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, PRIORITIES USA, et al.,	)	
Plaintiff-Appellee,	)	
	)	No. 20-1931
v.	)	
DANA NESSEL	)	
Defendant	)	
and	)	
THE MICHIGAN SENATE, THE MICHIGAN HOUSE OF REPRESENTATIVES, THE MICHIGAN REPUBLICAN PARTY, AND THE REPUBLICAN NATIONAL COMMITTEE	)	
Intervenor-Defendants-Appellants.	)	

THE LEGILSATURE'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR A STAY OF THE DISTRICT COURT'S PRELIMINARY INJUNCTION PENDING RESOLUTION OF THIS APPEAL

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INTRODUCTION

For over 160 years, the people of Michigan have "specifically commanded" the Michigan Legislature, through the Michigan Constitution, "to 'preserve the purity of elections' and 'to guard against abuses of the elective franchise.'" *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 453 (Mich. 2007); *see* Mich. Const. 1963, art 2, § 4. And 125 years ago, the Legislature—to fulfill the constitutional mandate—banned paying for voters' transportation to the polls. *See* 1895 P.A. 135. The current version of the law is substantively identical to 1895 P.A. 135 and has been around for almost 40 years. Mich. Comp. Laws § 168.931(1)(f).

On the eve of the election—and based on a *non-constitutional* preemption argument—the district court enjoined the paid-transportation ban. Because the Legislature's interest in preserving Michigan's electoral integrity is most critical at times like these, the Legislature has appealed the district court's injunction and asked this Court to preserve a century's worth of status quo by staying the eleventh-hour injunction. Plaintiffs' response, which parrots the district court's order, fails to offer any reason to maintain the injunction while the appeal is pending.

I. The Michigan Legislature has standing to appeal.

Plaintiffs suggest the Michigan Legislature lacks standing, but that's wrong. Contrary to Plaintiffs' suggestion, the parties to this lawsuit represent the

Legislature, and they have a unique interest in preserving Michigan's voting protections.

A. The Legislature is an Appropriate Party.

The parties to this litigation represent the Legislature. Plaintiffs try to make hay of the lack of a formal resolution about this litigation. This is a red herring. Plaintiffs fail to identify any authority *requiring* a resolution for the Legislature to bring (or defend) a legal action. This is unsurprising, given that whether and how the Legislature authorizes litigation is a legislative prerogative that courts cannot judicially review or second guess. *See Hammel v. Speaker of House of Representatives*, 825 N.W.2d 616, 619 (Mich. Ct. App. 2012) ("A general challenge to the governing procedures in the House of Representatives is not appropriate for judicial review.").

Moreover, both chambers of the Legislature have plenary authority over their rules and operations. *See* 1963 Mich. Const., art. 4, § 16. Both chambers' rules and policies, in turn, ultimately authorize the chambers' leaders—through the chambers' legal counsel—to defend this case. For instance, the published, official policy relating to Legal Counsel for the Michigan House of Representatives says that its attorneys "ultimately represent the House as an institution." Ex. 1, p 2. And the House's Legal Counsel is authorized to "[r]epresent the House in relation to any

anticipated or pending civil or criminal claim" and to "[r]etain outside counsel" for any matters the Office of Legal Counsel is permitted to handle. *Id.* at 3.

And, the statutory authorization for the Attorney General to defend Michigan laws is not exclusive. That is, no Michigan law suggests that *only* the Attorney General can defend the constitutionality of Michigan's laws. Mich. Comp. Laws § 14.28 merely says that "[t]he attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party." While this provision clearly creates a duty for the Attorney General, neither it nor any other law forbids another entity, like the Legislature, from litigating in its own right.

B. The Legislature has a unique interest here.

The Legislature represents its own interest in the enforcement and constitutionality of the paid-transportation ban, and it is not an "abstract dilution of legislative power." Appellee's Br., p. 7. As a district court recently recognized in a nearly identical case, "[a]lthough the Executive Branch … is tasked with enforcing the law and providing the primary defense against lawsuits directed at the State, the Legislature has an interest in the preservation and constitutionality of the laws governing the State." *Priorities USA v. Benson*, 448 F. Supp. 3d 755, 764 (E.D. Mich. 2020). The court emphasized the Legislature's unique institutional interest in the enforcement of voting laws:

> The collection of elected officials constituting the Legislature will be affected in a way unlike the average population. Michigan's voting

> procedures determine how elected representatives are selected. … This is not a situation where the interest of the Legislature is only peripherally relevant and where the main contests in the case have no effect on that interest.

