation that they will have to divert resources to educate voters on compliance with and to resolve the effects of the challenged law sufficiently created a concrete injury); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951, *aff'd*, 553 U.S. 181 (2008) (finding

For example, in *Havens Realty Corporation v. Coleman*, the Supreme Court held that a plaintiff-organization had sufficiently alleged standing based on its allegation that it "ha[d] been frustrated" by the defendant's conduct, and as a result, the organization "had to devote significant resources to identify and counteract the defendant's [*sic*] racially discriminatory steering practices." 455 U.S. 363, 379 (1982) (second alteration in original). The Court recognized that these allegations identified "concrete and demonstrable injury to the organization's activities[,] with the consequent drain on the organization's resources," which was "far more than simply a setback to the organization's abstract social interests." *Id.*[2]

organizational standing when the Democratic Party was compelled "to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law"); *Mote v. City of Chelsea*, 284 F. Supp. 3d 863, 887 (E.D. Mich. 2019) (organization had standing when it diverted resources to secure the defendant's Americans with Disabilities Act compliance, because "that diversion of resources ha[d] impacted its capacity to provide the range of other services that it offers to disabled persons"); *Zynda v. Arwood*, 175 F. Supp. 3d 791, 804 (E.D. Mich. 2016) (finding organizational standing due to diversion of resources).

[2] *See also Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("[T]he new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote."), *aff'd*, 553 U.S. 181; *id.* ("The fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury."); *Ne. Ohio Coal. for the Homeless ("NEOCH") v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (finding standing where the organization "overhauled" its election strategy and redirected its focus to in-person voting instead of absentee voting).

Defendant cites *Fair Elections Ohio v. Husted* in an effort to escape the weight of authority, *see* Dkt. 27 at 14, but her argument is easily dismissed. 770 F.3d 456 (6th Cir. 2014). In *Fair Elections*, the Sixth Circuit did *not* reject the diversion of resources theory. Instead, the court found an absence of proof at the summary judgment phase. *See Fair Elections*, 770 F.3d at 460. Here, at the pleading stage, Plaintiffs' allegations must be accepted as true. *See Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015).[3]

Defendant's efforts to distinguish *NEOCH* are equally unavailing. Dkt. 27 at 27. Defendant suggests that the statute in *NEOCH* was more vulnerable because it had only recently been amended, in contrast to the Voter Transportation Ban. But this distinction is wholly irrelevant: A law's age has nothing to do with whether Plaintiffs have plausibly alleged a concrete injury taking place *today*.

Defendant neither explains why a "long-existing" law cannot create an organizational injury in the form of diverted resources, nor does she cite any authority that adopts such a sweeping rule. *See* Dkt. 27 at 27. The law, in fact, is to the contrary: "It is immaterial whether the organizational injury resulted from a change in the law or a change in election-year conditions and circumstances that bring into focus potential problems with the state's statutory framework."

[3] Moreover, Plaintiffs have submitted declarations in support of their application for preliminary injunction that amply support its allegations. Dkt. 22-4, 22-5, 22-6.

Democratic Party of Ga., Inc. v. Crittenden, 347 F. Supp. 3d 1324, 1337 (N.D. Ga. 2018). All that is required to meet the injury-in-fact requirement is a plaintiffs' detrimental diversion of resources. *Id.*[4]

Indeed, these statutes have taken on new and heightened meaning in recent years. The Voter Transportation Ban was passed in the days before hired vehicle transportation, like rideshare companies Uber and short-term rental companies like ZipCar became a central feature of modern transportation. Uber's rides-to-the-polls promotion, which benefited voters everywhere in the country except for Michigan in 2018, did not exist in 1982 when the law was amended. Dkt. 17 ¶ 41. And the Absentee Ballot Organizing Ban predates Proposal 3, which dramatically increases the role of absentee ballot voting in Michigan's elections. Dkt. 17 ¶¶ 2, 17.

Accordingly, Plaintiffs have easily satisfied the injury-in-fact standard.

2. The credible threat of prosecution standard is not an obstacle to Plaintiffs' Article III standing.

a. Plaintiffs are not required to allege or prove a credible threat of prosecution.

Defendant suggests that *any plaintiff* raising a First Amendment challenge to a law with attendant criminal penalties must prove a credible threat of prosecution

[4] *See also Jacobson v. Lee*, No. 4:18cv262-MW/CAS, 2019 WL 6044035 at *6–7 (N.D. Fla. Nov. 15, 2019) (demonstrating standing to challenge state's 70-year-old ballot order law because it forced Priorities to expend and divert additional funds and resources at the expense of its efforts in other states to combat the effects of the challenged election law).

to establish Article III standing. *See* Dkt. 27 at 24–25. This argument is that the potential future criminal prosecution serves as the only injury-in-fact. *See id.* at 23.

Defendants are wrong. Plaintiffs have alleged two ongoing and concrete injuries separate and apart from any threat of prosecution.

First, Plaintiffs are required to expend and divert resources to ensure compliance with the challenged laws, and injury not dependent on a future criminal prosecution but engendered by the law's existence and ongoing effectiveness.[5]

Second, the challenged laws ban expressive conduct that Plaintiffs would otherwise engage in. Plaintiffs (1) desire to possess absentee ballot applications after requesting to do so, and (2) desire to pay for drivers and vehicles to transport voters to the polls. Dkt. 17 ¶ 23. The laws unequivocally prohibit this conduct and objectively chill certain activities.

Though some courts have analyzed the credibility of the threat of prosecution, they do so where there is some question about whether the challenged law *would even apply* to the plaintiff's conduct. *See Susan B. Anthony v. Driehaus*, 573 U.S. 149, 162-63; (2014); *McKay v. Federspiel*, 823 F.3d 862, 868–70 (6th Cir. 2016) (challenged law did not apply to those who received the judge's permission); *Platt*

[5] *Cf. Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (plaintiff suffered Article III injury in pre-enforcement First Amendment challenge because "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution").

v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Supreme Court, 769 F.3d 447, 452 (6th Cir. 2014) (challenged parts of the Code "at least chill" the plaintiff's desired "form of communication."). Because the challenged law may not have applied to the plaintiff's intended conduct, the chill on expressive conduct was "subjective." *McKay*, 823 F.3d at 868.

