UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

DANA NESSEL, in her official capacity as the ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Defendant.

No. 19-13341

HON. STEPHANIE DAWKINS DAVIS

MAG. R. STEVEN WHALEN

DEFENDANT'S REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS AMENDED COMPLAINT

RETRIEVED FROM DEMOCRACYDOCKET.COM

Sarah S. Prescott (P70510)
Attorney for Plaintiffs
105 East Main Street
Northville, Michigan 48168
248.679.8711

Kevin J. Hamilton
Attorney for Plaintiffs
1201 Third Ave, Suite 4900
Seattle, Washington 98101
206.359.9741

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Marc E. Elias
Attorney for Plaintiffs
607 Fourteenth St, NW
Washington, DC 20005
202.628.6600

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

TABLE OF CONTENTS

Page

Table of Contents 2

Index of Authorities i

Concise Statement of Issues Presented iii

Argument...1

A. Plaintiffs fail to demonstrate that a "diversion of resources" grants them standing to bring their claims. 1

B. The Absentee Ballot Organizing Plan statutes are constitutional.........5

C. The Voter Transportation Ban statute is constitutional. 7

Conclusion and Relief Requested 13

Certificate of Service 14

RETRIEVED FROM DEMOCRACYDOCKET.COM

INDEX OF AUTHORITIES

Page

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 2, 3

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 2, 3

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 9

Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) 7, 12

Burson v Freeman, 504 U.S. 191 (1992) 12

Chandler v. Muskegon Co., 652 N.W.2d 224 (Mich. 2002)..................................6, 8

Dep't of Envtl. Quality v. Worth Twp., 814 N.W.2d 646 (2012) 9

Eu v. San Francisco County Democratic Cen Committee, 489 U.S. at 228 (1989)..12

Fair Elections Ohio v. Husted, 770 F.3d 456 (6th Cir. 2014) 4

Grayned v. City of Rockford, 408 U.S. 104 (1972) 9

Green Party v. Hargett, 700 F.3d 816 (6th Cir. 2012) 8

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 3

Mason Co. v. Dep't of Community Health, 820 N.W.2d 192 (Mich. Ct. App., 2011) 9

McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003)................................12

MD Marinich, Inc. v. Michigan Nat. Bank, 484 N.W.2d 738 (1992).......................9

Mote v. City of Chelsea, 284 F. Supp. 3d 863 (E.D. Mich 2019).............................4

Zynda v. Arwood, 175 F. Supp. 3d 791 (E.D. Mich. 2016) 4

RETRIEVED FROM DEMOCRACYDOCKET.COM

Statutes

Mich. Comp. Laws § 14.30 11

Mich. Comp. Laws § 14.32 11

Mich. Comp. Laws § 168.759 6

Mich. Comp. Laws § 168.931 .... 7, 10

Mich. Comp. Laws § 8.3a 8

Mich. Comp. Laws § 168.759 6

RETRIEVED FROM DEMOCRACYDOCKET.COM

CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs' complaint should be dismissed because the lack standing to challenge Michigan's Election Laws that have not been applied to them, their members, or people with whom they have any special relationship?

2. Whether Plaintiffs' complaint should be dismissed because it fails to state a claim as to the unconstitutionality of these statutes?

RETRIEVED FROM DEMOCRACYDOCKET.COM

ARGUMENT

Time and space do not permit the Attorney General to respond to all of Plaintiffs' arguments regarding their eight-count complaint. But in reply, the Attorney General makes the following points.

