No. 20-1931

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Priorities USA, Rise Inc., and the Detroit/Downriver Chapter of the A. Philip Randolph Institute, Plaintiffs-Appellees, v. Dana Nessel, in her official capacity as Attorney General of Michigan Defendant, and Republican National Committee, Michigan Republican Party, Michigan House of Representatives, and Michigan Senate Intervenor-Defendants-Appellants.	On Appeal from the United States District Court for the Eastern District of Michigan *District Court Case No. 19-13341*

APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR STAY

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INTRODUCTION

Michigan is the only state in the country that restricts spending on transportation for voters to and from the polls. Appellees Rise, Inc., the A. Philip Randolph Institute Detroit/Downriver Chapter, and Priorities USA are organizations with significant voter engagement programs in Michigan. They all desire to fund voter transportation in the upcoming election. Until the district court's preliminary injunction issued nearly a month ago on September 17, they have been prohibited from engaging in that activity by Michigan's Transportation Spending Ban codified at Michigan Compiled Laws § 168.931(1)(f)). In the 28 days that have passed since the preliminary injunction was issued, Appellees have begun to hire transportation to take voters to the polls in the upcoming election. They did so in reliance on the preliminary injunction and on the defendant's—Attorney General Dana Nessel's—representation shortly after the injunction issued that she would not appeal.

Appellants, who purport to represent the Michigan House and Senate, now bring an "emergency" motion to stay pending appeal. They seek to undo a status quo that their own delay has helped codify (they waited eight days to move for a stay in the district court and another two weeks, including three days after the district court denied their stay, to move for one here). This belated attempt to negate the district court's order should be rejected. Appellants lack standing to appeal, are unlikely to secure a reversal on appeal, and will not suffer any injury in the absence of a stay.

Issuing a stay at this late date, however, would cause significant irreparable harm to Appellees who have expended resources to support programming in an election year, when such resources are necessarily finite. Appellees cannot be made whole for the loss of those election-related resources after the election has taken place. A stay would also irreparably harm Appellees because it would prevent them from further engaging in constitutionally and statutorily protected election spending during early voting now and on election day. The motion to stay should be denied.

BACKGROUND

The Transportation Spending Ban provides that "[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." MCL § 168.931(1)(f). In other words, the law effectively sets a spending limit of $0 on transporting voters to the polls. Like many campaign finance regulations, the Ban is enforced with criminal penalties. Anyone found guilty of violating the law commits a misdemeanor, *id.* § 168.931(2), and faces the prospect of ninety days of imprisonment and a $500 fine, *id.* § 750.504.

Transportation to and from the polls is often a central part of get-out-the-vote efforts by non-profits like Appellees, for-profit corporations, campaigns, and political parties alike. *Priorities USA v. Nessel*, No. 19-13341 (E.D. Mich) ("Dkt."), ECF No. 22-6 at 10, ECF No. 22-8 at 3-5, ECF 22-13, ECF 72-9 at 243. The

Transportation Spending Ban hamstrings these efforts. Michigan is the only state in the country where Uber did not offer free and discounted rides to the polls in 2018. Dkt. 22-13. The law has also limited the Appellees' programming.

Rise is a student-led non-profit that advocates for free public higher education in several states. In other states, Rise has funded successful 'party to the polls' events which include free and discounted rides to the polls for lawful voters with Lyft or Uber. Dkt. 22-6. Previously, Rise has refrained from executing similar projects in Michigan because of the Transportation Spending Ban. *Id.* Since the preliminary injunction was granted, however, Rise has expended resources planning a ride-to-the-polls program in collaboration with the Detroit Pistons. Rise is planning to spend $25,000 to rent buses for this collaboration and also to raise money from others to hire buses to take voters to the polls. Dkt. 88-2 at 6-10.

JURISDICTIONAL STATEMENT

This Court does not have jurisdiction because Appellants lack standing to appeal. *Diamond v. Charles*, 476 U.S. 54, 68 (1986).

