UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

and

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

Intervening Defendants.
_____/

Case No. 19-cv-13341

Honorable Stephanie Dawkins Davis
Magistrate Judge Kimberly G. Altman

THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Michigan Senate and the Michigan House of Representatives ("the Legislature") submit the following brief in opposition to Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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Dated: April 11, 2022

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BRIEF IN SUPPORT OF THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF ISSUES PRESENTED

1. Are Plaintiffs entitled to summary judgment where the record and undisputed facts show:

   a. The pending motions to exclude Plaintiffs' experts must be resolved before this motion can be decided;

   b. Plaintiffs lack Article III standing to pursue their claims;

   c. Plaintiffs' vagueness challenge to the Voter Transportation law (Count V) fails because it presents pure questions of law, and, as this Court has already held, the law is "straightforward and unambiguous";

   d. The Absentee Ballot Law, Mich. Comp. Laws 168.759, and the Voter Transportation Law, Mich. Comp. Laws 168.931(f), survive First Amendment scrutiny as a matter of law (Counts II and VI); and

   e. Plaintiffs are not aggrieved persons under the Voting Rights Act and thus lack standing to bring a private right of action under the Act, and Plaintiffs also admit they have no evidence that any person has ever been denied access to voting by application of the act (Count IV);

   Plaintiffs say **Yes.**
   The Legislature says **No.**
   The Court should say **No.**

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 56

Mich. Comp. Laws § 168.759

Mich. Comp. Laws § 168.931(1)(f)

Craig v. Bridges Bros. Trucking LLC, 823 F.3d 382 (6th Cir. 2016)

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Priorities USA v. Nessel, 462 F. Supp. 3d 792 (E.D. Mich. 2020)

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Virginia v. Hicks, 539 U.S. 113 (2003)

COUNTERSTATEMENT OF MATERIAL FACTS[1]

Plaintiffs' Statement of Material Facts is problematic in several ways. Rather than stick to undisputed, material facts, it includes considerable argument, inaccurate characterizations (including of this Court's prior rulings), and immaterial factual assertions. Indeed, despite, consuming ten full pages, the Statement contains very few actual "facts." Compounding the problem, the Statement does not comply with this Court's guidelines requiring "separately numbered paragraphs briefly describing the material facts underlying the motion" but rather lumps several assertions at a time into extended, unnumbered paragraphs.[2] All this impedes an orderly showing of which facts are disputed. To comply as closely as possible to the Court's guidelines, this Counter-Statement numbers Plaintiffs' paragraphs based on the order in which they appear:

1. Undisputed for purposes of this motion.

2. The Legislature disputes only Plaintiffs' arguments in this paragraph, e.g., that the challenged laws "stymie Plaintiffs' efforts" or "impede[] their mission." *See McLemore v. Gumucio*, No. 3:19-cv-00530, 2021 WL 2400411, at *6 (M.D. Tenn. June 11, 2021) ("[I]f a statement is an assertion of a fact but not a material

[1] The Legislature incorporates by reference the Statement of Material Facts included in its own motion for summary judgment. *See* ECF No. 150, PageID.3199-03.
[2] *See* Practice Guidelines for Judge Stephanie Dawkins Davis (March 27, 2022), https://www.mied.uscourts.gov/index.cfm?pageFunction=chambers&judgeid=30.

fact, or an assertion of something that is not a fact at all (but rather, say, an opinion or a legal principle), the statement is not properly included in a Rule 56.01 statement.").[3]

3. This paragraph is a disputed conclusion, not a factual statement. Further, Plaintiffs have overstated the Court's prior finding. The Court previously determined on the pleadings that Plaintiffs "have sufficiently ***alleged*** that they are refraining from protected First Amendment activity." *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 821 (E.D. Mich. 2020). That is not the same as a finding made after factual development.

4. The Legislature disputes Plaintiffs' conclusion that the Voter Transportation Law, Mich. Comp. Laws § 168.931(1)(f), burdens them. *See McLemore*, 2021 WL 2400411, at *6. The Legislature further denies the immaterial assertion that the Voter Transportation Law prohibits them from "hiring drivers," which is not supported by the text of the statute. *See* Mich. Comp. Laws § 168.931(1)(f). The Legislature further denies that Plaintiffs properly supported their assertions about the cost and availability of public transportation, which amount to undisclosed expert opinion offered by an unqualified lay witness.

