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' OPPOSITION TO UBER TECHNOLOGIES, INC.'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Michigan Senate and the Michigan House of Representatives ("the Legislature") oppose Uber Technologies, Inc.'s ("Uber") Motion for Leave to File an Amicus Brief in Support of Plaintiffs' Motion for Summary Judgment.

As detailed in the accompanying brief, the Court should deny Uber's Motion because it does not genuinely seek to aid the Court, but rather amounts to a full-throated support of Plaintiffs' motion for summary judgment based on new facts and irrelevant arguments presented after the close of discovery.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES' OPPOSITION TO UBER TECHNOLOGIES, INC.'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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STATEMENT OF ISSUES PRESENTED

Should Uber be permitted to file an amicus brief that does not genuinely seek to aid the Court, but rather amounts to a full-throated support of Plaintiffs' motion for summary judgment based on new facts and irrelevant arguments presented after the close of discovery?

The Michigan Legislature says **No.**

This Court should say **No.**

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Hill v. Colorado, 530 U.S. 703 (2000)

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

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062 (7th Cir. 1997)

Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2019)

United States v. State of Michigan, 940 F.2d 143 (6th Cir. 1991)

INTRODUCTION

This case has been through extensive motion practice, two trips to the Court of Appeals, fact and expert discovery, and opening briefs on summary judgment. Only after all of that did Uber Technologies, Inc. ("Uber") surface as a would-be participant in this action. Of course, Uber has been brought up many times in this case over the past three years, as has its discounted rides-to-polls program—so its averred interests are hardly new information. Yet it never sought to actively involve itself until now, via its motion for leave to file an amicus brief. And what it proposes to submit is not just a brief to help crystallize or clarify issues for the Court, but rather a full-throated, fact-laden support of Plaintiffs' summary-judgment motion, complete with claim-like assertions about how Uber's own rights allegedly have been infringed by the statutes at issue. This is not a proper use of an amicus brief and unfairly prejudices the parties. The motion should be denied.

LEGAL STANDARD

Allowing an amicus brief is "within the sound discretion of the courts." *United States v. State of Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). Many cases have provided guidance as to how that discretion should be exercised. To begin, an amicus brief should be permitted only where the amicus has interests that are "not represented competently or . . . at all," has interests in "another case that may be affected by the holding in the present case," or offers "unique information that can

help the court in a way that is beyond the abilities the lawyers for the parties are able to provide." *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Unfortunately, the "majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief." *Id.* Courts therefore "should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give" all that is necessary to reach a decision on the merits. *Id.* at 1064. Failing to do so "convert[s] the trial court into a free-wheeling forum of competing special interest groups capable of frustrating and undermining the ability of the named parties/real parties in interest to expeditiously resolve their own dispute." *State of Michigan*, 940 F.2d at 166.

ARGUMENT

I. Uber's proposed brief fails to provide any unique and valuable perspective for the Court.

Consistent with the applicable standards, Uber enthusiastically declares its perspective unique and valuable and urges the Court to receive that input. But announcing that conclusion is not the same as supporting it.

Uber does not suggest that its interests are "not represented competently or . . . at all." *See Ryan*, 125 F.3d at 1063. This is hardly surprising: Plaintiffs are represented by some of the most capable and sophisticated election counsel in the

nation. And, far from ignoring the alleged impact of the challenged laws on Uber, Plaintiffs have specifically discussed Uber's interests on numerous occasions. *See* ECF No. 17, PageID.105; ECF No. 22, PageID.160; ECF No. 22-13; ECF No. 152, PageID.3446. That discussion has hardly gone unnoticed: Even this Court has mentioned Uber's decision not to offer discounted rides. ECF No. 59, PageID.982. There is no credible deficiency in representing Uber's interests here.

Nor does Uber identify any other case in which it is involved that "may be affected by the holding in the present case." *See Ryan*, 125 F.3d at 1063. Certainly, the Legislature is aware of no such case and, given that the challenge here is to Michigan statutes, it is unlikely indeed that a case pending elsewhere raises overlapping issues.

Uber does argue that it has unique interests. But that argument does not withstand serious scrutiny. While the precise manifestations of its interests vary slightly—Uber wants to offer discounted rides and Plaintiffs want to be able to pay for them—this does not give rise to the kind of "unique" perspective that provides valuable aid to a Court. Rather, the nub of both Plaintiffs' and Uber's positions is identical: 1) the Voter Transportation Law is too vague for the average person to understand and thus subjects each of them to a risk of prosecution for providing rides to polls; and 2) the Voter Transportation Law impedes their respective efforts to promote voter engagement.

