UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

DANA NESSEL,

Defendant,

and

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

Intervenors–Defendants.

Civil No. 19-13341

DAWKINS DAVIS, J.
ALTMAN, M.J.

BRIEF FOR THE REPUBLICAN COMMITTEES OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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COUNTERSTATEMENT OF MATERIAL FACTS

The Republican Committees incorporate the material facts set forth in their Motion for Summary Judgment. ECF No. 154, PageID.4004–4007.[1] They accept or dispute as follows Plaintiffs' unnumbered paragraphs for purposes of this motion only:

1. Accepted.

2. This paragraph consists of improper legal conclusions. See *McLemore* v. *Gumucio*, No. 3:19-cv-00530, 2021 WL 2400411, at *6 (M.D. Tenn. Jun. 11, 2021) (it is improper to include immaterial facts and nonfactual assertions—e.g., an opinion or a legal principle—in a statement of material facts in support of a Rule 56 motion).

3. This paragraph consists of improper legal conclusions. *Ibid.* Plaintiffs also overstate the Court's prior ruling, which is that they had sufficiently *alleged* that they were refraining from First Amendment activity, *Priorities USA* v. *Nessel*, 462 F. Supp. 3d 792, 821 (E.D. Mich. 2020).

4. Disputed. The paid driver ban has not burdened Plaintiffs' ability to provide transportation to the polls. Hunter Decl. ¶5, ECF No. 152-4, PageID.3506–3507 (DAPRI provides free voter transportation staffed by volunteers); Lubin Decl. ¶23, ECF No. 152-3, PageID.3499 (Rise does not contend that it cannot secure volunteers to drive students to the polls, only that it chooses not to because it has a policy of paying

[1] Plaintiffs' fact section, which is not the first section of their brief and consists of unnumbered paragraphs that characterizes legal conclusions, does not comply with the Court's guidelines. Practice Guidelines, Mot. Practice, F (Dawkins Davis, J.). In a good faith effort to comply with the Guidelines, the Republican Committees have assigned numbers to Plaintiffs' paragraphs. *Ibid.*

"volunteers"); Cecil Decl. ¶11, ECF No. 152-5, PageID.3517–3518 (Priorities USA does not contend that it cannot secure volunteers; only that it would fund paid drivers if the law was invalidated). Plaintiffs have also failed to properly support their assertions about the cost and availability of transportation; the cited declarations amount to undisclosed expert opinion by unqualified lay witnesses. Nor are the voter transportation services Plaintiffs describe "crucial" or "critical"; Plaintiffs have not identified a single ambulatory voter who was unable to secure transportation to the polls or vote because of the paid driver ban. ECF No. 154-3, PageID.4048–4049.

5. Disputed. Plaintiffs mischaracterize the paid driver ban. Michigan prohibits only the paid transportation of ambulatory voters by third parties. *Priorities USA*, 462 F. Supp. at 801. Under the statute, an unlimited number of volunteers may transport an unlimited number of voters to the polls. In addition, Rise does not explain why the paid driver ban prevents "party at the polls" events.

6. Disputed. The terms "hire" and "physically unable to walk" are not vague or ambiguous. Hiring means "to engage the services of [another] for wages or other payment,' or 'to engage the temporary use of at a set price." *Priorities USA*, 487 F. Supp. 3d 599, 621 (E.D. Mich. 2020). "Physically unable to walk" means refers to one who lack the bodily capacity to travel on foot. *See infra* at 6 and n.3. Moreover, Plaintiffs previously admitted that "[t]here is no ambiguity in the Voter Transportation Law's statutory language." Appeal Brief for Plaintiffs, *Priorities USA* v. *Nessel*, No. 20-1931 (6th Cir. Apr. 16, 2021), Doc. 44, p. 47.

7. Accepted that DAPRI educates Michigan citizens about registering to vote and available methods of voting, including absentee voting. The remaining legal con-

clusions are disputed as inconsistent with the Court's earlier ruling. *Priorities USA*, 487 F. Supp. 3d at 614–15 ("plaintiffs can still educate the public about registering to vote absentee and answer questions about this process[.]"). Plaintiffs have not identified a single voter who "was unable to deliver [a] completed AV ballot application ["ABA"]. . . using any of the methods" in § 759(6). ECF No. 154-3, PageID. 4047–4048.

8. Accepted.

9. Disputed. Multiple instances of fraud, corruption, or undue influence related to the absentee voting process in Michigan have been identified. ECF No. 154, PageID.4005–4006, 4027, 4031–4032; ECF No. 154-10, PageID. 4145–4147. The Court found "that the state and intervenors have presented adequate evidence to demonstrate that the state's interests in preventing fraud and abuse in the absentee ballot application process and maintaining public confidence in the absentee voting process are sufficiently important interests and are substantially related to the limitations and burdens set forth in § 759." *Priorities USA*, 487 F. Supp. 3d at 614.

10. Accepted, except for the last sentence. ECF No. 154-5, PageID.4079–4091; Ex. A, Repub. Comms.' Ans. to Pls.' RFPs. Brater testified to allegations that candidates or campaigns were illegally soliciting to return ABAs and trying to influence voters with limited English proficiency in the November 2019 municipal election in Hamtramck. Brater Depo. 69:18–25, 70:25–72:3, ECF No. 154-11, PageID. 4220–4223. Even though these instances were not charged, they are nevertheless voter fraud.