LEGAL STANDARD

In evaluating the stay request, this Court must consider (1) Appellants' likelihood of success on appeal, (2) the likelihood that Appellants will be irreparably harmed absent a stay, (3) the prospect that the other parties will be harmed if a stay is granted, and (4) the public interest in granting a stay. *Mich. Coalition of*

Radioactive Material Users v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Appellants carry the burden of proof. *Griepentrog*, 945 F.2d at 153.

ARGUMENT

I. Appellants lack standing to appeal.

Appellants' status as intervenors does not automatically grant them standing to appeal. *Diamond*, 476 U.S. at 68. "[T]o appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *see also Diamond*, 476 U.S. at 68. When a legislative body seeks to defend a state statute on appeal, it must either (1) have been given legal authority "to represent the State's interests" in upholding that validity of its laws, or (2) possess standing in "its own right" to appeal. *Bethune-Hill*, 139 S. Ct. at 1952. Appellants have neither.

A. Appellants do not represent the interests of Michigan.

Defending the legality of a state statute is a quintessential state interest, and the State has standing to do so, including on appeal. *Id.* The State may "designate agents to represent it in federal court" to vindicate this interest. *Id.* at 1951. "That agent is typically the State's attorney general." *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013). A state statute or state constitution "may provide for other officials to speak for the State in federal court." *Id.*; *Tennessee ex rel. Tenn. Gen. Assembly v.*

U.S. Dep't of State, 931 F.3d 499, 517 (6th Cir. 2019). But absent a clear authorization in law doing so, federal courts should not presume that state actors have that right. *See, e.g.*, *Bethune-Hill*, 139 S. Ct. at 1952-53.

Appellants "ha[ve] not identified any legal basis for [their] claimed authority to litigate on the State's behalf." *Bethune-Hill*, 139 S. Ct. at 1951. Unlike some states, Michigan law does not authorize the Legislature to defend the constitutionality of state laws. *Contrast* Indiana Code § 2-3-8-1 (described in *Bethune-Hill*, 139 S. Ct. at 1952); N.C. Gen. Stat. § 1-72.2 (relied on in *N.C. State Conf. of NAACP v. Berger*, 970 F.3d 489, 500 (4th Cir. 2020)). Indeed, when the Legislature tried to pass such a law, the Governor vetoed it.[1] Instead, Michigan law unequivocally designates the Attorney General as the State's representative in litigation. *See* MCL §§ 14.28, 14.29, 14.101; *cf.* MCR § 2.209(D) (requiring notice to the Attorney General not the Legislature "[w]hen the validity of a Michigan statute . . . is in question.").

Thus, this case is just like those where courts have held that a legislative body lacks standing to assert the State's interests because it was not authorized to represent

[1] In 2019, the Legislature passed House Bill 6553, which "authorized and empowered" it "to intervene in any action commenced in any court of this state" involving "the constitutionality of a state statute." Governor Rick Snyder vetoed the bill. Veto Message from Governor, 2018 Journal of the House Addenda 3028-29 (Mich. Dec. 28, 2018), available at https://www.legislature.mi.gov/documents/2017-2018/Journal/House/pdf/2018-HJ-12-31-086.pdf.

the state. For example, in *Bethune-Hill*, the Supreme Court held that the Virginia House of Delegates lacked the authority to represent the interests of Virginia on appeal because no law authorized it do so—that authority was vested with their attorney general. *Bethune-Hill*, 139 S. Ct. at 1951 (quoting Va. Code §2.2-507(A) (2017)). Similarly, in *Tennessee General Assembly*, this Court held that Tennessee's legislature lacked standing to assert Tennessee's interests in litigation. 931 F.3d at 515-18. In Tennessee, like in Michigan, state law designates their attorney general as the State's representative in litigation and does not provide any statutory mechanism for the legislative body to assume that role. *Id.*

B. Appellants do not have standing in their own right.

Because the Michigan Legislature is not authorized under state law to assert the interests of the State, Appellants are required to prove that they have Article III standing in their own right. *Bethune-Hill*, 139 S. Ct. at 1951. They cannot do so. The challenged preliminary injunction does not implicate any of the Legislature's institutional interests, and, even if it did, the record does not establish that *Appellants* represent the institutional interests of the Legislature. Thus, Appellants are in no better a position than any other litigant seeking to enforce a state law.