Further, merely having a (supposedly) unique interest is only part of the question. The more important part is whether the involvement of the amicus "can help the court in a way that is beyond the abilities the lawyers for the parties are able to provide." *See Ryan*, 125 F.3d at 1063. For, if the amicus offers nothing but "me too" support for the same positions already litigated, then there is no genuine benefit provided by the Court's eager friend-to-be.

This is exactly what Uber offers here: full-throated support for positions that Plaintiffs are already ably and aggressively advocating, glossed over with details about how they apply to Uber but are otherwise indistinguishable. Indeed, Uber's brief reads far more like a request to intervene than a genuine amicus submission. But Plaintiffs themselves argued more than two years ago that it was too late to intervene, *see* ECF No. 48, PageID.897-99, and that was before the entire case went through fact and expert discovery, a pair of appeals, and still more dispositive motion practice.

Because an amicus is supposed to be "a friend of the court and not a friend of a party to the cause," a proffered brief "with a partisan, rather than impartial view," should be rejected. *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982). Yet Uber does not even attempt to soften its partisan bent here. It begins with a caption that declares its "support of Plaintiffs' motion for summary judgment." ECF No. 157, PageID.5942. Uber then makes the very same arguments against the Voter

Transportation Law that Plaintiffs offered in their motion for summary-judgment. But, where Plaintiffs had to divide their attention (and the resulting space allocation in their brief) between the Voter Transportation Law and the Absentee Ballot Law, Uber's proposed brief can reinforce and expand those arguments to fill a full 20 pages. *See generally id.* It provides nothing more than tactical support for Plaintiffs' positions—precisely the sort of amicus brief courts deem unhelpful and improper. *See Ryan*, 125 F.3d at 1063; *State of Michigan*, 940 F.2d at 166; *see also Leigh*, 535 F. Supp. at 422 (partisan amici may be tolerable in courts of appeal, where "only issues of law are resolved" but they are "not proper in a trial court").

II. Uber's belated, fact-laden brief unfairly prejudices the parties.

Even if Uber's proposed brief offered some unique value, the Court still should reject it because it unfairly sandbags the Defendants with a mountain of new facts after the close of discovery. Indeed, the *Leigh* court found "it inject[ed] an element of unfairness into the proceedings" where even the *government* belatedly submitted an amicus after summary-judgment motions were filed, and *without* trying to add new facts. *See* 535 F. Supp. at 422. All the more so for a private party to file a brief overflowing with facts outside the record.

Of course, Uber does not come right out and admit this is what it has done. Instead of supplying a "Statement of Facts," it offers seven pages of "Background." ECF No. 157, PageID.5955-62. Switching the label does not transform the content.

Nor does it change the calculus that, instead of attaching documents and declarations to their brief, Uber relies instead on articles and analysis supplied by way of footnoted hyperlinks and, in many cases, naked assertions about its programs and policies. *See, e.g.*, *id.* at PageID.5960 notes 25-27. Uber omits any evidentiary support that would spotlight these as new, post-discovery facts. *Id.*

If a party purported, after the close of discovery and after summary-judgment briefs had been filed, to inject new factual information into a case, the Court would instantly recognize the unfair prejudice. *See, e.g.*, *Irish v. Tropical Emerald LLC*, No. 18-cv-82, 2021 WL 5899048, at *3 (E.D.N.Y. Dec. 14, 2021) (a party "cannot sandbag its adversary" with new facts at the summary-judgment stage). That prejudice is no less manifest when the tactic is employed by a friendly non-party.

Indeed, an "amicus who argues facts should rarely be welcomed." *See Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Thus, based on the concern "about whether the amici will infuse external facts into the Court's consideration," a district court recently emphasized that it would not allow the amici's facts to affect its decision. *See Portland Pipe Line Corp. v. City of S. Portland*, No. 2:15-cv-00054, 2017 WL 79948, at *6 (D. Me. Jan. 9, 2017).