Here, in sharp contrast, there is no dispute that the challenged laws apply, and the chill on protected conduct is plain, clear, and objective. Courts regularly exercise jurisdiction without analyzing the credibility of the threat of prosecution in cases, like this, where plaintiffs allege a desire to engage in expressive conduct that is burdened or banned by a challenged election-related law that carries criminal penalties. *See, e.g.*, *Citizens United v. Federal Election Commission*, 558 U.S. 310, 318 (2010) (not discussing credibility of threat of prosecution under challenged law); *Meyer*, 486 U.S. at 417 (same); *NEOCH*, 837 F.3d at 622–24 (same). Accordingly, the injury to First Amendment interests, standing alone, is more than sufficient to confer Article III standing.

b. Plaintiffs have pleaded a credible threat of prosecution.

In any event, Plaintiffs have plainly pleaded a credible threat of prosecution. A credible threat of prosecution can be proven through "some combination of" (1) "a history of past enforcement against the plaintiffs or others"; (2) "enforcement warning letters sent to the plaintiffs regarding their specific conduct"; (3) "an

attribute of the challenged statute that makes enforcement easier or more likely"; or (4) "a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff." *McKay*, 823 F.3d at 868–70.

Here, Defendant and every county prosecutor in Michigan have refused to disavow enforcement of the challenged laws against Priorities or anyone else who desires to engage in the activity banned by those statutes. Dkt. 17 ¶¶ 27–28, 30–32; Dkt. 22-9, Dkt. 22-10; Dkt. 22-11. Indeed, far from *disavowing* prosecution of the challenged laws, Defendant Attorney General Nessel has aggressively *defended* their constitutionality. Dkt. 17 ¶ 29; Dkt. 10; Dkt. 27.

Plaintiffs have also alleged that the "Defendant and all Michigan prosecuting attorneys have a duty to investigate and prosecute violations of Michigan election laws like the Voter Transportation Ban and the Absentee Ballot Organizing Ban" under Michigan Compiled Laws § 168.940. Dkt. 17 ¶ 18. This attribute of Michigan's election laws coupled with Defendant's refusal to disavow prosecution constitutes a credible threat of prosecution. *See Platt*, 769 F.3d at 452–53 (credible threat where state refused to disavow prosecution under a citizen petition provision).

B. Although not required, Plaintiffs have prudential standing to assert the rights of third parties for the two undue burden claims.

Defendant appears to argue that all of Plaintiffs' claims invoke the rights of third parties and should be subjected to dismissal pursuant to the prudential standing doctrine. Dkt. 27 at 28. As a threshold matter, this argument fundamentally

misunderstands six of Plaintiffs' eight causes of action. Plaintiffs' claims alleging vagueness and overbreadth (Counts I and V), First and Fourteenth Amendment violations of speech and associational rights (Counts II and VI), and preemption (Counts IV and VIII) all rely on Plaintiffs' own rights and injuries as organizations. The only claims that would have historically been susceptible to review under the prudential standing doctrine are Plaintiffs' claims alleging undue burdens on the fundamental right to vote (Counts III and VII), because these are the only causes of action for which Plaintiffs assert the legal rights of third parties—voters themselves.

The Supreme Court, moreover, has cast doubt over the "continuing vitality" of dismissals on prudential grounds after a plaintiff has established Article III standing. *Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)). A dismissal based on prudential considerations is in "tension" with the Supreme Court's admonition that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc.*, 572 U.S. at 126 (citations omitted); *Kiser*, 765 F.3d at 606–07 (addressing only the ripeness inquiry and declining to apply the prudential framework in light of *Lexmark*). Because Plaintiffs have established Article III standing to challenge the Absentee Ballot Organizing Ban and the Voter Transportation Ban, *see supra* at I.A., this Court should not dismiss any cause of action on prudential standing grounds.

But even if the Court were to conduct a prudential standing analysis, Plaintiffs have prudential standing to assert the rights of Michigan voters because there exists (1) a close relationship between the party asserting the claim and the person possessing the right; and (2) a hindrance to the possessor's ability to protect her own interest. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Because this is a prudential standing doctrine, the Court has "been quite forgiving with these criteria in certain circumstances." *Id.* Those circumstances include issues such as those at play here, where "enforcement of the challenged restriction against the *litigant* would result indirectly in the violation of third parties' rights." *Id.* (emphasis added).

1. The Randolph Institute has prudential standing to assert undue burden claims.

The Randolph Institute's mission is "to fight for human equality and economic justice and to seek structural changes through the American democratic process." Dkt. No. 22-5 ¶ 2. It is a membership organization, *id.* at ¶ 7, and members are "involved in voter registration, political and community education, lobbying, legislative action and labor support activities." *Id.* ¶ 3. The organization undertakes activities to encourage the Detroit/Downriver community to vote, make plans to vote, and provide assistance with voting. *Id.* ¶ 5.

The Randolph Institute has developed close relationships with its members and the voters whose rights they seek to vindicate, namely young voters, hourly wage workers, senior voters, voters who are disabled, low-income voters, college-

aged voters, and voters with limited English proficiency. *Id.* at ¶¶ 6, 11, 16–18 (describing activities in greater detail). These are the very voters upon whom the burdens imposed by of the Absentee Ballot Organizing Ban and Voter Transportation Ban fall the hardest. Dkt. 17 ¶¶ 4, 74. They are likely to face a hinderance in asserting their right to vote for the same reason that the challenged laws create a burden. Dkt. 22-5 at ¶ 9.

2. Rise has prudential standing to assert undue burden claims.

Rise, too, has a close relationship with the student voters whose rights it seeks to assert. Rise is a student-driven organization whose leadership, organizers, partners, and volunteers are all students. Dkt. 22-6 ¶ 5. The student voters that Rise seeks to organize and mobilize to vote have limited resources—chief among them, transportation, time, and money—and those obstacles make it more difficult to vote. *See* Dkt. 22-6 ¶¶ 20, 23 (discussing student resources and access to transportation). The same obstacles serve as a hinderance to those voters independently navigating the legal system to protect their right to vote.

Finally, a plaintiff is certainly not required to identify a specific voter disenfranchised by a challenged election policy when it is inevitable that some voters will be harmed. *See Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004); *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) ("Plaintiff need not identify *specific* aspiring eligible voters

who intend to register as Democrats and who will be barred from voting; it is sufficient that some inevitably will."). Where a challenged law dramatically reduces the resources available to voters to vote, injury to some voters is inevitable. Dkt. 17 ¶¶ 36–38, 41, 42, 70.