A. Plaintiffs fail to demonstrate that a "diversion of resources" grants them standing to bring their claims.

Plaintiffs argue that merely alleging that they will divert resources is sufficient to establish an injury-in-fact. (R. 40, Resp. Mot. to Dis., PageID #748). But the entirety of Plaintiffs' allegations about the supposed diversion of their resources consist of a single paragraph in which they "are aware" of these Michigan statutes and "are expending and diverting additional funds and resources in GOTV, voter education efforts, mobilization, and turn out activities in Michigan, at the expense of its other efforts in Michigan, and for Priorities and Rise, at the expense of its efforts in other states, " and that they "are required to expend additional resources and employee time to educate their employees, volunteers, and partners about the Voter Transportation Ban and the Absentee Ballot Organizing Ban to avoid exposing them to criminal prosecution." (R. 17, Am. Cmplt., ¶24-25, PageID #98-99).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs' allegations are notably short on details. So minimal, they essentially reduce to a bare assertion that they are diverting resources because they say they are. This kind of general declaration is inconsistent with well-established

constructions of Federal Rule 8. A complaint only survives a motion to dismiss if it contains sufficient factual matter to state a claim to relief that is plausible on its face under *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). While Rule 8 does not require "detailed factual allegations," it does demand more than unadorned conclusions. *Iqbal*, 556 U.S. at 678. The U.S. Supreme Court held that a pleading that offers "labels and conclusions" or a formulaic recitation of the elements of a cause of action will not do, nor will a complaint suffice if it tenders "naked assertions" devoid of "further factual enhancement." *Iqbal*, 556 U.S. at 678.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs have repeatedly failed to make allegations showing—with any real clarity—how these two statutes are allegedly affecting their operations. For example, Priorities USA alleges that they have *already* committed to spend over $100 million on voter engagement in Michigan and other states. (R.17, ¶7, PageID #92). Similarly, Rise, Inc. already operated a volunteer network to engage in voter education. (R.17, ¶9, PageID #93). So, what diversion did these statutes supposedly require of them? Plaintiffs were already engaged in the activity they claim required a diversion of resources.

Alternatively, if their argument is that they were somehow required to expend *more* resources—how? The so-called transportation ban has been law for over a hundred years and has not substantively changed. Why would it suddenly

require the expenditure of additional resources? Similarly, the AV ballot application statutes require no expenditure of funds, and it is not immediately obvious what additional resources would be required in order to comply with it.

Plaintiffs may argue that these answers would come out in discovery, but that does not excuse deficient allegations. Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal* at 678-79. If a naked conclusion that resources might be diverted were held to be sufficient to survive a motion to dismiss, it would validate exactly the kind of formulaic recitations *Iqbal* and *Twombly* caution against. More is required of a plaintiff than the kind of generalized declaration the Plaintiffs make here.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs' resource-diversion arguments overstate and misapply the cases they cite. Plaintiffs cite primarily to *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), but in *Havens,* the Supreme Court's reference to resources was as a consequence of the impairment of the organization's operations:

> If, as broadly alleged, petitioners' steering practices have **perceptibly impaired** HOM's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such **concrete and demonstrable injury** to the organization's activities -- with the consequent drain on the organization's resources -- constitutes far more than simply a setback to the organization's abstract social interests.

Havens, 455 U.S. at 379 (emphasis added). Plaintiffs' blanket allegations here offer no insight to any perceptible or demonstrable impairment of their operations.

Also, as the Sixth Circuit noted in *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 n.1 (6th Cir. 2014), the plaintiff organization in *Haven* sought damages—not an injunction as here—and damages are a classic basis for standing. And, *Havens* also involved an enforceable right to truthful information, and that is not a part of the action here. *Fair Elections Ohio*, 770 F.3d at 460 n.1. So, *Havens* does not support Plaintiffs' standing.

Plaintiffs also cite to *Mote v. City of Chelsea*, 284 F. Supp. 3d 863, 887-888 (E.D. Mich 2019), but in that case, the Court recognized an injury in fact specifically where the organization's executive director testified that resources have been diverted from its "usual mission." Again, Plaintiffs allege they are already engaged in organization volunteers for GOTV and voter outreach. It cannot be a "diversion of resources" for an organization—having already undertaken to train their volunteers to interact with voters—to conform their training to existing law. As the Sixth Circuit held in *Fair Elections Ohio*, "[I]t is not an injury to instruct election volunteers about absentee voting procedures when the volunteers are being trained in voting procedures already." *Fair Elections Ohio*, 770 F3.d at 459-460.

