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,

MICHIGAN SENATE, MICHIGAN HOUSE OF REPRESENTATIVES, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Intervening-Defendants.
_____/

No. 19-13341

HON. STEPHANIE DAWKINS DAVIS

MAG. KIMBERLY G. ALTMAN

DEFENDANT ATTORNEY GENERAL DANA NESSEL'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs are not entitled to summary judgment because Mich. Comp. Laws § 168.759 and Mich. Comp. Laws § 168.931 are constitutional where neither statute violates First or Fourteenth Amendment rights of voters, and are not preempted by federal law?

COUNTER-STATEMENT OF FACTS

For purposes of this response, Defendant Attorney General Dana Nessel relies on the facts stated in the brief supporting her motion for summary judgment. (ECF No. 149, Nessel's MSJ, PageID.2324-3189.) The statement of facts in that brief, and the exhibits cited therein, are incorporated by reference here pursuant to Fed. R. Civ. Proc. 10(c).

ARGUMENT

I. The Voter Transportation law (Mich. Comp. Laws § 168.931) is not unconstitutionally vague.

In its current version, the Voter Transportation law provides:

> 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) (emphasis added). It is important to emphasize that Plaintiffs' challenge is not an as-applied challenge—they have no particular facts showing that the statute has been applied in an unusual or unforeseen manner. Instead, this is a facial challenge, and so Plaintiffs must demonstrate that the law is impermissibly vague in *all* of its applications. *Green Party v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012) (quoting *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates Inc.,*455 U.S. 489, 497 (1982)). Federal courts must construe

challenged state statutes, whenever possible, so as "to avoid constitutional difficulty." *Id.* (quoting *Davet v. City of Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006)). Every reasonable construction must be resorted to in order to save a statute from unconstitutionality. *Id.* (quoting *Chapman v. United States*, 500 U.S. 453, 464 (1991)).

Curiously but conspicuously absent from Plaintiffs' brief is any citation to *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), which succinctly states the test for vagueness: (1) the law must give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly[;]" and (2), the standards of enforcement must be precise enough to avoid "involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result." Instead, Plaintiffs rely on *City of Chicago v Morales*, 527 U.S. 41, 52 (1999). The Court's vagueness analysis in that case, however, focused on the particular law's vagueness as to when and how it applied, rather than on the vagueness of the words it used. *Id.* ("Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is

not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not.") It also bears notice that in *City of Chicago*, the Court was once again addressing vagueness with regard to a "loitering" statute, which are notoriously vulnerable to vagueness challenges. *See id.* at 353.

But there is nothing in *City of Chicago* that would suggest that the Court was abandoning or revising the long-established test for vagueness—to the contrary, it cited and quoted approvingly from *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), which expressly stated the test and cited *Grayned*:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

So, it is clear that the void-for-vagueness doctrine continues to require the same two-part test.

In their motion, Plaintiffs argue that the word "hire" is impermissibly vague. (ECF No. 152, Pl's MSJ, p 14, PageID.3458.) So—applying the two-part test—it must necessarily be Plaintiffs' argument that the word "hire" fails to allow a person of ordinary

intelligence to decide in advance what is prohibited and conduct themselves accordingly. That argument, however, simply cannot be maintained.

As the Attorney General has previously noted, while the act does not define the term "hire," the Michigan Court of Appeals has interpreted the term in another context to mean " 'to engage the services of for wages or other payment,' or 'to engage the temporary use of at a set price.' " *Tech & Crystal, Inc v. Volkswagen of Am, Inc.*, 2008 WL 2357643, at *3 (Mich. Ct. App., June 10, 2008) (quoting *Random House Webster's College Dictionary* (1997)). This construction is consistent with other dictionary definitions, where the word "hire" has also been defined as, "to engage the services of for a fee," or "to engage the temporary use of for a fee." *Hire*, Riverside Webster's II New College Dictionary (1995). That dictionary also included an apt example of the word: "*hire* a car." *Id.* Far from being a vague or incomprehensible term, the word "hire" here is an example of the word's common usage. There is no ambiguity to this term, and a person of ordinary intelligence would reasonably understand what it means to "hire" a motor vehicle or other transportation.

Plaintiffs' argument unsuccessfully seeks to blur a meaning that is actually quite clear. Indeed, this Court previously observed that the law is "relatively straightforward and *unambiguous*." *See Priorities U.S.A. v. Nessel*, 487 F. Supp. 3d 599, 621 (E.D. Mich. 2020) (emphasis added). "In a nutshell, no person (including a corporation) may pay wages or make any other payment to another to transport voters to the polls, unless the person so transported cannot walk. Thus, ... a corporation is limited to providing transportation for voters who can walk through means that do not involve payment to the person doing the transporting." *Id*. Also, when the Sixth Circuit granted the stay, it noted that the law "assuredly" "prohibit[s] hiring carriages to take ambulatory voters to the polls" while "[v]olunteers can drive voters for free[.]" *Priorities U.S.A. v. Nessel*, 978 F.3d 976, 983, 985 (6th Cir. 2020).