1. The preliminary injunction does not injure the Legislature's institutional interests.

"A legislative body suffers an injury sufficient to confer standing where the challenged law or litigation represents a disruption to that body's specific powers.'"

Tenn. Gen. Assembly, 931 F.3d at 511-12 (collecting cases). That disruption must be "concrete" and "particularized," not an "abstract dilution of legislative power." *Id.* at 512. For example, a legislative body has standing to challenge a law that usurps the legislative power by placing it in an independent commission, or to challenge a law that expands the executives' veto powers. *Id.* Appellants have not and cannot establish any such injury; instead, their case for standing rests on their desire to see the laws they have passed upheld. But courts have "never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." *Bethune-Hill*, 139 S. Ct. at 1953. This Court should not be the first.

2. The record does not establish that Appellants have authority to represent the Legislature.

Even if the Legislature could represent the interests of the State or assert its own institutional injuries, Appellants do not represent the Legislature. Authorization to sue is a touchstone of legislative standing. In *Raines v. Byrd*, for example, individual members of Congress challenged the constitutionality of the Line Item Veto Act in federal court. 521 U.S. 811 (1997). The Supreme Court held that the members lacked standing to sue, in part because they had "not been authorized to represent their respective Houses of Congress in this action." *Id.* at 829. The rule established in *Raines* has been adopted by state and federal courts around the country. *E.g.*, *Kerr v. Hickenlooper*, 824 F.3d 1207, 1215-16 (10th Cir. 2016);

Newdow v. US Cong., 313 F3d 495, 499 (9th Cir. 2002); *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 368 (Ky. 2016).

Although Appellants purport to represent the Michigan Legislature, it is unclear what authority they rely on in doing so. In the recent past, both chambers have passed resolutions to authorize litigation. *See* S.R. 6 of 2019 (authorizing the leadership to act on behalf of the body in litigation);[2] H.R. 17 of 2019 (same).[3] No such resolution exists here.

In addressing this question of their standing in the district court, Appellants argued that "both Houses of the Legislature have plenary authority over their rules and operations," and that the House has exercised this authority to create an Office of Legal Counsel that can represent it in litigation. *Id*. at 349. But Appellants did not actually identify any documentation of this authority, nor provide evidence that they followed the procedures to invoke it in joining this litigation.

Appellees and this Court are therefore left in the position only to speculate as to what these policies may be. Appellees have been unable to locate them in the House and Senate rules passed by each body at the start of the legislative session.

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[2] Available at https://www.legislature.mi.gov/documents/2019-2020/resolutionadopted/Senate/pdf/2019-SAR-0006.pdf.

[3] Available at https://www.legislature.mi.gov/documents/2019-2020/resolutionadopted/House/pdf/2019-HAR-0017.pdf.

See H.R. 1 of 2019;[4] S.R. 2 of 2019.[5] Thus, it is unclear whether the policies represent an authorization from the body as a whole, and not just the leadership of either body. *See Corman v. Torres*, 287 F. Supp. 3d 558, 569 (M.D. Pa. 2018) (per curiam) (holding leadership could not represent institutional interests of legislature in litigation). And there is no way to tell whether Appellants have followed these rules in initiating their involvement with this litigation. Appellants introduced no evidence in the record to support their argument. Accordingly, the record does not support a finding that Appellants represent the interests of the Michigan Legislature.

3. Appellants do not have standing to appeal because the preliminary injunction does not "order[] them to do or refrain from doing anything."

Whether representing the Michigan Legislature or just individual legislators, Appellants also do not have standing to sue because "the District Court ha[s] not ordered them to do or refrain from doing anything." *Hollingsworth*, 570 U.S. at 705. To appeal, the preliminary injunction must affect the appellant in a "personal and individual way," *id.*; the appellant "must possess a 'direct stake in the outcome' of the case," *id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). "Here, however, petitioners ha[ve] no 'direct stake' in the outcome of their

[4] Available at https://www.legislature.mi.gov/documents/2019-2020/resolutionadopted/House/pdf/2019-HAR-0001.pdf.