11. Accepted, except for the last sentence for the reasons stated in ¶ 10, *supra*.

12. Disputed. The Republican Committees dispute Dr. Sugrue's opinions for the reasons stated in the Legislature's motion to exclude his opinions, ECF No. 148,

PageID. 2173–2202. The Sixth Circuit also found that the paid driver ban "is assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling[,' which] can be a classic form of bribery," *Priorities USA*, 978 F.3d 978, 983 (6th Cir. 2020), and one provision among several others … intended to prevent fraud and undue influence." *Id.*, at 984.

13. Disputed for the reasons stated in ¶ 12, *supra*.

14. Disputed for reasons stated in the Republican Committees' motion to exclude Dr. Herron's opinions. ECF No. 155, PageID.5176–5200.

15. Disputed as to (*a*) Plaintiffs' characterizations of Director Strach's opinions, their legal challenges to her opinions and testimony, and (*b*) Dr. Herron's opinions, which the Republican Committees have moved to exclude. *Ibid.*

16. Disputed as improper legal conclusions. *McLemore*, *supra*. The paid driver ban "is assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling[,' which] can be a classic form of bribery." *Priorities USA*, 978 F.3d at 983. "[I]t utilizes well-recognized means in doing so." *Priorities USA*, 487 F. Supp. 3d at 614. "[N]one of [Michigan's laws criminalizing interference with the absentee voting process] are primarily designed to reduce fraud or abuse in the application process on the front end, as opposed to simply punishing it after it occurs." *Ibid.*

17. Accepted.

18. This paragraph consists of improper legal conclusions. *McLemore*, *supra*.

19. This paragraph consists of improper legal conclusions. *Ibid.*

20. Admitted, except for Plaintiffs' gratuitous (mis)characterization of the Republican Committees' Rule 12(c) motion.

ARGUMENT

Plaintiffs challenge provisions in two longstanding election laws in Michigan: (1) Mich. Comp. Laws § 168.759(4)–(7) (the "**harvesting ban**"), which prohibits a person from offering to return an absentee ballot application ("**ABA**") and from actually returning an application to the local clerk unless he or she meets certain criteria; and (2) Mich. Comp. Laws § 168.931(1)(f) (the "**paid driver ban**"), which prohibits payment for transporting third-party ambulatory Michigan voters to the polls.

I. The paid driver ban is not void for vagueness.[2]

Plaintiffs vagueness challenge cannot succeed unless they show that the paid driver ban (1) "fail[s] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorize[s] or even encourage[s] arbitrary and discriminatory enforcement." *Platt* v. *Bd. of Com'rs on Grievances & Discipline of Ohio Sup. Ct.*, 894 F. 3d 235, 246 (6th Cir. 2018) (cleaned up). "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Kolender* v. *Lawson*, 461 U. S. 352, 355 (1983). A statute will be struck down as facially vague only if Plaintiffs "demonstrat[e] that the law is impermissibly vague in all of its applications." *Green Party of Tenn.* v. *Hargett*, 700 F. 3d 816, 825 (6th Cir. 2012). "Sustaining a facial attack to the constitutionality of a state law . . . is momentous and consequential. It is an exceptional remedy." *Speet* v. *Schuette*, 726 F. 3d 867, 872 (6th Cir. 2013) (cleaned up).

[2] Plaintiffs do not argue that the paid driver ban is unconstitutionally overbroad. The Court should deem their overbreadth challenge forfeit. See *United States* v. *Lopez-Medina*, 461 F.3d 724, 743 n.4 (6th Cir. 2006).

The Court has already ruled that the paid driver ban is "relatively straightforward and unambiguous." *Priorities USA*, 487 F. Supp. 3d, at 621. "In a nutshell, no [one] may pay … another to transport voters to the polls, unless the person so transported cannot walk." *Ibid.* Plaintiffs admitted on appeal that "[t]here is no ambiguity in the … statutory language," Appeal Brief for Plaintiffs, *supra* at p. 47, and have conceded that vagueness is a pure question of law, ECF No. 25, PageID.359. Plaintiffs' own expert, Thomas Sugrue, even recognized that the average citizen can understand the concept of paying to transport voters to the polls. Sugrue Depo. 106:7–13, ECF No. 148-3, PageID.2314.

Despite previously admitting that the law was unambiguous, Plaintiffs now try to manufacture ambiguities by noting that the law does not define "hire" or "physically unable to walk." ECF No. 152, PageID.3457. But the Court has already found that hiring someone means "'to engage the services of [another] for wages or other payment,' or 'to engage the temporary use of at a set price.'" *Priorities USA*, 487 F. Supp. 3d at 621. And it held that the paid driver ban prohibits "pay[ing] wages or mak[ing] any other payment to another to transport voters to the polls, unless the person so transported cannot walk." *Ibid.* And the meaning of "physically unable to walk" is readily understood by a person of normal intelligence as lacking the bodily capacity to travel on foot.[3]

The parties and witnesses' conflicting testimony as to the exact parameters of the paid driver ban cannot render the law facially void for vagueness. ECF No. 152,

[3] "Physically, adv." Ex. B, Webster's New Int'l Dictionary of the English Language (1923) (based on the International Dictionary of 1890 and 1900) ("**Webster's**") ("bodily; corporeally"); "unable, adj." Webster's ("not able; incapable"); "walk, n." Webster's ("act of walking, or moving on the feet at a slow pace or without running").