The prudential rule against third party standing "assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Kowalski*, 543 U.S. at 129. That assumption is not correct here. By virtue of age, lack of mobility, socioeconomic status, limited English proficiency, or some combination of the above, these voters face a hindrance in both voting and protecting their right to vote. The Court should exercise its jurisdiction to hear these claims. [6]

C. The Court has jurisdiction over this declaratory judgment action.

Defendant next asserts that a declaratory judgment is inappropriate because "Plaintiffs[']claims are not ripe for review." Dkt. 27 at 53.

Defendant's argument fails, first, because it is premised on the notion that Plaintiffs are not suffering an ongoing injury. Plaintiffs have alleged that the

[6] To the extent that Defendant asserts that Plaintiffs lack associational standing, that claim also fails. Plaintiff Randolph Institute satisfies associational standing requirements for membership organizations. *See Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 731–32 (S.D. Ohio 2019) (Ohio branch of A. Philip Randolph Institute had associational standing to bring gerrymandering claim); *see also Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1269 (2015).

challenged laws have and will force them to divert resources, Dkt. 17 ¶ 25, and that the challenged laws have dissuaded conduct in which Plaintiffs would have otherwise engaged, Dkt. 17 ¶¶ 7–17, 24–26. That on-going impact makes Plaintiffs' claims ripe for review.

Second, Defendant's argument misconstrues the purpose of the Declaratory Judgment Act. As Justice Rehnquist noted, "the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity." *Steffel v. Thompson*, 415 U.S. 452, 480 (1974) (Rehnquist, J., concurring). The law does not "require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). In such cases, plaintiffs can eliminate the threat of prosecution by not doing what they claim the right to do, but that "[does] not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced." *Id.*

The "very purpose" of the Declaratory Judgment Act is to ameliorate "[t]he dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution." *Id.* at 130 (internal quotation marks

omitted). Accordingly, the Court has jurisdiction and should exercise it to issue declaratory judgments regarding the lawfulness of the challenged provisions.

II. Plaintiffs have stated a claim that the Absentee Ballot Organizing Ban is unconstitutional and preempted by federal law.

Plaintiffs' Amended Complaint asserts four claims challenging the legality of the Absentee Ballot Organizing Ban and its two subparts, the registration requirement and the solicitation ban. These allegations "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" as to each of those claims. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

A. Plaintiffs have stated a claim that the Absentee Ballot Organizing Ban is an unconstitutional infringement of First and Fourteenth Amendment speech and association rights.

Defendant argues that (1) the conduct affected by the Organizing Ban is not protected by the First Amendment and (2) the State's interest in protecting the absentee voting process outweighs any burden posed by the challenged law. Defendant is wrong on both counts.

1. The Absentee Ballot Organizing Ban regulates political expression.

The expression regulated by the Absentee Ballot Organizing Ban is protected by the First and Fourteenth Amendments. Defendant takes a myopic view of the Organizing Ban and the First Amendment interests it implicates. Dkt. 27 at 36–37. She focuses on one aspect of the acts regulated by the statute in abstraction—that is,

the delivery of an application to a local clerk—and ignores the ban on requesting to assist voters with returning their absentee ballot application. *See id.*

The Supreme Court and courts across the country have repeatedly held that activities aimed at encouraging and assisting voters to participate in the political process are constitutionally protected speech and association.[7]

In deciding whether election-related laws implicate First Amendment interests, the Supreme Court and courts within the Sixth Circuit have looked to whether the challenged law *inhibits* (and not just directly regulates) one-on-one communications between organizers and voters.[8]

[7] *See, e.g.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999) (collecting signatures for initiative petitions is protected First Amendment conduct); *Meyer*, 486 U.S. at 421 (same); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (voter registration organizing is protected First Amendment conduct); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N. D. Fla. 2012) (same); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006) (same); *Hernandez v. Woodard*, 714 F. Supp. 963, 973 & n.11 (N.D. Ill. 1989) ("The First Amendment rights of free speech, press, assembly and petition incorporate 'a right to band together for the advancement of political beliefs.'" (quoting *Hadnott v. Amos*, 394 U.S. 358, 364 (1969))); *see also Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (Supreme Court precedent has "made clear that the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas" (internal quotation marks omitted)); *NAACP v. Button*, 371 U.S. 415, 437 (1963) ("Free trade in ideas means free trade in the opportunity to persuade to action.").

[8] *See Buckley*, 525 U.S. at 192 ("But the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. We therefore detail why we are satisfied that . . . the restrictions in question significantly inhibit communication with voters about proposed political change . . . ."); *Meyer*, 486 U.S. at 421–22 (striking down

Plaintiffs allege the Organizing Ban inhibits just such interactions. *See* Dkt. 17 ¶¶ 1, 5, 9, 52. The acts it regulates—requesting to assist and assisting voters with absentee ballot applications—involve one-on-one conversations between politically motivated individuals, such as Rise's student organizers or the Randolph Institute's members and volunteers, and voters. Dkt. 17 ¶¶ 52, 59. It is difficult to imagine more fundamental political activity. Requesting to assist and then assisting voters in applying for absentee ballots, like circulating a petition, "necess[arily] involves . . . the expression of a desire for political change." *Meyer*, 486 U.S. at 421. The choice to vote is, after all, a political act in and of itself. *See Buckley*, 525 U.S. at 195–96. And that expression is protected by the First and Fourteenth Amendments. *See Hargett*, 400 F. Supp. 3d at 725 (voter registration activities are protected expression); *see also Meyer*, 486 U.S. at 421–22.