[5] Available at https://www.legislature.mi.gov/documents/2019-2020/resolutionadopted/Senate/pdf/2019-SAR-0002.pdf.

appeal. Their only interest in having the District Court order reversed [i]s to vindicate the [] validity of a generally applicable [Michigan] law." *Id.* at 705-06. Such a "'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Id.* at 706 (collecting cases); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 691 (6th Cir. 1994) ("Both of the interests asserted by NECA are interests in having the state law enforced. …. We find that [*Diamond*] is controlling here, and that, under the reasoning of that case, NECA lacks standing to prosecute this appeal.").

The party that does have a personal, particularized stake in the outcome of this litigation is the Attorney General, who is vested with the authority to enforce the Transportation Spending Ban and to defend challenges to Michigan's laws. But the Attorney General has chosen not to appeal to provide certainty and use the remaining time to educate voters. Beth LeBlanc, *Michigan Clerks must accept late ballots if mailed by Nov. 2, judge rules*, The Detroit News (Sept. 18, 2020). In her absence, Appellants lack standing to do so.

II. Appellants are not likely to succeed on the merits of their appeal.

Even if Appellants have standing to appeal, they are not likely to succeed on the merits of their appeal for at least two reasons. First, the district court's careful preemption analysis is correct. Second, the preliminary injunction may be affirmed

on the alternative grounds that the Transportation Spending Ban violates the First Amendment.

A. FECA preempts the Transportation Spending Ban.

The Transportation Spending Ban and the Federal Election Campaign Act ("FECA") are at irreconcilable odds. On the one hand, the Spending Ban places a $0 spending limit on transporting voters to the polls. Dkt. 92 at 4. On the other, FECA and its implementing regulations expressly allow spending on transporting voters to the polls. Specifically, FECA regulations expressly permit "disbursements" to provide transportation to the polls for voters. 11 C.F.R. §§ 114.3(c)(4)(i), 114.4(d)(1). "A disbursement is, of course, the spending of money, which is prohibited by" the Transportation Spending Ban. Dkt. 92 at 4; 11 C.F.R. § 300.2(d) ("Disbursement means any purchase or payment.").

Rather than meaningfully grapple with this basic tension, Appellants make two arguments about the preemptive scope of FECA and its regulations. Neither have merit.

1. The presumption against preemption does not apply.

Appellants suggest that the district court did not adequately account for the presumption against preemption. But the presumption against preemption does not apply for two reasons. First, it does not apply where a federal law conflicts with a state law governing federal elections. *Gonzalez v. Arizona*, 677 F.3d 383, 390-92

(9th Cir. 2012), *aff'd sub nom.* at *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) (reviewing history of Elections Clause and holding presumption against preemption does not apply to laws governing federal elections); *cf. Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (holding related doctrine of the plain statement rule does not apply to laws governing federal elections). The presumption is predicated on respect for a state's sovereign interests. *Gonzalez*, 677 F.3d at 392. Those interests, however, do not exist when it comes to state regulation of federal elections. *See id.* at 391-92; *Harkless*, 545 F.3d at 454 ("When it comes to time, place, and manner regulations for federal elections, the Constitution primarily treats states as election administrators rather than sovereign entities."). The state's authority to regulate federal elections is born from the Elections Clause of the U.S. Constitution, and is not an area where states have any "inherent or reserved power." *Gonzalez*, 677 F.3d at 392. Thus, this Court has refused to apply the plain statement rule, another rule that counsels against preemption, to laws that regulate federal elections. *Harkless*, 545 F.3d at 454. And it should refuse to apply the presumption against preemption as well.