Plaintiffs' brief dedicates two pages to supposed inconsistencies among the descriptions given by the Attorney General and "the Secretary of State." Plaintiffs' argument in this respect misses several key details. First, it was not the Secretary of State testifying—it was Director of Elections Jonathan Brater, whose deposition was noticed

pursuant to Fed. R. Civ. P. 30(b)(6). The 30(b)(6) notice, however, failed to identify interpretation of the challenged statutes as a proposed topic of deposition. (Exhibit A, SOS 30(b)(6) Notice.) So, Director Brater was not given the appropriate notice that he should be prepared to discuss *the Secretary's* interpretation, as opposed to his own personal interpretation. Second, the transcript shows that defense counsel objected to these questions on the grounds that they called for legal conclusions, assumed facts not in evidence, and lacked foundation. (*See* ECF No. 152, Pl's MSJ, Ex. 29, Brater Dep., p 44:10-45:06, p 46:19-47:05, p 43:01-44:08, p 43:13-44:08.) Those evidentiary objections remain, and these answers are not admissible evidence supporting Plaintiffs' claims. Lastly, being unsure—especially in a deposition in which an individual is serving as an official representative of a state agency—is not "inconsistent" with the Attorney General's legal position in this case. Being unsure is the opposite of a conclusive position, and such a statement reflects an honest lack of sufficient information upon which to state the Secretary of State's official position.

The Plaintiffs' argument about "arbitrary prosecution" itself runs contrary to their own arguments that no one has ever been prosecuted

for violating the Voter Transportation law. In the absence of any evidence of charges ever having been brought under the law, the risk of arbitrary prosecution is, apparently, zero. And while prosecution of a violation of the Voter Transportation law—like any criminal law—would necessarily depend upon all of the facts attendant to the violation (*see* ECF No. 149, Nessel's MSJ, Ex. B, Clark Tr., p 74 ln 2-5; p 145 ln 7-146 ln 21), the statute here plainly includes standards of enforcement precise enough so that individuals can decide in advance and judges can safely and certainly judge the result—e.g. was a person paid a fee or wages in exchange for transporting to polling places voters who were physically able to walk. *Grayned*, 408 U.S. at 108. Danielle Hagaman-Clark—testifying on behalf of the Attorney General—testified that the Department's approach to election complaints generally is to provide information about the law, allow an opportunity to correct behavior, and only criminally charge if the illegal behavior continues. (ECF No. 149, Nessel's MSJ, Ex. B, Clark Tr. p 74 ln 2-5.) This even further eliminates any risk of "arbitrary" prosecution, and shows that Plaintiffs' vagueness challenge must fail as a matter of law.

II. Neither of the challenged statutes severely burden Plaintiffs' First Amendment rights to speech or association.

In large measure, the arguments raised by Plaintiffs in their motion regarding the constitutionality of the challenged statutes are contradicted and refuted by the arguments presented in the brief supporting Defendant Attorney General Nessel's motion for summary judgment. (ECF No. 149, Nessel's MSJ, PageID.2324-3189.) As stated earlier, those arguments are incorporated by reference here in their entirety, pursuant to Fed. R. Civ. Proc. 10(c). Obviously, if the Attorney General is entitled to judgment as a matter of law—as argued in that motion and brief—then Plaintiffs' motion must necessarily be denied. This response will instead focus on particular defects in the arguments presented in the Plaintiffs' brief.

Most notably, Plaintiffs' argument relies almost exclusively upon their mistaken interpretation of *Americans for Prosperity v Bonta*, 141 S. Ct. 2373 (2021). Plaintiffs argue that *Bonta* requires the application of exacting scrutiny to both statutes because they deal with "political speech," and they deny that *Bonta* applies only to compelled disclosure cases. (ECF No. 152, Pl's MSJ, PageID.3462-3464.) The biggest flaw in

Plaintiffs' argument, however, is their failure to acknowledge what the Court actually said in *Bonta.*

The Court's opinion in *Bonta* makes numerous, repeated references to "compelled disclosure," and it is difficult to read the opinion as anything other than articulating the standard that should be applied *in compelled disclosure cases*. *Bonta,* in fact, was not an election case at all, and dealt explicitly with the regulation of charitable fundraising. *Bonta*, 141 S. Ct. at 2379. In the first paragraph of the opinion, the Supreme Court stated exactly what the case was about: "We must decide whether California's *disclosure requirement* violates the First Amendment right to free association." *Id.* (Emphasis added). The Court went on to recite past cases involving compelled disclosure, including *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). *Id.* at 2382. The Court then noted that *NAACP* v. *Alabama* did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure," and observed that the Court had since developed "a standard referred to as 'exacting scrutiny.'" *Id.* at 2382-83. The Court then examined why exacting

scrutiny—as opposed to strict scrutiny—was appropriate for disclosure requirements:

> It is true that we first enunciated the exacting scrutiny standard in a campaign finance case. And we have since invoked it in other election-related settings. *See, e.g., Citizens United v. Federal Election Comm'n*, 558 U. S. 310, 366-367 [ ] (2010); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 744 [ ] (2008). But exacting scrutiny is not unique to electoral disclosure regimes. To the contrary, *Buckley* derived the test from *NAACP v. Alabama* itself, as well as other nonelection cases. *See* 424 U. S. at 64 [ ] (citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U. S. 539 [ ] (1963); *NAACP v. Button*, 371 U. S. 415 [ ] (1963); *Shelton v. Tucker*, 364 U. S. 479 [ ] (1960); *Bates v. Little Rock*, 361 U. S. 516 [ ] (1960)). As we explained in *NAACP v. Alabama*, "it is immaterial" to the level of scrutiny "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." 357 U. S., at 460-461 [ ]. Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.

Id. at 2383 (emphasis added).[1] The entire paragraph is an explanation of the Court's holding that exacting scrutiny applies to all types of compelled disclosure requirements. It is difficult to imagine what else the Court could have said to make it's holding any clearer.

[1] Although the Court describes them as "election-related" cases, *Citizens United* and *Davis* are also campaign finance cases that involved disclosure requirements.

This case, of course, has nothing to do with compelled disclosure, and so the opinion in *Bonta* has no application here. Nowhere in *Bonta* does the Supreme Court assert a blanket application of the exacting scrutiny standard to election regulations anytime a plaintiff asserts a First Amendment interest in speech or association. The *Anderson-Burdick* test is itself an attempt to balance the competing interests of First Amendment protections and necessary regulation of elections. *See e.g. Daunt v. Benson,* 956 F.3d 396, 406-407 (2020) (describing *Anderson -Burdick* as a "flexible standard" for a court to "evaluate constitutional challenges to a state's election laws," including First Amendment claims); *see also Ohio Council 8 Am. Fedn. of State v Husted*, 814 F.3d 329, 334-335 (2016). *All* election regulations interact with political speech or association in some way. Whether a particular candidate is eligible for the ballot, how candidates go about their campaigns, and the manner of holding elections all restrict—in some degree—how people talk about elections and how they associate with their preferred candidates. Again, *Bonta* was not an election case, and so the Court had no reason to examine—let alone replace—the *Anderson-Burdick* framework.

If the Supreme Court were to hold that exacting scrutiny applied to election laws anytime that speech or association interests were implicated, it would be a pronounced departure and a dramatic sea-change in the field of election regulation that would upend decades of precent. That decision would be noticed, discussed, and featured prominently in virtually all subsequent election law cases. Yet, as recently as November 17, 2021—four months after *Bonta*—the Sixth Circuit continued to apply the *Anderson-Burdick* balancing test to assess election-related freedom of association claims in *Kowall v Benson*, 18 F.4th 542, 546-547 (2021). The Sixth Circuit did not mention *Bonta* in that case. So it appears that the Sixth Circuit does not agree with the Plaintiffs that *Bonta* requires exacting scrutiny to be applied to all First Amendment challenges to election regulations. Plaintiffs' arguments concerning the application of *Bonta* are erroneous and should be rejected by this Court.

A. The Voter Transportation law (Mich Comp. Laws § 168.931) does not severely burden the Plaintiffs' rights to speech or association.

Plaintiffs argue that the statute burdens their political speech, but their argument fails to really examine this claim. What speech, exactly,

is burdened by the law? The Voter Transportation law makes no mention of speech, and its express terms regulate only commercial transactions—i.e., hiring motor vehicles or other conveyances. Any political speech is ancillary and extraneous to the regulated transaction and could be communicated just as effectively without hiring anyone for anything.

Plaintiffs will likely argue that the Voter Transportation law implicates association rather than speech, and thus still implicates the First Amendment. But again, how? Voters may still gather and associate to support their favored candidates or ballot proposals without any restraint by this law. Voters may still be transported to polls by volunteers, family members, friends, coworkers, church congregations, or anyone willing. The only restraint imposed by the statute is the *hiring* of transportation for a fee. Again, the law prohibits a specific commercial transaction in defined circumstances for the purpose of preventing voter coercion or fraud. As the Sixth Circuit previously observed, paying for voters to transport themselves (or their families) to polls was known as "vote-hauling" and had the unfortunate tendency to mask vote-buying. *Priorities U.S.A.,* 978 F.3d at 983. The operative

concern is the hiring for money, and it is a short step from hiring transportation for voters to giving the voters money to hire transport themselves. Vote-hauling is a particular form of corruption that Michigan is not constitutionally obligated to tolerate, even if it is rare. *Id.*

Regardless, this law does not target or prohibit any political message or association. The abundant alternative means for transporting voters shows that any burden on protected speech or association—if it is burdened at all—must be considered minimal.

