Approved, SCAO

Original - Court
1st copy - Defendant

2nd copy - Plaintiff
3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS	CASE NO. 20-000191- MM

Court address
Court of Claims, Hall of Justice, 925 W. Ottawa St, P.O. Box 30185, Lansing, MI 48909

Court telephone no.
517-373-0807

Plaintiff's name(s), address(es), and telephone no(s).
REPUBLICAN NATIONAL COMMITTEE, and
MICHIGAN REPUBLICAN PARTY

v

Defendant's name(s), address(es), and telephone no(s).
SECRETARY OF STATE, and
ATTORNEY GENERAL

RECEIVED
SEP 24 2020
COURT OF CLAIMS

Plaintiff's attorney, bar no., address, and telephone no.
Kurtis T. Wilder (P37017)
Joseph E. Richotte (P70902
Steven R. Eatherly (P81180)
150 W. Jefferson, Suite 100, Detroit, MI 48226
(313) 22-7000

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (form MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (form MC 21) listing those cases.
☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.
☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
☐ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
☑ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☑ this court, ☐ _____ Court, where it was given case number 2020-000108-MM and assigned to Judge Cynthia D. Stephens.

The action ☑ remains ☐ is no longer pending.

Summons section completed by court clerk.

SUMMONS

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk
SEPT. 24, 2020	DEC. 28, 2020	Jerome W. Zimmer Jr.

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

SUMMONS
Case No. 20-000191-MM

PROOF OF SERVICE

TO PROCESS SERVER: You are to serve the summons and complaint not later than 91 days from the date of filing or the date of expiration on the order for second summons. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

☐ **OFFICER CERTIFICATE**
I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.104[A][2]), and that: (notarization not required)

OR

☐ **AFFIDAVIT OF PROCESS SERVER**
Being first duly sworn, I state that I am a legally competent adult, and I am not a party or an officer of a corporate party (MCR 2.103[A]), and that: (notarization required)

☐ I served personally a copy of the summons and complaint,
☐ I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint,

together with _____
List all documents served with the summons and complaint

_____ on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

☐ I have personally attempted to serve the summons and complaint, together with any attachments, on the following defendant(s) and have been unable to complete service.

Defendant's name	Complete address(es) of service	Day, date, time

I declare under the penalties of perjury that this proof of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
$		$	
Incorrect address fee	Miles traveled	Fee	TOTAL FEE
$		$	$

_____
Signature

_____
Name (type or print)

_____
Title

Subscribed and sworn to before me on _____ (Date), _____ County, Michigan.

My commission expires: _____ (Date) Signature: _____ (Deputy court clerk/Notary public)

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with _____ (Attachments)

_____ on _____ (Day, date, time)

_____ on behalf of _____.
Signature

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, and MICHIGAN REPUBLICAN PARTY,

Plaintiffs,

v.

SECRETARY OF STATE, and ATTORNEY GENERAL,

Defendants.

No. 20-000191-MM

HON. Murray

BUTZEL LONG, P.C.
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Joseph E. Richotte (P70902)
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Counsel for Plaintiffs

RELATED ACTION:

The claims in this Complaint arise from the same transactions or occurrences alleged in the following related action:

Michigan Alliance for Retired Americans v Benson, No. 2020-000108-MM

This action is still pending.

VERIFIED COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs Republican National Committee and Michigan Republican Party (collectively the "Republican Committees") file this Verified Complaint for Declaratory Relief against the Secretary of State and the Attorney General (collectively "State Defendants"):

INTRODUCTION

1. The Republican Committees seek declaratory relief that Michigan's long-standing election laws, specifically: (1) the prohibition against strangers possessing and delivering absent voter ("AV") ballots ("harvesting ban"), MCL 168.932(f), and (2) the deadline for AV ballots to be counted when the polls close at 8 p.m. on election day ("ballot receipt deadline"), MCL 168.764a, 168.720, are enforceable both facially and as generally applied to the November general election.

2. The Republican Committees acknowledge that the Court enjoined the harvesting ban and ballot receipt deadline as generally applied to the general election in *Michigan Alliance for Retired Americans v Benson*, No. 2020-000108-MM (the "9-18-20 Order") (**Ex. 1**). The Republican Committees were, however, jurisdictionally barred from intervening by *Council of Organizations & Others for Education About Parochiaid v State*, 321 Mich App 456 (2017), which interpreted the Court of Claims jurisdictional statute, MCL 600.6419, and held that the Court lacks subject-matter jurisdiction over claims against intervening private parties. The Republican Committees believe that the *Council of Organizations* ruling was wrongly decided, but in any event, it is not applicable here as the Republican Committees bring this original action against State Defendants.

3. The Republican Committees have exhausted their direct appeal to overturn *Council of Organizations*, and thus have exhausted their attempt to intervene as defendants in *Michigan Alliance,* to protect their interests, as well as the interests of their voters, candidates and members.

4. After the Court enjoined the harvesting ban and ballot receipt deadline, the Secretary of State and the Attorney General have publicly announced their intention not to enforce the challenged laws for the general election on the basis of voters and local clerks "need[ing] certainty."

5. With no parties defending the enjoined laws, the Republican Committees seek declaratory relief that the harvesting ban and ballot receipt deadline are enforceable both facially and as generally applied to the general election.[1]

JURISDICTION

[1] On September 21, 2020, the Legislature filed a renewed motion to intervene for purposes of appeal, in which counsel for State Defendants concurred. The Court ordered the parties to file responses to the Legislature's motion by September 28. Regardless of the Court's ruling on the Legislature's motion, the Republican Committees are entitled to seek declaratory relief in the present action to protect their interests, as well as the interests of their voters, candidates and members.

6. The Court has exclusive, original subject-matter jurisdiction over this action under MCL 600.6419.

7. The Court has personal jurisdiction over State Defendants.

8. The Court has the authority to enter a declaratory judgment under MCR 2.605.

PARTIES

9. Plaintiffs are political party committees that support Republicans in Michigan.

10. Plaintiff Republican National Committee is a national committee as defined by 52 USC 30101. It manages the Republican Party's business at the national level, supports Republican candidates for public office at all levels, coordinates fundraising and election strategy, and develops and promotes the national Republican platform.

11. Plaintiff Michigan Republican Party is a recognized major political party, *see* MCL 168.16, that works to promote Republican values and to assist Republican candidates in obtaining election to partisan federal, state, and local office.

12. Republican Committees have "direct" and "significant" interests in the continued enforcement of state laws governing ballot-receipt deadlines, postage requirements, and ballot-harvesting, as those laws are designed to serve "the integrity of [the] election process," *Eu v San Fran Cty Democratic Cent Comm*, 489 US 214, 231 (1989), and the "orderly administration" of elections, *Crawford v Marion Cty Election Bd*, 553 US 181, 196 (2008). Federal courts "routinely" find that political parties have interests in litigation regarding elections and election procedures. *See Issa v Newsom*, 20-01044; 2020 WL 3074351, at *3 (ED Cal, June 10, 2020). That is certainly true where, as here, "changes in voting procedures could affect candidates running as Republicans and voters who [are] members of the ... Republican Party." *Ohio Democratic Party v Blackwell*, No. 04-1055; 2005 WL 8162665, *2 (SD Ohio, Aug. 26, 2005); *see id.* (under such circumstances, "there [was] no dispute that the Ohio Republican Party had an interest in the subject matter of this case").

13. Plaintiffs have interests—their own and those of their members—in the rules governing Michigan elections.

14. Defendant Secretary of State, an office currently held by Jocelyn Benson, is "the chief election officer of the state" with "supervisory control over local election officials in the performance of their duties under the provisions of" the Michigan Election Law. MCL 168.21. The Secretary of State is responsible for "[a]dvis[ing] and direct[ing] local election officials as to the proper methods of conducting elections" and providing to each precinct "specific instructions on assisting voters in casting their ballots." MCL 168.31(1)(b)–(c). The Secretary of State, personally and through the conduct of her employees, officers, agents, and servants, acted under color of State law at all times relevant to this action.

15. Defendant Attorney General, an office currently held by Dana Nessel, is Michigan's top law enforcement official and is responsible, along with other prosecuting attorneys, for prosecuting the laws of Michigan. MCL 168.940. The Attorney General, personally and through the conduct of her employees, officers, agents, and servants, acted under color of State law at all times relevant to this action.

COUNT I
DECLARATORY JUDGMENT

16. In *Michigan Alliance*, the plaintiffs sued the Secretary of State and Attorney General to enjoin enforcement of Michigan's harvesting ban and ballot receipt deadline for the August primary election and November general election.[2]

17. The Republican Committees attempted to intervene as defendants, but was barred by *Council of Organizations* where the court reasoned that the Court of Claims does not have jurisdiction to allow private parties to intervene as defendants, even in actions "against the state." 321 Mich App at 467–68. The Republican Committees argued that *Council of Organizations* was

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[2] The *Michigan Alliance* plaintiffs also challenged Michigan law that requires voters who return their AV ballots by mail to provide their own postage, MCL 168.764a(a), which is not at issue here.

wrongly decided as applied in that case. Nothing in the Court of Claims' jurisdictional statute—or any other statute relating to the Court of Claims—bars the intervention of nongovernmental parties as defendants. And denying intervention to the Republican Committees precluded them from defending their interests in a proceeding in which those interests were irreparably harmed, constituting a violation of due process.

18. The Court, bound by *Council of Organizations*, denied the Republican Committees' motion and held that *Council of Organizations* "precludes [the Republican Committees] from intervening as defendants in this matter" (the "7-14-2020 Order"). The Court further found that their interests were adequately represented. Finally, the Court *sua sponte* granted the Republican Committees the status of amici curiae.

19. The Republican Committees filed an emergency application for leave to appeal with the Court of Appeals. Shortly after, the Republican Committees filed with the Supreme Court an emergency bypass application for leave to appeal before decision by the Court of Appeals. The Court of Appeals denied the Republican Committees' application on the basis that the Court is bound by *Council of Organizations* (the "8-18-2020 Order"). Then, the Supreme Court denied the Republican Committees' emergency application not persuaded that the question presented should be reviewed (the "8-28-2020 Order"). The Republican Committees filed a timely motion for reconsideration, which remains pending before the Court.

20. On September 18, 2020, within 50 days until the general election, the Court found that the harvesting ban and ballot receipt deadline are unconstitutional as generally applied to the November 2020 general election in light of the COVID-19 pandemic, and enjoined these election laws. (9-18-2020 Opinion and Order).

21. *First*, the Court enjoined the harvesting ban for the general election from 5:00 p.m. on Friday, October 30, 2020, until the close of the polls on Tuesday, November 3, 2020, without any restrictions on who may solicit and return AV ballots from Michigan voters.

22. *Second*, the Court enjoined the ballot receipt deadline to allow all AV ballots postmarked by November 2, 2020 (the day before election day) and received by November 17,

2020 (the deadline for certifying election results)—14 days after the general election, *see* MCL 168.822(2)—to be counted in the same manner as provisional ballots.

23. These rulings in *Michigan Alliance* are both legally and factually erroneous.

24. The Secretary of State and the Attorney General have publicly announced that they will neither appeal these rulings nor enforce the harvesting ban and ballot receipt deadline—resulting in no adverse parties defending these challenged laws.[3]

25. The Republican Committees seek a declaratory judgment that Michigan's harvesting ban and ballot receipt deadline are enforceable both facially and as generally applied to the general election.

26. "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1).

27. There is an actual controversy and present controversy between the parties.

28. The Republican Committees' claim for declaratory relief became ripe following the Court's 9-18-2020 Order in *Michigan Alliance*.

29. Specifically, an actual controversy exists relating to State Defendants failure to enforce the long-standing harvesting ban and ballot receipt deadline before the general election.

30. The harvesting ban and ballot receipt deadline are constitutional both facially and as generally applied to the general election for the arguments set forth in Republican Committees' brief as amici curiae in *Michigan Alliance*, which are incorporated herein. (**Ex. 3**).

31. The harvesting ban is constitutional and not preempted by federal law. The Legislature has the constitutional authority to enact laws to preserve the purity of elections, to

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[3] LeBlanc, *Michigan clerks must accept late ballots if mailed by Nov. 2, judge rules*, Detroit News (Sept. 18, 2020), https://perma.cc/7M6G-HKEZ (**Ex. 2**) ("Attorney General Dana Nessel's office said it will not appeal [Judge] Stephens' decision, nor a separate voting decision issued Thursday in federal court. 'With the November election quickly approaching, voters and local clerks need certainty — and these decisions provide that,' said Ryan Jarvi, a spokesman for Nessel. 'Therefore, we do not intend to appeal, but rather will use this time to educate and inform voters of their rights.'").

guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. *See* 1963 Const, art 2, § 4(2). The State's important regulatory interests are sufficient to justify the reasonable, nondiscriminatory restrictions under the harvesting ban, especially in the context of absentee voting.

32. Prohibiting unlimited AV ballot harvesting is a commonsense means of preventing undue influence, voter fraud, ballot tampering, and voter intimidation. The harvesting ban preserves the integrity of absentee voting by increasing the likelihood that a voter will entrust his or her AV ballot with someone who is both familiarly trustworthy and legally accountable.

33. Further, on September 17, 2020—the day before the Court's injunctions in *Michigan Alliance*—a federal court denied a similar challenge to Michigan's prohibition that strangers cannot solicit and return AV ballot applications from Michigan voters. *Priorities USA v Nessel*, No. 19-13341 (ED Mich, Sept. 17, 2020) (**Ex. 4**).[4] There, the court found that the plaintiffs' First Amendment, void-for-vagueness, and federal preemption under the Section 208 of the Voting Rights Act, 52 USC 10508, arguments were unlikely to succeed on the merits. The court ultimately denied the plaintiffs' motion for a preliminary injunction relating to Michigan's AV ballot application harvesting law. The federal court's persuasive ruling should apply equally to harvesting AV ballots.

34. The ballot receipt deadline is also constitutional. The Michigan Court of Appeals recently held that the ballot receipt deadline is a "policy decision," which "does not effectively preclude a voter from completing the process of voting by absentee ballot during the 40 days before the election." *League of Women Voters of Mich v Secretary of State*, —Mich App—; 2020 WL 3980216, at *8–9 (2020). As-applied challenges should be rejected for the substantive reasons articulated in the majority and concurring opinions in *League of Women Voters*.

35. COVID-19 does not nullify the Legislature's obligation to set a deadline "for the submission of the completed ballot to election officials" and the ballot receipt deadline "does not

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[4] The Court may consider federal authority when interpreting Michigan's constitutional protections. *See Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 256 (2013).

effectively preclude a voter from completing the process of voting by absentee ballot during the 40 days before the election." *Id.* at *9. These are election policy decisions best left to the Legislature. *See State Farm v Old Republic Ins Co*, 466 Mich 142, 149 (2002) ("It is not the role of the judiciary to second-guess the wisdom of a legislative policy choice; our constitutional obligation is to interpret—not to rewrite—the law."). During these trying times of disruption caused by COVID-19, states have an even *greater* interest in avoiding judicial interference with the laws and processes which have long been in place to protect the integrity of elections.

36. The Republican Committees are forced to bring the present action because *Council of Organizations* unconstitutionally precluded them from defending their interests in *Michigan Alliance* in which those interests were irreparably harmed, constituting a violation of due process.

37. State Defendants further refuse to enforce the harvesting ban and ballot receipt deadline for the general election. *See, e.g., League of Women Voters*, —Mich—; No. 161671 (Mich, Sept. 11, 2020) (Viviano, J., concurring).

38. State Defendants' failure to enforce the ballot receipt deadline represents a failure to adequately represent the Republican Committees' interests, despite the Court's ruling to the contrary in its 7-14-2020 Order in *Michigan Alliance*, completely depriving the Republican Committees of the opportunity to be heard and violating their right to due process.

39. The failure to enforce the harvesting laws and ballot receipt deadline unfairly impacts the Republican Committees, their candidates, their voters, and their own institutional interests by fundamentally changing the "structur[e] of this competitive environment." *Shays v FEC*, 414 F3d 76, 85 (DC Cir, 2005). The Republican Committees and their candidates will face "a broader range of competitive tactics than [state] law would otherwise allow." *Id.* at 86. The injunction "fundamentally alter[s] the environment in which [they] defend their concrete interests (e.g. . . . winning reelection)." *Id.* The Republican Committees will need to divert substantial resources to comply with the Court's injunction in *Michigan Alliance*, which they have not had the opportunity to defend based on wrongfully decided *Council of Organizations*. Consequently,

the Republican Committees, their candidates, and their voters have suffered and will continue to suffer because of this dispute.

40. The Republican Committees have already expended resources on voter education and mailers that have been rendered incorrect by the failure to enforce the harvesting laws and ballot receipt deadline. Absent intervention by this Court, those expenditures will be wasted and the Republican Committees will be forced to spend additional resources to reeducate voters and correct its mailers. (**Ex. 5**).

41. The Republican Committees acknowledge that, absent a stay or reversal by the Court of Appeals or the Supreme Court, this Court's 9-18-2020 Order in *Michigan Alliance*, finding the harvesting ban and ballot receipt deadline unconstitutional as generally applied to the general election, prevents State Defendants from enforcing these enjoined laws. But with State Defendants refusing to further defend these laws and the Republican Committees being blocked from intervening in *Michigan Alliance* due to *Council of Organizations*, the Republican Committees have been left with no judicial avenue in which to seek protection of their substantial rights before the general election, outside of the present action.

42. The Republican Committees therefore seek a judicial declaration that the harvesting ban and ballot receipt deadline are enforceable both facially and as generally applied to the November 2020 general election.

PRAYER FOR RELIEF

WHEREFORE, the Republican Committees respectfully ask the Court to grant the following relief:

A. A declaratory judgment that the harvesting ban and ballot receipt deadline are enforceable both facially and as generally applied to the general election as set forth in this Verified Complaint;

B. Award the Republican Committees their reasonable attorneys' fees, costs, and expenses under any applicable law;

C. Any other such further relief to which the Republican Committees may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: September 24, 2020

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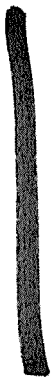

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN ALLIANCE FOR RETIRED AMERICANS, et al.,

Plaintiffs,

v

JOCELYN BENSON, et al.,

Defendants.
_____/

OPINION AND ORDER

Case No. 20-000108-MM

Hon. Cynthia Diane Stephens

Pending before the Court is plaintiffs' request for preliminary injunctive relief on three issues: restrictions on ballot assistance, the requirement that voters affix postage to their mailed absentee ballots, and the limitation that only ballots received by 8 p.m. Election Day be tallied. Plaintiff's have argued that due to current circumstances including the impact of the novel Coronavirus these election procedures are unconstitutional. For reasons articulated later in this opinion the court orders as follows:

1. This court enjoins MCL 168.932(f) in this election from 5:00 p.m. Friday October 30, 2020 until the close of the polls on November 3, 2020, in so far as it limits the class of persons who may render an absent voter assistance. As a result, a voter casting an absent voter ballot in the November 2020 general election may select any individual the voter chooses to render assistance in returning an absent voter ballot, but only for the limited time period when assistance from the clerk is not required, i.e., between 5:01 p.m. on the Friday before the election and the close of polls on Election Day.

2. Enforcement of the ballot receipt deadlines in MCL 168.759b and MCL 168.764a as they relate to the date and time by which absentee ballots must be received by the clerk in order to be tallied, is enjoined for this election only. All ballots postmarked no later than one day before election day, i.e., November 2, 2020, and received by the deadline for certifying election results, are eligible to be counted in the same manner as all provisional ballots

3. Finally, plaintiffs have not met the burden of demonstrating a substantial likelihood of success on their challenge to the requirement that absentee voters supply their own return postage, and injunctive relief with respect to that issue is DENIED.

I. BACKGROUND

Plaintiffs' request for injunctive relief concerns three provisions of Michigan Election Law that pertain to absent voter ballots: (1) a ballot receipt deadline; (2) a limitation on who can help a voter return an absent voter ballot; and (3) a requirement that absentee voters supply their own return postage. Plaintiffs presented both facial and as applied arguments. This Court held a hearing on plaintiff's initial request for injunctive relief on July 8, 2020. No witnesses were called. Prior to the release of this Court's ruling on that motion the Court of Appeals issued its opinion in *League of Women Voters of Mich v Sec'y of State (League of Women Voters I)*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 350938; 351073). That case concerned, as written, constitutional challenges to several statutory provisions at issue in this case. The August primary was held. Plaintiffs filed a renewed prayer for injunctive relief following supplemental briefing and documentary evidence regarding the August 2020 primary election, and this Court held a hearing on plaintiffs' request for relief on September 3, 2020. Plaintiffs presented witness testimony at the hearing to supplement their various affidavits and documentary evidence. Counsel for defendants did not challenge the documentary evidence at the hearing and conceded

that the affidavits and documentary evidence provide an evidentiary record from which this Court can make findings for purposes of resolving plaintiffs' request for injunctive relief.