5. The Legislature disputes any reliance on Dr. Thomas Sugrue's opinions

[3] Unless otherwise noted, all internal quotations and alterations have been omitted and all emphases added.

for the reasons set forth in its pending Motion to Exclude. *See* ECF No. 148, PageID.2187-2201. In particular, that motion showed that Dr. Sugrue did nothing to confirm the statement attributed to him here. *Id.* at PageID.2200. The Legislature further disputes Plaintiffs' conclusion that the Voter Transportation Law "prevents" Plaintiffs from "leveraging existing resources or partners"—an assertion unsupported by the statute's text. *See* Mich. Comp. Laws § 168.931(1)(f).

6. This paragraph consists of nothing but disputed legal argument and conclusions. *See McLemore*, 2021 WL 2400411, at *6.

7. The Legislature disputes only Plaintiffs' conclusion that the Absentee Ballot Law, Mich. Comp. Laws § 168.759, burdens them. *Id*.

8. Undisputed for purposes of this motion.

9. Plaintiffs have not supported the assertions made in this paragraph. Indeed, the assertion that "widespread voter fraud [and] coercion has never existed in Michigan" is contradicted by their own proffered expert, Dr. Sugrue, who detailed many forms of "electoral corruption" in his report. ECF No. 152-6, PageID.3531-3546. Plaintiffs also assert, without citation, that no one has been charged with violating the Voter Transportation Law, but this apparently is based on Sugrue's deficient research, which is discussed in the Motion to Exclude him. *See* ECF No. 148, PageID.2187-2201. And the uncited assertion about the effectiveness of the challenged laws is merely a disputed conclusion.

10. Undisputed for purposes of this motion.

11. Undisputed for purposes of this motion.

12. The Legislature disputes any reliance on Dr. Sugrue's opinions for the reasons set forth in its pending Motion to Exclude. *See* ECF No. 148, PageID.2187-2201.

13. The Legislature disputes any reliance on Dr. Sugrue's opinions for the reasons set forth in its pending Motion to Exclude. *See* ECF No. 148, PageID.2187-2201.

14. The Legislature denies the contention, implicit in Dr. Michael Herron's report, that rare crimes need not be prohibited. The Legislature further disputes any reliance on Dr. Herron's opinions for the reasons set forth in the Republican Committees' pending Motion to Exclude. *See* ECF No. 155.

15. The Legislature disputes any reliance on Dr. Sugrue's and Dr. Herron's opinions (including rebuttal opinions) for the reasons set forth in the pending Motions to Exclude. *See* ECF Nos. 148, 155.

16. This paragraph consists of nothing but disputed legal argument and conclusions, mostly drawn from (but not citing) the flawed opinions of Dr. Sugrue that the Legislature has moved to exclude. *See* ECF No. 148, PageID.2187-2201.

17. Undisputed for purposes of this motion.

18. Undisputed for purposes of this motion.

19. Undisputed for purposes of this motion.

20. Undisputed for purposes of this motion, except for Plaintiffs' inaccurate characterization of the Intervenors' motions, which is not a factual assertion.

LEGAL STANDARD

Summary-judgment standards "do not change when, as here, both parties seek to resolve the case through the vehicle of cross-motions for summary judgment." *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 387 (6th Cir. 2016). *See also Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991) ("The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other . . . Rather, the court must evaluate each party's motion on its own merits[.]").

A district court may grant summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The party must identify specific facts, as opposed to general allegations, establishing the element. Just as a plaintiff may not rely on conclusory allegations to proceed past the pleading stage, so too a plaintiff may not rely on conclusory evidence to proceed past the summary-judgment stage." *Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020).

ARGUMENT

I. The Motions to Exclude Plaintiffs' Experts Must Be Resolved Before This Motion Can Be Decided.

Plaintiffs' motion relies heavily on the opinions of their experts, Drs. Sugrue and Herron. The Legislature has moved to exclude Dr. Sugrue, and the Republican Committees have moved (with the Legislature's concurrence) to exclude Dr. Herron. *See* ECF Nos. 148, 155. Where the admissibility of those opinions is sharply disputed, the motions to exclude should be decided before the opinions can be considered in connection with this summary-judgment motion. *See Williams v. Tristar Prods., Inc.*, 418 F. Supp. 3d 1212, 1220 (M.D. Ga. 2019).