Defendant ignores this body of case law and instead argues that the Organizing Ban regulates only conduct, not speech. *See* Dkt. 27 at 36–37. But fundamental rights cannot be so easily dismissed with the wave of a hand. "[A] State

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law that inhibits "the type of interactive communication concerning political change that is appropriately described as 'core political speech'"); *Hargett*, 400 F. Supp. 3d at 725 (challenged law directly implicates the First Amendment because it "involves the direct regulation of communication and political association, among private parties, advocat[ing] for a particular change." (alteration in original) (internal quotation marks omitted)); *Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.*, 275 F. Supp. 3d 849, 858 (S.D. Ohio 2017) (challenged rule was not protected by the First Amendment because it did not "directly affect or even involve one-on-one communications with voters.").

cannot foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429. Indeed, all of the cases cited above involved speech that could be labeled "conduct": collecting signatures in *Buckley*, 525 U.S. at 186, and *Meyer*, 486 U.S. at 421; voter registration drives in *League of Women Voters*, 400 F. Supp. 3d at 720, *League of Women Voters of Fla.*, 863 F. Supp. 2d at 1158, and *Project Vote*, 455 F. Supp. 2d at 700; "band[ing] together for the advancement of political beliefs" in *Hernandez*, 714 F. Supp. at 972–73 & n.11. First Amendment scrutiny applies here, even when the subject of the regulation, requesting to and assisting voters with absentee ballot applications, is labeled as "conduct."[9]

2. Plaintiffs have stated a claim that the Absentee Ballot Organizing Ban is unconstitutional.

The Absentee Ballot Organizing Ban is subject to exacting or strict scrutiny, and the State's purported interest in enforcing the ban to preserve the absentee voting system is insufficient to justify the law's continuing operation.

a. The Absentee Ballot Organizing Ban should be analyzed under a First Amendment framework.

[9] The out-of-circuit cases Defendant cites about different but related activities such as voter registration and absentee ballot collection, Dkt. 27 at 37, are wrong and have been disagreed with by other district courts within this circuit and elsewhere. *See Hargett*, 400 F. Supp. 3d at 720 (voter registration is protected political conduct); *Project Vote*, 455 F. Supp. 3d at 698 (same); *Browning*, 863 F. Supp. 2d at 1158 (same). The Ninth Circuit also recently declined to reach and affirm the holding in *Feldman v. Ariz. Sec. of State's Office*, 840 F.3d 1057, 1086 (9th Cir. 2016), a case relied on by Defendant, when it struck down a ballot collection law. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1046 (9th Cir. 2020).

Regulations that directly govern election-related political expression are subject to either strict or exacting scrutiny, not to review under the *Anderson-Burdick* framework. *See Hargett*, 400 F. Supp. 3d at 722 (explaining that "the Supreme Court has applied 'exacting scrutiny'—not *Anderson-Burdick*—to cases governing election-related speech rather than 'the mechanics of the electoral process."). The Organizing Ban involves the direct regulation of communication and political association, not electoral mechanics. *See supra* II.A.1. Accordingly, traditional First Amendment scrutiny applies.

b. The Absentee Ballot Organizing Ban is not narrowly tailored to serve a compelling government interest.

To withstand strict scrutiny, the Organizing Ban must be narrowly tailored to serve a compelling government interest. *Citizens United*, 558 U.S. at 340. To withstand exacting scrutiny, the Organizing Ban must have a substantial relationship with a "sufficiently important" governmental interest. *Id.* at 366–67; *John Doe #1 v. Reed*, 561 U.S. 186, 196 (2010) ("[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."). The Organizing Ban does not pass muster under strict or exacting scrutiny because neither bear any relation to a legitimate government interest.

Defendant argues that the Organizing Ban preserves the integrity of absentee voting (and prevents fraud) by increasing the likelihood that a voter will entrust her application with someone who is trustworthy and accountable. *See* Dkt. 27 at 40–

41. This argument requires the Court to resolve a factual dispute—that is, whether a registered voter is more or less trustworthy than an unregistered voter—which is beyond the scope of a 12(b)(6) motion. *Sims v. Mercy Hosp. of Monroe*, 451 F.2d 171, 173 (6th Cir. 1971). And in any event, a voter still decides to entrust a stranger with delivering an application even if the stranger is the one who requests to do so.[10]

The Absentee Ballot Organizing Ban is insufficiently tailored to address the State's interest in preventing voter fraud as it targets the *application process*, not the casting of ballots. Dkt. 17 ¶ 54. And there are robust laws protecting absentee voting.[11] Michigan also "retains an arsenal of safeguards" to prevent voting fraud. *Buckley*, 525 U.S. at 204. There are no fewer than seven Michigan criminal laws that robustly address voting fraud, including laws that specifically target absentee voting fraud. Amended Complaint, Dkt. 17 ¶ 55. This array of criminal statutes dramatically diminishes the need for the Organizing Ban. *See Buckley*, 525 U.S. at 204–05

[10] And Plaintiffs have not challenged the law's requirement that a person returning an absentee ballot application provide his name, address, and date of birth, see Dkt. 17 ¶ 51, which allows the State to contact persons who have submitted absentee ballot applications, see Buckley, 525 U.S. at 196 (rejecting similar argument in favor of registration requirement for initiative petition circulators because the circulators were still ascertainable).

[11] In particular, the process itself requires that a ballot will only be turned over in person directly to the voter or mailed to the address at which the voters is registered. Dkt. 17 ¶ 54. If a voter were to receive an absentee ballot that he, she, or they did not request, the voter could still vote in person at the polls and their absentee ballot would be cancelled. Id. Finally, a list of where and to whom absentee ballots were mailed is made public, so it can be reviewed by voters for accuracy. Id.

(relying on alternatives also in place to prevent fraud including criminal penalties in striking down a restriction on political expression); *Meyer*, 486 U.S. at 427 (same). The Absentee Ballot Organizing Ban can withstand constitutional scrutiny.

(i) The Registration Requirement

The requirement that only voters registered in Michigan can assist voters in submitting absentee ballot applications (other than family or household members) is subject to strict scrutiny because it prohibits only certain persons—individuals who are not registered to vote in Michigan—from engaging in core political expression. Laws that regulate expression differently based on the identity of the speaker are subject to strict scrutiny. *See Citizens United*, 558 U.S. at 340–41. Regardless, because the registration requirement directly regulates core political expression, *see supra* at II.A.1, it is, at a minimum, subject to exacting scrutiny. *See id.* at 366–67; *Hargett*, 400 F. Supp. 3d at 722.[12]

As discussed *supra* at II.A.2.b, the registration requirement is not fairly designed to serve any important government interest. The Supreme Court has already recognized as much in *Buckley*, when it struck down a Colorado law allowing only registered voters to circulate initiative petitions because it was likely to result in "speech diminution." *Id.* at 193–94. There, the record reflected that there

[12] *But see Buckley*, 525 U.S. at 207 (Thomas, J., concurring) (arguing that strict scrutiny applies even to laws that affect but do not directly regulate core political speech).

were 400,000 voting eligible persons who were not registered to vote. *Id.* at 193. The Supreme Court therefore concluded that "[b]eyond question, Colorado's registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions." *Id.* at 183.