Second, the presumption against preemption does not apply because FECA itself provides that the statute and regulations implementing it "supersede and preempt any provision of State law with respect to election to Federal office." 52 U.S.C. § 30143. Because FECA expressly preempts state law, the presumption

against preemption does not apply. *See Puerto Rico v. Frankling Ca. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). And given the "plain wording" of Section 30143, *id.*, which is broad and unqualified, it is clear that Congress intended FECA's regulations to preempt contrary state laws. *See id.*; *see also Weber v. Heaney*, 793 F. Supp. 1438, 1452 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993) (discussing congressional intent regarding FECA preemption); Supp. App'x at 355-56.

2. The Transportation Spending Ban is preempted under 11 C.F.R. § 108.7.

Appellants also argue that the Transportation Spending Ban is not preempted because it falls outside of the scope of 11 C.F.R. § 108.7. It does not.

First, 11 C.F.R. § 108.7 states that FECA and its regulations supersede "any provision of State law with respect to election to Federal office," including "limit[s] on contributions and expenditures regarding Federal candidates." Appellants argue that the Transportation Spending Ban falls outside of this regulation because it does not involve "limit[s] on contributions and expenditures regarding Federal candidates." ECF No. 16-1 at 14-15. This argument is easily dispensed with.

The relevant FEC regulations define "contributions and expenditures" as "anything of value" provided to "any [] person in connection with any election to" federal office. 11 C.F.R. § 114.1(a)(1). Spending on transportation to the polls easily falls within this broad language, and the Transportation Spending Ban limits that spending.

Congress and the FEC clearly thought transportation spending could be a contribution because they developed detailed rules to exempt spending on voter transportation from the prohibition on corporate contributions. In broad strokes, FECA prohibits labor organizations and corporations from making contributions or expenditures in connection with federal elections. 52 U.S.C. § 30118(a). The statute defines contributions and expenditures to exempt types of spending from the corporate contribution ban. *Id.* § 30118(b)(2). These exemptions include certain spending for "get-out-the-vote campaigns." *Id.* The two regulations that preempt the Transportation Spending Ban—11 C.F.R. § 114.3(c)(4)(i) and § 114.4(d)(1)—merely clarify and define this exception as it applies to transportation spending. Thus, the Spending Ban and the regulations that preempt it clearly and directly relate to limits on contributions and expenditures.

Second, Appellants argue that the Transportation Spending Ban is excepted from preemption by 11 C.F.R. § 108.7(c)(4), which carves out state laws that prohibit false registration, voting fraud, theft of ballots, and similar offenses. But this exception plainly does not reach the Spending Ban. The Ban provides that "[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." MCL § 168.931(1)(f). The act criminalized by the Ban is paying to transport voters to the polls, full stop. That's it. That's the law. "Nothing in the plain

language of the [law], as it is now written, suggests that its purpose is to prevent voter fraud or similar offenses." Dkt. 92 at 72.[6]

"To find an anti-fraud purpose," therefore, "the court would essentially have to conclude that spending on transporting voters to the polls … is fundamentally an activity that promotes voter fraud, undue influence, or voter intimidation." *Id.* at 9. The record does not support this conclusion. *Id.* And such a conclusion is belied by the fact that federal law expressly permits this spending and 49 other states allow it. *Id.* at 360-61; *cf. Deon v. Branch*, 960 F.3d 152, 163-65 (3d Cir. 2020) (explaining restrictions not justified to prevent corruption where most other states have not enacted them).[7]

B. The Transportation Spending Ban violates the First Amendment.

In granting an injunction based on Appellees' preemption claim, the district court did not reach their claim that the Transportation Spending Ban is an impermissible campaign finance restriction that violates the First Amendment.

[6] Appellants make much ado about the proper interpretation of a prior version of the Spending Ban. *See* ECF No. 16-1 at 16–19. Even if Appellants are correct, "this does little to contradict the court's conclusion that there is no obvious anti-fraud purpose to the current" version which contains no such language. *See* Supp. App'x at 358.

[7] Appellants' reliance on *Dewald v. Wriggelsworth*, 748 F.3d 295 (6th Cir. 2014) is misplaced. *Dewald* was a habeas case that considered not whether FECA preempted a state law but whether the state court was unreasonable in holding that FECA did not clearly establish the constitutionality of the petitioner's criminal conduct. *See id.* at 301 ("We therefore ask not whether the state court's determination was incorrect, but rather whether fair-minded jurists could disagree about whether the state court's decision conflicts with existing Supreme Court caselaw.").