PageID.3458–3460; see *Roberts* v. *Unimin Corp.*, 883 F. 3d 1015, 1018 (8th Cir. 2018) ("[T]he proper scope of the term is subject to conflicting interpretations, which is true in every instance where parties do not see eye to eye: It does not necessarily mean the term is vague or ambiguous."); *United States* v. *Triumph Cap. Grp., Inc.*, 260 F. Supp. 2d 470, 475 (D. Conn. 2003) ("A statute is not ambiguous merely because the parties interpret it differently."). And further a rule is not facially vague because Plaintiffs present tough hypotheticals as to the law's application. See *Grayned* v. *Rockford*, 408 U. S. 104, 112 n.15 (1972) ("It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question." "[E]ven a well-drafted statute may be 'susceptible to clever hypotheticals testing its reach.'" *League of Women Voters* v. *Hargett*, 400 F. Supp. 3d 706, 727 (M.D. Tenn. 2019) (quoting *Platt*, 894 F.3d at 251). The Court should once again find that the paid driver ban is "relatively straightforward and unambiguous," *Priorities USA*, 487 F. Supp. 3d at 621, and dismiss Plaintiffs' vagueness challenge.

II. The harvesting ban is not preempted by the Voting Rights Act.

The Court has already ruled that Plaintiffs are unlikely to prove that § 208 of the VRA preempts the harvesting ban. *Priorities USA*, 487 F. Supp. 3d, at 620. "Whether a federal law preempts state law is a legal question[.]" *Torres* v. *Precision Indus., Inc.*, 995 F. 3d 485, 491 (6th Cir. 2021). Plaintiffs concede this point. ECF No. 25, PageID.359.

Plaintiffs specifically argue that Michigan's harvesting ban conflicts with and violates § 208. ECF No. 152, PageID.3475. Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, or where state

law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wimbush* v. *Wyeth*, 619 F. 3d 632, 643 (6th Cir. 2010) (citation omitted). When analyzing conflict preemption, the court "should be narrow and precise, to prevent the diminution of the role Congress reserved to the States while … preserving the federal role." *Downhour* v. *Somani*, 85 F. 3d 261, 266 (6th Cir. 1996) (cleaned up); see also *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 449 (2005) (recognizing preemption is disfavored in areas traditionally regulated by the state).

Section 208 provides in full: "Any 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, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U. S. C. § 10508. The Court previously ruled that "its language suggests that some state law limitations on the identity of persons who may assist voters is permissible." *Priorities USA*, 487 F. Supp. 3d at 619. This is bolstered by legislative history. *Ibid.*; see also *DSCC* v. *Simon*, 950 N.W.2d 280, 290–91 (Minn. 2020) (rejecting a similar § 208 preemption challenge to a Minnesota law prohibiting a voter agent from delivering or mailing completed absentee ballots for more than three voters in any election).

The only limit imposed under the harvesting ban is that the person assisting the voter must be a registered Michigan voter. Mich. Comp. Laws §168.759(4). The Court may take judicial notice that there are more than 8 million registered voters in Michigan. ECF No. 154-2, PageID.4041–4042. Plaintiffs have not identified one "voter covered under Section 208 . . . unable to receive assistance in voting due to the harvesting ban" since August 1, 2018. ECF No. 154-3, PageID. 4049–4050 (ROG 3). Nor do they have

any "documents evidencing that the harvesting ban 'affects disproportionately Michigan citizens with disabilities.'" ECF No. 154-17, PageID.4513–4514 (RFP 12). The harvesting ban is generally applicable, has many options for returning ABAs, and does not address the delivery of completed ballots by voters covered under § 208.

Plaintiffs want to relitigate the Court's interpretation of § 208, relying on *Arkansas United* v. *Thurston*, No. 5:20-cv-05193 ECF No. 35, PageID.169–179; 2020 WL 6472651 (W.D. Ark. Nov. 3, 2020). In *Arkansas United*, the plaintiff GOTV organization sought injunctive relief *less than two hours* before the 2020 General Election. *Id.*, at PageID.171. Without any real analysis, the court disagreed with this Court's opinion. *Id.* at PageID.175–176. Then the court seemingly referenced the major questions doctrine, stating Congress does not "hide elephants in mouseholes." *Ibid.* (quoting *Whitman* v. *Am. Trucking Ass'n*, 531 U. S. 457, 468 (2001)).[4] The major questions doctrine does not apply here because there has been no disputed delegation of power from Congress to an administrative agency and, more importantly, state legislatures have the constitutional duty to provide for the time, place, and manner of holding federal elections, U. S. Const. art. I, § 4, cl. 1, and federal law generally defers to the states' authority to regulate the right to vote. *Ohio Dem. Party* v. *Husted*, 834 F. 3d 620, 626 (6th Cir. 2016).