The impact is even more dramatic here. There are at least 750,000 persons who are eligible to vote but are not registered to vote residing in Michigan. Dkt. 17 ¶ 70. And there are, of course, millions of U.S. citizens who do not reside in Michigan. Some of them would participate in Plaintiffs' efforts to encourage and assist voters to vote absentee but for the registration requirement. The registration requirement should suffer the same fate as the registration requirement in *Buckley*.

(ii) The Solicitation Ban

The Absentee Ballot Organizing Ban also proscribes non-family or household members from soliciting or requesting to help a voter to return an absentee ballot application. Mich. Comp. Laws § 168.759(4), (5). This ban is subject to strict scrutiny because it operates differently based on the identity of the speaker, *see Citizens United*, 558 U.S. at 340–41, and because it is a content-based restriction on speech, *Berger v. City of Seattle*, 569 F.3d 1029, 1051–52 (9th Cir. 2009) (strict scrutiny applied to law that banned active solicitation of donations as a content-based restriction). *See also Burson v. Freeman*, 504 U.S. 191, 197 (1992) (ban on an entire subject is content-based and subject to strict scrutiny). The solicitation ban is further

subject to strict scrutiny review because it proscribes political expression. *Citizens United*, 558 U.S. at 340, 366–67 (distinguishing between regulations that "impose no ceiling" on expression and "do not prevent anyone from speaking" from a ban on political expression; applying strict scrutiny to latter); *Button*, 371 U.S. at 429, 439. The solicitation ban also directly regulates core political expression, *see supra* at II.A.1, and is, at a minimum, subject to exacting scrutiny. *See Citizens United*, 558 U.S. at 366–67; *Hargett*, 400 F. Supp. 3d at 722.

The solicitation ban cannot survive either strict or exacting scrutiny review for the same reasons that undermine the Absentee Ballot Organizing Ban generally. *See supra* at II.A.2.b. In *Button*, the Supreme Court struck down a Virginia law that criminalized the NAACP's efforts to "solicit" clients, that is, to inform parents and children of their rights to challenge segregation through litigation. 371 U.S. at 421, 434. The Court was in part concerned with the challenged law's vagueness, *see id.* at 431–38, concerns that are also present here, *see infra* at II.B. But the Court also struck down the law because it prevented the NAACP from persuading others to action, thereby burdening the NAACP's efforts to bring litigation, the organization's chosen means for affecting change. *Id.* at 429–31, 437. Similarly, Michigan's solicitation ban burdens Plaintiffs' ability to persuade Michigan voters to vote by a convenient means, thereby burdening their ability to affect change through their chosen method, at the ballot box.

c. Even if *Anderson-Burdick* applies, Plaintiffs have stated a claim.

To the extent this Court concludes that *Anderson-Burdick* provides the appropriate standard, (1) Plaintiffs have plausibly pleaded that the challenged statutes severely burden their rights and that Defendant has an insufficient justification to do so; and (2) Defendant has conceded that the challenged statutes "burden the right to speech and association," Dkt. 27 at 6-7. The Court must evaluate the severity of the burden, which is a necessarily fact-based inquiry not suited for the motion-to-dismiss stage of the proceedings. *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (the extent of the burden is an intensely factual inquiry "requiring a full development of the record"). The Court must then weigh the burden against the necessity of Defendant's stated interest. Because neither of the challenged provisions bears a sufficient relationship to fraud prevention, *see supra* II.A.b, Plaintiffs also prevail under *Anderson-Burdick*.[13]

B. Plaintiffs allege that the Absentee Ballot Organizing Ban is unconstitutionally vague.

It is not clear from the face of the statute whether soliciting includes passive conduct that induces a voter to entrust her absentee ballot application with a third party or offers of assistance that do not explicitly involve a request. Dkt. 17 at 26–

[13] The same is true for Plaintiffs' claim that the Voter Transportation Ban violates Plaintiffs' speech and associational rights (Count VI).

27. Presumably an individual solicits or requests to assist a voter when he says, "May I return your absentee ballot application for you?" But what about if an individual tells a voter "I would be happy to return your absentee ballot application for you" or "I am returning your neighbor's absentee ballot application" or "I am forbidden from 'soliciting' or 'requesting' to return your absentee ballot application, so I can't ask you, but if you ask *me* then I would be happy to assist"? Although none can be banned under the First Amendment, *see supra* at II.A, it is not clear which, if any, the challenged provision permits. So even if the ban covers only a narrow band of conduct—that is, only formal, direct requests to assist—its imprecision chills a broader range of interaction. "There thus inheres in the statute the gravest danger of smothering all discussion" regarding the exercise of voter's right to vote absentee. *Button*, 371 U.S. at 434.

Even if the solicitation ban had some permissible application, the solicitation ban's language—which prohibits "solicit[ing] or request[ing] to return" an absentee ballot application, Mich. Comp. Laws § 168.759(4), (5)—is unconstitutionally vague. Any state criminal law that is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" violates the Due Process Clause of the Fourteenth Amendment. *See United States v. Johnson*, 135 S. Ct. 2551, 2556 (2015) (applying the Due Process Clause of the Fifth Amendment to strike down a federal criminal law). When a

criminal law effects political expression, the "standards of permissible statutory vagueness are strict." *Button*, 371 U.S. at 432; *id.* at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). The solicitation ban does not pass muster under Due Process Clause void-for-vagueness or First Amendment overbreadth and vagueness analysis.

Defendant argues that the conduct covered by "solicit" in the Organizing Ban is easily divined from the word's ordinary meaning. Dkt. 27 at 36. But she fails to divulge the word's ordinary meaning and ignores the fact that other courts have not found it to be so easily defined.[14] The solicitation ban's vagueness is particularly troublesome given the recent expansion of absentee voting rights to all Michigan voters. The 2020 general election will be the first federal general election where absentee voting is open to everyone. Dkt. 17 ¶ 49. Plaintiffs and others have a significant interest in educating voters about their new rights and increasing voter participation. Dkt. 17 ¶ 59. Engaging voters in their constituencies and encouraging those voters to exercise political power through voting is key to Plaintiffs' mission. Dkt. 17 ¶¶ 8, 9, 35. But no organization is likely to ask persons to risk criminal

[14] *See, e.g.*, *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 106 (D.C. Cir. 2005) (interpreting "solicit" to include so-called "winks, nods, and circumlocutions to channel money in favored directions"); *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992) (holding that "solicitation" of a proscribed act included "any speech or conduct that implicitly invites" the proscribed act, "not just explicit verbal requests for" the proscribed act).

sanction to educate voters about how to exercise their right to absentee vote. Dkt. 17 ¶¶ 25, 30. The solicitation ban will chill these important and constitutionally protected conversations. *Button*, 371 U.S. at 432; *cf. Hargett*, 400 F. Supp. 3d at 720. Nor is this a hypothetical concern. Dkt. 17 ¶¶ 17, 27.