II. Plaintiffs Have Not Established Article III Standing for Purposes of Summary Judgment.

Plaintiffs bear the burden to establish standing for each of their claims throughout this lawsuit, yet their motion is largely silent on the topic.[4] *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *David v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008); *Carney v. Adams*, 141 S. Ct. 493, 499 (2020). As more fully explained in the Legislature's motion for summary judgment, Plaintiffs' two standing theories—threat of prosecution and diversion of resources—collapsed during discovery. *See* ECF No. 150, PageID.3205-09.

[4] Plaintiffs briefly discuss organizational standing solely as to their Section 208 preemption claim. That specific standing issue is addressed in Section V.

First, Plaintiffs not only admit, but affirmatively argue that no one has been charged or investigated for a violation of the challenged laws. *See* ECF No. 152, PageID.3450. And Plaintiffs have produced no evidence either that they have violated the laws or been threatened with prosecution. To the contrary, they carefully insist that they have refrained from the conduct they claim would be prohibited. On this record, Plaintiffs cannot have a credible fear of prosecution.

Second, Plaintiffs produced no evidence showing diverted resources relating to the 2022 elections and are now back to vague and generic assertions about what they might do in the future. But their own evidence belies their contentions about burdens. For example, Plaintiffs make much of the need to educate their volunteers in light of these laws. But they also admit they "require 16 hours of training for all of our volunteers before they interact with voters to make sure they understand Michigan election law." Hunter Decl. ¶ 18, ECF No. 152-4, PageID.3512. Plaintiffs don't try to show that this training is at all—let alone substantially—more extensive due to these two narrow statutes, which form only a small part of Michigan's election laws. *See id.*; *see also* Lubin Decl. ¶ 19, ECF No. 152-3, PageID.3497-98 (referring generically to "resources and employee time to educate" personnel but failing to show the incremental amount of time attributable to these laws).

Manufactured fear and mere allegations do not suffice at this stage. And a party cannot "spend its way into standing based on speculative fears of future harm."

Shelby Advocates for Valid Elections v. Hargett, 947 F.3d 977, 982 (6th Cir. 2020). Plaintiffs' motion should be denied, first and foremost, because they lack standing.

III. Plaintiffs' Claim that the Voter Transportation Law is Vague and Overbroad Fails as a Matter of Law.

Whether the Voter Transportation Law is unconstitutionally vague is a question of law that has already been fully briefed by the parties and resolved by this Court. *See Priorities USA v Nessel*, 487 F. Supp. 3d 599, 621 (E.D. Mich. 2020) (finding the Voter Transportation Law to be "relatively straightforward and unambiguous"); ECF No. 25, PageID.359 (Plaintiffs acknowledge their vagueness claim against the Voter Transportation Law is a "purely legal question[]"). The Sixth Circuit recognized the Voter Transportation Law "*assuredly*" "prohibit[s] hiring carriages to take ambulatory voters to the polls" while "[v]olunteers can drive voters for free" and handily interpreted the statute. *Priorities USA v. Nessel*, 978 F.3d 976, 983, 985 (6th Cir. 2020). Plaintiffs also already conceded that "[t]here is no ambiguity in the Voter Transportation Law's statutory language." *See* Brief of Plaintiffs-Appellees at *35, *Priorities USA v. Nessel*, 2021 WL 1604068, No. 20-1931 (6th Cir. Apr. 16, 2021). They've likewise disavowed a First Amendment vagueness and overbreadth challenge and asserted their claim is simply "a due process challenge to a criminal statute." *See* ECF No. 121, PageID.1990 (arguing against applying First Amendment precedent to Count V).

But now Plaintiffs are trying to recant. They say the Voter Transportation Law

requires particularly close scrutiny and that people of ordinary intelligence cannot understand either what it means to "hire" a motor vehicle or to be "physically unable to walk." ECF 152, PageID.3457-58. This is unavailing for the reasons detailed in the Legislature's motion for summary judgment. *See* ECF No. 150, PageID.3223-25; ECF No.123, PageID.1998-2000.

In their present motion, Plaintiffs return to hypotheticals and speculation to muddy the waters. But "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). *See also United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963); *United States v. Williams*, 553 U.S. 285, 305-06 (2008).

Atop that, Plaintiffs questioned witnesses about hypothetical situations involving their interpretation of the Voter Transportation Law during depositions. Plaintiffs now maintain that minor discrepancies between the witnesses' responses (and manufactured, untrue distinctions between Defendants' various briefs) mean the statute must be unconstitutionally vague.[5] *See* ECF No.152, PageID.3458-60.