With respect to that documentary evidence, the unrefuted affidavits and documents compel the conclusion that, in light of delays attributable to the COVID-19 pandemic, mail delivery has become significantly compromised, and the risk for disenfranchisement when a voter returns an absent voter ballot by mail is very real. Plaintiffs have produced documentary evidence that there have been significant mail delays since the onset of the pandemic, particularly in Detroit, despite a decrease in the volume of mail being processed during the same time. Furthermore, plaintiffs' documentary evidence revealed that, due to "major operational changes" with the Postal Service—such as elimination of overtime hours—mail delivery could be slowed down even further, particularly with what figures to be an event that increases strain on the system, such as a large increase in mail volume associated with mailing absentee ballots in advance of the November 2020 general election. For these and similar reasons, the Secretary of State issued public warnings to voters the week before the August 2020 primary and urged voters to *not* use the United States Postal Service to return absent voter ballots, given the risk that completed ballots would not arrive in time to be counted.

Plaintiffs presented affidavit evidence that many voters were in fact deprived of having their absent voter ballot tallied in the Augusts primary. Plaintiffs presented unrefuted evidence that thousands of voters' absentee ballots were not counted due to having been received after Election Day in the most recent August 2020 primary election. Affidavits and testimony detailed that despite voters requesting absent ballots weeks in advance of the primary, their actual ballot arrived as late as Election Day. The late receipt made it virtually impossible to return the ballot

by mail in time to be counted. Furthermore, plaintiffs have produced evidence of instances where voters' completed ballots were sent well in advance of the receipt deadline for the August 2020 primary election, but where the ballots were not counted because, as a result of mail delays, they were not received on time. In one instance, a ballot that was destined for the clerk's office in Wyandotte, Michigan, was routed out of state, to Illinois, before being delivered (late) to its intended address in Michigan. These ballots were just some of the over 6,400 otherwise valid ballots that were rejected for having been received after the election day receipt deadline.

The general counsel for the United States Postal Service acknowledged that the law in this state, namely the ballot receipt deadline, posed a significant risk of disenfranchisement because of current mail processing. Given the documented increase in absent ballot requests, the risks of disenfranchisement are projected to rise with respect to the November 2020 general election.

The risks of disenfranchisement are even greater when the Court considers the documentary evidence submitted by plaintiffs regarding individuals who are immunocompromised and/or who live alone and are without ready access to someone who can help return an absent voter ballot under MCL 168.932(f). While city and township clerks are required to assist voters, upon request, the requirement to provide assistance ends at 5:00 p.m. on the Friday before election day. See MCL 168.764a; MCL 168.764b (4). The cutoff time for rendering assistance has a particularly harsh effect in light of the mail delays noted above, i.e., if an absent voter ballot is received after the 5:00 p.m. assistance cutoff deadline, the voter is not guaranteed help from the clerk.

One of the issues in this case concerns evidence—or lack thereof—of voter fraud and threats to election integrity associated with absent voter ballots. Plaintiffs produced largely

unrefuted expert testimony and documentary materials from Dr. Michael C. Herron, who concluded that literature on voter fraud consistently concluded that incidences of fraud were "rare." In addition, he concluded that there was "no evidence of significant voter fraud in [Michigan] associated with absentee voting and voter assistance." Nor were there significant incidences of fraud reported with the May 2020 election, in which nearly all ballots were cast by mail or at a ballot drop-box.

A. BALLOT RECEIPT DEADLINE

With the approval of Proposal 3 in 2018, this state's electorate enshrined in the Michigan Constitution the right "to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4. Provisions of the Michigan Election Law, which pre-date the approval of Proposal 3, require that, in order to be valid, an absent voter ballot must be returned to the clerk before polls close at 8:00 p.m. on election day. MCL 168.759b; MCL 168.764a. See also *Lantz v Southfield City Clerk*, 245 Mich App 621; 628 NW2d 583 (2001). "An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted." See MCL 168.764a. Absent voter ballots may be returned by either: (a) depositing the ballot (with postage) in the United States Mail or another public postal service or common carrier; or (b) delivering the absent voter ballot to the office of the clerk, the clerk, or to an authorized assistant of the clerk. *Id.* See also MCL 168.932(f).

Plaintiffs argue that the ballot receipt deadline is constitutionally infirm for a number of reasons. They argue that absent voter ballots should be counted if they are postmarked before or on, but received after, election day. In support, plaintiffs note that provisional ballots are counted

after election day, see MCL 168.523a; MCL 168.813, and that a board of county canvassers is not required to certify its election results until 14 days after election day, see MCL 168.822(2).

B. VOTER ASSISTANCE BAN

The next point of contention in this case concerns what has been referred to as the "voter assistance ban." In essence, the voter assistance ban restricts the pool of individuals who can render assistance to a voter who chooses to return an absent voter ballot. MCL 168.932(f) contains a list of those who can return, solicit to return, or agree to return an absent voter ballot to the appropriate clerk. That list is limited to:

> [1] a person whose job it is to handle mail before, during, or after being transported by a public postal service, express mail service, parcel post service, or common carrier, but only during the normal course of his or her employment;
>
> [2] a clerk or assistant of the clerk;
>
> [3] a member of the immediate family [1] of the absent voter including father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild; or
>
> [4] a person residing in the absent voter's household[.] [MCL 168.932(f).]

A violation of the restrictions regarding the return of absent voter ballots constitutes a felony. See MCL 168.932.

Plaintiffs argue that the voter assistance ban runs afoul of a number of provisions of this state's constitution. Alternatively, they argue that the ban is contrary to the federal Voting Rights Act and that the ban is thus preempted by the federal statute.

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[1] The term "immediate family" is further defined in MCL 168.2(*l*) to mean "individual's father, mother, son, daughter, brother, sister, and spouse and a relative of any degree residing in the same household as that individual."

C. POSTAGE REQUIREMENT

As it concerns the return of absent voter ballots, plaintiffs point out that MCL 168.764a requires voters to supply their own postage if they wish to return their absentee ballots by mail. See MCL 168.764a. Plaintiffs, who refer to this as the "postage requirement," contend that the statute imposes an unnecessary monetary cost on voting at a time when many voters in this state are suffering from the economic effects of COVID-19. Plaintiffs ask the Court to enjoin the postage requirement, which would effectively require the state to supply return postage for those who wish to submit their absent voter ballots by mail. Plaintiffs argue that the postage requirement contained in MCL 168.764a is constitutionally infirm because it adds additional burdens to the self-executing right to return an absent voter ballot by mail contained in Const 1963, art 2, § 4. They also argue that the postage requirement imposes an unconstitutional burden on the right to vote absentee, in violation of Const 1963 art 1, § 2.

II. PRELIMINARY INJUNCTIVE RELIEF

This matter is before the Court on plaintiff's request for preliminary injunctive relief. A preliminary injunction is an extraordinary form of equitable relief "that has the objective of maintaining the status quo pending a final hearing concerning the parties' rights." *Slis v State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 351211; 351212), slip op at 12. In weighing whether to grant this form of relief, the Court must consider:

> (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction; (2) whether the applicant is likely to prevail on the merits; (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party; and (4) whether the public interest will be harmed if a preliminary injunction is issued. [*Id.*]

The proponent of preliminary injunctive relief bears the burden of demonstrating the necessity of the relief sought. *Id.*

A. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs challenge the pertinent statutes on a variety of constitutional grounds. Any evaluation of plaintiffs' ability to succeed on the merits of their challenges must begin with the presumption that the challenged statutes are constitutional, as well as with the notion that the Court must construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Council of Orgs & Others for Ed About Parochiaid v State*, 326 Mich App 124, 139; 931 NW2d 65 (2018). "The power to declare a statute unconstitutional must be exercised with extreme caution [,]" and this Court must indulge every reasonable presumption in favor of the validity of the challenged statutes. *Id.* "[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that [a statute] violates some provision of the Constitution that a court will refuse to sustain its validity." *Id.* at 139-140 (citation and quotation marks omitted). See also *League of Women Voters of Mich v Sec'y of State (League of Women Voters I)*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), slip op at 10. Based on the arguments presented and the repeated references to the ongoing COVID-19 pandemic, plaintiffs are raising facial and as-applied challenges to the statutes at issue. An as-applied challenge "alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (citation and quotation marks omitted). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016) (citation and quotation marks omitted).

Plaintiffs also assert facial challenges to the statutes. A party asserting a facial challenge is confronted with a difficult task, as she "must establish that no set of circumstances exists under

which [the challenged provision] would be valid. . . ." *Bonner*, 495 Mich at 223. The Court of Appeals recently issued a published decision that conclusively resolves plaintiffs' facial challenge to the ballot receipt deadline. See *League of Women Voters of Mich v Sec'y of State (League of Women Voters II)*, __ Mich App __; __ NW2d __ (2020) (Docket No. 353654) (opinion by SAWYER, J.). As a result, plaintiffs are unable to demonstrate any likelihood of success on the merits of their facial challenge to the ballot receipt deadline, and no additional discussion of the issue is warranted in this opinion and order. The Court also concludes that plaintiffs are unlikely to succeed on the merits of their facial challenge to the voter assistance ban and to the postage requirement. The bulk of this Court's discussion will focus on the as-applied challenges as a result.

1. PLAINTIFFS' AS-APPLIED CHALLENGE TO THE BALLOT RECEIPT DEADLINE

Plaintiffs argue that the ballot receipt deadline is unconstitutional as-applied in light of the ongoing COVID-19 pandemic. On this point, the Court agrees, and finds that the case, based on the unrefuted evidence presented, is distinguishable from *League of Women Voters II* and that the holding in that case does not dictate the outcome here. Thus, the Court is not concluding that plaintiffs will succeed in their attempts to invalidate the ballot receipt deadline in toto; rather, the Court's holding is that, as applied to plaintiffs under the facts and evidence presented in this case, the ballot receipt deadline violates plaintiffs' constitutional rights guaranteed by art 2, § 4.

Plaintiffs correctly note that the right to vote by absent voter ballot is self-executing, and that the right to vote by absent voter ballot, like all rights enshrined in art 2, § 4, "shall be liberally construed in favor of voters' rights in order to effectuate its purposes." Const 1963, art 2, § 4(1). Legislation may supplement self-executing constitutional provisions; however, legislation "must not curtail the rights reserve or exceed the limitations specified" in a self-executing constitutional provision. *League of Women Voters I*, __ Mich App at __, slip op at 11. The Legislature has a

constitutional obligation to implement this state's election laws and to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Art 2, § 4. Legislation enacted pursuant to this constitutional mandate may not, however, "create unnecessary burdens which tend to restrict the constitutional rights" enshrined in art 2, § 4. See *League of Women Voters I*, __ Mich App at __, slip op at 12.

In light of the unrefuted documentary evidence concerning the effects of the pandemic and mail delays, the Court concludes that the statutory ballot receipt deadline is, as applied, an impermissible restriction on the self-executing right to vote by absent voter ballot and to choose to return such a ballot by mail. See *id.* at 11 (explaining that legislation supplementary to a self-executing constitutional provision must "further" the exercise of the self-executing right and must "make it more available"). The evidence in this case stands uncontroverted and establishes that the mail system is currently fraught with delays and uncertainty in light of the COVID-19 pandemic. Notably, the United States Office of the Inspector General released a report that specifically identified Michigan as a state with statutes placing voters at a "high risk" of disenfranchisement. In addition, Ronald A. Stroman, the former Deputy Postmaster General, provided information regarding the significance, and prevalence, of mail delays in this state. These risks are not merely hypothetical, because over 6,400 otherwise valid absent voter ballots were rejected in the August 2020 primary election because they were received after the statutory deadline. The number of ballots rejected, as pointed out by plaintiffs' documentary evidence, increased, as did the rate at which absent voter ballots were rejected. The evidence supports a

finding of fact that under the current circumstances, enforcement of the deadline for ballot receipt has led, and is likely to lead, to significant instances of failure to count absent ballots.

Indeed, the evidence demonstrates that, under the present circumstances, a voter's right to cast an absent voter ballot by mail in the 40 days before the November 2020 general election is severely restricted, and at times outright eliminated. Even for those voters who are fortunate enough to receive their absent voter ballots in advance of the election, mail delays and the COVID-19 pandemic stack the deck against successfully casting an absent voter ballot by mail in a timely manner. For those with underlying health risks and who prefer not to cast a vote in person, returning the ballot by mail is the only realistic option. Where the current state of affairs has riddled that option with uncertainty after uncertainty, the Court concludes that the 8:00 p.m. ballot receipt deadline unnecessarily curtails the self-executing right to vote by absent voter ballot and to return that ballot by mail. See *League of Women Voters I*, __ Mich App at __, slip op at 12, (rejecting as unconstitutional a statute that "is both unnecessary for effective administration of" a self-executing constitutional right and "restrictive" of that right).

Stated otherwise, a ballot receipt deadline might very well operate as a permissible restriction on the right to cast an absent voter ballot when there is some modicum of certainty that the (normally reliable) United States Postal Service will be able to: (1) deliver the voter's ballot to the voter before the election and in time for the voter to act on the ballot; and (2) deliver a completed ballot by the statutory deadline, should the voter place the completed ballot in the mail at a reasonable time. Here, unfortunately, that critical element of certainty is missing, and voters know neither whether their ballot will be received (by them) on time or delivered to the clerk's office on time. As a result, applying the strict, 8:00 p.m. ballot receipt deadline on absent voter

ballots imposes too great a restriction for the upcoming general election. Some flexibility must be built into the deadline in order to account for the significant inability of mail to arrive on what would typically be a reliable, predictable schedule. That flexibility will be outlined in § II. C. of this opinion.

In so concluding, the Court agrees with plaintiffs that the unrefuted factual record in this case, as well as the as-applied nature of the challenge before the Court, distinguishes this matter from *League of Women Voters II* and that the holding in that case does not bind the Court on the issue presented here. Most notably, the lead opinion in *League of Women Voters II* discounted many of the risks of ballots arriving exceptionally late as "extreme, and undoubtedly rare" and concluded that delayed mail was simply one of the risks that the voter must assume when he or she decides to return an absent voter ballot. See *League of Women Voters II*, __ Mich App at __, slip op at 10 (opinion by SAWYER, J.). Here, however, the uncontroverted data presented by plaintiffs convinces the Court that the incidences in which ballots are not received in time—either by the voter or by the pertinent clerk's office—cannot be cast aside as "rare." As acknowledged by *League of Women Voters II*, voters "certainly possess" the right to choose to submit an absent voter ballot by mail. *Id.* at 9. The evidence presented in this case reveals that the pandemic's effect on the mail system has outright removed, or effectively removed, the right to choose to submit an absent voter ballot by mail. Thus, the facts of this case show that a voter cannot remove the risks associated with mail delivery by, as characterized by the *League of Women Voters II*, simply acting "sooner when they choose to mail in their ballot," nor can the facts and circumstances of this case be dismissed by characterizing mail issues as merely affecting "how and when" the choice to vote by mail is made. Cf. *id.* Instead, the facts of this case show that the choice to return a ballot by mail has been effectively removed from the voter. That is, unlike non-

pandemic instances where it can generally be assumed that mail will arrive and that it will arrive on time, a voter cannot simply choose to act sooner and avoid the effects of mail delays, particularly when those delays are of such a magnitude that they remove the choice altogether. Delayed mail is not the only risk involved during the pandemic. The health risks of COVID-19, which have been well-documented and which need not bear repeating here, also weigh on voters. For many, that risk presented by the pandemic is simply too great. Nor is it one that should be encountered, given that the Constitution guarantees the right to return the absent voter ballot by mail. Thus, on the unrefuted evidence presented in this case, the Court concludes that the *League of Women Voters II* decision does not control the as-applied challenge presented to the Court in the instant matter.

In light of the above, plaintiffs have demonstrated a substantial likelihood of success on their assertion that the ballot receipt deadline contained in MCL 168.759b is unconstitutional as applied in this case.

2. VOTER ASSISTANCE BAN

Plaintiffs have also demonstrated a substantial likelihood of success on their challenge to the statutory voter assistance ban. Article 2, § 4 grants voters the right to return an absent voter ballot in-person, should they choose to do so. MCL 168.932(f) contains a limited list of individuals who can assist a voter in returning an absent voter ballot. In general, and at a time without COVID-19, the limited list of individuals who are eligible to provide assistance would likely not rise to the level of an unnecessary burden tending to restrict the self-executing constitutional right to vote by absent voter ballot. However, the record in this case convinces the Court that plaintiffs have a strong likelihood of succeeding on their claim that the list of individuals enumerated in

MCL 168.932(f), under the narrow circumstance noted in this opinion, cannot pass constitutional muster.

Pertinent to this issue, MCL 168.932(f) provides that voters casting an absent voter ballot may choose from "immediate family" members or another person residing in the voter's household to return an absent voter ballot. Plaintiffs' documentary evidence points out that many home-bound individuals live alone and have no family members living nearby. Perhaps in recognition of the same, the statute contains a fail-safe option for such individuals, as MCL 168.932(f) permits a clerk or assistant of the clerk to help an absent voter return an absentee ballot. This fail-safe option ends, however, at 5:00 p.m. on the Friday before the Election, and the clerk is not required to provide assistance after that time. See MCL 168.764b. Thus, in the days leading up to the election, and at a time when assistance might be most needed, the absent voter is most in danger of being left without assistance.

Again, in ordinary times, the statute likely poses no constitutional issue. These are not, however, ordinary times. As noted, there are documented instances in this case of absentee voters who received their absent voter ballot shortly before the August 2020 election, despite a timely request for such a ballot. As noted, a voter is only guaranteed to receive help from the clerk if the voter makes a request before 5:00 p.m. on the Friday before Election Day. The very real risk of receiving an absent voter ballot in an untimely fashion increases the risk that voters who are otherwise without a statutorily enumerated person to help return their ballot will not be able to take advantage of the fail-safe option of receiving assistance from the clerk. One can think of residents in an assisted living facility, the access to which has been extremely limited during the pandemic, who might fall into this category. Additionally, prospective absentee voters who simply wish to

take their time in weighing which candidates to vote for run the risk of missing out on the clerk-supplied assistance. Such individuals might be hesitant, or unable, to receive assistance from family members or household members due to health concerns associated with the COVID-19 pandemic. Or the health risks inherent with COVID-19 might prevent such a voter from returning a ballot in-person. Therefore, and under the current circumstances, the Court is convinced that the time deadline imposed on the fail-safe option of seeking assistance from the clerk risks leaving too many voters without the opportunity of receiving assistance in returning their ballots. Under the facts of this case, and as applied, MCL 168.932(f)'s voter assistance ban creates an unnecessary burden that tends to unduly restrict the rights enshrined in art 2, § 4.

Accordingly, and under the facts presented, the Court agrees plaintiffs have demonstrated a substantial likelihood of success on the merits of their assertion that MCL 168.932(f) unduly restricts the right guaranteed by art 2, § 4, but only during the time between 5:01 p.m. on the Friday before the election and Election Day. It is during this timeframe when the statute's fail-safe option is unavailable and during which the voter might find himself or herself in most need of assistance. Where no justification has been given for ending the fail-safe option in the days before the election, the Court concludes plaintiffs have a substantial likelihood of succeeding on the merits of their claim that the restrictions in MCL 168.932(f) are both unnecessary for the administration of absentee voting and restrictive of the self-executing right contained in art 2, § 4 under the present circumstances. See *League of Women Voters I*, __ Mich App at __, slip op at 12 (declaring as unconstitutional statutes that unnecessarily restrict self-executing constitutional rights). As will be discussed in § II. C. of this opinion, this constitutional violation will be remedied by permitting, but only during the specified timeframe, an absentee voter to seek assistance from a third party of their choosing.