After the 2020 General Election, the *Arkansas United* court held that the plaintiff GOTV organization had demonstrated organizational standing to bring its § 208

[4] "[T]he major questions doctrine … is based on the expectation that Congress speaks clearly when it delegates the power to make decisions of vast economic and political significance." *U.S. Dept. of Homeland Sec.* v. *Regents of the Univ. of Cal.*, — U.S.—, 140 S. Ct. 1891, 1925 (2020) (THOMAS, J., concurring) (cleaned up).

claim at the 12(b)(6) stage. *Arkansas United* v. *Thurston*, 517 F. Supp. 3d 777, 794 (W.D. Ark. 2021)).[5] Plaintiffs reference this ruling as persuasive, but even if they have organizational standing to bring their VRA preemption claim, standing alone this cannot establish a conflict between Michigan's harvesting ban and § 208. The court further denied the state's motion to dismiss because "whether a state provision unduly burdens the right to have the assistance of a person of the voter's choice is 'a practical one dependent upon the facts.'" *Arkansas United*, 517 F. Supp. 3d at 796 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. at 62–63); see *id.*, at 797 ("While [plaintiffs'] assertions might not be sufficient, without more, to create a genuine dispute of material fact at summary judgment, they are adequate to satisfy the pleading standard and state a claim that [the Arkansas laws] are preempted by [§] 208."). Plaintiffs further rely on *OCA-Greater Houston* v. *Texas*, 867 F. 3d 604, 615 (5th Cir. 2017), but the record here stands in stark contrast to that case where one of the plaintiffs was an English-limited voter who had been unable to complete her ballot due to the challenged state law limiting those eligible to assist as an interpreter. As noted earlier, *supra*, at 6, Plaintiffs have been unable to identify any voter covered under Section 208 who has been unable to receive assistance in voting due to the harvesting ban since August 1, 2018. As the Court previously stated, this "omission is notable in that for other cases challenging limits on who may assist with ballots, the challengers provided evidence of individual voters who were denied necessary assistance …." *Priorities USA*, 487 F. Supp. 3d at 620.

[5] Plaintiffs lack Article III standing as set forth in the Republican Committees' motion for summary judgment. ECF No. 154, PageID.4008–4015.

III. The challenged laws are constitutional.

Plaintiffs assert that the challenged laws unconstitutionally burden their First Amendment rights. ECF No. 17, PageID.114–116, 122–124; ECF No. 152, PageID. 3433. In their motion, Plaintiffs' ignore their heightened burden to show that the challenged laws are *facially* unconstitutional. Facial challenges are generally disfavored. See *Speet*, 726 F.3d at 871 ("A facial challenge . . . is an effort to invalidate the law in each of its applications, to take the law off the books completely."); *Ohio Dem. Party*, 834 F.3d at 627 (cleaned up) ("Because plaintiffs have advanced a broad attack on the constitutionality of [the statutes], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.").

Plaintiffs further misframe the level of scrutiny applied to the challenged laws on their First Amendment claims. The Sixth Circuit found that the less stringent *Anderson-Burdick* framework applies to Plaintiffs' First Amendment challenge to the paid driver ban and that this claim likely fails. *Priorities USA*, 860 F. Appx. 419, 422 n.3 (6th Cir. 2021) ("We generally evaluate First Amendment challenges to state election regulations using the *Anderson-Burdick* framework" (cleaned up)).[6] The harvesting ban, is also a state election regulation and should be analyzed under the same standard. Thus, *Anderson-Burdick* should apply to both Plaintiffs' First Amendment claims.

[6] Although the Court previously ruled that exacting scrutiny applies to Plaintiffs' First Amendment challenge to the paid driver ban, ECF No. 59, PageID.1003, the Sixth Circuit's subsequent application of the *Anderson-Burdick* framework binds the Court. ECF No. 115, PageID.1931–1932; ECF No. 124, PageID.2011-2013. See *United States* v. *Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) ("determinations of the court of appeals of issues of law are binding on both the district court on remand and the court of appeals upon subsequent appeal.").

Although Plaintiffs characterize the Sixth Circuit's application of *Anderson-Burdick* as merely a "cursory footnote," ECF No. 152, PageID.3463, the appellate court thoroughly analyzed the First Amendment claim and held that the *Anderson-Burdick* framework applies to a challenge to the paid driver ban and explained why Plaintiffs "d[id] not seem likely to [be able to] shoulder [their] heavy burden" for their facial challenge to the law. *Priorities USA*, 860 F. Appx. at 422 n.3. The Sixth Circuit issued a "fully considered ruling on an issue of law." *Howe* v. *Akron*, 801 F. 3d 718, 740 (6th Cir. 2015). The Court therefore should apply the *Anderson-Burdick* framework and rule that both longstanding election laws are constitutional.

A. The paid driver ban is constitutional.

Plaintiffs argue that the paid driver ban was not enacted to prevent voter fraud or coercion, relying solely on the testimony of Dr. Sugrue. The Sixth Circuit, however, has already recognized the state's interest in protecting against fraud and undue influence in enacting the paid driver ban. Specifically, the law "is one provision among several others in the statute intended to prevent fraud and undue influence," which is "assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling.'" *Priorities USA*, 978 F.3d at 983–84. And "[t]he state's interest in preventing potential voter fraud is an important regulatory interest." *Priorities USA*, 860 F. Appx. at 422 n.3. Accordingly, the state's interests in the paid driver ban are settled and Plaintiffs' arguments to the contrary should be rejected.