Because Appellees are likely to succeed on the merits of this claim as well, and this Court may affirm the district court on any grounds regardless of whether it was "relied upon or even considered by the trial court," this provides further reason for finding that Appellants are not likely to succeed on the merits of their appeal. *See UFCW Local 1099 v. S.W. Ohio Regional Transit Auth.*, 163 F. 3d 341, 349 n.3 (6th Cir. 1998).

By criminalizing the act of paying to transport voters to the polls, the Transportation Spending Ban imposes an unconstitutional $0 limit on spending to transport voters to the polls. Rides to the polls are a recognized element of get-out-the-vote drives. *E.g.*, 11 C.F.R. § 114.4(d)(1) ("Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration."). And as now-Justice Kavanaugh noted in *Emily's List v. Federal Election Commission*, people "are entitled to spend and raise unlimited money for … get-out-the-vote efforts." 581 F.3d 1, 16 (D.C. Cir. 2009).

Because it is an element of get-out-the-vote efforts, the act of spending money to transport voters to the polls is expression protected by the First Amendment. *See id.*; *see also Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (finding "expenditure ceilings impose . . . severe restrictions on protected freedoms of political expression and association"). A long line of Supreme Court precedent holds that any regulation of political spending must be "closely drawn to serve a cognizable anti-corruption

interest." *Emily's List*, 581 F.3d at 18 (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008)); *see also Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 478-80 (2007).

No such anticorruption justification exists for the Transportation Spending Ban, and even if one did exist, the law is not closely drawn to address it. The Ban does not prohibit a person from transporting voters to the polls; it simply imposes an expenditure ceiling of $0 that a person may spend to transport voters to the polls. If the Ban contains any anticorruption element, it is not apparent on its face or in its reach. Under the law, a private bus or car company would be free to exercise its First Amendment right to engage in get-out-the-vote efforts by directing its drivers to use its vehicles to transport thousands of Michigan voters to the polls, but Appellees would be unable to hire that same private bus company to perform the exact same service.

This distinction is nonsensical. There is no evidence to suggest that paying drivers, renting cars, or otherwise paying money to convey voters to the polls would contribute to corruption any more or less than using employee or volunteer drivers. *Cf. Meyer v. Grant*, 486 U.S. 414, 426 (1988) (refusing to accept unsupported allegation that paid petition circulators are more likely to engage in corrupt behavior than a volunteer who is motivated entirely by an interest in the outcome). And *quid pro quo* arrangements are already criminalized by Michigan law. MCL

§ 168.931(b)(i). Because the Spending Ban prohibits protected spending on elections, and does so without a sufficient anticorruption interest, it violates the First Amendment.

III. The equities do not favor a stay pending appeal.

A. Appellants have not proven that they will be irreparably injured absent a stay.

When, as here, Appellants have a low likelihood of success on the merits, their burden of demonstrating harm absent a stay increases. *See Griepentrog*, 945 F.2d at 153. Appellants pay lip service to this requirement. But instead of explaining how *they* will be irreparably injured absent a stay, they rely wholly on the State's interest in defending its laws. *See* ECF No. 16-1 at 20-22. As explained *supra* at I.A., Appellants do not have standing to assert those interests. The preliminary injunction impacts the Attorney General, who may not prosecute individuals under the Transportation Spending Ban. Appellants have no interest in whether the Attorney General does or does not prosecute persons under the Ban, *see Diamond*, 476 U.S. at 64, and the preliminary injunction does not require Appellants to do anything or refrain from doing anything, *Hollingsworth*, 570 U.S. at 694. Thus, as they implicitly concede, they are not injured by the continuing validity of the injunction.

Because Appellants can prove neither a likelihood of reversal, nor irreparable injury, a stay is not justified.