Plaintiffs' likelihood of success on this matter is not affected by the amici's concerns about election integrity. The documentary evidence in this case reveals that the incidences of voter fraud and absentee ballot fraud are minimal and that the fears of the same are largely exaggerated. Moreover, there is little evidence to suggest that fraud would increase with a larger pool of persons eligible to assist absentee voters. Nor, for that matter, is there a compelling case to be made on this record that a voter's neighbor, who otherwise would not be able to help her return a ballot, would be more likely to induce fraud than an individual who is approved to render assistance by MCL 168.932(f), such as a voter's brother-in-law. Furthermore, as plaintiffs point out, the remaining provisions of MCL 168.932 already prohibit interference with the absentee voting process and are much more tailored to that purpose than the voter assistance ban. The fraud-fighting role of the voter assistance ban is debatable, at best. As explained in *League of Women Voters of Mich I*, __ Mich App at __, slip op at 11, legislation supplementary to a self-executing constitutional provision such as art 2, § 4 "must be in harmony with the spirit of the Constitution, and its object to *further the exercise of constitutional right and make it more available*, and such law must not curtail the rights reserved or exceed the limitations specified." (Citation and quotation marks omitted; emphasis added). Under the circumstances and timeframe identified in this case, the voter assistance ban curtails the self-executing rights set forth in art 2, § 4 in a way that cannot survive constitutional scrutiny.

3. LIKELIHOOD OF SUCCESS ON THE POSTAGE REQUIREMENT

While plaintiffs have demonstrated the requisite likelihood of success on the two aforementioned challenges, the Court finds that they are unlikely to succeed on their challenge to the postage requirement contained in MCL 168.764a. Judge Sawyer's opinion in *League of Women Voters* concluded that "requiring absentee voters to pay for return postage does not impose

a severe restriction on the right to vote." *League of Women Voters II*, __ Mich App at __, slip op at 16 (opinion by SAWYER, J.). Rather, the postage requirement:

> is a reasonable, minimal, and nondiscriminatory restriction. Notably, Const. 1963, art. 2, § 4(1)(g), provides voters the right to choose to submit an absentee ballot by mail. It does not require that voters be permitted to submit absentee ballots at no cost. Every election regulation "imposes to some degree a burden on an elector." [*In re Request for Advisory Opinion Re Constitutionality of 2005 PA 71*, 479 Mich 1, 22; 740 NW2d 444 (2007)]. Considering the various options for submitting an absentee ballot, the requirement that a voter pay return postage is minimal. To the extent that the cost of return postage may pose a financial hardship, the voter or an immediate family member may deliver the ballot in person, or, if requested, the city or township clerk must pick up the ballot or send an election assistant to pick up the ballot. [*League of Women Voters II*, __ Mich App at __, slip op at 16.]

The above analysis convinces the Court that plaintiff is unlikely to succeed on either of its constitutional challenges to the postage requirement in this case. Unlike their as-applied challenge to the ballot receipt deadline, plaintiffs' documentary evidence concerning the postage requirement does not compel a different result than was reached in *League of Women Voters II*. Indeed, as noted by the *League of Women Voters II* opinion, the burden imposed is only slight, and it is not of the ilk that would curtail the self-executing rights established in art 2, § 4. The documentary evidence presented thus far does not convince the Court that the burden is anything other than what it was described in *League of Women Voters II*. Nor is the Court convinced that plaintiffs have any likelihood of succeeding under the *Anderson-Burdick*[2] framework. See *In re Request for Advisory Opinion*, 479 Mich at 22. As a result, the Court need not address the remaining factors for injunctive relief in order to conclude that preliminary injunctive relief is not warranted with respect to plaintiffs' claims regarding the postage requirement.

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[2] See *Anderson v Celebrezze*, 460 US 780, 788-789; 103 S Ct 1564; 75 L Ed 2d 547 (1992), and *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992).

B. REMAINING FACTORS FOR INJUNCTIVE RELIEF

As it concerns the remaining factors for injunctive relief, the Court will focus only on the two issues where plaintiff has established a substantial likelihood of success on the merits—the as-applied challenges to the ballot receipt deadline and to the voter assistance ban.

Turning first to irreparable harm, the Court concludes that this "indispensable" factor weighs in favor of granting injunctive relief. See *Pontiac Fire Fighters Union Local 376*, 482 Mich 1, 9; 753 NW2d 595 (2008). That is, given the record evidence detailing an increase in the number and percentage of absent voter ballots that have been rejected solely for being received after the statutory deadline and in light of the other evidence of record, plaintiffs are able to demonstrate a "particularized showing of irreparable harm," arising from the denial of the right to vote by absent voter ballot as guaranteed by art 2, § 4, rather than a mere apprehension of future injury. See *id.* See also *Garner v Mich State Univ*, 186 Mich App 750, 764; 462 NW2d 832 (1990) (explaining that the loss of a constitutional right "constitutes an irreparable harm which cannot be adequately remedied by an action at law.").

Balancing the harms and the public interest weigh in favor of injunctive relief as well. Undoubtedly, the public is benefited from preserving and furthering the right to vote. The Court finds that the relief granted in this opinion can be accomplished without imposing a meaningful inconvenience to the state. Allowing third parties to assist voters during the narrow window of time granted by this opinion does not, on the record before this Court, undermine or affect the state's interest in preserving election integrity. So long as they are postmarked at the appropriate time—the same does not impose a significant burden on the state. The state already has a mechanism in place to do this very thing with respect to overseas and military voters. See MCL 168.759a(16). Election results need not be certified until 14 days after the election. See

MCL 168.822. Hence, so long as ballots are properly postmarked—see discussion in § II. C. of this opinion—the state can count eligible ballots received up until the 14-day certification deadline without encountering any other statutory difficulties.

The Court is not convinced that defendants' concerns about the timing of injunctive relief, and its proximity to the November 2020 election, weigh against granting the requested injunctions. As the Court noted in its previous order, it is cognizant of the warning in *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357; 200 NW2d 749 (1972), about administrative difficulties and the need to allow election officials time to comply with the mechanics of election-related changes. However, the Court concludes that, unlike in *New Democratic Coalition*, the relief granted here would not "seriously strain the election machinery [or] endanger the election process." *Id.* Cf. *Purcell v Gonzalez*, 549 US 1, 4-5; 127 S Ct 5; 166 L Ed 2d 1 (2006) (recognizing that, as an election looms closer, the risk that a court order will sow confusion before an election grows). Here, injunctive relief regarding the voter assistance ban does not require the state to do anything differently. Injunctive relief requiring officials to accept ballots that are postmarked in time, but received later, merely requires the state to resort to a process that is already employed in certain circumstances. Furthermore, officials will have nearly 50 days after the issuance of this opinion and order to prepare for an election. Defendants' briefing has even conceded that the Secretary of State "believes that there is sufficient time to draft guidance to local election officials that would adequately instruct officials with respect to reviewing postmarks for timeliness and resolving any disputes, as well as providing for a specific timeline for transmitting results to the boards of county canvassers." As a result, the Court concludes there is sufficient time to implement the remedy afforded by this opinion in a manner that will not affect the smooth operation of the November 3, 2020 general election.

C. REMEDY FOR CONSTITUTIONAL VIOLATIONS

For the reasons stated above, plaintiffs are entitled to injunctive relief on their claims that, as applied, the ballot receipt deadline and the voter assistance ban unnecessarily burden and restrict their self-executing constitutional right to vote by absent voter ballot. Those constitutional violations can be remedied by enjoining the enforcement of the statutes at issue as follows.

As it concerns the ballot receipt deadline, the Court's analysis is informed by the nature of the right guaranteed by art 2, § 4(1)(g), which grants the right to vote an absent voter ballot "during the forty (40) days *before* an election . . . ." (Emphasis added). Hence, so long as an absent voter ballot is postmarked *before* election day—in the case of the upcoming general election the latest available date would be November 2, 2020—it is eligible to be counted. See *League of Women Voters II*, __ Mich App at __, slip op at 11 n 19 (opinion by SAWYER, J.) (noting that the right guaranteed by art 2, § 4(1)(g) is the right to vote by absent voter ballot in the 40-day period *before* an election). Consistent with MCL 168.822, the timely postmarked ballot must be received by the clerk's office no later than 14 days after the election has occurred, so as not to interfere with the board of county canvassers' duty to certify election results by the fourteenth day after the election. Additionally, the Court draws on the ability of the Secretary of State to extend the ballot receipt deadline for uniformed services voters and overseas voters under MCL 168.759a(16) as support for this conclusion.

Therefore, and for the avoidance of doubt, an absent voter ballot that is postmarked by no later than November 2, 2020, and received within 14 days after the election, is eligible to be counted.

As it concerns the voter assistance ban, MCL 168.932(f) is unconstitutional as applied to only a narrow timeframe: the time between 5:01 p.m. on the Friday before the election and Election Day, i.e., when the clerk or an assistant is not required to assist a voter who wishes to cast an absent voter ballot. During this timeframe, and only during this timeframe, a voter may select any third party of his or her choosing to render assistance in returning an absent voter ballot. Any penalties and prohibitions that would otherwise apply to the mere act of helping a voter return an absent voter ballot,[3] including those found in MCL 168.932 and MCL 168.935, will be enjoined from applying during this specified timeframe only.

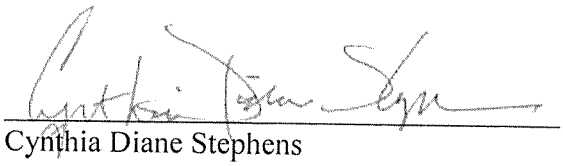
Therefore, and for the avoidance of doubt, the injunctive relief granted with respect to the voter assistance ban runs from 5:01 p.m. on Friday, October 30, 2020, through the close of polls, on Election Day, November 3, 2020.

III. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' request for preliminary injunctive relief is GRANTED as specified in this opinion and order.

This is not a final order and it does not resolve the last pending claim or close the case.

September 18, 2020



Cynthia Diane Stephens
Judge, Court of Claims

[3] The relief granted by this opinion does not prevent the operation of penalties for fraud or other acts prohibited by this state's election law. Rather, the grant of injunctive relief applies only to allow voters to select a third party of their choosing during the narrow timeframe identified herein.

The Detroit News

MICHIGAN

Michigan clerks must accept late ballots if mailed by Nov. 2, judge rules

Beth LeBlanc The Detroit News

Published 11:01 a.m. ET Sep. 18, 2020 | Updated 3:40 p.m. ET Sep. 18, 2020

Lansing — A Court of Claims judge ruled Friday that Michigan clerks must accept late ballots so long as they are postmarked no later than Nov. 2 and received before the deadline for certifying election results, or 14 days after the election.

The preliminary injunction, which applies only to the Nov. 3 election, comes about a month and a half after the Michigan Supreme Court declined to hear an appeal from the League of Women Voters challenging the law.

Judge Cynthia Stephens noted the separate case from the Michigan Alliance for Retired Americans included a renewed motion after the August primary, from which they provided evidence that showed "in light of delays attributable to the COVID-19 pandemic, mail delivery has become significantly compromised, and the risk for disenfranchisement when a voter returns an absent voter ballot by mail is very real."

"Plaintiffs presented affidavit evidence that many voters were in fact deprived of having their absent voter ballot tallied in the August primary," wrote Stephens, noting more than 6,400 valid ballots were rejected because they were received after the Aug. 4 primary.

"...Affidavits and testimony detailed that despite voters requesting absentee ballots weeks in advance of the primary, their actual ballot arrived as late as Election Day," wrote Stephens, an appointee of Democratic former Gov. Jennifer Granholm

Attorney General Dana Nessel's office said it will not appeal Stephens' decision, nor a separate voting decision issued Thursday in federal court.

"With the November election quickly approaching, voters and local clerks need certainty — and these decisions provide that," said Ryan Jarvi, a spokesman for Nessel. "Therefore, we do not intend to appeal, but rather will use this time to educate and inform voters of their rights.

Secretary of State Jocelyn Benson, who is the subject of the suit, had asked the Legislature to change state law to allow clerks to count late ballots so long as they are postmarked before Election Day. She encouraged voters on Friday to get their ballots in early regardless of the new extension.

"We still want voters to make a plan to vote now, and not wait until the last minute if they want to vote by mail," Benson said.

Serial litigant Robert Davis said he plans to file an emergency appeal as a voter who is "adversely affected" by the possibility that late ballots would still be counted.

The decision was celebrated by the retirement associations that had pushed for the changes. Seniors can "rest easier" by voting without putting their health at risk, they said.

“This ruling means that we can be confident that any mail delays will not keep our votes from being counted," said Dick Long, president of the Michigan Alliance for Retired Americans.

Stephens also granted a request for a preliminary injunction that would allow absentee voters to select anyone of their choosing to assist them in delivering their ballot between 5 p.m. Oct. 30 and Nov. 3, when help from the clerk's office may be unavailable.

Michigan law prohibits absentee voters from enlisting help in returning their ballot by anyone other than a mail-handler, clerk or assistant to the clerk, a person living in the household or a member of the immediate family.

"The court is convinced that the time deadline imposed on the fail-safe option of seeking assistance from the clerk risks leaving too many voters without the opportunity of receiving assistance in returning their ballots," Stephens wrote.

Stephens denied a request for a preliminary injunction on the requirement that absentee voters supply their own postage.

The ruling comes the day after a federal judge blocked a Michigan law that prevented groups from transporting voters to polling locations while also upholding a separate law that prevented "ballot harvesting," or gathering completed absentee ballots from voters.

The Priorities USA super political action committee filed the lawsuit almost a year ago challenging Michigan's laws banning those activities. The group, which described itself as a "nonprofit, voter-centric progressive advocacy and service organization," has filed several suits against the state over the last year over Michigan's voting laws.

In enjoining the state's law on vehicle transport, U.S. District Judge Stephanie Dawkins ruled Wednesday that "it is unclear how paying for a taxi or Uber is any more likely to influence a voter than offering to transport them by way of a volunteer driver in a non-profit corporation's minivan."

Additionally, Dawkins said, "Congress implemented a statutory scheme and gave citizens the right to spend money on transporting voters to the polls."

Stephens also ruled "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" placed on soliciting or requesting the collection or delivery of ballots under state law.

"Given the lack of evidence that any voters have been affected by the limits on their choice of assistance, there is no basis for the court to conclude that Michigan's law stands as an obstacle," Dawkins said.

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STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN ALLIANCE FOR RETIRED AMERICANS, DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE, CHARLES ROBINSON, GERARD MCMURRAN, JIM PEDERSEN, *Plaintiffs*, v. JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, and DANA NESSEL, in her official capacity as the Michigan Attorney General, *Defendants*,	Court of Claims No. 2020-000108-MM Hon. Cynthia D. Stephens

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REPUBLICAN NATIONAL COMMITTEE AND MICHIGAN REPUBLICAN PARTY'S BRIEF AS AMICI CURIAE IN SUPPORT OF DEFENDANTS' 8/31/20 MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF INTEREST AS AMICI CURIAE

In the July 14, 2020 Order, the Court granted the Republican National Committee and Michigan Republican Party (Amici) opportunity to participate in this case as amici curiae. In denying their application for leave to appeal, the Michigan Court of Appeals stated that Amici retain their status as amici curiae in the Court of Claims. (August 18, 2020 Order).

CHALLENGED ELECTION LAWS

I. Harvesting Ban

After a registered elector has received and completed an absent voter (AV) ballot, the marked ballot must be returned to the local clerk. The options for returning an AV ballot are provided in the instructions included with every ballot:

> Step 5. Deliver the return envelope by 1 of the following methods:
>
> (a) Place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier.
>
> (b) Deliver the envelope personally to the office of the clerk, to the clerk, or to an authorized assistant of the clerk.
>
> (c) In either (a) or (b), a member of the immediate family[1] of the voter . . . or a person residing in the voter's household may mail or deliver a ballot to the clerk for the voter.
>
> (d) You may request by telephone that the clerk who issued the ballot provide assistance in returning the ballot. The clerk is required to provide assistance if you are unable to return your absent voter ballot as specified in (a), (b), or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pickup the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered. Your absent voter ballot will then be picked up by the clerk or an election assistant sent by the clerk. . . .
>
> Step 6. The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted. [MCL 168.764a], MCL 168.764b(4)-(5).]

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[1] Michigan election law defines "immediate family" as "an individual's father, mother, son, daughter, brother, sister, and spouse and a relative of any degree residing in the same household as that individual." MCL 168.2(l). Section 932(f) further provides that "immediate family" includes a voter's "father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild." MCL 168.932(f).

These are the expressly authorized delivery options to be used by a voter and accepted by a clerk for the return of an AV ballot. MCL 168.764b(1).[2] If a voter's ballot is returned to the clerk's office in an unauthorized manner, the ballot will not be "invalidated solely because the delivery to the clerk was not in compliance" with the statutes, MCL 168.764b(7), but rather, the ballot will be processed as a challenged ballot. MCL 168.764b(7), 168.745.

The AV ballot instructions include a "warning" that "the following actions are violations of the Michigan election law and are illegal:"

> (4) For a person other than those listed in these instructions to return, offer to return, agree to return, or solicit to return an absent voter ballot to the clerk.
>
> (5) For a person other than the absent voter; a person listed in these instructions; or a person whose job it is to handle mail . . . to be in possession of a voted or unvoted absent voter ballot. [MCL 168.764a.]

A similar warning and language appear on the return envelope for an AV ballot. MCL 168.761. Section 932(f) makes the violation of these statutes a felony, punishable "by a fine not exceeding $1,000, a term of imprisonment not exceeding five years, or both." MCL 168.932(f), 168.935.

II. Ballot Receipt Deadline

Michigan's ballot receipt deadline provides that AV ballots "must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted." MCL 168.764a. The polls close at 8:00 p.m. on election day. MCL 168.720.

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[2] There are narrow statutory exceptions to the AV ballot return process, such as for military and overseas voters (MCL 168.759a), people who need an "emergency" AV ballot (MCL 168.759b), and for voters who wish to register and vote in a jurisdiction within 14 days of an election (MCL 168.761).

INTRODUCTION

Plaintiffs seek to dismantle the State's election procedures—such as ballot-receipt deadlines, absentee-ballot requirements, and ballot-harvesting safeguards—in the waning days before the November general election. Michigan, like most if not every state, has in place long-standing rules to promote and preserve order and integrity in its elections. Plaintiffs challenge long-standing Michigan election laws that (1) prohibit strangers from possessing and delivering AV ballots ("harvesting ban"), and (2) sets the deadline for AV ballots to be counted when the polls close at 8 p.m. on election day ("ballot receipt deadline"). Because AV ballots remove the act of voting from the controlled confines of the polling place, absent ballots are more susceptible to voter intimidation, fraud, and organizational mistakes. The harvesting ban implements commonsense rules that prophylactically aim to curb "voter fraud" and ballot tampering, to prevent undue influence in voting, and to "safeguard[] voter confidence" in the State's elections. *Crawford v Marion Cty Election Bd*, 553 US 181, 191-200 (2008). And, as the Michigan Court of Appeals recently held, the ballot receipt deadline is a "policy decision," which "does not effectively preclude a voter from completing the process of voting by absentee ballot during the 40 days before the election." *League of Women Voters of Mich v Secretary of State*, ___ Mich App ___; 2020 WL 3980216, at *8-9 (2020) ("*LWV*"). During these trying times of disruption caused by COVID-19, states have an even *greater* interest in avoiding judicial interference with the laws and processes which have long been in place to protect the integrity of elections. Plaintiffs' requested relief in enjoining these reasonable, non-discriminatory election safeguards as-applied in the last 60 days before the general election would significantly diminish electoral legitimacy, especially when all eyes are on Michigan this November.

ARGUMENT

I. Plaintiffs lack standing to challenge these Michigan election laws.

Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy." *Allstate Ins Co v Hayes*, 442 Mich 56, 68 (1993). Under Michigan law, "a litigant has standing whenever there is a

legal cause of action." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010). "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Comm'r of Ins*, 174 Mich App 467, 471 (1988). Where a cause of action has not been provided by law, a plaintiff must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large ...." *LSEA*, 487 Mich at 372. In sum, a plaintiff may have standing if either (1) the plaintiff has a special right that will be detrimentally affected in a manner distinct from the citizenry at large, or (2) when the Legislature has intended to confer standing on the litigant under a particular statutory scheme. *League of Women Voters of Mich v Secretary of State*, ___ Mich App ___; 2020 WL 423319, at *5 (2020). Plaintiffs cannot point to any statutory scheme conferring standing. Therefore, Plaintiffs must demonstrate a special right, distinct from all Michiganders, that will be detrimentally affected. They do not.

Here, the individual plaintiffs fail to establish a special right distinct from the citizenry at large. Each individual plaintiff alleges the same injury: that he is "concerned about potential slowdowns" with mail delivery, "worried that his ballot will not be counted" if not received by the ballot receipt deadline, and "would be more confident that his ballot would be counted" without the ballot receipt deadline. Am. Compl. 24-26. This alleged interest is no different than the interest of any other elector who chooses to vote absentee in the general election in Michigan. Similarly, the Plaintiff organizations cannot establish representational standing in the interest of their members when those members do not have standing as individual plaintiffs. *See UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496 n 15 (2012).