The Sixth Circuit further found that the paid driver ban "is likely not a severe burden on [Plaintiffs'] rights because it does not appear to result in 'exclusion or virtual

exclusion' from the ballot." *Ibid.* (quoting *Libertarian Party of Ky.* v. *Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)). The court also found that "[t]he state's interest in preventing potential voter fraud is an important regulatory interest," and "prohibiting paid vote-hauling is likely a reasonable, nondiscriminatory restriction justified by that interest." *Priorities USA*, 860 F. Appx. at 422 n.3 (comparing *Ohio Dem. Party*, 834 F. 3d at 631, and *Crawford* v. *Marion Cty. Election Bd.*, 553 U. S. 181, 198–99 (2008)). The court concluded that the paid driver ban "does not appear to pose an unconstitutional burden." *Priorities USA*, 860 F. Appx. at 422 n.3. "'[E]ven assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to' warrant invalidating the [paid driver ban] altogether." *Ibid.* (quoting *Crawford*, 553 U.S. at 199–200). Despite insisting on the need for factual discovery, Plaintiffs have not identified one ambulatory voter who could not secure transportation to the polls or has been unable to vote because of the paid driver ban. See ECF No. 154-3, PageID.4048–4049. Absent such need, Plaintiffs have not proved they are burdened by the ban. Moreover, the ban does not prohibit them from providing free transportation to the polls.

To challenge the state's interests in the paid driver ban, Plaintiffs rely on Dr. Sugrue's testimony that the paid driver ban was imported from British law from the Victorian era and was aimed to "suppress the vote." ECF No. 152, PageID.3451 (emphasis omitted) (citing Sugrue Rep. at p. 2, 10). Plaintiffs recycle similar arguments that the paid driver ban was somehow influenced by the UK's Corrupt and Illegal Practices Prevention Act of 1883, 46 & 47 Vict. c.51, which the Sixth Circuit implicitly rejected.[7]

[7] On appeal, Plaintiffs relied on the House of Commons' Parliamentary Debates

Plaintiffs fail to show or explain why their perceived motives behind a foreign statute, governing foreign elections, enacted by a foreign legislature structured differently than the Michigan Legislature, should drive the interpretation of Michigan's paid driver ban. There is nothing to establish that the Legislature intended to mirror Parliament's views on how to best protect election integrity when it enacted the paid driver ban 125 years ago. The proximity of the passage of these two laws, or even evidence that individual legislators in Michigan were aware of the UK law, proves nothing about the Legislature's corporate intent. See *Priorities USA*, 978 F.3d at 984 ("the [paid driver ban] was enacted in a way and at a time such that we can infer no invidious intent on the legislature's part."). Then and now, Michigan has a legitimate interest in outlawing vote-hauling.

As to alleged voter suppression, Plaintiffs have not identified a single ambulatory voter who could not secure transportation to the polls or has been unable to vote because of the paid driver ban. ECF No. 154-3, PageID.4048–4049. In other words, Plaintiffs have produced zero evidence that the law suppresses voting. The Sixth Circuit has already found that "the [paid driver ban] was enacted in a way and at a time such that we can infer no invidious intent on the legislature's part." See *Priorities USA*, 978 F.3d at 984. Thus, Plaintiffs' argument, without any supporting evidence, that this longstanding election law suppresses votes is baseless.

Plaintiffs argue it is nonsensical that a private bus or car company can provide free transportation to polls compared to GOTV organizations like Plaintiffs paying these

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to argue the paid driver ban was enacted to reduce the cost for candidates to participate in elections. Appeal Brief for Plaintiffs, *supra* at p. 49–53.

same companies to drive voters to the polls. ECF No. 152, PageID.3466. As much as Plaintiffs wish to ignore it, there is a common-sense reason for the distinction: GOTV organizations, like Plaintiffs, are often not disinterested organizations but have their own electoral goals and preferred candidates.[8] And those motives raise the risk of bribery. See, e.g., ECF No. 154, PageID.4020–4021 (discussing how ballot selfies can facilitate bribery through paid vote haulers). The law targets that risk by targeting the means to facilitate bribery without restricting the actual transportation of voters to the polls.

Plaintiffs argue that the lack of prosecutions under the paid driver ban is "strong evidence" that the state's interests are not being served by the law. ECF No. 152,

[8] See, e.g., Lubin Decl., Cofounder and CEO of Rise, Inc. (Mar. 17, 2022), ECF No. 152-3, PageID.3490–3503. Lubin served as a political appointee at the Department of Education during the Obama Administration, worked for New York Mayor Michael Bloomberg, and was a field organizer for President Obama's 2012 reelection campaign. *Id.* at ¶ 1; PageID.3490–3491. Rise launched its Michigan campaign in January 2019 because it believed Governor Whitmer's election provided an opportunity to advocate for free community college. *Id.* at ¶ 12; PageID. 3495.

See also, e.g., Hunter Decl., President of DAPRI and United Steelworkers Local 1299 (Mar. 17, 2022), ECF No. 152-4, PageID.3505–3513. DAPRI is a local chapter a senior constituency group of the AFL-CIO and seeks structural changes through the American democratic process. *Id.* at ¶ 2; PageID.3505–3506.