Plaintiffs' citation to *Zynda v. Arwood*, 175 F. Supp. 3d 791 (E.D. Mich. 2016) is also inapt. In *Zynda*, the plaintiff organization (Sugar Law) alleged facts, attached affidavits, and provided receipts demonstrating how the organization's

RETRIEVED FROM DEMOCRACYDOCKET.COM

resources were affected. *Zynda*, 175 F. Supp. 3d at 804-805. Sugar Law showed that the statute itself increased the number and burden of its cases. *Id.* Plaintiffs here make no such allegation or demonstration.

Last, Plaintiffs allege that they have standing because they have shown a credible threat of prosecution. But this "credible threat" is based upon the Attorney General's defense of the constitutionality of the statutes in this lawsuit. (R. 17, PageID #754). This is circular logic—because Plaintiffs filed a lawsuit and the Attorney General moved to dismiss it, then they have standing to file the lawsuit? Under that reasoning, it would also follow that if Plaintiffs had not filed this lawsuit, then they would not have standing to file a lawsuit.

RETRIEVED FROM DEMOCRACYDOCKET.COM

B. The Absentee Ballot Organizing Plan statutes are constitutional.

Plaintiffs first argue that the Absentee Ballot Organizing Plan statutes prohibit or inhibit speech and must be analyzed under an exacting or strict scrutiny standard. (R. 40, Resp. to Mot. to Dismiss, PageID #760-764). Plaintiffs appear to agree that the act of delivering AV ballot applications to a clerk is not protected speech *per se*. (*Id.*, PgID #760-761). Instead they focus on the front-end of the transaction—the interaction their volunteers may have with a voter. Here, it's important to recall how narrow the statutes are—they simply prohibit a person

from returning, offering to return, agreeing to return, or soliciting[1] to return the voter's AV ballot application to the clerk unless or before the voter first requests such assistance. Mich. Comp. Laws §§ 168.759(4)(6). Plaintiffs' volunteers can speak with a voter about anything under the sun including explaining the voter's rights to vote an AV ballot and even reading word-for-word the instructions on the application form, *see* § 759(6), so that a voter is fully apprised of his or her options for returning the application—including the option of having a registered elector return the form. The volunteer must simply wait to be asked by the voter for assistance in returning the application before the volunteer may offer such assistance.[2] To the extent offering to assist a voter in returning his or her application veers more toward protected speech rather than toward less protected conduct, the volunteer's speech is not prohibited—it is simply delayed.

As Plaintiffs note, to survive "exacting scrutiny" under *Buckley v. Am. Constitutional Law Found.*, a law must be "substantially related to important

RETRIEVED FROM DEMOCRACYDOCKET.COM

---

[1] Under state law, when a term or phrase is not defined in a statute, Michigan courts may consult a dictionary to ascertain its commonly accepted meaning. *Chandler v. Muskegon Co.,* 652 N.W.2d 224 (Mich. 2002). As used here, the ordinary meaning of the word "solicit" can be understood to mean "to approach with a request or plea" or "to make petition to: entreat." *See* https://www.merriam-webster.com/dictionary/solicit.

[2] There is no threat of criminal penalty unless the same person both distributes the AV ballot application to the voter and then improperly solicits and returns the voter's application. Mich. Comp. Laws, § 168.759(8).

governmental interests." 525 U.S. 182, 202 (1999) (citation omitted). *See also 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."). As explained in Defendant's principal brief, the State has an important governmental interest in protecting voters and the AV ballot process from undue influence and manipulation. (R. 27, PgID #420-422). This important interest easily outweighs the minimal burden on the professed "speech rights" of Plaintiffs' volunteers to offer to return voters' AV ballot applications. Plaintiffs argue that the statutes are "insufficiently tailored to address the State's interest in preventing voter fraud as it targets the *application process*, not the casting of ballots." (R. 40, PgID #765) (emphasis in original). But this argument is short-sighted. Protecting against fraud in the actual *voting* of AV ballots necessarily requires protections in the process for *requesting* the AV ballot itself. The statutes withstand constitutional scrutiny even under an "exacting" review.