Plaintiffs Alliance and APRI lack organizational standing. Alliance alleges that it has been injured because the challenged provisions "frustrate [its] mission," it will be "required to devote time and divert resources" to educate its members, and educating its members "will reduce the time and resources" to educate on public policy issues. Am. Compl. 19. Alliance's frustration of mission basis is purely an ideological challenge that amounts to a mere "organizational interest in a problem." *Sierra Club v Morton*, 405 US 727, 739 (1972). And

Alliance is neither a political party nor a campaign and thus cannot manufacture diversion-of-resources standing by making volitional expenditures. *See Clapper v Amnesty Int'l*, 568 US 398, 416 (2013). Plaintiff APRI does not allege any "special right," only that it would like to "facilitate absentee voting by . . . collecting and returning ballots for its members." Am. Compl. 8. Possible future action cannot amount to a "special right" necessary for standing. For these reasons, Plaintiffs lack standing and the Amended Complaint should be dismissed on that basis alone.

II. Plaintiffs' constitutional challenges to these Michigan election laws fail as a matter of law.

Plaintiffs challenge the constitutionality of long-standing Michigan election laws. "A statute challenged on a constitutional basis is 'clothed in a presumption of constitutionality,' and the burden of proving that a statute is unconstitutional rests with the party challenging it." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 (2007). Plaintiffs bring both facial and as-applied constitutional challenges. "A facial challenge is a claim that the law is invalid *in toto*—and therefore incapable of any valid application." *Id.* at 11 & n 20. "A party challenging the facial constitutionality of a [statute] faces an extremely rigorous standard." *Bonner v Brighton*, 495 Mich 209, 223 (2014). A plaintiff "must establish that no set of circumstances exists under which the act would be valid" and "[t]he fact that the ... act might operate unconstitutionally under some conceivable set of circumstances is insufficient" to render the act invalid. *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568 (1997). Indeed, "if any state of facts reasonably can be conceived that would sustain [a legislative act], the existence of the state of facts at the time the law was enacted must be assumed." *Id.*

Plaintiffs' as-applied challenges raise the question whether the challenged laws *became* unconstitutional after COVID-19 and specifically as-applied to the general election. An as-applied challenge alleges "a present infringement or denial of a specific right or of a particular injury in process of actual execution" of government action. *Bonner*, 495 Mich at 223 n 27. "The

practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569-70 (2016). Plaintiffs' constitutional claims, either facially or as-applied, all fail as a matter of law.

A. The harvesting ban is constitutional and not preempted by federal law.

1. The harvest ban does not infringe on the right to vote absentee.

Plaintiffs allege that the harvesting ban unduly burdens Michigan's constitutional right to vote absentee. Am. Compl. 114. After Proposal 3 passed in November 2018, the Michigan Constitution was amended to allow for no excuse absentee voting. Const 1963, art 2, § 4(1)(g) provides: "[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." There is no dispute that this right is self-executing. *Id.* at § 4(h).

While the Legislature may not impose additional obligations on a self-executing constitutional provision, it may enact laws that supplement a self-executing constitutional provision. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971). Statutes that supplement a self-executing provision may be desirable, "by way of providing a more specific and convenient remedy and facilitating the carrying into effect or executing of the rights secured, making every step definite, and *safeguarding the same so as to prevent abuses*." *Promote the Vote v Secretary of State*, ___ Mich App ___; 2020 WL 4198031, at *10 (2020) (emphasis added).

Plaintiffs argue that the State effectively cannot place any restrictions on absentee voting. The Legislature, however, has the constitutional authority to enact laws to preserve the purity of elections, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. *See* 1963 Const, art 2, § 4(2). It is axiomatic that "every provision [in the constitution] must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit*

Court, 469 Mich 146, 156 (2003). "Th[e] equal right to vote is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways." *Promote the Vote*, at *9 (quoting *Dunn v Blumstein*, 405 US 330, 336 (1972)).

The harvesting ban is in harmony with the Legislature's constitutional obligations to protect the right to vote absentee from fraud and corruption and preserve the purity of elections, represents a common sense restriction in limiting the individuals permitted to deliver someone's AV ballot, and provides reasonable safeguards from potential abuses of voters exercising their right to vote absentee.

Further, the harvesting ban does not unduly burden the right of registered Michigan voters to vote absentee or GOTV efforts. Section 4(g) expressly provides voters the option to return their absentee ballots either "in person *or* by mail." (emphasis added). "Or" is "a disjunctive term, used to indicate a disunion, a separation, an alternative." *People v Kowalski*, 489 Mich 488, 499 n 11 (2011). "[Michigan voters] may personally deliver the ballot in person to the city or township clerk, they may have an immediate family member deliver the ballot, or request the local clerk to pick up the ballot." *LWV*, at *10 (citing MCR 168.764a). In sum, the harvesting ban does not unduly burden the right to vote absentee.

2. The harvesting ban does not violate Michigan's Equal Protection Clause.

Plaintiffs allege that the harvesting ban imposes an undue burden on the right to vote absentee or in person in violation of Michigan's Equal Protection Clause. Am. Compl. 123. "To the degree the provisions are congruous," courts construe "Michigan's equal protection provision to be coextensive with the Equal Protection Clause of the federal constitution." *In re Request for Advisory Opinion regarding 2005 PA 71*, 479 Mich at 11. Equal protection applies when a state either classifies voters in disparate ways or places undue restrictions on the right to vote. *Promote the Vote*, at *13.

Michigan jurisprudence applies the *Anderson-Burdick* framework in assessing equal protection challenges to election laws under the Michigan Constitution. *In re Request for Advisory Opinion regarding 2005 PA 71*, 479 Mich at 35. First, the court must consider the

character and magnitude of the asserted injury to the rights protected by the Constitution that the plaintiffs seek to vindicate. *Ohio Dem Party v Husted*, 834 F3d 620, 626-27 (CA 6, 2016). Second, the court must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. *Id.* Finally, the court must determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights. *Id.*

If a state imposes "severe restrictions" on a plaintiff's constitutional rights, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Id.* at 627. On the other hand, "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "the State's important regulatory interests are generally sufficient to justify the restrictions." *Ohio Council 8 Am Fed'n of State v Husted*, 814 F3d 329, 335 (CA 6, 2016). Regulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a "flexible" analysis, "weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Green Party v Hargett*, 767 F3d 533, 546 (CA 6, 2014).

First, the harvesting ban imposes a reasonable, nondiscriminatory restriction on voting absentee. Plaintiffs bear a "heavy constitutional burden" to demonstrate that a state's minimally burdensome law is unconstitutional. *See Burdick*, 504 US at 434; *Ohio Council*, 814 F3d at 338. For not unduly burdensome regulations, the *Anderson-Burdick* framework does not require a state to prove "the sufficiency of the evidence." *Ohio Dem Party*, 834 F3d at 632. The harvesting ban "applies evenhandedly to every registered voter in the state of Michigan without making distinctions with regard to any class or characteristic." *In re Request for Advisory Opinion regarding 2005 PA 71*, 479 Mich at 25.

Michigan election law provides numerous ways for Michigan voters to return his or her AV ballot: (1) delivering it in person to the clerk or drop-box, (2) sending it by mail or other common carrier, (3) having an "immediate family" member deliver it to the clerk, (4) having an unrelated person who resides with the voter deliver it to the clerk, or (5) calling the clerk's office

to arrange for the ballot to be picked up from the voter. MCL 168.764a, 168.764b. Because of these many avenues provided to a Michigan voter in returning an AV ballot, the harvesting ban is "minimally burdensome and nondiscriminatory," which results in "a less-searching examination." *NEOCH v Husted*, 837 F3d 612, 631 (CA 6, 2016).

Second, Michigan has important regulatory interests in preventing voter fraud and preserving the integrity of its elections justifying the minimal restrictions of the harvesting ban. As to a minimally burdensome regulation triggering rational-basis review, the Court accepts a justification's sufficiency as a "legislative fact" and defers to the findings of the Legislature so long as its findings are reasonable. *Ohio Dem Party*, 834 F3d at 632. State Defendants need not produce evidence of actual instances of corruption. *See Crawford*, 553 US at 195-96.

The Legislature has a constitutional duty to enact "laws to regulate the time, place and manner of all . . . elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Const 1963, art 2, § 4(2). Under art. 2, § 4, the Legislature also has been specifically commanded by citizens of Michigan to "preserve the purity of elections" and "to guard against abuses of the elective franchise." *In re Request for Advisory Opinion Regarding 2005 PA 71*, 479 Mich at 17. These election provisions have been a part of Michigan's Constitution for almost as long as Michigan has been a state. *Id.*

The State has compelling interests in both preserving the integrity of its election and preventing fraud in the absentee voting process. It is indisputable that states have a "compelling interest in preserving the integrity of its election process." *Purcell v Gonzalez*, 549 US 1, 4 (2006). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Id.* "While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 US at 196. And *Crawford* identified "fraudulent voting" that was "perpetrated using absentee ballots." 553 US at 195-96.

The State's regulatory interests are sufficient to justify these reasonable, nondiscriminatory restrictions. Michigan has an important interest in protecting the integrity of its absentee voting process. These interests are not only legitimate, they are compelling. *John Doe No 1 v Reed*, 561 US 186, 197 (2010) ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Citizens for Tax Reform v Deters*, 518 F3d 375, 387 (CA 6, 2008) ("[E]liminating election fraud is certainly a compelling state interest[.]"). Prohibiting unlimited AV ballot harvesting is a commonsense means of preventing undue influence, voter fraud, ballot tampering, and voter intimidation. The harvesting ban preserves the integrity of absentee voting by increasing the likelihood that a voter will entrust his or her ballot with someone who is both familiarly trustworthy and legally accountable.

The State's interest in protecting its elections against fraud is particularly acute in the context of absentee voting. Numerous courts and commentators have recognized the legitimacy of states' concerns about voter fraud—and especially in the context of absentee voting. *See Crawford*, 553 US at 195-96 (explaining history of in-person and absentee fraud "demonstrate[s] that not only is the risk of voter fraud real but that it could affect the outcome of a close election"); *In re Request for Advisory Opinion regarding 2005 PA 71*, 479 Mich at 25 (in challenging Michigan's photo ID law, "the opposing Attorney General argue[d] that the statute does nothing to address or prevent fraudulent absentee voting, 'where fraud is known to exist.'"); *Griffin*, 385 F3d at 1130-31 ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting."); *Veasey v Abbott*, 830 F3d 216, 256 (CA 5, 2016) ("The district court credited expert testimony showing mail-in ballot fraud is a significant threat—unlike in-person voter fraud."); *Qualkinbush v Skubisz*, 826 NE2d 1181, 1197 (Ill App Ct 2004) ("It is evident that the integrity of a vote is even more susceptible to influence and manipulation when done by absentee ballot.").[3]

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[3] Khan & Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, https://bit.ly/3gLbqTy (accessed Sept. 2, 2020) (study of election crimes from 2000–2012 finding that more fraud crimes involved absentee ballots than any other categories).

The statutory history of Section 932(f) supports the State's compelling interest in preventing voter fraud. "[T]he Legislature enacted MCL 168.932(f) to ensure the integrity of the absentee voting process. Before the enactment of MCL 168.932(f), any registered voter could return the AV ballot of an absentee voter if a family member or person residing with the absentee voter was not available, and this led to abuse by campaign workers who were eager to 'assist' absentee voters." *People v Pinkney*, No. 282144, 2009 WL 2032030, at *11 (2009) (citing House Legislative Analysis, HB 4242, Oct. 17, 1995).

If any doubt remained that the harvesting ban is sensible, the ban on ballot harvesting is consistent with the recommendations of the bipartisan Carter–Baker Commission. Specifically, "[a]bsentee ballots remain the largest source of potential voter fraud. . . . States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." (**Ex. A**, Carter–Baker Commission Report, 46 (Sept. 2005)). In short, the compelling rationale for prohibiting interested third-parties from harvesting absent ballots in Michigan is consistent with the recommendations of the Carter–Baker Commission.

Plaintiffs argue that the State's compelling interest in preserving purity of elections "falls flat" because according to them the harvesting ban violates the Michigan Constitution. *See* Pls' 8/17/20 Brief at 13. This argument puts the cart before the horse. Plaintiffs' assumption that the challenged provisions are unconstitutional violates the long-standing canon of construction that statutes are presumed constitutional. *See Cady v Detroit*, 289 Mich 499, 505 (1939).

Moreover, the State has a compelling public health interest related to COVID-19. Plaintiffs' requested relief would potentially increase the number of total strangers coming to voters' homes (and hundreds of others), soliciting their ballots face-to-face with no social distancing restrictions, and delivering these ballots. Such interpersonal interactions negate the supposed safety which Plaintiffs assert will generate increased absentee voting in the first place, posing a serious threat to the additional spreading of COVID-19 by individuals who may be difficult or impossible to contact trace. Finally, when Plaintiffs seek to harvest ballots from the

elderly and communities with less access to healthcare—populations most at risk from the disease, the intersection of public health and election policy decisions are best left to the Legislature. Therefore, the harvesting ban does not violate Michigan's Equal Protection Clause.

3. The harvesting ban does not unconstitutionally infringe on political speech or assembly rights.

Plaintiffs allege that the harvesting ban burdens their free speech and assembly rights, specifically broadly engaging in voter turnout efforts. Am. Compl. 143.[4] The Michigan Constitution provides "[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const 1963, art 1, § 5. The Court may consider federal authority when interpreting the extent of Michigan's free speech protections. *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 256 (2013).

Plaintiffs have the burden to prove that the First Amendment applies. *Clark v Cmty for Creative Non-Violence*, 468 US 288, 293 n 5 (1984). Amici contend that the First Amendment is not applicable as the harvesting ban does not affect political speech or associational rights. While the First Amendment protects speech as well as certain kinds of conduct, only conduct that is "inherently expressive" is entitled to First Amendment protection. *See Rumsfeld v Forum for Academic & Inst Rights*, 547 US 47, 66 (2006). To determine whether conduct is protected, courts look to (1) whether the conduct shows an "intent to convey a particular message" and (2) whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v Johnson*, 491 US 397, 404 (1989). Conduct does not become speech for purposes of the First Amendment merely because the person engaging in the conduct intends to express an idea. *See Rumsfeld*, 547 US at 66 (holding that conduct regulated by the challenged law, which

[4] Plaintiffs fail to demonstrate how the harvesting ban implicates their constitutional right to peaceably assemble. *See* Am. Compl. 138-45. A litigant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199 (2012).

denied federal funding to universities that prohibited military recruiting on campus, was not inherently expressive conduct).

The Supreme Court has long held that non-expressive conduct does not acquire First Amendment protection whenever it is combined with another activity that involves protected speech. *Clark*, 468 US at 297-98 (emphasizing that camping does not become speech protected by the First Amendment when demonstrators camp as part of a political demonstration); *Rumsfeld*, 547 US at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."); *United States v O'Brien*, 391 US 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

The harvesting ban regulates the mechanics of the absentee voting process. It does not regulate an elector's ability to vote by AV ballot, nor does it regulate any individual or organization's right to engage in political speech. Plaintiffs err in their contention that the harvesting ban inhibits their protected political speech under the broad umbrella of "political expression" when interacting with Michigan voters. Am. Compl. 142. That the act by a voter in returning his or her AV ballot may be preceded by or lead to a political conversation does not transform (nonprotected) conduct into (protected) speech under the First Amendment. *See Clark*, 468 US at 297-98; *Rumsfeld*, 547 US at 66; *O'Brien*, 391 US at 376. In sum, the harvesting ban targets only non-expressive conduct.

The process of returning an AV ballot is neither inherently expressive nor inextricably entwined with protected speech. *See Voting for America v Steen*, 732 F3d 382, 389-90 (CA 5, 2013) (emphasizing that provisions regulating Texas's volunteer deputy registrars were not intertwined with voter registration efforts). Stated differently, the Court can easily distinguish the prohibited, nonprotected conduct (e.g., limits on who may possess or transport absentee ballots) from otherwise protected speech by Plaintiffs or voters. At least one court has followed the Fifth Circuit's reasoning to conclude that "there is nothing inherently expressive or communicative

about collecting a voter's completed early ballot and delivering it to the proper place." *DNC v Reagan*, 329 FSupp3d 824, 851 (D Ariz, 2018), rev'd and remanded on other grounds sub nom. *DNC v Hobbs*, 948 F3d 989 (CA 9, 2020) (en banc), cert petition pending. The same conclusion should follow the possession and deliverance of AV ballots, which have no expressive activity, even if done by a third-party collector.

Plaintiffs' reliance on *Meyer*, *Buckley*, and *Hargett* for applying exacting scrutiny is in error. In *Meyer v Grant*, the Court held that the circulation of a petition to amend the Colorado Constitution by ballot initiative involved political speech, and Colorado's prohibition against the use of paid circulators violated the First Amendment. 486 US 414, 425, 428 (1988). The Court in *Buckley v American Constitutional Law Found*, extended *Meyer* in holding that other Colorado statutes regulating initiative-petition circulators violated the First Amendment, including a requirement that circulators be registered voters. 525 US 182 (1999). Both Courts held that initiative petitions are protected speech of the petition circulators. *Meyer*, 486 US 414 at 421-22; *Buckley*, 525 US at 192. The challenged restrictions in both cases were found to "limi[t] the number of voices who will convey [the initiative proponents'] message" and, consequently, cut down "the size of the audience [proponents] can reach." *Buckley*, 525 US at 194-95 (quoting *Meyer*, 486 US at 422). Finally, the Courts held that Colorado had failed to justify these restrictions on the circulators' speech. *Meyer*, 486 US at 425-28; *Buckley*, 525 US at 196-97.

In *League of Women Voters v Hargett*, 400 FSupp3d 706 (MD Tenn, 2019), plaintiff organizations challenged Tennessee election laws restricting voter registration drives. The court recognized that "encouraging others to register to vote" is "pure speech" and organizing others in support of voter registration efforts involves political association. *Id.* at 720.

The harvesting ban is factually and legally distinguishable from *Meyer*, *Buckley*, and *Hargett*. The results in *Meyer* and *Buckley* were contingent on the Court's finding that petition circulation is protected as speech because the "circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer*, 486 US at 422. The act of possessing or delivering an AV ballot, on

the other hand is a non-discretionary, content-neutral act that does not of necessity involve the expression of any political view or the discussion of any political view. If the AV ballot itself were speech, it would be the speech of the voter, not the speech of the third-party returning the ballot. Delivering a voter's AV ballot on their behalf contains no inherently political expression by the third-party that would be protected by the First Amendment.

The harvesting ban further does not discriminate against any particular point of view. The ban applies equally to Plaintiffs and the MRP and RNC—despite their opposing political viewpoints. Amici are often adverse to Plaintiffs in the political process, and are among the entities directly regulated by the challenged provisions. Therefore, strict scrutiny is not applicable as the harvesting ban restricts only the mechanisms of voting, value-neutral conduct that cannot be construed to convey any political viewpoint or expression.

This case is akin to *Schmitt v LaRose*, 933 F3d 628 (CA 6, 2019), which rejected First Amendment exacting scrutiny. The plaintiffs in *Schmitt* relied on *Meyer* and *Buckley* to challenge Ohio's system of reviewing ballot initiatives. The Sixth Circuit rejected their argument and applied *Anderson-Burdick*, finding that the challenged laws "regulate the process by which initiative legislation is put before the electorate, which has, at most, a second-order effect on protected speech." *Id.* at 638. Here, the process of returning AV ballots, if anything, has only a "second-order effect on protected speech." Thus, any heightened scrutiny is not applicable as the harvesting ban restricts only voting mechanisms, value-neutral conduct that cannot be construed to convey any political viewpoint or expression.

Even if the Court concludes that the harvesting ban is subject to exacting scrutiny, the challenged law passes constitutional muster. Exacting scrutiny "requires a 'substantial relation' between the [challenged law] and a 'sufficiently important' governmental interest." *Citizens United v FEC*, 558 US 310, 366-67 (2010). To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Reed*, 561 US at 196.

The Supreme Court's ruling in *John Doe No 1 v Reed*, 561 US 186 (2010) is instructive. There the Court held that disclosure requirements of Washington's Public Records Act were sufficiently related to the state's interest in protecting the integrity of the electoral process to satisfy exacting scrutiny. The speakers, whose First Amendment rights were at issue, were those signing referendum petitions. *Id.* at 194-95. An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. But the Court held that the State's interest of preserving the integrity of the electoral process by combating fraud was sufficiently important to satisfy exacting scrutiny. *Id.* at 197. "The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government.' " *Id.* (quoting *Purcell*, 549 US at 4).