See also, e.g., Cecil Decl., Chairman of Priorities USA (Mar. 21, 2022), ECF No. 152-5, PageID.3515–3519. Priorities USA is a progressive advocacy and service organization and its mission is to build a powerful progressive movement. *Id.* at ¶¶ 3, 13; PageID.3515–3516, 3518–3519. Priorities USA seeks to support progressive candidates and policies. *Id.* at ¶ 10; PageID.3517. Priorities USA goes so far as to openly align itself on its website with the Democratic Party. See Priorities USA, *Research Hub for Progressives and Democrats*, https://perma.cc/FTC8-7BUY (last accessed Apr. 7, 2022) ("[t]o help Democrats chart a path forward, Priorities is engaged in consistent, long-term public opinion research focused on identifying and refining the most effective strategies Democrats can employ … to protect and expand Democratic majorities.").

PageID.3467 (citing *Americans for Prosperity Foundation* v. *Bonta*, 594 U.S.—; 141 S. Ct. 2373, 2387 (2021)). *Bonta* is distinguishable for many reasons (discussed further below), but not enforcing a disclosure obligation is wholly different than enforcing and prosecuting election law crimes targeted at voter fraud. Limited prosecutions of the paid driver ban also does not mean that the state does not enforce the law. For example, the Attorney General served a cease-and-desist letter on a Hamtramck city councilman who was offering to drive people to the polls for the 2020 General Election. ECF No. 154-10, PageID.4145–4147.

Plaintiffs further argue that "[l]ess intrusive means" would advance the state's interests. ECF No. 152, PageID.3468–3469. Although voter fraud and undue influence could be prosecuted under other Michigan election laws, the state can seek to specifically protect against vote hauling. *Priorities USA*, 978 F.3d at 983–84 (ruling that the paid driver ban is "assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling.'"). And the transportation of voters to the polls is also an impressionable time as it will likely be the last time a voter could be exposed to electioneering before voting. See Mich. Comp. Laws §168.744 (prohibiting campaigning within 100 feet of polling place entrances). Other Michigan criminal laws addressing voting fraud after the fact cannot prevent vote hauling like the paid driver ban.

B. The harvesting ban is constitutional.

The Court ruled that the harvesting ban is constitutional "whether [it] applies exacting scrutiny or a rational basis standard of review …." *Priorities USA*, 487 F. Supp. 3d at 612. Discovery has bolstered that the harvesting ban serves the state's

constitutional and important regulatory interests of preserving election integrity and preventing fraud in the absentee voting process, including at the application stage.

Throughout discovery, the Republican Committees have identified multiple instances of fraud, corruption, or undue influence related to the absentee voting process in Michigan. See ECF No. 154, PageID.4005–4006, PageID.4031–4032. The Attorney General identified other instances of absentee voter fraud. ECF No. 154-10, PageID.4145–4147 (ROG 4). The Michigan Department of State testified to reports of illegal solicitation or return of ABAs in the cities of Flint, Sterling Heights, and Hamtramck. Brater Depo. 69:9–73:9, ECF No. 154-11, PageID.4220–4224. The Court has highlighted the greater susceptibility of fraud in the absentee voter context, *Priorities USA*, 487 F. Supp. 3d at 613 (string citation), expressly referencing the Carter-Baker Report, *id.* at 614 n.3. Kimberly Westbrook Strach, the former Executive Director of the North Carolina State Board of Elections ("**Director Strach**"), also relied on the Carter-Baker Report in concluding that the absentee process is susceptible to voter fraud, especially by interested third parties. See Report of Kimberly Westbrook Strach ("**STRACH**") ¶¶ 74, 96, ECF No. 159-2, PageID.6014, 6020. The same fraud concerns for absentee voting apply equally at the application stage. See *Priorities USA*, 487 F. Supp. 3d at 614 n.3 ("[I]t logically follows that precluding [third-party] organizations from handling [ABAs] may also limit the opportunities for fraud and abuse in the application process."). The Court correctly found that "the state's interests in preventing fraud and abuse in the absentee ballot application process and maintaining public confidence in the absentee voting process are sufficiently important interests and are substantially related to the limitations and burdens set forth in §759." *Id.* at 615.

Director Strach has also opined that (1) "absentee ballot harvesting restrictions protect the integrity of elections," and (2) "absentee ballot safeguards provide opportunities to detect irregularities or fraud that could impact elections." ECF No. 154-12, PageID.4298. She testified as to why the harvesting ban is "a valuable safeguard." Strach Depo. 156:19–20, ECF No. 159-3, PageID.6179. On the frontend, it reduces the number of voters who would give their absentee ballot applications to fraudsters. She tied this observation to her investigation into the North Carolina Ninth Congressional District race ballot harvesting scheme in 2018 orchestrated by Leslie McCrae Dowless. She noted that a law prohibiting harvesting (which was not on the books in North Carolina) would have deterred some people from giving their absentee ballot applications to Dowless's coconspirators. *Id.*, at 156:15–19, PageID.6179. Director Strach also explained that the harvesting ban is useful to detecting fraud on the backend because it ensures that: (1) there is a record of who returns an absentee ballot application for a voter through a "form that is required to be signed by the person [who] is delivering the application"; and (2) the State will know—if the need arises—where to start looking for that person because she must be a registered voter who will have an address listed in her voter file. *Id.*, at 156:21–157:4, PageID.6179–6180.