C. Plaintiffs have sufficiently pleaded that the Voting Rights Act preempts the Absentee Ballot Organizing Ban

Section 208 of the Voting Rights Act preempts the Absentee Ballot Organizing Ban because it prohibits voters with limited English proficiency or some disability from receiving assistance from persons of their choice. Dkt. 17 ¶¶ 71–77 (Count IV). The Absentee Ballot Organizing Ban (1) completely bars certain individuals from providing voters with assistance and (2) categorically prohibits persons who would otherwise be eligible from providing assistance to a voter if they asked to provide help to do so. Dkt. 17 ¶¶ 75–76.

Conflict preemption occurs in one of two ways: (1) when it is physically impossible to comply with state and federal law or (2) "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 98, 109 (1992) (internal quotation marks omitted). *See infra* at III.C. Both apply here.

Plaintiffs have alleged that it is impossible for the two laws to coexist. Section 208 expressly provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a

person of the voter's choice." 52 U.S.C. § 10508. Full stop; no limits. But the Absentee Ballot Organizing Ban restricts who a voter may choose to assist them in voting.[15]

Plaintiffs have also alleged that the Absentee Ballot Organizing Ban stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Section 208 of the Voting Rights Act. "In recommending that Section 208 be added to the Voting Rights Act, the Senate Judiciary Committee recognized that voters who do not speak English and voters with disabilities 'run the risk that they will be discriminated against at the polls and that their right to vote in State and Federal elections will not be protected.'" Dkt. 17 ¶ 74 (quoting S. Rep. No. 97-417, at 62 (1982)). The Committee concluded that those voters "must be permitted to have the assistance of a person *of their own choice*." *Id.* (emphasis added). By forcing voters covered by Section 208 to choose the person to assist them from a prescribed subset, the statute deprives voters of an opportunity to have the assistance of a person of their choice. This deprivation of choice stands as an obstacle to (1) protecting voters with disabilities and language barriers from discrimination at the polls and (2) ensuring that their right to vote will be protected.

[15] Defendant's motion does not contest that Section 208 applies to the absentee ballot application process, which is a necessary part of absentee voting. *See* Dkt. 17 ¶ 73.

Defendant does not contest any of the factual assertions regarding Section 208 in the Amended Complaint, but baldly asserts that it does not conflict with the Absentee Ballot Organizing Ban. That is demonstrably incorrect. Plaintiffs Section 208 preemption allegations are plainly sufficient.

III. Plaintiffs have stated a claim that the Voter Transportation Ban is unconstitutional and preempted by federal law.

Plaintiffs' Amended Complaint asserts four claims challenging the legality of the Voter Transportation Ban, each of which "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" as to each those claims. *Iqbal*, 556 U.S. at 678. Accordingly, Defendant's motion should be denied.

A. Plaintiffs have alleged that the Voter Transportation Ban is unconstitutionally vague and overbroad.

The Voter Transportation Ban, Mich. Comp. Law. § 168.931(1)(f), makes it a misdemeanor to "hire a motor vehicle" to transport voters to the polls unless those voters are "physically unable to walk." Plaintiffs allege that what the statute allows is unclear, Dkt. 17 ¶ 81, and Defendant's two motions only underscore that point.

Defendant correctly states that the vagueness doctrine exists "to ensure that both those who enforce a statute and those who must comply with it know what is prohibited." Dkt. 27 at 34. Despite having ample opportunity to do so, Defendant has not yet in this litigation defined what it means to "hire a motor vehicle" or cause a motor vehicle to be hired. Instead, Defendant, the State's top law enforcement

official lists activities that she believes the Voter Transportation Ban does not prohibit. Dkt. 27 at 45 (paying for expenses); Dkt. 27 at 49 (paying for gas); Dkt. 27 at 41 (using company or personal vehicles driven by employees or volunteers);; Dkt. 27 at 49 (provide free rides to the polls).

Although Defendant asserts that Plaintiffs' concerns are "not rooted in a reasonable reading of the statute," Dkt. 27 at 47, it is difficult to read the plain language of the Voter Transportation Ban and understand how Defendant's professed interpretation of the statute is any more reasoned than Plaintiffs' concerns. These creative approaches to statutory interpretation do not clarify the ambiguities in the law. Because Defendant provides no citation for these pronouncements or reasoning behind them, it is unclear (1) how she reached these conclusions; (2) if she is correct; (3) how Plaintiffs or anyone who seeks to transport voters to the polls would know what is and is not allowed; and (4) how the county prosecutors tasked with enforcing the Voter Transportation Ban would know what is and is not prohibited. Given that the Attorney General has not even provided a formal opinion regarding her interpretation of the statute,[16] it is entirely unclear how citizens facing

[16] Even if she had, such an opinion would not be binding on the 83 county prosecutors spread throughout Michigan, each of whom has his or her own statutory responsibilities to interpret and to enforce the statute. Some might approach that task with creativity equal to the Attorney General's; others might take a more literal interpretation of the statutory text. Citizens are left to a constitutional coin flip in evaluating their legal risk.

the threat of criminal prosecution are to locate, much less understand, this creative statutory interpretation. Plaintiffs have stated a claim.

B. Plaintiffs have alleged that the Voter Transportation Ban is an unconstitutional infringement of First and Fourteenth Amendment speech and association rights.

Plaintiffs have stated a claim that the Voter Transportation Ban violates their First and Fourteenth Amendment right to engage in political expression. Defendant argues that (1) the conduct affected by the Organizing Ban is not protected by the First Amendment and (2) the State's interest in preventing undue influence on voters outweighs any burden posed by the law. Defendant is wrong on both counts.