The harvesting ban is narrowly tailored to "help[] prevent certain types of ... fraud otherwise difficult to detect" such as might occur if a bad actor were to bully or fraudulently entice a voter into giving the bad actor the voter's AV ballot only for the bad actor to destroy or fail to deliver the AV ballot.[5] *Reed*, 561 US at 198. The harvesting ban thus does not unconstitutionally infringe on political speech regardless of the level of scrutiny applied.

4. Michigan's harvesting ban is not conflict-preempted by the federal Voting Rights Act.

Plaintiffs allege that the harvesting ban conflicts with and thus is preempted by Section 208 of the Voting Rights Act (VRA), 52 US 10508. Am. Compl. 149. "Conflict preemption acts to preempt state law to the extent that it is in direct conflict with federal law or with the purposes and objectives of Congress." *Ryan v Brunswick*, 454 Mich 20, 28 (1997). Section 208 has limited application. It states in full: "[a]ny 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,

[5] For example, an illegal ballot harvesting scheme by a political operative working for a Republican candidate forced a redo of the 2018 midterm race for North Carolina's 9th Congressional District. Snead, *North Carolina Election Fraud Should Be a Wake-Up Call for the Left*, DAILY SIGNAL (March 5, 2019), https://dailysign.al/32HOXBX.

other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 USC 10508 (emphasis added).

Plaintiffs' VRA preemption claim fails as a matter of law. *See Bates v Dow Agrosciences LLC*, 544 US 431, 449 (2005) (recognizing that preemption is disfavored in areas traditionally regulated by the state). In passing Section 208, Congress explained that it would preempt state election laws "only to the extent that they unduly burden the right recognized in [Section 208], with that determination being a practical one dependent upon the facts." S. REP. NO. 97-417, at 63 (1982). Plaintiffs, however, have not presented facts sufficient to show that Section 208 preempts the harvesting ban. Indeed, Plaintiffs have not presented evidence of any Michigan voters covered under Section 208 who have been unable to vote or to use their assistants of choice because of the harvesting ban. This record stands in stark contrast to the records presented in the cases that Plaintiffs cite in support of their claims. For example, in *OCA-Greater Houston v Texas*, 867 F3d 604 (CA5, 2017), 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. 867 F3d at 615. Similarly, in *United States v Berks Cnty*, 250 FSupp2d 525, 530 (ED Penn, 2003), the Government presented specific evidence of English-limited voters denied the right to use a voting assistant of choice by poll workers. Without any evidence of the sort adduced here, it is impossible to determine whether the harvesting ban imposes any burden whatsoever on the rights of voters covered under Section 208 of the VRA.

Furthermore, it is not clear that the harvesting ban conflicts with § 208 protections for covered voters. The VRA defines "voting" in pertinent as "all action necessary to make a vote effective in any primary, special, or general election." 52 USC 10310(c)(1). This definition encompasses a broad range of activities that precede, include, and follow the physical act of reading, marking, and casting a ballot. *See OCA-Greater Houston*, 867 F3d at 615. But Section 208's legislative history focuses on election-day assistance and in-person voting—not absent ballot voting. *See, eg*, Senate Report 62 ("Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting

booth."). It is logical that the legislative history of the VRA would not consider the actions "necessary to make a vote effective" under the VRA to include absentee voting, since there is no broad constitutional or federal statutory right to vote by absent ballot, which at the time of its enactment was considered to be merely a legislative "indulgence—not a constitutional imperative." *Crawford*, 553 US at 209 (Scalia, J., concurring); *see also McDonald*, 394 US at 807-08.

For these reasons, the harvesting ban is constitutional and not preempted by federal law, and these claims should be dismissed as a matter of law.

B. The ballot receipt deadline is constitutional.[6]

1. *LWV* controls against Plaintiffs' facial and as-applied challenges to the ballot receipt deadline.

The Court is bound by the Michigan Court of Appeals' rejection of Plaintiffs' identical facial challenges in reliance on the self-executing right to vote absentee and Michigan's Equal Protection Clause in *LWV*. MCR 7.215(C)(2). Plaintiffs' as-applied challenges should similarly be rejected for the substantive reasons articulated in the majority and concurring opinions in *LWV*. COVID-19 does not nullify the Legislature's obligation to set a deadline "for the submission of the completed ballot to election officials" and the ballot receipt deadline "does not effectively preclude a voter from completing the process of voting by absentee ballot during the 40 days before the election." *Id.* at *9. These are election policy decisions best left to the Legislature. *See State Farm v Old Republic Ins Co*, 466 Mich 142, 149 (2002) ("It is not the role of the judiciary to second-guess the wisdom of a legislative policy choice; our constitutional obligation is to interpret—not to rewrite—the law."). This deference to legislative prerogatives is

[6] Amici acknowledge that State Defendants did not move for summary disposition regarding Plaintiffs' ballot receipt deadline claims, but request that the Court consider Amici's defense of the challenged law. State Defendants' failure to defend the ballot receipt deadline represents a failure to adequately represent Amici's interests, despite the Court's ruling to the contrary (July 14, 2020 Order), potentially depriving Amici of the opportunity to be heard and violating their right to due process.

especially pertinent given that proposed legislation is currently before the Legislature regarding receipt of AV ballots for the general election.[7]

The Court must consider how COVID-19 affects both sides of the balance—interests of the State and the individual. COVID-19 has complicated many public activities, including voting. But "States" also "have important interests ... in the wake of election emergencies": they must "focus their resources on recovering from the emergency, ensuring the accuracy of voter registrations they have received, relocating polling places as needed, ensuring adequate staffing for the voting period, and otherwise minimizing the likelihood of errors or delays in voting." *Morley, Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory LJ 545, 593 (2018). As emergencies complicate the exercise of individuals' voting rights, they also enhance the State's interest in maintaining orderly, inexpensive processes that help restore "some sort of order, rather than chaos" to the democratic process. *Burdick v Takushi*, 504 US 428, 433 (1992). An "election emergency" should thus "seldom warrant" any "large-scale" changes to election laws by courts. Morley, 67 Emory LJ at 593; *ACORN v Blanco*, No. 2:06-cv-611 (ED La, Apr. 21, 2006) (denying request "to extend the deadline for counting absentee ballots received by mail" in New Orleans in the wake of Hurricane Katrina). In fact, the Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, has stated that he sees "no reason" Americans should avoid voting in-person as long as social distancing guidelines are followed.[8] Whether to delay the election deadline is a large-scale change to Michigan election law, which should be best-left to the Legislature. *LWV* controls against Plaintiffs' facial and as-applied challenges to the ballot receipt deadline.

2. The ballot receipt deadline does not violate Michigan's Due Process Clause.

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[7] HB5987 would allow for AV ballots received within 48 hours of election day to be counted; and SB 757 would allow clerks to start processing AV ballots earlier.

[8] McArdle, *Fauci: 'No Reason' Americans Can't Vote In-Person as Long as Precautions Are Taken*, YAHOO NEWS (Aug. 14, 2020), https://yhoo.it/3IyVis0.

Plaintiffs allege that the ballot receipt deadline violates Michigan's Due Process Clause, Am. Compl. 137, which provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The clause is only violated if there has been a deprivation of life, liberty, or property. *Bonner*, 495 Mich at 225-26. "If there is no such deprivation, no process is 'due' and thus no harm has occurred." *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 186 (2019). Plaintiffs have not been deprived any liberty interest relating to the general election. For that reason alone, Plaintiffs' due process claim fails as a matter of law.

Additionally, Plaintiffs due process claim independently fails because the State has not deprived Plaintiffs of their right to vote absentee. Plaintiffs complain about alleged delayed deliveries in the USPS and COVID-19—these are all external factors outside of the State's agency and thus the State has not deprived Plaintiffs of anything. Moreover, the fact that one or several individuals may have experienced delays in receiving absent ballot applications or mailing absentee ballots is not proof that the system is broken.[9] Finally, absent voters have up to 40 days to submit their absentee ballots in person or by mail; similar to a litigant harboring error as an appellate parachute, an elector's individual decision to wait to the last moment to apply for and mail their absentee ballots should not be considered an as-applied constitutional deficiency of the ballot receipt deadline should the ballot not be timely delivered.

Plaintiffs further argue that a voter "hav[ing] no idea whether their ballots will be counted reveals a fundamental breakdown in the voting process that undermines the fundamental fairness of the electoral system." Pl. 7/21/20 Brief 13. But this is true anytime a voter submits an absentee ballot through the USPS or by common courier. The voter trusts that her absentee ballot will be received and counted; the State has no responsibility or influence to guarantee the performance of the USPS. Moreover, all registered voters can track their ballot online by looking up their

[9] *See* Wilkinson, *Will Postal Service botch election in Michigan? It's unlikely, experts say.*, BRIDGE (Aug. 28, 2020), https://bit.ly/2QIE39y (discussing expert study performed in Michigan showing that local mail traveling within a community, which is typical for absentee ballots, was for the most part timely delivered).

information on the Michigan Voter Information Center website. *See also* MCL 168.764c ("[T]he clerk of that city or township shall utilize the ballot tracker program and allow voters to track their absent voter ballots online.").

For these reasons, the ballot receipt deadline is constitutional, and Plaintiffs' facial and as-applied challenges fail as a matter of law.

III. *New Democratic Coalition* or *Purcell* bar Plaintiffs' as applied challenges to the general election.

With the general election less than 60 days away, the Court's August 8, 2020 Order stated that it was mindful of the warning in *New Democratic Coalition v Austin*, stating:

> We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections. Court can reasonably endeavor to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election officials. In this case to grant the relief requested by the plaintiffs would seriously strain the election machinery and endanger the election process. [*New Democratic Coalition v Austin*, 41 Mich App 343, 356-57 (1972).]

Specifically, courts must consider that injunctions "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 US at 5. "As an election draws closer, that risk will increase." *Id.* at 4. There is "inadequate time to resolve factual disputes and legal disputes . . . ." *Crookston v Johnson*, 841 F3d 398, 398 (CA 6, 2016). Because Michigan's general election is ongoing and its "election machinery is already in progress," the State's already powerful interests become insurmountable. *Reynolds v Sims*, 377 US 533, 585 (1964). The "disruption to the electoral process" and the "impair[ment] [to] the State's ability guarantee the integrity of its elections" increase "exponentially" when laws are enjoined at this late stage. *Bethea v Deal*, 2016 WL 6123241, at *3 (SD Ga, Oct. 19, 2016); *Ariz Dem Party v Reagan*, 2016 WL 6523427, at *11 (D Ariz, Nov. 3, 2016).

Plaintiffs' requested relief will result in administrative difficulties and voter confusion. At this stage, registered Michigan voters have already begun applying for AV ballots for the general

election on August 20, 2020 (75 days before general election). MCL 168.759(2). On September 19, county clerks must begin delivering AV ballots for the general election to local clerks, MCL 168.714.[10] Local clerks are required to immediately mail AV ballots upon receipt of an application. MCL 168.761(1). Also, on September 19, delivery of AV ballots to the military and those living overseas must begin for the general election. MCL 168.759a. If the harvesting ban and ballot receipt deadline are declared unconstitutional, then the Secretary would need to re-print these AV ballots with the revised instructions, and possibly spoil AV ballots that had already been sent out.

Plaintiffs' requested relief at this late stage of the general election would negatively impact Amici, their candidates, their voters, and their own institutional interests by fundamentally changing the "structur[e] of this competitive environment." *Shays v FEC*, 414 F3d 76, 85 (DC Cir, 2005). If Plaintiffs prevail and enforcement of the statutes is enjoined, Amici and their candidates will face "a broader range of competitive tactics than [state] law would otherwise allow." *Id.* at 86. An injunction in favor of Plaintiffs would "fundamentally alter the environment in which [they] defend their concrete interests (e.g. . . . winning reelection)." *Id.*

CONCLUSION

In sum, Amici respectfully urge the Court to grant the State Defendants' motion for summary disposition.

Respectfully submitted,

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Dated: September 2, 2020

[10] Secretary of State, *2020: Michigan Election Dates*, https://bit.ly/32GKnDV (accessed Sept. 2, 2020).

PROOF OF SERVICE

STEVEN EATHERLY, being first duly sworn, deposes and says that on the 2nd day of September, 2020, he served a copy of a Republican National Committee and Michigan Republican Party's Brief as Amici Curiae in Support of Defendants' 8/31/20 Motion for Summary Disposition and this Proof of Service in the above-entitled matter upon via email:

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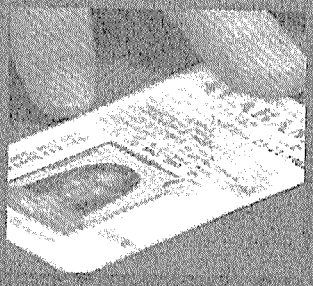
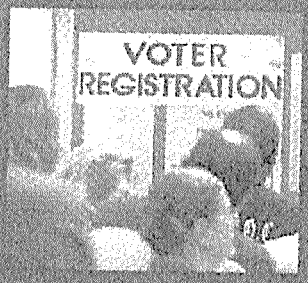
I DECLARE UNDER PENALTY OF PERJURY
THAT THE ABOVE STATEMENT IS TRUE TO THE
BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

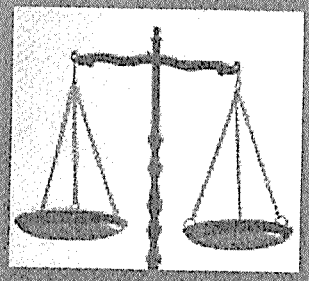
/s/ Steven Eatherly
STEVEN EATHERLY

EXHIBIT A

Building Confidence in U.S. Elections







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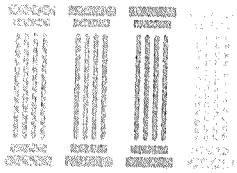

Building Confidence in U.S. Elections

REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM

SEPTEMBER 2005

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5. Improving Ballot Integrity

Because the integrity of the ballot is a hallmark of democracy, it is imperative that election officials guarantee eligible voters the opportunity to vote, but only once, and tabulate ballots in an accurate and fair manner.

5.1 INVESTIGATION AND PROSECUTION OF ELECTION FRAUD

While election fraud is difficult to measure, it occurs. The U.S. Department of Justice has launched more than 180 investigations into election fraud since October 2002. These investigations have resulted in charges for multiple voting, providing false information on their felon status, and other offenses against 89 individuals and in convictions of 52 individuals. The convictions related to a variety of election fraud offenses, from vote buying to submitting false voter registration information and voting-related offenses by non-citizens.[54]

In addition to the federal investigations, state attorneys general and local prosecutors handle cases of election fraud. Other cases are never pursued because of the difficulty in obtaining sufficient evidence for prosecution or because of the low priority given to election fraud cases. One district attorney, for example, explained that he did not pursue allegations of fraudulent voter registration because that is a victimless and nonviolent crime.[55]

Election fraud usually attracts public attention and comes under investigation only in close elections. Courts may only overturn an election result if there is proof that the number of irregular or fraudulent votes exceeded the margin of victory. When there is a wide margin, the losing candidate rarely presses for an investigation. Fraud in any degree and in any circumstance is subversive to the electoral process. The best way to maintain ballot integrity is to investigate all credible allegations of election fraud and otherwise prevent fraud before it can affect an election.

Investigation and prosecution of election fraud should include those acts committed by individuals, including election officials, poll workers, volunteers, challengers or other nonvoters associated with the administration of elections, and not just fraud by voters.

Recommendations on Investigation and Prosecution of Election Fraud

5.1.1 In July of even-numbered years, the U.S. Department of Justice should issue a public report on its investigations of election fraud. This report should specify the numbers of allegations made, matters investigated, cases prosecuted, and individuals convicted for various crimes. Each state's attorney general and each local prosecutor should issue a similar report.

5.1.2 The U.S. Department of Justice's Office of Public Integrity should increase its staff to investigate and prosecute election-related fraud.

5.1.3 In addition to the penalties set by the Voting Rights Act, it should be a federal felony for any individual, group of individuals, or organization to engage in any act of violence, property destruction (of more than $500 value), or threatened act of violence that is intended to deny any individual his or her lawful right to vote or to participate in a federal election.

5.1.4 To deter systemic efforts to deceive or intimidate voters, the Commission recommends federal legislation to prohibit any individual or group from deliberately providing the public with incorrect information about election procedures for the purpose of preventing voters from going to the polls.

5.2 ABSENTEE BALLOT AND VOTER REGISTRATION FRAUD

Fraud occurs in several ways. Absentee ballots remain the largest source of potential voter fraud.[56] A notorious recent case of absentee ballot fraud was Miami's mayoral election of 1998, and in that case, the judge declared the election fraudulent and called for a new election. Absentee balloting is vulnerable to abuse in several ways: Blank ballots mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting "third-party" organizations, candidates, and political party activists from handling absentee ballots. States also should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted.

Non-citizens have registered to vote in several recent elections. Following a disputed 1996 congressional election in California, the Committee on House Oversight found 784 invalid votes from individuals who had registered illegally. In 2000, random checks by the Honolulu city clerk's office found about 200 registered voters who had admitted they were not U.S. citizens.[57] In 2004, at least 35 foreign citizens applied for or received voter cards in Harris County, Texas, and non-citizens were found on the voter registration lists in Maryland as well.[58]

The growth of "third-party" (unofficial) voter registration drives in recent elections has led to a rise in reports of voter registration fraud. While media attention focused on reports of fraudulent voter registrations with the names of cartoon characters and dead people, officials in 10 states investigated accusations of voter registration fraud stemming from elections in 2004, and between October 2002 and July 2005, the U.S. prosecuted 19 people charged with voter registration fraud.[59] Many of these were submitted by third-party organizations, often by individuals who were paid by the piece to register voters.

States should consider new legislation to minimize fraud in voter registration, particularly to prevent abuse by third-party organizations that pay for voter registration by the piece. Such legislation might direct election offices to check the identity of individuals registered through third-party voter registration drives and to track the voter registration forms.

HAVA requires citizens who register by mail to vote in a state for the first time to provide

an ID when they register or when they vote. Some states have interpreted this requirement to apply only to voter registration forms sent to election offices by mail, not to forms delivered by third-party organizations. As a result, neither the identity nor the actual existence of applicants is verified. All citizens who register to vote with a mail-in form, whether that form is actually sent by mail or is instead hand-delivered, should comply with HAVA's requirements or with stricter state requirements on voter ID, by providing proof of identity either with their registration application or when they appear at the polling station on Election Day. In this way, election offices will be obliged to verify the identity of every citizen who registers to vote, whether or not the registration occurs in person.

John Fund and Colleen McAndrews at the April 18 hearing (American University Photo/Jeff Watts)

In addition, states should introduce measures to track voter registration forms that are handled by third-party organizations. By assigning a serial number to all forms, election officials will be able to track the forms. This, in turn, will help in any investigations and prosecutions and thus will serve to deter voter registration fraud.

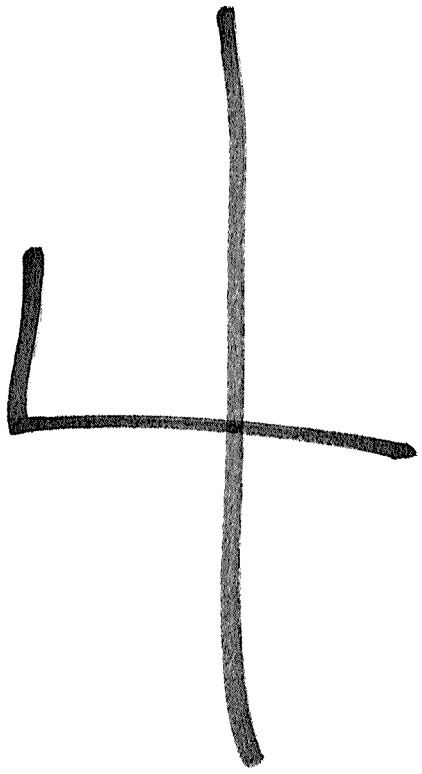
Many states allow the representatives of candidates or political parties to challenge a person's eligibility to register or vote or to challenge an inaccurate name on a voter roll. This practice of challenges may contribute to ballot integrity, but it can have the effect of intimidating eligible voters, preventing them from casting their ballot, or otherwise disrupting the voting process. New procedures are needed to protect voters from intimidating tactics while also offering opportunities to keep the registration rolls accurate, and to provide observers with meaningful opportunities to monitor the conduct of the election. States should define clear procedures for challenges, which should mainly be raised and resolved before the deadline for voter registration. After that, challengers will need to defend their late actions. On Election Day, they should direct their concerns to poll workers, not to voters directly, and should in no way interfere with the smooth operation of the polling station.