[5] Plaintiffs draw comparisons between this litigation and that in *Ricks v. D.C.*, 414 F.2d 1097 (D.C. Cir. 1968). In *Ricks*, the appellate court found a statute to be unconstitutionally vague where the statute "categorize[d] eight classes of persons who shall be deemed vagrants in the District of Columbia" and "witnesses at appellant's trial . . . voiced widely differing interpretations of 'loitering[.]'" *Ricks*, 414 F.2d at 1098, 1103. Here, however, the Voter Transportation Law doesn't have any—let alone eight—subcategories to confuse the "ordinary citizen."

None of this suffices. Statutes do not fall to facial challenges simply because a clever challenger can parse the words inventively enough to create some hypothetical violation. *See Colten v. Kentucky*, 407 U.S. 104, 110 (1972); *Hill*, 530 U.S. at 732.

Citing *Chicago v. Morales*, 527 U.S. 41 (1999), Plaintiffs insist that "no ordinary citizen would understand what conduct" the Voter Transportation Law prohibits. ECF 152, PageID.3457. This is an astonishingly dim commentary on the people Plaintiffs claim to want to politically empower. In any event, the ordinance in *Morales* prohibited "criminal gang members from loitering in public places" if a police officer ordered them to disperse. 527 U.S. at 41. Average people might not know if they are "loitering"; but they certainly do know if they are hiring a vehicle and able (or not) to walk. And, again, this isn't a case brought by "ordinary citizens" who claim not to understand the statute; it is a challenge brought by sophisticated political organizations injecting themselves into other people's voting process.

Doe v. Cooper, 842 F.3d 833 (4th Cir. 2016), and *Lytle v. Doyle*, 326 F.3d 463, 469 (4th Cir. 2003), don't help Plaintiffs either and actually cut against their arguments. As they describe it, *Cooper* found the term "regularly scheduled" was unconstitutionally vague "because the statute did not explain what 'regular' meant in context," and *Lytle*'s problem was not with "normal meaning" but rather specific conduct. *See* ECF 152, PageID.3458. But Plaintiffs identify no special contextual meaning to "hire" or "physically unable to walk," and the "normal meaning" of these

words is readily apparent—as this Court and the Sixth Circuit already have said.

At bottom, this is a question of law the Court has already put to rest. Plaintiffs are not entitled to revisit this issue at the eleventh hour. The Court should deny Plaintiffs summary judgment on Count V.

IV. The Absentee Ballot Law and Voter Transportation Law Survive First Amendment Scrutiny as a Matter of Law.

As the Legislature stated in its motion for summary judgment, and fully briefed in connection with its motion for judgment on the pleadings, the Legislature respectfully maintains the *Anderson-Burdick* standard applies here.[6] *See* ECF No. 150, PageID.3210; ECF No. 113, PageID.1902-06; ECF No. 123, PageID.2000-03; *see also Priorities USA v. Nessel*, 860 F. App'x 419, 422 n.3 (6th Cir. 2021) (employing the *Anderson-Burdick* framework). Notably, Plaintiffs make only a fleeting and undeveloped argument that the challenged laws fail under that standard. *See* ECF No. 152, PageID.3474. Thus, if the Court applies *Anderson-Burdick*, the motion is completely unsupported.

Even under exacting scrutiny, the motion still should be denied. Plaintiffs strain to construe these statutes as sweeping far more broadly than they actually do. *See, e.g.*, ECF 152, PageID.3462 (asserting hindrances to their "ability to encourage

[6] The Legislature has also explained why the Voter Transportation Law and Absentee Ballot Law regulate non-expressive conduct and do not genuinely implicate First Amendment concerns. *See* ECF No. 68, PageID.1167-76, 1185-86.

and facilitate voters in exercising their fundamental rights and building political power," infringing on their "efforts to persuade Michigan voters to vote," and "burdening their ability to affect change through political mobilization"). But nothing about either law precludes Plaintiffs from encouraging people to vote, or even telling them all about the many different ways to request and return an absentee ballot application. *See Priorities USA*, 487 F. Supp. 3d at 614-15 (cataloging just a handful of the ways Plaintiffs can promote civic engagement regardless of the challenged laws). The laws *only* stop Plaintiffs from offering to return the applications or hiring transportation to the polls.