Plaintiffs next argue that the absence of prosecutions shows that the state's interests are not being served by the law. (ECF No. 152, Pl's MSJ, PageID.3467). But that is not at all clear from the record. The absence of prosecutions may just as well demonstrate that there is not much genuine confusion about the law or how it applies. Again, the Attorney General's approach to election complaints is to provide information about the law, allow an opportunity to correct behavior, and criminally charge if the illegal behavior continues. (ECF No. 149, Nessel's MSJ, Ex. B, Clark Tr. p 74 ln 2-5.) Under this process, only willful violations *after being contacted by law enforcement* would result

in criminal charges. Certainly, being contacted by the state Attorney General's office would do much to correct misconduct and deter an individual from continuing to violate the law. This is, in fact, exactly what happened with a nascent "vote-hauling" situation in the City of Hamtramck during the 2020 election. (ECF No. 149, Nessel's MSJ, Ex. A, AG's Answers to Pl's Int's, p 4-5, #4; Ex. B, Clark Tr. p 72 ln 4-p 74 ln 13, p 75 ln 15-22; Clark Dep. Ex. 7.) The law does not have to result in criminal prosecution in order for it to serve the state's interests.

Lastly, Plaintiffs argue that there are less intrusive alternatives to the Voter Transportation law, but the only suggestion they offer is prosecution of other laws addressing voter fraud more generally. This offers little assurance, however, where the fraud or coercion involved in vote-hauling would be difficult to detect by other means. Prohibiting the transaction accomplishes the state's objective without needing to conduct surveillance to ensure that voters are not being coerced—or their votes purchased—through hiring transportation.

B. The Absentee Ballot law (Mich. Comp. Laws § 168.759) does not severely burden Plaintiffs' rights to speech or association.

As above, Plaintiffs again emphasize the lack of prosecutions. (ECF No. 152, Pl's MSJ, PageID.3470.) However, this argument fares no better with regard to the Absent Ballot law because the Department of Attorney General's practice of emphasizing education and correction before prosecution applies in this circumstance as well. (ECF No. 149, Nessel's MSJ, Ex. B, Clark Tr. p 74 ln 2-5.) So, the absence of prosecutions may just as readily be explained through potential defendants correcting their behavior well before criminal charges are necessary. But if the law were removed, any deterrent effect it provides would be lost.

III. The Absentee Ballot law (Mich. Comp. Laws § 168.759) is not pre-empted by Section 208 of the Voting Rights Act.

Plaintiffs' argument is largely the same as it presented in its motion for preliminary injunction, which this Court denied as to this claim after holding Plaintiffs were unlikely to succeed upon it. The only significant addition to the Plaintiffs' argument is its citation to an opinion from the Western District of Arkansas. (ECF No. 152, Pl's MSJ, PageID.3476) (citing *Arkansas United v. Thurston*, No. 5:20-CV-5193,

2020 WL 6472651, at *4 (W.D. Ark. Nov. 3, 2020).) While Plaintiffs describe this as a "recent" case, it was decided in 2020, roughly two months after this Court's opinion denying the preliminary injunction. And, as a decision of a district court from another state, the case is not binding—indeed, the *Arkansas United* Court noted as much as it stated that it was "unconvinced" by this Court's opinion. *Ark. United*, 2020 U.S. Dist. LEXIS 207145, at *10. Also, the Arkansas statute at issue in that case prohibited any person other than a poll worker from assisting more than six voters in marking and casting a ballot at an election. *Id.* at *4. That statute bears little resemblance to the Absent Ballot law at issue here. Further, the Court in *Arkansas United* was only determining a likelihood of success for purposes of a preliminary injunction motion filed *on election day*, instead of a dispositive motion as presented here. *Id.* at *3-4. So, the Arkansas decision sheds little light on whether the Voting Rights Act pre-empts laws like Michigan's, even if this Court were to consider it.

In all other respects concerning Plaintiffs' preemption claim, the Attorney General relies upon the arguments presented in the brief supporting her motion for summary judgment.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed above and in Defendant Attorney General Dana Nessel's Motion for Summary Judgment, Plaintiffs' claims are without merit, and Defendant Nessel is entitled to judgment as a matter of law. Plaintiffs' motion for summary judgment should be denied and their amended complaint dismissed in its entirety with prejudice.

Respectfully submitted,

s/Erik A. Grill

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Dated: April 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2022, 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/Erik A. Grill

Erik A. Grill (P64713)
Assistant Attorney General