Recommendations on Absentee Ballot and Voter Registration Fraud

5.2.1 State and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.

5.2.2 All states should consider passing legislation that attempts to minimize the fraud that has resulted from "payment by the piece" to anyone in exchange for their efforts in voter registration, absentee ballot, or signature collection.

5.2.3 States should not take actions that discourage legal voter registration or get-out-the-vote activities or assistance, including assistance to voters who are not required to vote in person under federal law.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA, *et al.*,

Plaintiffs

v.

DANA NESSEL,

Defendant.
_____/

Case No. 19-13341

Stephanie Dawkins Davis
United States District Judge

ORDER DENYING IN PART AND GRANTING IN PART MOTION FOR PRELIMINARY INJUNCTION (Dkt. 22)

I. PROCEDURAL HISTORY

Plaintiff, Priorities USA, originally filed this action challenging two Michigan statutes, one governing the handling of absentee ballot applications in Michigan and the other governing transportation to polling places. (ECF No. 1). On January 27, 2020, plaintiffs filed an amended complaint, adding two additional plaintiffs, Rise, Inc. and Detroit/Downriver Chapter of the A. Philip Randolph Institute (DAPRI). (ECF No. 17). Defendant Nessel filed a motion to dismiss the amended complaint on February 10, 2020. (ECF No. 27). After oral argument, the Attorney General's motion to dismiss was granted in part and denied in part. (ECF No. 59). The court also heard and granted motions to intervene in this matter by the Michigan Republican Party and the Republican National Committee (the

Republican Party) and the Michigan Senate and Michigan House of Representatives (the Legislature). (ECF Nos. 33, 39, 60).

Plaintiffs filed the instant motion for preliminary injunction to which the Attorney General responded. (ECF Nos. 22, 30). Upon their entry into the case, the court also permitted the Intervenors to file responses to the motion for preliminary injunction, which they did on June 5, 2020. (ECF Nos. 68, 70). Plaintiffs filed replies to all response briefs. (ECF Nos. 41, 73). The court held a hearing via video on July 14, 2020, pursuant to notice. (ECF No. 74).

For the reasons the follow, the court **DENIES** plaintiffs' motion for preliminary injunction with respect the Absentee Ballot Law and **GRANTS** the request for preliminary injunction regarding the Voter Transportation Law.

II. FACTUAL BACKGROUND

Priorities USA is a 501(c)(4) nonprofit corporation, self-described as a "voter-centric progressive advocacy and service organization." (ECF No. 17, PageID.92, ¶ 7). Its "mission is to build a permanent infrastructure to engage Americans by persuading and mobilizing citizens around issues and elections that affect their lives." *Id.* It engages in activities to "educate, mobilize, and turn out voters" in Michigan, and "expects to" make expenditures and contributions towards those objectives in upcoming Michigan state and federal elections. *Id.*

Rise is also a 501(c)(4) nonprofit organization. It "runs statewide advocacy and voter mobilization programs in Michigan and California, as well as on a number of campuses nationwide." (ECF No. 17, PageID.93, ¶ 8). Rise asserts that "efforts to empower and mobilize students as participants in the political process ... are critical to Rise's mission because building political power within the student population is a necessary condition to achieving its policy goals." *Id.* Rise launched its second state-specific campaign in Michigan in 2019; it has eleven student organizers who are paid to organize their campuses around voter education and turnout activities. Rise plans to continue this program through the 2020 election. *Id.* at 9. This effort has included and will continue to include engaging fellow students in grassroots voter education, registration, and turnout activities, including on-campus, get-out-the-vote drives and canvasses. *Id.*

DAPRI is a local (Detroit) chapter of the A. Philip Randolph Institute, a national 501(c)(3) nonprofit organization. It is a membership organization "with a mission to continue to fight for Human Equality and Economic Justice and to seek structural changes through the American democratic process." (ECF No. 17, PageID.95, ¶ 14). Its members are "involved in voter registration, get-out-the-vote activities, political and community education, lobbying, legislative action, and labor support activities in Michigan. *Id.* As part of its get-out-the-vote activities, DAPRI's members have "provided rides" to and from the polls for community

members on election day; the organization intends to continue this practice and to expand this work in future elections. *Id.* at ¶ 16. DAPRI acknowledges that Proposal 3, which passed in 2018, makes absentee voting available to all and says that it would like to educate voters about the opportunity to vote absentee. (ECF No. 17, PageID.96, ¶ 17).

All three non-profit corporations challenge what they refer to as Michigan's "Absentee Ballot Organizing Ban" (hereinafter the "Absentee Ballot Law") (Mich. Comp. Laws § 168.759(4), (5), (8)) (*see* ECF No. 17, PageID107-112, ¶¶ 48-55) and its "Voter Transportation Ban" (hereinafter the "Voter Transportation Law") (Mich. Comp. Laws § 168.931(1)(f)) (*see* ECF No. 17 PageID.101-107, ¶¶ 33-47). Specifically, they contend that the Absentee Ballot Law is (1) unconstitutionally vague and overbroad under the First and Fourteenth Amendments (Count I); (2) violative of their Speech and Association rights under the First and Fourteenth Amendments (Count II); and (3) preempted by Section 208 of the Voting Rights Act of 1965 (Count IV). Similarly, they assert that the Voter Transportation Law is (1) unconstitutionally vague and overbroad under the First and Fourteenth Amendments (Count V); (2) violative of their Speech and Association rights under the First and Fourteenth Amendments (Count VI); and (3) preempted by Section 208 of the Voting Rights Act of 1965 (Count VIII). (ECF No. 17). The court

previously dismissed plaintiffs' claims that the laws place an undue burden on the fundamental right to vote (Counts III and VII). (ECF No. 59).

III. STATUTORY SCHEMES

A. Absentee Ballot Law, Mich. Comp. Laws § 168.759

Michigan's Absentee Ballot Law provides that a voter must request an application and submit that application to the voter's local clerk in order to receive an absentee voter ("AV") ballot. For both primaries and regular elections, an elector may apply for an AV ballot at any time during the 75 days leading up to the primary or election until 8 p.m. on the day of the primary or election. Mich. Comp. Laws § 168.759(1)-(2). In either case, "the elector shall apply in person or by mail with the clerk" of the township or city in which the elector is registered. *Id.* Subsection 759(3) provides that:

> (3) An application for an absent voter ballot under this section may be made in any of the following ways:
>
> (a) By a written request signed by the voter.
>
> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.
>
> (c) On a federal postcard application.
>
> (4) An applicant for an absent voter ballot shall sign the application. A clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application. A person shall not be in possession of a signed absent voter ballot application except for the

> applicant; a member of the applicant's immediate family; a person residing in the applicant's household; a person whose job normally includes the handling of mail, but only during the course of his or her employment; a registered elector requested by the applicant to return the application; or a clerk, assistant of the clerk, or other authorized election official. A registered elector who is requested by the applicant to return his or her absent voter ballot application shall sign the certificate on the absent voter ballot application.
>
> (5) The clerk of a city or township shall have absent voter ballot application forms available in the clerk's office at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request.

Mich. Comp. Laws §§ 168.759(3)-(5)

Where a form application is used, under § 759(5), the "application shall be in substantially the following form." The statute then provides the body of the form and includes a general "warning" and a "certificate" portion for "a registered elector" delivering a completed application for a voter. Mich. Comp. Laws § 168.759(5). The warning must state that:

> It is a violation of Michigan election law for a person other than those listed in the instructions to return, offer to return, agree to return, or solicit to return your absent voter ballot application to the clerk. An assistant authorized by the clerk who receives absent voter ballot applications at a location other than the clerk's office must have credentials signed by the clerk. Ask to see his or her credentials before entrusting your application with a person claiming to have the clerk's authorization to return your application.

Id.

Similarly, the certificate for a registered elector returning an AV ballot application must state that:

> I am delivering the absent voter ballot application of [the named voter] at his or her request; that I did not solicit or request to return the application; that I have not made any markings on the application; that I have not altered the application in any way; that I have not influenced the applicant; and that I am aware that a false statement in this certificate is a violation of Michigan election law.

Id.

Under § 759(6), the application form must include the following instructions to the applicant:

> Step 1. After completely filling out the application, sign and date the application in the place designated. Your signature must appear on the application or you will not receive an absent voter ballot.
>
> Step 2. Deliver the application by 1 of the following methods:
>
> (a) Place the application in an envelope addressed to the appropriate clerk and place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier.
>
> (b) Deliver the application personally to the clerk's office, to the clerk, or to an authorized assistant of the clerk.
>
> (c) In either (a) or (b), a member of the immediate family of the voter including a father-in-law, mother-in-law,

> brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or a person residing in the voter's household may mail or deliver the application to the clerk for the applicant.
>
> (d) If an applicant cannot return the application in any of the above methods, the applicant may select any registered elector to return the application. The person returning the application must sign and return the certificate at the bottom of the application.

Mich. Comp. Laws § 168.759(6).

Consistent with these statutes, § 759(8) provides that "[a] person who is not authorized in this act and who both distributes absent voter ballot applications to absent voters and returns those absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor." Mich. Comp Laws § 168.759(8). Section 931 also provides for penalties associated with distributing and returning AV ballot applications. *See* Mich. Comp. Laws §§ 168.931(1)(b)(iv) and (1)(n).

Based on these provisions, there are two ways to apply for an absentee voter ballot: (1) a written request signed by the voter, and (2) on an absentee voter ballot application form provided for that purpose and signed by the voter. In either case, the voter applies by returning his or her preferred mechanism – a written request or form application – to the voter's local clerk in person or by mail. Mich. Comp. Laws §§ 168.759(1), (2), (6). For several years, the Secretary of State has also instructed Clerks to accept applications sent by facsimile and email. Voters who

cannot turn in their application in person, cannot mail their application or return it by email or facsimile, may have an immediate family member or a person residing in the voter's household deliver their application, or may request another registered voter to return the application on their behalf. Mich. Comp. Laws §§ 168.759(4), (5), (6). In short, only persons authorized by law, i.e. those described in § 759(4), may return a signed application for an absentee voter ballot to a local clerk. Mich. Comp. Laws §§ 168.759(4)-(5).

Plaintiffs assert that the restrictions contained in the Absentee Ballot Law inhibit their ability to organize around absentee voting. DAPRI encourages voters to vote absentee when they work far away from home and getting to the polls on election day would be prohibitively time consuming. (ECF No. 22-5, Hunter Decl. ¶ 16). And both DAPRI and Rise have a programmatic focus of encouraging college students to vote absentee. (ECF No. 22-5, Hunter Decl. ¶ 16; ECF No. 22-6, Lubin Decl. ¶¶ 3, 24, 26). Rise encourages absentee voting because convenience is a significant factor in youth voting. (ECF No. 22-6, Lubin Decl. ¶¶ 22, 24; ECF No. 22-7, Palmer Decl. ¶ 19). Plaintiffs have found that between classes, studying, extracurriculars, and a lack of access to private transportation, voting in person on election day is decidedly difficult for college students. (ECF No. 22-6, Lubin Decl. ¶¶ 20, 22-23; ECF No. 22-7, Palmer Decl. ¶ 19 (study showed 40+ percent of young voters who did not vote in 2016 cited being too

busy)). DAPRI also encourages college students who are registered to vote at home but attend college in another part of Michigan to vote absentee, for example a student in Detroit who is registered to vote in the Upper Peninsula. (ECF No. 22-5, Hunter Decl. ¶ 16). Election officials in Michigan widely expected absentee voting numbers to surge in the presidential primary and expect the same in the 2020 general election, the first federal elections in which no-excuse absentee voting will be available to all Michigan voters. *See* Ashley Schafer, *City preps for uptick of absentee voters*, Midland Daily News, Nov. 22, 2019; Jackie Smith, *Clerks prepare to handle spike in absentee voters in March presidential primary election*, Port Huron Times Herald, Dec. 10, 2019. Yet, plaintiffs maintain that the Absentee Ballot Law unduly limits the ability of organizations like theirs to persuade and encourage Michigan voters to apply for absentee ballots and makes it more difficult for voters to apply for absentee ballots.

B. Voter Transportation Law, Mich. Comp. Laws § 168.931(1)(f)

The Voter Transportation Law can be found at Mich. Comp. Laws § 168.931, and provides, in relevant part:

> (1) A person who violates 1 or more of the following subdivisions is guilty of a misdemeanor:
>
> * * *
>
> (f) A person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election.

Mich. Comp. Laws § 168.931(1)(f) (hereinafter "Voter Transportation Law"). Thus, under this provision, a person cannot pay for the transportation of a voter to the polls unless the voter is physically unable to walk. This language has existed in some form since 1895, *see* 1895 P.A. 35, and has been a part of Michigan's modern election law since it was reenacted in 1954 P.A. 116. It was amended by 1982 P.A. 201 to replace the term "carriage" with the current term "motor vehicle."

According to plaintiffs, transportation to and from the polls can be a determinative factor in whether many voters, especially students and hourly workers, make it to the polls. (ECF No. 22-5, Hunter Decl. ¶¶ 8-9; ECF No. 22-6, Lubin Decl. ¶ 23; ECF 22-7, Palmer Decl. ¶ 19 (study showed that 29 percent of all young voters and 38 percent of young voters of color cited lack of transportation as a factor in why they did not vote)). Advocacy organizations like plaintiffs provide rides to the polls as a central part of their organizing efforts. (ECF No. 22-5, Hunter Decl. ¶¶ 6–11; ECF No. 22-6, Lubin Decl. ¶ 24; ECF No. 22-8, Ufot Decl. ¶¶ 3-11). The Voter Transportation Law limits options for any organization seeking to transport voters in Michigan. Providing rides to the polls is a key organizing tactic for political and advocacy organizations like plaintiffs, as it helps to encourage voters to participate in the political process and helps communities traditionally underrepresented at the polls build their political power. (ECF No.

22-5, Hunter Decl. ¶¶ 5-6; ECF No. 22-6, Lubin Decl. ¶¶ 3, 12, 18; ECF No. 22-8, Ufot Decl. ¶¶ 3-11). Hence, plaintiffs seek to enjoin enforcement of the referenced statutes.

IV. ANALYSIS

A. Preliminary Injunction Standard

In determining whether injunctive relief is proper, the court considers four factors: (1) whether plaintiffs have a strong likelihood of success on the merits; (2) whether plaintiff has shown that irreparable injury will occur without an injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *See Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005). Although no single factor is controlling, the likelihood of success on the merits is often the predominant consideration. *Gonzales v. National Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000) ("[A] finding that there is simply no likelihood of success on the merits is usually fatal.").

Plaintiffs bear the burden of demonstrating entitlement to an injunction, and the burden is a heavy one because injunctive relief is "an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). Indeed, the "proof required for the

plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000); *see also McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012) ("The proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion because a preliminary injunction is an extraordinary remedy."). "The four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *Hamad v. Woodcrest Condo. Ass'n,* 328 F.3d 224, 230 (6th Cir. 2003) (quoting *Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001)). A plaintiff must always, however, show irreparable harm before a preliminary injunction may issue. *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982).

B. Likelihood of Success on the Merits

1. *The Absentee Ballot Law*

a. First Amendment, U.S Const, amend I.

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law ... abridging the freedom of speech.'" *Virginia v. Black*, 538 U.S. 343, 358 (2003). The First Amendment generally mandates "'that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *United States v.*

Stevens, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). Plaintiffs contend the requirement that only voters registered in Michigan can assist voters in submitting absentee ballot applications (other than family or household members) violates the First Amendment because it prohibits only certain persons -- individuals who are not registered to vote in Michigan -- from engaging in core political expression. The Absentee Ballot Law also proscribes non-family or household members from soliciting or requesting to help a voter to return an absentee ballot application. Mich. Comp. Laws § 168.759(4), (5). According to plaintiffs, this solicitation ban is also subject to strict scrutiny because it (1) operates differently based on the identity of the speaker; (2) acts as a content-based restriction on speech; (3) proscribes political expression; and (4) regulates core political expression. As explained in *Project Veritas v. Ohio Election Comm'n*, 418 F.Supp.3d 232, 245 (S.D. Ohio 2019), "the Supreme Court and the Sixth Circuit have considered facial challenges under the First Amendment that … were not overbreadth challenges; instead, the courts considered whether the regulations were content-based or otherwise restricted protected activity." *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (holding ordinance facially unconstitutional because it prohibited speech based on content and declining to consider overbroad argument); *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010) (applying First Amendment "exacting scrutiny"

in facial challenge to compelled disclosure of signatory information on referendum petitions); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016) (applying strict scrutiny to facial challenge of Ohio false statement laws as content-based restrictions); *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019) (holding ballot-initiative process not a prior restraint in facial challenge to statute under First Amendment and analyzing under *Anderson-Burdick* framework). Plaintiffs do not appear to be making a First Amendment overbreadth challenge, and accordingly, the Court will determine if the challenged provisions of the Absentee Ballot Law present unconstitutional content-based restrictions.

The parties continue to disagree on whether the Absentee Ballot Law implicates the First Amendment and accordingly, the appropriate standard governing the court's inquiry. In its Order Denying Defendant's Motion to Dismiss the Amended Complaint ECF No. 59), the court concluded that exacting scrutiny applied to this inquiry. Ultimately, the court found the rationale in *League of Women Voters v. Hargett*, 400 F.Supp.3d 706 (M.D. Tenn. 2019) persuasive. *Hargett* concluded that encouraging others to register to vote is "pure speech" and because that speech is political in nature, it is "core First Amendment activity." This court concluded that unlike cases involving the mere administrative process or the mechanics of the electoral process, the Absentee Ballot Law, as interpreted by plaintiffs and as set forth in the amended complaint, involves the regulation of

political speech. This court found little difference between discussions of whether to register to vote and discussions of whether to vote absentee. (ECF No. 59).

The Intervenors have brought forward several cases that call into question this aspect of the court's earlier decision and seek to distinguish the present circumstances from *Hargett*. Like *Hargett*, none of the cases the Intervenors cite are precedential, but the court will, nonetheless, give them due consideration. In *American Ass'n of People With Disabilities v. Herrera*, 580 F.Supp.2d 1195, 1203 (D. N.M. 2008), the plaintiff challenged a regulatory scheme that restricts third-party voter registration in various ways, and places affirmative requirements on parties wishing to engage in third-party voter registration in the following ways: (i) requiring that registration agents complete a pre-registration process and provide personal information; (ii) limiting the number of registration forms an organization or individual may receive; (iii) requiring that third-party registration agents return completed registration forms to the county clerk or Secretary of State within forty-eight hours; and (iv) applying criminal and civil penalties for parties who do not comply with third-party registration laws. The *Herrera* court opined however, that none of the challenged restrictions concerned or affected the content of any speech by third-party voter registration organizations. *Id.* at 1214. More specifically, the court observed that the New Mexico statute did not "mandate any particular speech or statement or information" and did not preclude any speech. Indeed, the state

conceded that the third-party registration agent could intentionally lie, deceive or provide fraudulent information and the law would not penalize that agent in any way. Yet, the statutory scheme at issue in *Herrera* is plainly distinguishable from § 759, which prohibits a large sector of Michigan electors and all non-Michigan electors from requesting or soliciting a person to return their absentee ballot application. Requesting and soliciting describe the content of the prohibited communication. Accordingly, the court does not find *Herrera* to be persuasive or meaningfully analogous to the present circumstances.

Next, the Intervenors point to *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013), in which the plaintiff organizations challenged various provisions of Texas's law governing volunteer deputy registrars (VDR Law). Specifically, they challenged (1) the provision forbidding non-Texas residents from serving as VDRs, (2) the provision forbidding VDRs of one county from serving in another county; (3) the compensation provision; (4) the photocopying prohibition; and (5) the prohibition on VDRs sending completed registration applications via US mail – requiring personal delivery instead. The Fifth Circuit observed that some voter registration activities involve speech – including urging citizens to register, distributing voter registration forms, helping voters fill out forms, and asking for information to verify the registrations were processed successfully. *Id.* at 389. But the court concluded that the challenged provisions

could easily be separated from the speech aspects of voter registration activities. Out-of-state or out-of-county canvassers can participate anywhere, in any capacity, except to perform the functions exclusively assigned to trained volunteer VDRs: collecting, reviewing for completeness, issuing a receipt, and delivering the completed voter registration forms to a county office. Thus, the court concluded that the challenged provisions were not based on speech. Unlike the organization in *Steen*, no members of plaintiffs here can assist with or return absentee ballot applications even if they are Michigan electors unless they are asked to do so because they are prohibited from asking to do so, an act which necessarily involves speech by the organizations. Indeed, the *Steen* court distinguished *Buckley/Meyer*[1] because those cases involved laws that regulated "the process of advocacy itself, dictating who could speak (only unpaid circulators and registered voters) or how to go about speaking (with name badges and subsequent detailed reports)." *Id.* at 390. In contrast, the Absentee Ballot Law plainly regulates who can speak (only Michigan electors or family or household members of the applicant) and what they may say.