Plaintiffs' maneuvering is rather transparently intended to evade the burdens they face in establishing their facial claims. It is their obligation to prove that the statutes prohibit "a substantial amount of protected speech in relation to [their] many legitimate applications."[7] *See Virginia v. Hicks*, 539 U.S. 113, 123-24 (2003). But under *Bonta*—Plaintiffs' preferred case—that burden kicks in only "where the challenged regime is narrowly tailored to an important government interest." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021). Thus, if Plaintiffs can exaggerate the sweep of the statutes, they can end-run the need to support their alleged burdens.

[7] The Legislature disputes Plaintiffs' interpretation of the exacting scrutiny standard under *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021). *See* ECF No. 150, PageID.3212-16; ECF No. 123, PageID.2002-03.

A look at *Bonta* itself shows why that effort fails. There, the Court found a "dramatic mismatch" between the putative purpose of the law and its sweep, which required approximately 60,000 charities to affirmatively disclose extensive and sensitive information every single year. *Id.* at 2386. No one needed to artificially manipulate the scope of the law to showcase its breadth. And the parties who were challenging the law were directly subject to that compelled disclosure. *Id.* at 2379. Here, in contrast, the statutes impose no affirmative obligation at all but instead prohibit certain limited activities—e.g., returning applications and hiring transport. Further, the challenge is brought by organizations who are actively trying to inject themselves into the voting process. These distinctions are stark, and the laws here cannot be said to "broadly stifle" protected activity. *See id.* at 2384-85.

In any event, this Court has already held that "whether the court applies exacting scrutiny or a rational basis standard of review, . . . the Absentee Ballot Law" survives. *Priorities USA*, 487 F. Supp. 3d at 612; *see also id.* at 615 (finding the State interests "sufficiently important" and "substantially related" to the restrictions). The same is true of the Voter Transportation Law. Indeed, Jonathan Brater and Danielle Hagaman-Clark both confirmed these statutes serve compelling State interests. *See* Exhibit A, Deposition of Danielle Hagaman-Clark ("Hagaman-Clark Dep.") at 85:7-10 (Absentee Ballot Law), 70:17-20 (Voter Transportation Law); Exhibit B, Deposition of Jonathan Brater ("Brater Dep.") at 99:3-6 (Absentee

Ballot Law), 99:7-9 (Voter Transportation Law).

To dispute what the State's witnesses testified to, and this Court already recognized, Plaintiffs rely on their challenged experts and on manufactured inconsistencies in the Defendants' positions. None of this holds up. As noted, Plaintiffs' experts are subject to pending Rule 702 motions and their testimony should not be allowed. In particular, Dr. Sugrue's speculation about the subjective intent of lawmakers more than 125 years ago is irrelevant. *See* ECF No. 148, PageID.2197-98. And while Plaintiffs call it "nonsensical" to draw a distinction based on hiring transportation rather than providing it for free, myriad election laws limit the influence of money in politics because the Legislature recognizes that, sometimes, additional money in elections may bring additional corruption, too.

Meanwhile, while Plaintiffs insist that the lack of prosecutions is evidence of a deficient state interest, it is equally consistent with the goal of deterrence and the fact that detecting violations—which everyone agrees happens rarely—is itself difficult. That does not make it pointless to prohibit them. This argument is particularly vulnerable with respect to the Absentee Ballot Law, given that it was only recently that no-excuse absentee voting was authorized in Michigan.

Notably, Plaintiffs insist that "less intrusive means" would adequately advance the State interests. But they do not identify any such means; their entire argument is simply to say that other Michigan laws adequately deter fraud. *See* ECF

152, PageID.3468-69, 3473-74. They support this assertion with no comparative analysis, however, relying on pure speculation. This does not suffice.

Having spent all their energy trying to attack the sufficiency of State interests and the fit between these statutes and those interests, Plaintiffs breeze past the issue of how they are actually burdened by the statutes. The evidence they supply with their motion is telling in this regard. For example, Rise ultimately reveals that the real problem it has with the Voter Transportation Law is that its "current policy is to pay *all* of its volunteers" and that it "has no intention of deviating from their policy." Lubin Decl. ¶ 23, ECF 152-3, PageID.3499. An organizational policy of wanting to pay people instead of recruiting actual volunteers is hardly a burden of constitutional magnitude. Similarly, DAPRI's extended speculation about the costs and challenges of getting to the polls, Hunter Decl. ¶¶ 6-8, ECF 152-4, PageID.3507-08, is difficult to interpret as addressing a genuine burden given that Michigan now allows no-excuse absentee voting that eliminates any need for a voter to leave her home.