Whether such parsing is ever realistic is debatable. But it certainly is not possible here. After providing seven pages of "Background," Uber spends the rest of its proposed brief applying its arguments to those facts. *See* ECF No. 157,

PageID.5962-71. To the extent there is anything left of Uber's brief after excising its fact-bound arguments, it is completely redundant of what Plaintiffs have already argued—viz., ordinary people cannot understand the word "hire."

III. To the extent Uber offers "unique" arguments, they are irrelevant and unhelpful to the Court.

As already noted, most of Uber's proposed brief consists of parroting and expanding the arguments presented in Plaintiffs' already-extended length summary-judgment motion. To the extent anything genuinely "unique" is provided, it is contorted hypotheticals and a new and different set of burdens than the ones on which Plaintiffs sued. None of this aids the Court in resolving *this case*.

A. Uber's vagueness arguments are irrelevant and unsound.

Uber's vagueness arguments are predicated on an extended series of hypothetical bogeymen. *See* ECF No. 157, PageID.5967. "Hypotheticals are a favorite tool of those bringing vagueness challenges" since every statute is "susceptible to clever hypotheticals testing its reach." *Schickel v. Dilger*, 925 F.3d 858, 879 (6th Cir. 2019). But the Supreme Court has already foreclosed that tactic: "[S]peculation 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, 733 (2000).

Not only has Uber gone down a dead-end in basing its arguments on hypotheticals, but the ones it has chosen also collapse on their own lack of merit.

For example, Uber strains to place itself at risk by equating the discounts it wishes to provide with impermissibly "hiring" transportation. But Uber isn't "hiring" transportation at all; it's ***providing*** it.[1] And when Uber offers a discount, it has done nothing other than adjust its own prices. To sharpen the point, nowhere in its brief does Uber suggest it somehow violated the Voter Transportation Law by providing (or "facilitating") ordinary, full-fare rides to would-be voters.[2] Nor does it say that it shut down all Uber services in Michigan on election day to prevent being accused of "hiring" transportation. Its discounted-rides argument is fundamentally illogical.

B. Uber's First Amendment arguments are irrelevant.

Uber fares no better when it comes to the First Amendment claim. This Court is obligated to evaluate that claim based on the evidence of burdens affecting ***the Plaintiffs***, not by the new theories of burdens upon others that Uber seeks belatedly to inject into the case. And once again, even those theories are patently flawed.

Uber relies on untested, unsworn statistics correlating a lack of transportation

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[1] Apparently anticipating this issue, Uber takes care to emphasize that its drivers are "independent" and "not Uber employees," and that it "facilitates" rides rather than pressing the gas pedal. *See* ECF 157, PageID.5960 n.26, PageID.5964, PageID.5967. This is an irrelevant distinction. Uber provides the ride-hailing app and is paid based on transportation provided. Whether the money flows first to drivers and then to Uber, and whether it is Uber's profits or the driver's that are impacted by discounts, is beside the point.

[2] Indeed, if Uber's argument were taken seriously, then it would turn every taxi ride or bus trip that ended at the polls into a potential crime. A vagueness argument that reduces to absurdity is no argument at all.

with an individual's decision to vote. *See* ECF No. 157, PageID.5954, 5956-57. Nowhere in this case, however, is there any party who is a voter at all, much less one who has alleged she was unable to vote because her only way to get to the polls was someone else hiring a ride for her. Meanwhile, where this Court already ruled that Plaintiffs could not rely on alleged harm to voters or an alleged burden on voters' rights, *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 808 (E.D. Mich. 2020), Uber plainly should not be permitted to do so as an amicus.

Uber fares no better with its own alleged burdens. It asserts that the Voter Transportation Law "chills" the company's "First Amendment right to effectuate its expressive interests in promoting civil participation." ECF No. 157, PageID.5968. The Rides to the Polls Program is, according to Uber, "an affirmative expression of" its "commitment to the democratic process." *Id.* Entirely missing from that submission, however, is any authority holding that a company's pricing policies constitute protected expression. It is of course beyond dispute that the First Amendment reaches past verbal expression to encompass certain conduct; but Uber's unsupported argument would constitutionalize virtually any commercial activity that a company decided to characterize as relating to democracy or expression. This Court ought not to take the invitation to break that ground here by accepting a delinquent amicus brief asserting burdens wholly different than those otherwise at issue in the case.

CONCLUSION

For all the foregoing reasons, the Court should deny Uber's motion for leave to file an amicus brief.

Respectfully submitted,

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