The Intervenors also cite *League of Women Voters of Florida v. Browning*, 575 F.Supp.2d 1298 (S.D. Fla. 2008), in which the plaintiffs challenged certain

[1] *Meyer v. Grant*, 486 U.S. 414 (1988) and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).

aspects of the Florida third-party organization voter registration law, including certain deadlines and reporting requirements that could result in fines for those who failed to comply. In *Browning,* the plaintiffs claimed that certain aspects of Florida's statutory scheme were vague and imposed an unconstitutional burden on their political speech and association rights. Notably, the court acknowledged that the plaintiffs' "interactions with prospective voters in connection with their solicitation of voter registration applications constitutes constitutionally protected activity." *Id.* at 1321. Yet, the challenged provisions of the statutory scheme, unlike those in *Meyer* and *Schaumburg*, "did not place any direct restrictions or preconditions on those interactions." *Id.* at 1322. The court further explained:

> For instance, it does not place any restrictions on who is eligible to participate in voter registration drives or what methods or means third-party voter registration organizations may use to solicit new voters and distribute registration applications. Instead, the Amended Law simply regulates an administrative aspect of the electoral process—the handling of voter registration applications by third-party voter registration organizations after they have been collected from applicants. Thus, the impact of this regulation on Plaintiffs' "one-to-one, communicative" interactions with prospective voters is far more indirect and attenuated than the statute addressed in *Meyer*.

Id. In contrast, § 759 does place restrictions on who may participate in certain aspects of voter registrations drives -- only Michigan electors who are also family or household members of the applicant may solicit or request to return absentee

ballot applications. In *Browning*, the court was able to separate the speech aspects of the voter registration drive – any person or organization can use any method to solicit new voters and distribute applications – from the regulated handling of the voter registration applications after they have been collected from the applicants. Here, however, it is impossible to separate the ban on possessing and returning applications to vote absentee from the ban on soliciting or requesting to return absentee ballot applications.

Finally, the Intervenors cite *Democratic Nat'l Comm. v. Reagan*, 329 F.Supp.3d 824, 851 (D. Ariz. 2018), rev'd and remanded on other grounds sub nom. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (*en banc*), cert. petition pending, in which the plaintiffs challenged a law prohibiting third-party collection of early ballots. The court found that the law only minimally burdened the voters' voting rights and associational rights. While the court discussed the free speech aspects of *Steen*, *supra*, it did not address, nor did the plaintiffs assert, any burden on free speech. Accordingly, this case is largely inapposite.

In short, none of the cases cited cause the court to reverse its earlier conclusion that exacting scrutiny applies to plaintiffs' First Amendment challenge to this law, as explained in *Hargett*. The court remains convinced that there is little difference between discussions about whether to register to vote and whether to

register to vote absentee. Indeed, under the current circumstances in this state and throughout the nation – where a global pandemic causes many Michigan voters, particularly those with certain underlying medical conditions, to question the safety of voting in person – discussions about whether and how to vote absentee are especially critical and certainly "implicate[] political thoughts and expression" both on the part of applicant and on the part of the third-party organizations seeking to assist voters with this process. *Hargett*, at 724 (quoting *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 195 (1999)). However, whether the court applies exacting scrutiny or a rational basis standard of review, on the record before the court and as discussed in detail below, the Absentee Ballot Law is constitutional.

To withstand exacting scrutiny, the challenged provisions of the Absentee Ballot Law must have a substantial relationship to a "sufficiently important" governmental interest. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). And, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe #1 v. Reed*, 561 U.S. 186, 196 (2010).

Plaintiffs maintain that the registration requirement for those who would return AV ballot applications is not fairly designed to serve any important government interest. They compare the registration requirement to the law struck

down by the Supreme Court in *Buckley*, which allowed only registered voters to circulate initiative petitions because it was likely to result in "speech diminution." *Id.* at 193-194. There, the record showed that there were 400,000 voting eligible persons who were not registered to vote. *Id.* at 193. The Supreme Court therefore concluded that "[b]eyond question, Colorado's registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions." *Id.* at 193. Plaintiffs say there are at least 750,000 persons who are eligible to vote but are not registered to vote residing in Michigan. (ECF No. 22-7, Palmer Decl. ¶¶ 6-13). Accordingly, plaintiffs assert that the registration requirement drastically reduces the number of persons who can return AV ballot applications and should suffer the same fate as the registration requirement struck down in *Buckley*. Additionally, plaintiffs maintain that the ban on non-family or household members from soliciting or requesting to help a voter return an absentee ballot application cannot survive exacting scrutiny for the same reasons. Plaintiffs argue that the solicitation ban burdens their ability to persuade Michigan voters to vote by absentee ballot, similar to the law struck down in *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 430 (1963).

Defendant and the Intervenors contend that the State has compelling interests in both preserving the integrity of elections and preventing fraud in the absentee voting process. States have a "compelling interest in preserving the

integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Id.* "While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008). In *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), the Supreme Court held that disclosure requirements of Washington's Public Records Act were sufficiently related to the state's interest in protecting the integrity of the electoral process to satisfy exacting scrutiny. The speakers whose First Amendment rights were at issue, were those who signed referendum petitions, which is expressive conduct under the First Amendment. *Id.* at 194-95. They sought to prohibit the state from making referendum petition signatory information available in response to the state's public records act. But the Court held that the state's interest in preserving the integrity of the electoral process by combating fraud was sufficiently important to satisfy exacting scrutiny. *Id.* at 197. "The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government.'" *Id.* (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

Importantly, in *Reed*, the Court found that the threat of fraud was not merely hypothetical. Indeed, the respondents and *amici* cited a number of petition-related cases of fraud across the country to support their point. *Id.* at 198. Similarly, here the Intervenors have cited cases from across the country in which courts have acknowledged that the absentee ballot process is susceptible to fraud, along with other supporting evidence. *See Crawford*, 553 U.S. at 195-96 (explaining history of in-person and absentee fraud "demonstrate[s] that not only is the risk of voter fraud real but that it could affect the outcome of a close election"); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting." (citing John C. Fortier & Norman J. Ornstein, *Symposium: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. & Reform 483 (2003))); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill. App. Ct. 2004) ("It is evident that the integrity of a vote is even more susceptible to influence and manipulation when done by absentee ballot."); Khan & Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, https://votingrights.news21.com/article/election-fraud (study of election crimes from 2000-2012 finding that more fraud crimes involved absentee ballots than any other categories); *Veasey v. Abbott*, 830 F.3d 216, 256 (5th Cir. 2016) ("The

district court credited expert testimony showing mail-in ballot fraud is a significant threat—unlike in-person voter fraud.").[2]

Further, while Michigan has a number of laws criminalizing interference with the absentee voting process, including making it a felony to forge a signature on an absentee ballot application, none of these laws 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. The Absentee Ballot Law is designed with fraud prevention as its aim and it utilizes well-recognized means in doing so. As explained by the Legislature, "[b]y regulating the distribution and collection of absentee ballot applications and limiting those who are permitted to transport the applications, the state increases accountability and protects against instances of carelessness." (ECF No. 68, PageID.1174). In this vein, the *Browning* court recognized several potential abuses with third-party collection of absentee-ballot applications, ranging from "hoard[ing]" applications, to "fail[ing] to submit applications" by the deadline, to "fail[ing] to submit applications at all." *Browning*, 575 F.Supp.2d at 1324.[3]

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[2] In acknowledging the findings contained in the authorities cited by the intervenors about the greater susceptibility to fraud in the absentee voter context, the court does not find or suggest that there has been any showing of a greater incidence of fraud in the absentee voting process in Michigan.

[3] At least one report, the Carter-Baker Commission report which was put together by a group headed by former president Jimmy Carter and former Secretary of State James Baker, states that "[a]bsentee ballots remain the largest source of potential voter fraud. . . . States

The Legislature also makes the point that, "only allowing registered electors to transport absentee ballot applications, Section 759 ensures that the person is a civic-minded individual, whose information is already on record with the state, and who is subject to subpoena power in Michigan." (ECF No. 68, PageID.1174). Similarly, by requiring that the voter "request" assistance from anyone other than a relative or house-hold member, it creates a greater likelihood that the registered elector is someone the voter trusts. The court is convinced that these checks are designed to promote accountability on the part of those handling the applications and faith in the absentee-voting system. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. at 197 ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."); (ECF No. 70-5, the Carter-Baker Commission report) (The "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.").

The burden imposed on plaintiffs is that they may not engage in speech (§ 759(5)) that would facilitate the collection and return of signed absentee ballot

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therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." (ECF No. 70-5, Ex. 4, Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform, p. 46 (Sept. 2005)). While the report specifically refers to the handling of ballots by third-party organizations, it logically follows that precluding such organizations from handling absentee voter applications may also limit the opportunities for fraud and abuse in the application process.

applications from Michigan voters, which they are otherwise banned from possessing (§ 759(4)) and banned from returning to the clerk (§ 759(8)). Because of the organizations' aims to encourage civic engagement and empower voters through use and facilitation of the absentee ballot process, this restriction is not slight. However, plaintiffs can still educate the public about registering to vote absentee and answer questions about this process. Moreover, nothing in the law restricts plaintiffs from providing a pool of electors that can return the ballots for them *when requested by voters*. Additionally, § 759 provides a number of ways for voters to return their requests for an application or their applications to the local clerk: (1) in person, (2) by US mail or some other mail service, (3) email, (4) fax, (5) through in-person, mail, or other delivery by an immediate family member, which includes in-laws and grandchildren, (6) through in-person, mail, or other delivery by a person residing in the same household, and (7) if none of those methods are available, through in-person, mail, or other delivery "by any registered elector." Mich. Comp. Laws § 168.759(4)-(6). The question is whether there is a substantial relationship between the level of burden imposed on plaintiffs' speech rights and the sufficiently important governmental interests identified by defendant and the Intervenors. The court finds 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. As such, the court concludes that plaintiffs are unlikely to success on their First Amendment challenge to the Absentee Ballot Law.

b. Unduly Vague and Overbroad

Plaintiffs also complain that it is not clear from the face of the statute whether soliciting includes passive conduct that induces a voter to entrust her absentee ballot application to a third party and offers of assistance that do not explicitly involve a request. Several statutory provisions are implicated by plaintiffs' claim. First, § 759(4) provides that a person must not possess an absentee voter ballot application unless they are a "registered elector requested by the applicant to return the application." Subsection § 759(5) requires the registered elector to certify that he or she is delivering the absentee voter ballot application at the request of the applicant, that he or she "did not solicit or request to return the application," and that he or she did not "influence[] the application." Subsection § 759(8) provides that "[a] person who is not authorized in this act and who both distributes absent voter ballot applications to absent voters and returns absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor."

Defendant maintains that the conduct being prohibited is plain and clear. One must not "solicit or request" to return an absentee ballot application.

Defendant asserts that the words "solicit" and "request" are not ambiguous or vague and are readily understood in their ordinary and common meaning. Simply put, according to defendant, the statute prohibits a person from asking to return an absentee ballot application.

"[B]asic principles of due process set an outer limit for how vague a statutory command can be if a person is going to be expected to comply with that command." *Hargett*, at 727 (citing *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Court*, 894 F.3d 235, 251 (6th Cir. 2018)). Specifically, a statute is unconstitutionally vague under the Fourteenth Amendment if its terms "(1) 'fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'authorize or even encourage arbitrary and discriminatory enforcement.'" *Id.* at 246 (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). "'[A] more stringent vagueness test should apply' to laws abridging the freedom of speech ...." *Id.* (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). That standard can be "relaxed somewhat" if the law at issue "imposes civil rather than criminal penalties and includes an implicit scienter requirement." *Id.* (citing *Hoffman Estates*, 455 U.S. at 499). Federal courts must construe challenged state statutes, whenever possible, "to avoid constitutional difficulty." *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012). The Sixth Circuit has stated

that a statute will be struck down as facially vague only if the plaintiff has "demonstrate[d] that the law is impermissibly vague in all of its applications." *Id.*

"When the common meaning of a word provides adequate notice of the prohibited conduct, the statute's failure to define the term will not render the statute void for vagueness." *United States v. Hollern*, 366 Fed. Appx. 609, 612 (6th Cir. 2010). Stated differently, where the challenged language "is commonly used in both legal and common parlance," it often will be "sufficiently clear so that a reasonable person can understand its meaning." *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees*, 411 F.3d 777, 798 (6th Cir. 2005) (*en banc*).

The language of § 168.759(4), (5) prohibits a person from "solicit[ing]" or "request[ing] to return" an absentee voter ballot application. In interpreting this language, the solicitation ban should be read in context with the ban on third-party collection as a whole. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007). Where a statutory term is undefined, courts give it its ordinary meaning. *United States v. Wright*, 774 F.3d 1085, 1088 (6th Cir. 2014). The Sixth Circuit recently defined "solicit" as "to make petition to . . . especially: to approach with a request or plea (as in selling or begging)." *Platt*, 894 F.3d at 250 (quoting *O'Toole v. O'Connor*, 2016 WL 4394135, at *16 (S.D. Ohio Aug. 18,

2016) (quoting Webster's Third New International Dictionary, Unabridged (2016)).

At bottom, the aim of the statute is to preclude certain third-party collection of signed absentee ballot applications. The state does not want anyone outside of the enumerated persons of trust to possess, collect, or return any signed absentee ballot applications. To protect this interest, the Legislature banned such persons from soliciting or requesting to return such applications, thus reducing the danger of anyone outside the enumerated persons of trust from possessing, collecting, or returning any signed absentee ballot applications. The affidavits submitted by plaintiffs suggest that they do understand what is prohibited by § 759. For example, in Guy Cecil's affidavit, he says that but for the Absentee Ballot Law, Priorities USA would support partner organizations to organize around absentee ballot voting, including "offering assistance to voters in submitting an absentee ballot application, and assisting voters in submitting absentee ballot applications." (ECF No. 22-4, ¶ 12). Mr. Cecil acknowledges that they cannot do so because the Absentee Ballot Law criminalizes these activities. *Id.* Similarly, Maxwell Lubin from Rise, but for the Absentee Ballot Law, would also deploy volunteers to assist and offer to assist voters in submitting absentee ballot applications. (ECF No. 22-6, ¶ 26). In the court's view, the prohibited conduct or speech is readily understood by a person of ordinary intelligence. That is, a person must not solicit

or request to do that which would place signed absentee ballot applications in his or her possession for collection or return. Accordingly, the court concludes that plaintiffs are unlikely to succeed on the merits of their claim that the Absentee Ballot Law is unduly vague in violation of the Fourteenth Amendment.

c. Preemption by the Voting Rights Act

Plaintiffs maintain that the § 759 of the Absentee Ballot Law is preempted by § 208 of the Voting Rights Act. Section 208 provides:

> 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 VRA defines the terms "vote" and "voting" to include:

> [A]ll action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

52 U.S.C. § 10310. The definition of "voting" appears to include all stages of applying for an absentee ballot. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017) (Interpreting the VRA and stating that "'[t]o vote,' therefore, plainly contemplates more than the mechanical act of filling out the ballot sheet. It includes steps in the voting process before entering the ballot box, 'registration,'

and it includes steps in the voting process after leaving the ballot box, 'having such ballot counted properly.' Indeed, the definition lists 'casting a ballot' as only one example in a non-exhaustive list of actions that qualify as voting.").

The doctrine of preemption is rooted in the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, ¶ 2, and is based on the premise that when state law conflicts or interferes with federal law, state law must give way. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662-64 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 515-16 (1992). Federalism concerns counsel that state law should not be found preempted unless that is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). However, "clear and manifest" does not necessarily mean "express," and "Congress's intent to preempt can be implied from the structure and purpose of a statute even if it is not unambiguously stated in the text." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 523-25 (1977)). As explained in *Teper*, the Supreme Court has identified three categories of preemption: (1) "express," where Congress "define[s] explicitly the extent to which its enactments pre-empt state law," *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); (2) "field," in which Congress regulates a field so pervasively, or federal law touches on a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and (3)

"conflict," where state and federal law actually conflict, so that it is impossible for a party simultaneously to comply with both, or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Preemption of any type "fundamentally is a question of congressional intent." *Id.*

Plaintiffs point out that in its report recommending that this protection be added to the Voting Rights Act, the Senate Judiciary Committee noted that state restrictions that "deny the assistance at some stages of the voting process during which assistance was needed" would violate § 208. S. Rep. No. 97-417, at 63 (1982). In recommending that § 208 be added to the Voting Rights Act, the Senate Judiciary Committee recognized that voters who do not speak English and voters with disabilities "run the risk that they will be discriminated against at the polls and that their right to vote in State and Federal elections will not be protected." S. Rep. No. 97-417, at 62 (1982). To limit that risk, those voters "must be permitted to have the assistance of a person of their own choice." *Id.*

Plaintiffs contend that § 208 preempts Michigan's Absentee Ballot Law because Michigan's law prohibits voters who need help returning their absentee ballot applications from receiving assistance from the person of their choice. Instead, a voter is limited to choosing amongst only registered Michigan voters, family members, or household members, and not any of the hundreds of thousands

of other Michigan residents who may be none of these things. Further, an absentee voter may not receive assistance with their application from a third party if that third party has offered to help. *See OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017) (Section 208 preempted a Texas law restricting who may provide interpretation assistance to English-limited voters); *United States v. Berks Cty., Pennsylvania*, 277 F.Supp.2d 570, 580 (E.D. Pa. 2003) (county election law restricting who may provide language assistance to Spanish-speaking voters violated § 208).

The Legislature argues that because Michigan's prohibition on the unauthorized solicitation and collection of absentee ballots does not "stand[] as an obstacle to the accomplishment and execution" of Congress's objectives, there is no preemption. *Gade v. Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 98 (1992) (Conflict preemption occurs where compliance with both a federal and state regulation is physically impossible or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."). According to the Legislature, nothing in § 208 prevents the state from reasonably restricting the individuals permitted to return absentee ballot applications. Defendant and the Republican Party make similar arguments.

When federal preemption is alleged, the analysis starts with "the assumption that the historic police powers of the States were not to be superseded by the

Federal Act unless that was the clear and manifest purpose of Congress." *Cmty. Refugee & Immigration Servs. v. Registrar, Ohio Bureau of Motor Vehicles*, 334 F.R.D. 493, 509 (S.D. Ohio 2020) (quoting *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 438 (2002) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). While there is a strong presumption against preemption of a state law by a federal regulation, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), Congress may preempt a state law by enacting its own specific laws. *Cmty. Refugee & Immigration Serv.*, 334 F.R.D. at 509 (citing *Arizona v. U.S.*, 567 U.S. 387, 399 (2012); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)). When interpreting a statute, the starting point is the language of the statute itself. *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 433-34 (6th Cir. 2019) (citing *Hale v. Johnson*, 845 F.3d 224, 227 (6th Cir. 2016)). "Where the statute's language is clear and unambiguous and the statutory framework is coherent and consistent, 'the sole function of the courts is to enforce it according to its terms.'" *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). But "we must take care not to interpret the language [of a statute] in a vacuum; instead, we must look to the 'structure, history, and purpose' of the statutory scheme." *Id.* (quoting *Abramski v. United States*, 573 U.S. 169, 179 (2014)).

Section 208 provides that certain specified voters – i.e. those needing assistance due to blindness, disability, or inability to read or write – "may be given assistance by *a* person of the voter's choice…" (Emphasis added). Section 208 does not say that a voter is entitled to assistance from *the* person of his or her choice or *any* person of his or her choice. In other words, the statute employs the indefinite article "a" which by its very term is non-specific and non-limiting, as opposed to the definite article "the," which by its terms is specific and limiting. *See* "Indefinite article," Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/indefinite%20article. Accessed 9/17/2020; "Definite article," Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/definite%20article. Accessed 9/17/2020. (Defining an indefinite article as "[t]he word a or an used in English to refer to a person…not identified or specified," and defining definite article as "the word the used in English to refer to a person or thing that is identified or specified."). Congress's language choice must be given meaning and here, where it has declined to use a definite article, its language suggests that some state law limitations on the identity of persons who may assist voters is permissible.