B. Appellees will be injured by a stay.

The equities otherwise weigh strongly against a stay because it would "substantially injure the other parties interested in the proceeding." *Hilton*, 481 U.S. at 776. The district court entered the preliminary injunction on September 17. Dkt. 79. Rather than immediately moving to stay the order, Appellants waited eight days to move to stay the injunction in the district court. Dkt. 84. They then waited another two weeks, including three days after the district court denied their motion for stay, to file a motion in this Court. ECF No. 16.

In the 28 days that have passed, Rise has committed resources to their joint venture with the Detroit Pistons to rent vans to transport voters to the polls on election day. Dkt. 88-2. If the injunction is stayed, Rise would have to switch gears resulting in a significant diminution of their ability to engage in constitutionally protected expression and to assist others in fully participating the democratic process. Additional fundraising and volunteer recruitment efforts take time, coordination, and money, and each day lost negatively impacts these efforts. And the resources they have already put into that project will be irreparably lost.

A stay would also deny Appellees the opportunity to spend money on get-out-the-vote activities in violation of federal law and the First Amendment activity. 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). Early voting has already begun in Michigan. Any stay would result in a lost opportunity to engage in First Amendment protected activity even if it were somehow resolved in advance of election day.

Appellants have little to say about this factor, pressing only a disingenuous argument that "Appellees slept on their rights until 2019" and so cannot claim irreparable injury. ECF No. 16-1 at 22–23. But the district court rightly rejected this argument because changing technology—including the rise of short-term car rentals and ridesharing apps—have changed the import of the Transportation Spending Ban in recent years. Dkt. 72 at 16-17. And, as Appellees explained below, both Rise and Priorities USA did not even establish operations in Michigan until 2019, the year they sued. Dkt. 22-6 at 2-4; Dkt. 72 at 16-17; D72-8. Appellees brought this suit at the earliest plausible time. If Appellants mean to suggest that Appellees should have earlier litigated the constitutionality of an obscure state law that did not impact their operations, they cite no basis in law that supports such a proposition.

C. The public interest does not favor a stay.

The public interest also strongly favors denying the motion to stay. Generally, "the public interest is served by preventing the violation of constitutional rights." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004). The district court's injunction does just that. To argue otherwise, Appellants attempt to situate this case in a number of decisions where courts have

stayed or declined relief in the face of an impending election. ECF No. 16-1 at 23-24. But this case is different in two key ways.

First, the preliminary injunction does not require election administrators or voters to do anything or refrain from doing anything for the election. Instead, it prevents the post-hoc prosecution of third parties like plaintiffs for hiring transportation to take voters to the polls. These prosecutions would almost certainly occur after the election. The injunction is not comparable to requiring a state to print new ballots when it "would be extremely difficult, if not impossible" to do so. *Williams v. Rhodes*, 393 U.S. 23, 34 (1968); *see also SEIU Local 1 v. Husted*, 698 F.3d 341, 346 (6th Cir. 2012) (staying a preliminary injunction that "require[d] the expedited issuance of new instructions to poll workers less than two weeks before the election"); *North Carolina v. League of Women Voters of N. C.*, 135 S. Ct. 6, 6 (2014) (staying injunction of law abolishing same day registration and out-of-precinct voting).

Second, in each of those cases, the impacted party—the State—asked for the stay of relief. Attorney General Nessel has not; indeed, she has not even appealed the preliminary injunction. Instead, she has decided to implement the district court's judgment rather than continue to fight it in court. That is her decision to make.

Ultimately, as the district court properly found after careful consideration of the evidence and arguments before it, the Transportation Spending Ban both

infringes on the rights of organizations like Appellees and corporations like Lyft and Uber and also removes options for voters to get to the polls. Access to transportation has a significant impact on voter participation. *See* Justin de Benedictis-Kessner and Maxwell Palmer, *Working Paper: Driving Turnout: The Effect of Car Ownership on Electoral Participation* (Oct. 9, 2020), available at https://maxwellpalmer.com/research/jdbk_mp_driving_turnout.pdf. Thus, the injunction benefits a range of Michiganders.

For these reasons, the motion for stay pending appeal should be denied.

Dated: October 15, 2020

Respectfully submitted,

By: /s/ Marc E. Elias

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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