1. The Voter Transportation Ban regulates political expression.

The Voter Transportation Ban regulates political expression protected by the First Amendment in two ways. First, the Voter Transportation Ban regulates political expression because it limits political spending; that is, the Transportation Ban imposes an unconstitutional $0 spending limit on transporting voters to the polls. Dkt. 17 ¶ 44. The act of transporting voters to the polls is a recognized element of voter registration and get-out-the-vote drives. *E.g.*, 11 C.F.R. § 114.4(d)(1) ("Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration."). And as now-Justice Kavanaugh noted in *Emily's List v. Fed. Election Comm'n*, people "are entitled to spend and raise unlimited money for those activities." 581 F.3d 1, 16 (D.C. Cir. 2009) (referring to

"advertisements, get-out-the-vote efforts, and voter registration drives"). Because it is an element of get-out-the-vote efforts, the act of spending money to transport voters to the polls is political speech protected by the First Amendment. *See id.*; *see also Valeo*, 424 U.S. at 23 (noting that "expenditure ceilings impose . . . severe restrictions on protected freedoms of political expression and association").

Second, it regulates rides-to-the-polls efforts. Organized rides-to-the-polls efforts are a common organizing activity for political organizations who seek to encourage political activity. Dkt. 17 ¶ 35. The conduct regulated by the Voter Transportation Ban is protected political expression under the same body of case law that applies to the Absentee Ballot Organizing Ban. *See supra* at II.A.

2. The Voter Transportation Ban is not sufficiently related to any government interest.

a. The Voter Transportation Ban is not closely drawn to serve a cognizable anticorruption interest.

A long line of Supreme Court precedent holds that any regulation of political spending must be "closely drawn to serve a cognizable anticorruption interest." *Emily's List*, 581 F.3d at 18 (collecting cases). The Voter Transportation Ban's regulation of political spending must meet this standard.

If the Voter Transportation Ban contains any anticorruption element, it is not apparent on its face or in its reach. The Voter Transportation Ban does not prohibit a person from transporting voters to the polls; it simply prohibits expenditures on

such activities. And under the Defendant's interpretation of the law, a private bus company would be able to freely exercise its First Amendment rights by directing its drivers to use its vehicles to transport thousands of Michigan voters to the polls, but Plaintiffs or any other person or entity would be unable to hire that same private bus company to perform the exact same service. *See* Dkt. 27 at 51.

There is no evidence to suggest that paying drivers, renting cars, or otherwise paying money to convey voters to the polls would contribute to corruption any more or less than using employee or volunteer drivers. *Cf. Meyer*, 486 U.S. at 426 (refusing to accept unsupported allegation that paid petition circulators are any more likely to engage in corrupt behavior than a volunteer who is motivated entirely by an interest in the outcome). Accordingly, Plaintiffs have stated a claim that the Transportation Ban operates as an impermissible limit on political spending.

b. The Voter Transportation Ban does not bear a substantial relationship to a sufficiently important government interest.

Because get-out-the-vote efforts including rides-to-the-polls are protected political expression, the Voter Transportation Ban is subject to, at a minimum, exacting scrutiny. *See Citizens United*, 558 U.S. at 366–67; *Meyer*, 486 U.S. at 420; *Buckley*, 424 U.S. at 25, 44–45; *Hargett*, 400 F. Supp. 3d at 722. Under exacting scrutiny, the Transportation Ban must bear a substantial relationship to a sufficiently important government interest. *See supra* II.A.2.b.

Defendant argues that the Transportation Ban is justified by the State's interest "in protecting voters from undue influence, which helps preserve the integrity of Michigan's elections." Dkt. 27 at 47–48. Specifically, the State argues, the Ban prevents "'quid pro quo' arrangements that may occur when money is exchanged and voters might perceive that they are being offered something of value in exchange for a vote in favor of the candidates or proposals supported by the individual or organization who hired the transportation." *Id.* at 49.

The Voter Transportation Ban is not substantially related to preventing quid pro quo corruption, or to preventing the exercise of "undue influence" on voters. The Transportation Ban is both overinclusive and underinclusive to achieve these goals. On the one hand, the Voter Transportation Ban does not prohibit providing free transportation to voters, which confers a benefit of value on those voters (transportation). And, according to Defendant, the law does not even prohibit paying for aspects of voter transportation. *See supra* at III.A. On the other hand, the law bans any hired transportation to the polls even if the ride is not contingent on (or even offered in relation to) support for a particular candidate or issue.

The State's interest in achieving its stated goals through the Voter Transportation Ban is also lessened by other criminal provisions that explicitly cover the conduct it is seeking to prevent. *See Buckley*, 525 U.S. at 204–05 (relying on alternatives also in place to prevent fraud including criminal penalties in striking

down a restriction on political expression); *Meyer*, 486 U.S. at 427 (same). Specifically, Michigan Law makes it a crime to enter into a quid pro quo arrangement with a voter, Mich. Comp. Laws § 168.932(a), or to promise or receive something of value for deciding for whom to vote, *id.* § 168.931(1)(a), (b).

Plaintiffs have alleged that the Transportation Ban poses a significant burden on rides-to-the-polls efforts. Because options available to organizers of rides to the polls are limited in Michigan by the law, the number of voters with whom these organizers can transport is necessarily diminished; the opportunities for political engagement and interaction is therefore also diminished. Dkt. 17 ¶¶ 24, 38, 92. The Supreme Court has consistently held that diminished opportunities for political expression are unconstitutional. In *Meyer*, the Supreme Court struck down a law that made it a felony to pay circulators of initiative petitions. 486 U.S. at 416. In *Buckley*, the Supreme Court struck down a law that only allowed registered voters to circulate initiative petitions. 525 U.S. at 193. In both cases, the Supreme Court reasoned that the challenged laws would diminish political expression by lessening the pool of people available to assist the proponents of initiatives. *Buckley*, 525 U.S. at 194; *Meyer*, 486 U.S. at 423. The same reasoning applies here. Plaintiffs have stated a claim that the Transportation Ban is an impermissible burden on expressive activity.