The fact that the Government charged instances of identified absentee voter fraud under other Michigan election laws, including felony-level crimes unlike the harvesting ban, does not nullify the law or the interests it serves. "[I]t is well established that prosecutors have broad discretion in charging decisions." *United States* v. *Hughes*, 632 F.3d 956, 962 (6th Cir. 2011). "[W]hen a single act violates multiple statutes, the prosecution is given discretion in its charging decision as long as the offenses and penalties

are sufficiently clear. That prosecutors might often elect to charge the felony in no way makes the misdemeanor charge surplusage ...." *People* v. *Seewald*, 499 Mich. 111, 124 (2016). Brater testified to the difficulty of enforcing the non-solicitation requirement in the harvesting ban and how law enforcement may prioritize investigations that are easier to prove. Brater Depo. 76:15–78:6, ECF No. 154-11, PageID.4227–4229.

The Court previously found that the alleged burden imposed on Plaintiffs by §759 is "not slight." *Priorities USA*, 487 F. Supp. 3d at 614. The Republican Committees respectfully disagree. Plaintiffs overstate the alleged burden imposed by the harvesting ban on their GOTV efforts. But, because Plaintiffs bring a facial challenge, the Court's focus cannot be solely on the law's impact on Plaintiffs (or even on GOTV organizations generally). See *United States* v. *Stevens*, 559 U.S. 460, 472–73 (2010). Plaintiffs' position requires the Court to accept that Michigan voters are too dimwitted to grasp that they can ask Plaintiffs' volunteer—who just lawfully explained to them the options for returning an application—to return the ABA for them (assuming the volunteer is a registered Michigan voter). Plaintiffs may not have much confidence in the smarts of Michiganders, but that is hardly enough to sustain a constitutional challenge.

Moreover, the harvesting ban still allows Plaintiffs to engage in GOTV efforts: "[P]laintiffs can still educate the public about registering to vote absentee and answer questions about this process," *Priorities USA*, 487 F. Supp. 3d at 614, and they may mail and hand out blank applications to voters. The ban also protects Michigan voters from being badgered at their door by pushy people pressing them to fill out a form that instant when the voter may wish to privately reflect on whether to vote absentee and, if so, whether to personally return the completed form or whether (and with whom) to

entrust the important task of returning the ABA.

Section 759 further provides many ways for Michigan voters to return their written requests or form applications to the local clerk: (1) in person, (2) by mail, (3) email, (4) fax, (5) through in-person, mail, or other delivery by immediate family members (including in-laws and grandchildren) or by a person residing in the same household, and (6) if none of those methods are available, through in-person, mail, or other delivery by any registered elector. *Id.*, at 615 (citing Mich. Comp. Laws §168.759 (4)–(6)). As noted earlier, there are over 8 million registered electors in Michigan, meaning Michigan voters have over 8 million options for returning an ABA. The Secretary of State further sent every registered voter an ABA before the 2020 elections. *Davis* v. *Secretary of State*, 333 Mich. App. 588, 591 (2020) (so observing, except for locales where local clerks already planned to do this).

Through discovery, Plaintiffs have not identified a single voter who "was unable to deliver [a] completed [ABA] to the appropriate clerk using any of the methods" in §759(6). ECF No. 154-3, PageID.4047–4048. Because the state's interests served by the harvesting ban far outweigh any burden on Michigan voters and third-party organizations like Plaintiffs, the law is constitutional.

C. Plaintiffs misconstrue the exacting scrutiny standard and misrely on *Bonta*.

The Republican Committees have thoroughly briefed why the challenged laws withstand the exacting scrutiny, and those previous arguments are incorporated here. ECF No. 154, PageID.4029–4033. Exacting scrutiny "requires a substantial relation between the [challenged law] and a sufficiently important governmental interest." *Citi-*

zens United v. *Federal Election Comm'n*, 558 U.S. 310, 366–67 (2010) (cleaned up). Exacting scrutiny "require[s] a fit that is not necessarily perfect, but reasonable." *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 218 (2014) (cleaned up). To withstand exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1* v. *Reed*, 561 U.S. 186, 196 (2010).

Plaintiffs wrongly assert that *Bonta* requires that the state must show a *compelling* government interest, which is applicable only to the strict scrutiny standard. Compare ECF No. 152, PageID.3463 ("emphasizing that exacting scrutiny requires … a compelling interest"), with *Bonta*, 141 S.Ct., at 2383 ("Under [exacting scrutiny], there must be … a sufficiently important governmental interest.'" (quoting *Reed*, 561 U.S. at 196); see also *id.*, at 2391 (ALITO, J., concurring) ("[R]equiring a compelling interest and a minimally intrusive means of advancing that interest … is fully in accord with contemporary strict scrutiny doctrine."). Although the challenged laws serve compelling interests, it is undisputed that they serve important regulatory interests: preserving election integrity and preventing fraud in the absentee voting process. *Priorities USA*, 487 F. Supp. 3d at 615 (harvesting ban); *Priorities USA*, 978 F.3d at 984 (paid driver ban).