This conclusion is also supported by the legislative history. In passing § 208, Congress explained that it would preempt state election laws "only to the extent that they unduly burden the right recognized in [Section 208], with that

determination being a practical one dependent upon the facts." S. REP. NO. 97-417, at 63 (1982); *see also Ray v. Texas*, 2008 WL 3457021 (E.D. Tex. Aug. 7, 2008) ("The legislative history [of § 208] evidences an intent to allow the voter to choose *a* person whom the voter trusts to provide assistance. It does not preclude all efforts by the State to regulate elections by limiting the available choices to certain individuals.") (emphasis in original). Notably, plaintiffs have not come forward with evidence that any voters have been denied the person of their choice to assist them in the absentee ballot application process, let alone voters belonging to the class of individuals identified in § 208 (i.e. those requiring assistance due to blindness, disability, or inability to read or write). Thus, they have not made a showing of undue burden. Rather, plaintiffs' evidence speaks in generalities about low income voters, elderly voters, student voters, disabled voters, and voters for whom English is their second language. (ECF 22-4, Affidavit of G. Cecil, "I am concerned that the ... Absentee Ballot Organizing Ban will depress the vote among persons [Priorities USA] is targeting for engagement in the political process in Michigan, including low income and student voters and voters who are disabled."); ECF No. 22-5, Affidavit of A. Hunter, "APRI Detroit/Downriver plans to (a) educate individuals throughout our community about their ability to apply to vote via absentee ballot in upcoming elections and (b) provide assistance with those applications. For example, there are large Spanish- and Arabic-speaking

populations in our community, and we have members who speak those languages. APRI Detroit/Downriver plans to go into those communities and educate individuals about the absentee ballot application process in their own language, as well as offer assistance with filling out and returning the absentee ballot applications."); (ECF No. 22-6, Affidavit of M. Lubin, "In my experience, get-out-the-vote activities such as … absentee ballot organizing are critically important organizing tools for our student organizers and volunteers."). Though plaintiffs' evidence ably demonstrates that they plan to target at least two categories of voters covered by § 208, disabled voters and voters who may face language barriers, they offer no examples of instances in which such voters have been deprived of voting assistance. The 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 in the voting process. For example, in *OCA-Greater Houston v. Texas*, 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. 867 F.3d at 615. And, in *United States v. Berks Cnty.*, 250 F.Supp.2d 525, 530 (E.D. Pa. 2003), the government presented specific evidence of English-limited voters denied the right to use a voting assistant of choice by poll workers. Given the lack of evidence that any voters have been affected by the limits on their choice of assistance, there is no basis for

the court to conclude that Michigan's law stands as an obstacle to the objects of § 208. Accordingly, the court finds that plaintiffs have not shown a likelihood of success on their bid to overcome the presumption against preemption.

2. *Voter Transportation Law*

Plaintiffs also contend that the Voter Transportation law is preempted by federal law. More particularly, they argue that the Voter Transportation Law imposes a spending limit of $0 as it relates to elections involving federal candidates and as such, the law conflicts with federal regulations expressly permitting corporations to spend money to transport voters to polls. 11 C.F.R. § 114.3(c)(4)(i); 11 C.F.R. § 114.4(d)(1). Accordingly, plaintiffs argue that the Voter Transportation Law is both expressly and impliedly preempted by the Federal Election Campaign Act (FECA) and its regulations.

The Legislature contends that the Voter Transportation Law does not limit contributions or expenditures with respect to federal elections and that plaintiffs' argument ignores FECA's carve out for state statutes that protect against voting related fraud and other abuses. According to the Legislature, because the Voter Transportation Law protects against quid pro quo and voter fraud, it falls within the carve out set forth in 11 C.F.R. § 108.7. The Republican Party further asserts that the FECA preemption provisions have been narrowly construed by the courts and that plaintiffs do not point to any cases providing that FECA preempts state

criminal laws targeting election fraud. The Republican Party also argues that FECA regulations do not conflict with the Voter Transportation Law because the regulations allow corporation to "provide" transportation whereas the Transportation Law expressly prohibits *payment* for transportation. Accordingly, says the Republican Party, nothing in the Voter Transportation Law prohibits plaintiffs from *providing* transportation.

As *Teper* explained, in order to decide the preemptive effect of FECA on a state law, the court must "juxtapose the state and federal laws, demonstrate their respective scopes, and evaluate the extent to which they are in tension." Michigan's Voter Transportation Law provides in full:

> A person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election.

Mich. Comp. Laws § 168.931(1)(f). While there is no Michigan case interpreting the Voter Transportation Law in this context, as discussed above, a universal rule of statutory construction is that "the courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The Michigan Election Law does not define "person." But Mich. Comp. Laws § 8.3l provides that "[t]he word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals." *See also* Mich. Comp. Laws § 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language[.]"). Similarly, the act does not define the term "hire." Albeit in an unpublished decision, the Michigan Court of Appeals has interpreted the term in another context to mean "'to engage the services of for wages or other payment,' or 'to engage the temporary use of at a set price.'" *Tech & Crystal, Inc v. Volkswagen of Am, Inc.*, 2008 WL 2357643, at *3 (Mich. Ct. App., June 10, 2008) (quoting Random House Webster's College Dictionary (1997)). The Act defines "[e]lection" to mean "an election or primary election at which the electors of this state or of a subdivision of this state choose or nominate by ballot an individual for public office or decide a ballot question lawfully submitted to them." Mich. Comp. Laws § 168.2(g). The court finds the Voter Transportation Law to be relatively straightforward and unambiguous. In a nutshell, no person (including a corporation) may pay wages or make any other payment to another to transport voters to the polls, unless the person so transported cannot walk. Thus, under Michigan's law, a corporation is limited to providing transportation for voters who can walk through means that do not involve payment

to the person doing the transporting. Now, the court must examine the scope and meaning of the relevant FECA provisions and accompanying regulations.

FECA was amended in 1974 to include a preemption provision, which states that "[t]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provisions of state law with respect to election to Federal office." *Teper*, 82 F.3d at 994 (quoting 2 U.S.C. § 453). The current version § 453 replaced a prior provision that included a savings clause, expressly preserving state laws, except where compliance with state law would result in a violation of FECA or would prohibit conduct permitted by FECA. *Id.* (citing Federal Election Campaign Act of 1971, Pub.L. No. 92-225, 1972 U.S.C.C.A.N. (86 Stat.) 23 (amended by Federal Election Campaign Act Amendments of 1974, Pub.L. No. 93-443, 1974 U.S.C.C.A.N. (88 Stat.) 1469)). The House Committee that drafted the current provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." *Id.* (quoting H.R. Rep. No. 1239, 93d Cong., 2d Sess. 10 (1974)). "When Congress ... has included in the enacted legislation a provision explicitly addressing [preemption], and when that provision provides a 'reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the

legislation." *Cipollone*, 505 U.S. at 517, 112 S.Ct. at 2618 (citations omitted). The interpretive regulation, 11 C.F.R. § 108.7, sets forth the statute's preemptive scope in accordance with the statute's plain language and its legislative history:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (b) Federal law supersedes State law concerning the—
>
> > (1) Organization and registration of political committees supporting Federal candidates;
> > (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
> > (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.
>
> (c) The Act does not supersede State laws which provide for the—
>
> > (1) Manner of qualifying as a candidate or political party organization;
> > (2) Dates and places of elections;
> > (3) Voter registration;
> > (4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; or
> > (5) Candidate's personal financial disclosure.

See Bunning v. Com. Of Ky., 42 F.3d 1009, 1012 (6th Cir. 1994).

According to 11 C.F.R. § 114.4(c)(2), a corporation may make voter registration and get-out-the-vote communications to the general public. Disbursements for such activities are not considered contributions or expenditures

if the voter registration and get-out-the-vote communications to the general public do not expressly advocate the election or defeat of any clearly identified candidate or candidates of a clearly identified political party and the preparation of voter registration and get-out-the-vote communications are not coordinated with any candidate or political party. *Id.* Further, a corporation may support or conduct voter registration and get-out-the-vote drives aimed at employees outside its restricted class and the general public. 11 C.F.R. § 114.4(d)(1). Disbursements for such voter registration and get-out-the-vote efforts are *not expenditures*,[4] if the corporation does not make any communication expressly advocating the election or defeat of any clearly identified candidate or party as part of the voter registration or get-out-the-vote drive, the drive is not directed primarily to individuals registered with or who intend to register with the party favored by the corporation, the information and other assistance with registration, including transportation, are made available without regard to the voter's political preference, the individuals conducting the drives are not paid on the basis of the number of individuals registered or transported who support a particular candidate or party, and the

[4] "The terms contribution and expenditure shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a State bank, a federally chartered depository institution (including a national bank) or a depository institution whose deposits and accounts are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, if such loan is made in accordance with 11 CFR 100.82(a) through (d)) to any candidate, political party or committee, organization, or any other person in connection with any election to any of the offices referred to in 11 CFR 114.2 (a) or (b) as applicable." 11 C.F.R. § 114.1(a)(1).

corporation must notify those receiving information or assistance of the requirement that services cannot be denied on the basis of party or candidate preference. 11 C.F.R. § 114.4(d)(2)(i)-(v).

Accordingly, organizations like plaintiffs could offer two types of voter registration and get-out-the-vote drives. First it could offer the type described in § 114.4(c)-(d), which, if followed, would not be considered an "expenditure" for purpose of FECA. Or presumably, it could offer drives that are partisan and do advocate for certain candidates or political parties, in which case, the expenses associated with the drive would be classified as "independent expenditures" under FECA, thus triggering the federally mandated disclaimers identifying the organization paying for the communication and stating that the communication was not authorized by a candidate or candidates' committee. *See* 11 C.F.R. §§ 109.11, 110.11. In either case, the FECA regulations expressly permit corporations like plaintiffs to spend money on providing transportation to the polls as part of their get-out-the-vote efforts. And to the extent that providing such transportation is tied to a specific candidate or party, Congress has elected to preempt state laws limiting such contributions and expenditures. 11 C.F.R. § 108.7(b)(3). This allowance thus conflicts with Michigan's Voter Transportation Law, which bars *all* spending on transportation to the polls, except for that made on behalf of those unable to walk to the polls. *See Teper*, 82 F.3d at 995 ("[I]t is

the effect of the state law that matters in determining preemption, not its intent or purpose. Under the Supremacy Clause, state law that in effect substantially impedes or frustrates federal regulation, or trespasses on a field occupied by federal law, must yield, no matter how admirable or unrelated the purpose of that law.").

The question now becomes whether the Voter Transportation Law falls within one of the areas excepted from preemption; 11 C.F.R. § 108.7(c)(4) excepts from preemption state laws that prohibit false registration, voting fraud, theft of ballots, and similar offenses. In order to wedge the Voter Transportation Law into this category as defendant and intervenors suggest, the court must read language into the statute which is no longer there. As the parties explain, in its previous form, the Voter Transportation Law expressly prohibited paying for transportation to the polls as a quid pro quo for a vote. As originally enacted, the Voter Transportation Law, 1895 P.A. 135, stated:

> Any person who shall hire any carriage or other conveyance, or cause the same to be done, for conveying voters, other than voters physically unable to walk thereto, to any primary conducted hereunder, or who shall solicit any person to cast an unlawful vote at any primary, or who shall offer to any voter any money or reward of any kind, or shall treat any voter or furnish any entertainment for the purpose of securing such voter's vote, support, or attendance at such primary or convention, or shall cause the same to be done, shall be deemed guilty of a misdemeanor.

Yet, the Legislature later expressly removed all language relating to paying for transportation in exchange for a vote. Nothing in the plain language of the Transportation Law, as it is now written, suggests that its purpose is to prevent voter fraud or similar offenses. While the Voter Transportation Law is contained within a broader provision addressing prohibited conduct in Michigan's Election Law, not all prohibited conduct found in this section is designed to prevent voter fraud and the influencing of votes. For example, § 168.931(1)(g) imposes a penalty on an inspector of election for failing to report to the designated polling place. *See also*, § 168.931(1)(h) ("A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election."). In contrast, other subsections speak in specific terms about prohibiting vote-buying and vote-influencing. *See e.g.*, § 168.931(1)(d) ("A person shall not, either directly or indirectly, discharge or threaten to discharge an employee of the person for the purpose of influencing the employee's vote at an election."); § 168.931(1)(e) ("(e) A priest, pastor, curate, or other officer of a religious society shall not for the purpose of influencing a voter at an election, impose or threaten to impose upon the voter a penalty of excommunication, dismissal, or expulsion, or command or advise the voter, under pain of religious

disapproval."). The Voter Transportation Law, like other subsections found in § 168.931, does not directly speak to voter fraud or vote-influencing. While defendant and the Intervenors want the court to read an anti-fraud purpose into Voter Transportation Law's ban on hiring or paying for transportation, it is unclear how paying for a taxi or Uber is any more likely to influence a voter than offering to transport them by way of a volunteer driver in a non-profit corporation's minivan. Moreover, FECA expressly allows expenditures, including those for transportation, to be made in relation to a particular candidate. So, premising a purpose of fraud prevention on the idea that spending on rides for particular candidates or parties leads to fraud is inconsistent with federal law. Thus, the court finds the Voter Transportation Law unlikely to fall into this exception to preemption.

As set forth above, the Intervenors also argue that FECA's preemptive scope is to be narrowly construed and that state criminal statutes are generally not preempted by FECA. The court's reading of the cases addressing FECA's preemptive scope suggest a different line of demarcation: those cases involving statutes of general application versus those cases involving statutes directly bearing on elections and campaign finance. The court in *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 712 F.3d 185 (5th Cir. 2013) focused on this distinction. In *Janvey*, the court examined whether the Texas Uniform Fraudulent

Transfer Act (TUFTA) was preempted by FECA. In *Janvey*, the receiver of assets of the perpetrators of a Ponzi scheme sought to recover the perpetrators' contributions that had been made to various political committees under TUFTA. The political committees contended that TUFTA was preempted by FECA. The court concluded that TUFTA was a general state statute that "happens to apply to federal political committees in the instant case." *Id.* at 200. *See also Stern v. Gen. Electric Co.*, 924 F.2d 472 (2d Cir. 1991) (holding that § 453 does not preempt a state law establishing a company's directors' fiduciary duty to shareholders, including not wasting corporate assets, and explaining that "the narrow wording of [§ 453] suggests that Congress did not intend to preempt state regulation with respect to non-election-related activities"); *Reeder v. Kans. City Bd. of Police Comm'rs*, 733 F.2d 543 (8th Cir. 1984) (holding that § 453 did not preempt a state law prohibiting officers or employees of the Kansas City Police Department from making any political contribution); *Friends of Phil Gramm v. Ams. for Phil Gramm in '84*, 587 F.Supp. 769 (E.D. Va. 1984) (holding that § 453 did not preempt a state law prohibiting unauthorized use of a person's name for advertising or commercial purposes). These cases stand in contrast to those finding preemption of state law that regulated elections or campaign finance. *See Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996) (state law effectively prohibiting Georgia legislators from accepting donations for a federal campaign while the state General Assembly was

in session); *Bunning v. Ky.*, 42 F.3d 1008 (6th Cir. 1994) (state law authorizing investigation of campaign expenditures of a federal political committee); *Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993) (state law establishing system under which federal congressional candidates could agree to limit their federal expenditures in exchange for state funding for their campaigns). In the court's view, the Voter Transportation Law, which is contained in a chapter of the Michigan Election Law, directly regulates election activity and campaign-related spending. Accordingly, it falls in the latter category of cases where preemption by FECA is generally found.

C. Irreparable Harm and the Balance of Harms

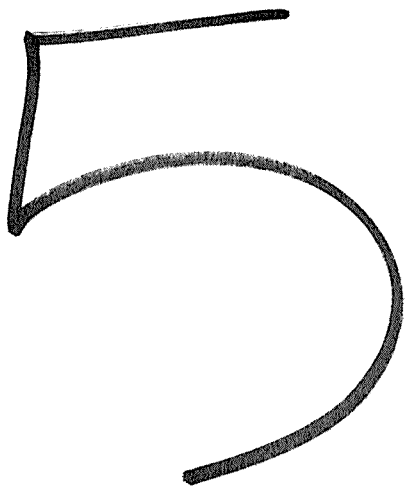
To establish irreparable harm, plaintiffs must show that, unless their motion is granted, they will suffer actual and imminent harm rather than harm that is speculative or unsubstantiated. *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006). The court's role on a preliminary injunction motion is to assess not whether a particular outcome or harm is possible or certain, but whether "irreparable injury is likely in the absence of an injunction." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A preliminary injunction will not be issued simply to prevent the

possibility of some remote future injury. *Los Angeles v. Lyons*, 461 U.S. 95 (1983). Irreparable injury is presumed "when constitutional rights are threatened or impaired." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). In particular, a "restriction on the fundamental right to vote," *id.*, or the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Here, because the court has concluded that plaintiffs are unlikely to succeed on their constitutional claims as they relate to the Absentee Ballot Law, no constitutional rights are threatened or impaired by this law. Thus, irreparable harm is unlikely. The Intervenors argue that plaintiffs cannot show irreparable harm in "educat[ing] voters about their options to vote absentee" or "encourage[ing] voters to take advantage of the conveniences of absentee voting" (ECF No. 22-1, PageID.164), when the Secretary of State plans to send every registered voter an AV ballot application in Michigan before the primary and general elections. (ECF 70-4, Ex. 3). Equally important, nothing in the Absentee Ballot Law precludes plaintiffs from engaging in such education efforts. Rather, the law only precludes them from requesting or soliciting to return signed absentee voter applications. Accordingly, the court finds that irreparable harm to plaintiffs by not issuing the preliminary injunction as to the Absentee Ballot Law is unlikely.

Conversely, issuing a preliminary injunction as to the Absentee Ballot Law would cause harm to the State. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J. in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J. in chambers). Moreover, the State's public interest in preserving the integrity of its election processes cannot seriously be disputed. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Crawford*, 553 U.S. at 194-97. Accordingly, the court finds that the balance of harms and the public interest weigh against issuing a preliminary injunction on the Absentee Ballot Law.

In contrast, the court has concluded that plaintiffs are likely to succeed on the merits of their claim that the Voter Transportation Law is preempted by FECA. Denying a preliminary injunction would impair plaintiffs' ability to transport voters to the polls and to spend money to do so, which is contrary to federal election law and frustrates the purpose of FECA. Congress implemented a statutory scheme and gave citizens the right to spend money on transporting voters to the polls. The November election is nearly upon us and any particular election only occurs once. The restriction on plaintiffs' ability to organize and spend money on transporting voters to the polls for this election cannot be remedied



STATE OF MICHIGAN

IN THE COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, and MICHIGAN REPUBLICAN PARTY, *Plaintiffs*, v. SECRETARY OF STATE, and ATTORNEY GENERAL, *Defendants*.	No. HON.

DECLARATION OF RYAN TERRILL IN SUPPORT OF REPUBLICAN COMMITTEES' COMPLAINT

I, Ryan Terrill state the following based on my personal knowledge:

1. I am over 18 years of age and competent to make this Declaration.

2. I am an independent contractor for the Republican National Committee ("RNC").

3. I have reviewed the Republican Committees' Complaint.

4. I make this Declaration in support of Republican Committees' Complaint.

5. The RNC is the national organization of the Republican Party. It is an unincorporated organization registered with the Federal Election Commission pursuant to 52 U.S.C. § 30101(14).

6. A critical part of the RNC's mission is to support Republican candidates at all levels—local, state, and national—in elections throughout the country, including in Michigan.

7. In the 2020 election, the Republican Committees will be supporting a full slate of candidates for local, state, and national offices, up to and including the Office of President. As

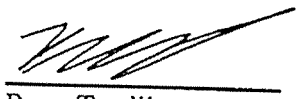
part of this effort, the Republican Committees engage in get-out-the-vote ("GOTV"), Election Day Operations ("EDO") and voter education efforts to encourage and enable their voters to cast effective, valid ballots.

8. The Republican Committees have spent substantial resources, worth at least $600,000, this election cycle developing and executing GOTV and EDO plans involving the education of voters and volunteers on Michigan's voting procedures, including Michigan's ballot receipt deadline and Michigan's statutory restrictions on third-party handling or return of ballots.

9. If Michigan's statutory ballot receipt deadline and Michigan's statutory restrictions on third-party handling or return of ballots are not enforced by Defendants, some portion of the funds and resources already expended by the Republican Committees on GOTV and EDO will be rendered obsolete, resulting in waste. The Republican Committees will further be forced to expend substantial time and resources to develop and execute alternative GOTV and EDO strategies and will likely be forced to spend additional time and resources to re-educate voters and volunteers regarding Michigan's election rules.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 23, 2020



Ryan Terrill