C. Plaintiffs have alleged that Federal law preempts the Voter Transportation Ban.

Finally, and in any event, the Voter Transportation Ban's spending limitation of $0 applies to elections involving federal candidates and stands in stark contrast with federal regulations that *expressly permit* corporations to spend money to transport voters to polls. 11 C.F.R. § 114.3(c)(4)(i); 11 C.F.R. § 114.4(d)(1). The Voter Transportation Ban is therefore both expressly and impliedly preempted by the Federal Election Campaign Act ("FECA") and its regulations, as pleaded in the Amended Complaint. *See* Dkt. 17 at ¶¶ 46-47, 94-97

1. FECA's preemption provision and its accompanying regulation expressly preempt the Voter Transportation Ban.

"Express preemption exists where either a federal statute or regulation contains explicit language indicating that a specific type of state law is preempted." *State Farm Bank v. Reardon*, 539 F.3d 336, 341–42 (6th Cir. 2008). FECA, which provides a uniform national regulation of political spending in federal elections, contains an express preemption provision that states, in relevant part, that "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 52 U.S.C. § 30143.[17]

[17] The Federal Elections Commission further defined the scope of that statute in a regulation. 11 C.F.R. § 108.7 (stating, among other things, that federal law supersedes state law concerning the "[l]imitation on contributions and expenditures regarding Federal candidates and political committees")."[B]ecause it was tacitly approved by Congress, [§ 108.7] represents a valid interpretation of congressional

FECA thus expressly supersedes state law regarding limitations on contributions and expenditures in federal elections. 52 U.S.C. § 30143; 11 C.F.R. § 108.7; *see also Weber*, 793 F. Supp. at 1452 (finding that § 108.7 is "probably the most persuasive evidence that [FECA's preemption provision] was intended to preempt all state laws purporting to regulate congressional campaign expenditures"). The Voter Transportation Ban, by its plain language, forms a $0 spending limitation by criminalizing disbursements for providing transportation to the polls for all elections. Because the Voter Transportation Ban attempts to regulate permissible expenditures in federal elections, it is expressly preempted.

2. The Voter Transportation Ban is impliedly preempted.

FECA's regulations that permit corporations to transport voters to the polls impliedly preempt the Transportation Ban through conflict preemption. Courts determine whether conflict preemption exists on a case-by-case basis, looking at the entire federal statutory scheme to determine whether the challenged state law serves as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

intent" regarding FECA's preemptive scope. *Weber v. Heaney*, 793 F. Supp. 1438, 1452 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993).

Here, two federal regulations promulgated pursuant to FECA expressly permit disbursements to provide transportation to the polls for voters. 11 C.F.R. § 114.3(c)(4)(i) (permitting corporations to make disbursements to provide transportation to the polls for certain employees); *id.* § 114.4(d)(1) (permitting corporations to make disbursements to provide transportation to the polls for the general public). Although the text of these regulations permits corporations to "provide" transportation, it does so in the context of making "disbursements," that is, spending money, to provide these services.

These federal regulations further FECA's purpose of "insur[ing] the integrity of the election process by regulating the critical aspects of campaigning and campaign funding, and by opening up the whole area to informed scrutiny by the electorate." *Gifford v. Congress*, 452 F. Supp. 802, 805 (E.D. Cal. 1978). These regulations are a part of the system Congress and the FEC created to establish rules regarding permissible monetary disbursements and the reporting of such disbursements. And "even though federal law merely permit[s] but d[oes] not compel" payment for the transportation of voters, *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 404 (6th Cir. 2001), the Voter Transportation Ban is preempted because it is an obstacle to the accomplishment of federal objectives.[18]

[18] *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000) (state law restricting ability to conduct trade with Burma conflict preempted because

The evenhanded application and equalized availability of these rules to all federal elections across the country not only provide for transparency and integrity, but also promote the appearance of fairness in both intra- and interstate federal elections (that is, federal legislative elections and the presidential election). If Michigan's Voter Transportation Ban is allowed to stand, Plaintiffs and any other person will not be able to pay to provide transportation for voters to the polls on Election Day 2020. But it will be perfectly legal for Plaintiffs and any other person to engage in that act in the neighboring states of Wisconsin, Indiana, and Ohio.

IV. Plaintiffs have stated a claim that the challenged laws unduly burden the fundamental right to vote.

Plaintiffs allege, in Counts III and VII, that the Absentee Ballot Organizing Ban and the Voter Transportation Ban burden the fundamental right to vote. To determine whether a challenged election law places an undue burden on the fundamental right to vote, courts apply the *Anderson-Burdick* test.

The *Anderson-Burdick* test is a flexible standard that weighs "the character and magnitude of the *asserted injury* to the rights protected by the First and

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it posed an obstacle to federal statute imposing sanctions on Burma); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 881 (2000) (state law requiring certain in-car safety restraints conflict preempted because it posed an obstacle to federal objective of giving car manufacturers an option of using a "variety and mix" of restraints); *Felder v. Casey*, 487 U.S. 131, 153 (1988) (state law imposing certain requirements on plaintiffs seeking relief against state officials conflicted with Section 1983's objective and was preempted).

Fourteenth Amendments that the plaintiff seeks to vindicate 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." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphases added) (internal quotation marks omitted). The more severe the burden, the more severe the scrutiny. But even if the law burdens voting rights only minimally, the state's rationale for that burden must withstand some level of scrutiny. *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016).

Plaintiffs have made factual allegations that the Absentee Ballot Organizing Ban and Voter Transportation Ban burden the fundamental right to vote. Dkt. 17 ¶¶ 4-5, 38, 66, 69, 70, 77, 90, 92. Plaintiffs have also alleged that the challenged provisions bear no relation to important or compelling government interests. Dkt. 17 ¶¶ 4, 43, 54, 64, 68, 85, 87–88, 91. On a motion to dismiss, these plausible allegations must be taken as true. The amended complaint "contain[s] sufficient factual matter, accepted as true, to state [claims] to relief that [are] plausible on [their] face." *Iqbal*, 556 U.S. at 678 (2009) (internal quotation marks omitted).

Indeed, Defendant has *conceded* that the challenged provisions burden the right to vote. Dkt. 27 at 7 (asserting that "The [Absentee Ballot Organizing Ban] only minimally burden[s] the right to vote" and "The [Voter Transportation Ban]

only minimally burdens the right to vote"). In light of these concession, the Court must, at a minimum, consider evidence regarding the severity of the burden. *See, e.g.*, *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (the extent of the burden is an intensely factual inquiry "requiring a full development of the record"). The Court must then weigh that evidence against the State's precise asserted interests in the challenged provisions. Because this cannot be accomplished with only the amended complaint and the motion to dismiss, dismissal at this stage is inappropriate.

CONCLUSION

Plaintiffs respectfully submit that the Court should deny Defendant's motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

LOCAL RULE CERTIFICATION

I, Marc Elias, certify that this document and complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that I have sought *ex parte* leave from the court to file a brief in excess of 25 pages. Local Rule 7.1(d)(3).

Respectfully submitted,

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