Plaintiffs also erroneously rely on the narrow holding in *Bonta*. The Court struck down California's compelled disclosure requirement that charities and nonprofits operating in the state provide the attorney general with the names and addresses of their largest donors. 141 S.Ct. at 2389. When the attorney general threatened enforcement against those failing to supply such information, two charities filed First Amendment facial and as-applied challenges against the regulation. The Court concluded that exact-

ing scrutiny applied to the charities' First Amendment challenges to California's compelled disclosure regime and that the disclosure regime imposes a widespread burden on donors' associational rights. *Id.* at 2383, 2389. California argued that it needed to collect donor information to help it police fraud, but the facts adduced at trial showed that the attorney general never used the information to advance any investigative efforts and did not rigorously enforce the requirement for a long period of time. *Id.* at 2386. And since the attorney general could obtain this information in other targeted ways when actually needed, the dragnet collection was not narrowly tailored to advance the policing interest. *Id.* at 2387. The Court further ruled that California's actual interest in amassing sensitive information—i.e., administrative convenience—was weak. *Id.* at 2389.

The *Bonta* Court held that narrow tailoring applies to the exacting scrutiny standard in the context of First Amendment challenges to compelled disclosure regimes. *Id.*, at 2383–85. *Bonta* did not hold that exacting scrutiny and narrow tailoring apply to *all* First Amendment challenges. That *Bonta* stated exacting scrutiny is not limited to "electoral disclosure regimes," *id.*, at 2383, does not mean that that narrow tailoring must apply to all First Amendment challenges, specifically non-compelled disclosure cases such as here. It makes sense that the challenged laws in *Bonta*, which compelled speech and chilled association, would require a closer "fit" than the disputed laws here, which only minimally burden Plaintiffs' GOTV efforts. State election laws must also be given greater latitude due to the required "substantial regulation of elections if they are to be fair and honest[.]" *Storer* v. *Brown*, 415 U.S. 724, 730 (1974). *Bonta* also focused on the burden of donors' *associational* rights, *Bonta*, 141 S. Ct. at 2389; whereas here, Plaintiffs do not argue, let alone substantiate with evidence, that the laws burden their associa-

tional rights—they state only blankly that "[b]oth statutes burden [their] free speech and associational rights under the First Amendment." ECF No. 152, PageID.3433. This Court should not, as a matter of first impression, expand *Bonta*'s narrow, context-specific holding to all First Amendment challenges viewed under exacting scrutiny.

Moreover, *Bonta* is distinguishable as the Court ruled that California's interest in administrative convenience was weak. 141 S. Ct. at 2389. The Sixth Circuit found as to the paid driver ban that "[t]he state's interest in preventing potential voter fraud is an important regulatory interest," and "prohibiting paid vote-hauling is likely a reasonable, nondiscriminatory restriction justified by that interest." *Priorities USA*, 860 F. Appx. at 422 n.3. And this Court found that the "[harvesting ban] is designed with fraud prevention as its aim and it utilizes well-recognized means in doing so." *Priorities USA*, 487 F. Supp. 3d at 614. The strength of the state's important interests in preventing vote-hauling and undue influence satisfies any minimal burden from the challenged laws on Plaintiffs' First Amendment rights. See *Reed*, 561 U.S. at 196.

Plaintiffs further argue that *Bonta*'s narrow tailoring should apply because the challenged laws impose a burden on Plaintiffs. ECF No. 152, PageID.3465. As stated earlier, *supra* at III A–B, the Republican Committees disagree that Plaintiffs are burdened by the challenged laws, but regardless they are minimally burdened. Plaintiffs' argument that any burden (no matter the level) from an election law requires exacting scrutiny (and further narrow tailoring) conflicts with the Supreme Court's statement that "[i]t does not follow … that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992).

Even if the Court applies the exacting scrutiny standard, the challenged laws still withstand this level of scrutiny.

IV. The *Purcell* principle weighs against enjoining the challenged laws before the August 2022 primary.

Plaintiffs seek a resolution of this case before the August 2022 primary election. ECF No. 152, PageID.3434. Given that careful study of the parties' pending motions (including the still pending motions for judgment on the pleadings, ECF Nos. 113–115) may result in a final merits ruling close in time to the August primary, the *Purcell* principle should weigh against enjoining the challenged election laws for that election, if the Court believes Plaintiffs' arguments have merit. The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.* v. *Democratic Nat'l Comm.*, —U.S.—;140 S. Ct. 1205, 1207 (2020) (per curiam). See also *Purcell* v. *Gonzalez*, 549 U.S. 1, 4–6 (2006) (per curiam). "[W]hen an election is close at hand, the rules of the road must be clear and settled." *Merrill* v. *Milligan*, 142 S.Ct. 879, 880–81 (2022) (Mem) (KAVANAUGH, J., concurring). States have an "extraordinarily strong interest in avoiding late, judicially imposed changes to … election laws and procedures." *Id.*, at 881. See also *Crookston* v. *Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("[C]ourts will not disrupt imminent elections absent a powerful reason for doing so."). Therefore, if close to the August primary, the Court should decline to enjoin the challenged election laws.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' Motion for Summary Judgment and alternatively dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

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