RETRIEVED FROM DEMOCRACYDOCKET.COM

C. The Voter Transportation Ban statute is constitutional.

Plaintiffs argue that § 931(f) is unconstitutionally vague and overbroad. This section provides, in relevant part, that "[a] *person* shall not *hire* a motor vehicle . . . 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(f).

A statute should not be struck as facially vague unless the plaintiff has "demonstrated that the law is impermissibly vague in all of its applications." *Green Party v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012)(citation omitted). Every reasonable construction must be resorted to to save a statute from unconstitutionality. *Id.* (citation omitted).

Plaintiffs mistakenly argue that the Attorney General has not offered any reasonable construction as to what § 931(f) means. (R. 40, PgID # 774-775). But in her principal brief, the Attorney General provided definitions for the key words "person," "hire," and "election." (R. 27, PgID #425). *See also Chandler v. Muskegon Co.,* 652 N.W.2d 224 (Mich. 2002) (When a term or phrase is not defined in a Michigan statute, resort to a dictionary to ascertain its commonly accepted meaning is permitted); *see also* Mich. Comp. Laws § 8.3a. And argued, based on statutory construction principles, that "[u]nder this provision, a person cannot engage the service of a vehicle for a fee to transport a voter to an election[.]" (R. 27, PgID #425). However, the provision does not preclude "a person from paying for expenses incurred in transporting a voter by vehicle so long as it does not amount to hiring for the service." (*Id.*, PgID #425-426). This is because Michigan's campaign finance laws specifically contemplate that an "expenditure" might be made for transporting voters to the polls. *See* Mich. Comp. Laws § 169.206(1)-(2). This construction harmonizes and gives meaning to both

RETRIEVED FROM DEMOCRACYDOCKET.COM

state statutes. And, of course, the statute by its own terms does not prohibit a person from providing a voter with free transportation to an election. The words of the statute are understandable by a person of ordinary intelligence according to the common meaning of the words and are not vague.

With respect to Plaintiffs' claims of facial overbreadth, the plain language of § 931(f) would appear to capture innocuous situations like that of a parent arranging and paying for an Uber to take a daughter at college to the polls, or a daughter arranging and paying for an Uber to take her low-income parent to the polls. But this is not what the Michigan Legislature intended. "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973) (citations omitted). Thus, the Court must consider any limiting construction of the statute that the Attorney General can present. *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972)).

RETRIEVED FROM DEMOCRACYDOCKET.COM

As Defendant stated in her principle brief, § 931(f) is very old and has been modified. (R. 27, PgID # 424-425). Michigan courts consider changes in an act or statute in light of predecessor statutes and historical developments. *See Dep't of Envtl. Quality v. Worth Twp.*, 814 N.W.2d 646, 654 (2012); *Mason Co. v. Dep't of Community Health*, 820 N.W.2d 192, 199-201 (Mich. Ct. App., 2011); *MD Marinich, Inc. v. Michigan Nat. Bank,* 484 N.W.2d 738, 740 (1992). The current

language of § 931(1)(f), which is remarkably similar to its enacted language in 1895, was separated from its surrounding provisions in the early 1900's. But it was the surrounding provisions that gave context and meaning to what is now § 931(1)(f). (R. 27, PgID # 424-425). As is evident from the original enacted "for the purpose of" language, (R. 27, PgID # 424), the purpose of the transport prohibition is to protect voters against undue influence. Or more specifically, it is to prevent "quid pro quo" arrangements that may occur when money or services are 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.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Under this limiting construction, an individual or corporate body that *hires* transportation to convey voters to an election would not run afoul of § 931(1)(f)'s prohibition *unless* the service was provided to voters with the demand or expectation that voters will support candidates or proposals supported by the individual or corporate body that hired the transportation. Thus, parents who hire Uber drivers for their children at college, or churches paying drivers to take people to the polls, would not be subject to punishment if the transportation was provided with no strings attached, i.e., no requirement or expectation that the transported voters will support particular candidates or proposals. And, as noted above, the statute otherwise does not prohibit an individual or corporate body from making

expenditures to transport voters by vehicle; it does not prohibit persons from providing voters with free transportation to an election; and it has no application to voters who are physically unable to walk to an election.[3]