At bottom, the Absentee Ballot Law and the Voter Transportation Law survive under exacting scrutiny (as well as the *Anderson-Burdick* standard). The Court should deny Plaintiffs' motion for summary judgment as to Count II and Count VI.

V. The Absentee Ballot Law is Not Preempted by the Voting Rights Act.

Plaintiffs finally argue the Absentee Ballot Law "conflicts with and violates

Section 208 of the Voting Rights Act . . . and is thus preempted and invalid." ECF No. 152, PageID.3475. This is a naked request for reconsideration seeking the Court to revisit a prior holding. *See Priorities USA*, 487 F. Supp. 3d at 619 (finding that "some state law limitations on the identity of persons who may assist voters is permissible"). *See also Bar's Prod., Inc. v. Bar's Prod. Int'l, Ltd.*, No. 10-cv-14321, 2014 WL 12703149, at *2 (E.D. Mich. Mar. 26, 2014) (denying motion for leave to file motion for partial summary judgment because the plaintiff was "essentially seeking untimely motions for reconsideration" of the court's denial its previous motion for leave); *accord Wiedbusch v. Oakland Cnty.*, No. 03-cv-74033, 2006 WL 286865, at *4 (E.D. Mich. Feb. 6, 2006).

In support of that bid, Plaintiffs rely on an out-of-district case that disagreed with this Court's analysis of the impact of the VRA's use of the indefinite article "a" as opposed to the definite article "the." *See* ECF 152, PageID.3476 (citing *Ark. United v. Thurston*, No. 5:20-cv-5193, 2020 WL 6472651, at *4 (W.D. Ark. Nov. 3, 2020). At the outset, district court rulings are not binding precedent. *See Klemencic v. Ohio State Univ.*, 111 F.3d 131 (6th Cir. 1997) (explaining that binding precedent comes "from the Supreme Court, the Sixth Circuit or [the district court] itself"); *accord Gillispie v. Timmerman-Cooper*, No. 3:09-cv-471, 2012 WL 6644624, at *4 (S.D. Ohio Dec. 20, 2012). This is particularly true where the cited authority referred to and disagreed with this Court's prior ruling. *See Ark. United*, 2020 WL 6472651,

at *3.

Beyond that, there are several other reasons for this Court to refrain from revisiting its prior interpretation based on this new case. The above-cited opinion was from a motion for a temporary restraining order; and the later opinion cited from the same case was from a motion to dismiss. *See Ark. United v. Thurston*, 517 F. Supp. 3d 777, 793 (W.D. Ark. 2021). Importantly, the latter allowed the claim to proceed based on allegations made in support of a diversion-of-resources theory of standing. *Id.* at 792. But this case is now at the summary-judgment stage and, although Plaintiffs here made the same argument to try to establish standing, they have been unable to support it. *See* Section II, *supra*.

Plaintiffs' other authority does not bolster this claim, either. *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), included a plaintiff who could not complete her ballot due to the challenged state law limiting those eligible to assist as an interpreter. *Id*. at 615. *Democracy Now N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020), found that only one individual plaintiff—not the organizations—pled an injury under the VRA. *Id.* at 188-89. *United States v. Berks Cnty.*, 277 F. Supp. 2d 570 (E.D. Pa. 2003), was brought by the government, not a purportedly "aggrieved" voter under the VRA. *Id.*

By contrast, Plaintiffs still have not identified *even one* individual burdened by the Absentee Ballot Law, much less shown that they are "aggrieved persons."

Plaintiffs' reliance on *Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016), is therefore unavailing. That organizations in the past have been permitted to bring VRA claims "based on their own injuries," *see* ECF 152, PageID.3477, is meaningless because Plaintiffs here have not shown injuries of their own. For this reason, as fully argued in the Legislature's motion for summary judgment, Plaintiffs' Section 208 claim fails because they are not "aggrieved persons" who can avail themselves of a private right of action; and they have brought forth no evidence that the Absentee Ballot Law substantially burdens the rights of Michigan voters. *See* ECF No. 150, PageID.3216-20.

CONCLUSION

For all these reasons, the Court should deny Plaintiffs' motion for summary judgment.

Respectfully submitted,

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