Plaintiffs complain that ordinary citizens and the local prosecutors will have no way of knowing about this interpretation. (R. 40, PageID #775).[4] But presumably if the Attorney General's motion to dismiss is granted as to these claims (unless it is granted on a jurisdictional basis), the Court will enter an opinion and order setting forth the limiting construction as a basis for dismissal. The Court's opinion is a public record, available to anyone. Further, the Attorney General would certainly provide Michigan's local prosecutors with this Court's opinion and order consistent with her duty to supervise their work. *See* Mich. Comp. Laws § 14.30 ("The attorney general shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices[.]").

RETRIEVED FROM DEMOCRACYDOCKET.COM

---

[3] Defendant made these same arguments in her response in opposition to Plaintiffs' motion for preliminary injunction filed February 18, 2020. (*See* R. 30, PageID #478-487).

[4] Plaintiffs chastise Defendant for not rendering an opinion regarding her interpretation of this statute. (R. 40, PageID #775). But no state officer has requested her opinion. *See* Mich. Comp. Laws § 14.32 ("It shall be the duty of the attorney general . . . to give [her] opinion upon all questions of law submitted to [her] by the legislature . . . or by the governor . . . or any other state officer[.]"). And she cannot provide an "opinion" now because the policy of the Department is to deny such requests when there is pending litigation on the same subject matter.

The remainder of Plaintiffs' arguments as to § 931(f) must be viewed through the lens of the limiting construction. To the extent driving voters to elections includes elements of speech, the statute does not unconstitutionally restrict *protected* speech. As explained above, under § 931(1)(f), Plaintiffs can spend any amount of money to transport voters to elections so long as the transportation is not a "quid pro quo" for the voters' support of particular candidates or ballot proposals supported by Plaintiffs. And prohibiting Plaintiffs from spending money to arrange quid pro quos is an important, if not compelling, State interest in protecting against corruption in elections. *See, e.g.*, *Buckley v. Valeo,* 424 U.S. 1, 45 (1976) and *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 204-206 (2003) (recognizing corruption as an important governmental interest supporting restrictions on spending for political speech). *See also Burson v Freeman*, 504 U.S. 191, 199 (1992) (citing *Eu v. San Francisco County Democratic Cen Committee*, 489 U.S. at 228, 229 (1989) (explaining that a State has a compelling interest in protecting voters from undue influence).

RETRIEVED FROM DEMOCRACYDOCKET.COM

And any burden on a voter's right to vote is likewise minimal. Again, any voter who cannot get to an election may utilize the AV ballot process, which minimizes any burden. (R. 27, PageID #428-429). Otherwise, a voter may receive rides from family, friends, or volunteers of organizations, including Plaintiffs, if the transportation is provided for free or, if paid for, without any intent to secure or

unduly influence the voter's vote. Moreover, Plaintiffs can incentivize volunteer drivers by offering to cover their expenses, such as the cost of gas. Ultimately, any secondary burden on voters, who are not the target of § 931(1)(f), is minimal.

And the State's substantial government interest in preserving the integrity of its elections and protecting voters against undue influence support the minimal burden. *See Burson*, 504 U.S. at 199. Plaintiffs fail to demonstrate a likelihood of success on the merits as to their First and Fourteenth Amendment claims.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in Defendant's principal brief (R. 17), the Court should grant Defendant Attorney General's motion to dismiss.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Respectfully submitted,

s/Heather S. Meingast

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
P55439

Dated: March 9, 2020

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 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.

s/Heather S. Meingast
Heather S. Meingast (P55439)
Assistant Attorney General
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
P55439

RETRIEVED FROM DEMOCRACYDOCKET.COM