Id. at 764–65. The Michigan Court of Claims recognized the same interest. See Ex. 2, *Priorities USA v. Benson*, Case No. 19-000191-MZ, March 31, 2020 ("The Michigan Legislature … has a *significant interest* in ensuring the validity of not only its statutes but particularly [election laws]." (emphasis added)).

Further, the Michigan Constitution creates another distinct interest by commanding the Legislature—and the Legislature alone—to enact laws that "preserve the purity of elections" and "guard against abuses of the elective franchise." *See* 1963 Mich. Const., art. 2, § 4(2); *Priorities USA v. Nessel*, Case No. 2:19-CV-13341, Dkt 60, p 11, 2020 WL 2615504 (E.D. Mich., May 22, 2020) ("The Legislature's interest in this case is sound as it stems from its constitutional mandate to 'enact laws … to preserve the purity of elections.'").

Plaintiffs' reliance on *Virginia House of Delegates v. Bethune-Hill* is misplaced. --- U.S. ---; 139 S. Ct. 1945 (2019). In *Bethune-Hill*, a single chamber of Virginia's legislature asserted standing to defend a redistricting plan. *Id.* That single chamber lacked standing because the Virginia Constitution allocates redistricting authority to the Virginia "General Assembly," and the Virginia House of Delegates "constitutes only a part" of the assembly. *Id.* at 1953. The Court distinguished *Bethune-Hill* from *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576

U.S. 787 (2015), because the Arizona House and Senate—"*acting together*"—had standing to challenge a referendum that removed their redistricting authority. *Id*. (emphasis added). "Just as individual members lack standing to assert the institutional interests of a legislature," said the Court, "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id*. at 1953–54. Here, Michigan's House and Senate—which are collectively ordered to protect Michigan's elections—are acting as one to defend their unique interest in preserving validly enacted election laws. *See also Committee on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 767 (D.C. Cir. 2020) (noting the Legislature could "challenge the judicial invalidation" so long as "the Senate and House of Delegates" chose to "act together") (cleaned up).

The more applicable decision is *N. Carolina State Conference of NAACP v. Berger*, 970 F.3d 489 (4th Cir. 2020). There, applying *Ariz State Legislature*, the court held that the North Carolina Legislature had standing to defend its election laws because its intervention was bicameral. *Id*. at 500 ("[T]he Proposed Intervenors represent the *entirety of the bicameral legislative branch* in North Carolina which makes this matter comparable to *Arizona State Legislature*." (emphasis added)). Likewise, here, both chambers of Michigan's bicameral legislature intervened together. Just as in *Berger*, then, the Legislature has standing.

Plaintiffs also cite *Tennessee ex rel. Tenn. Gen. Assembly v. U.S. Dep't of State*. 931 F3d 499, 511 (6th Cir. 2019). But a close analysis of *Tennessee General Assembly* shows that it actually supports the Legislature's position. Consistent with *Tennessee General Assembly*, "[a] legislative body may, in some circumstances, sue as an institutional plaintiff if it has suffered an institutional injury." 931 F.3d at 499 (citing *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2664). An institutional injury "constitutes some injury to the power of the legislature as a whole rather than harm to an individual legislator." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016). As explained above, the Legislature has an institutional injury.

II. This Court will likely hold that the paid-transportation ban is a valid, non-preempted exercise of the Legislature's duty.

Plaintiffs' response fails to show that this Court is likely to affirm the district court's erroneous decision.

The presumption against preemption applies. Plaintiffs omit this Court's only opinion addressing whether the presumption against preemption exists in the FECA context. In *Dewald v. Wriggelsworth*, this Court held that "the Michigan Court of Appeals reasonably decided that the presumption against preemption applies" in a case where the issue was whether FECA preempted a state criminal law. 748 F.3d 295, 303 (6th Cir. 2014). *See also Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1280 (5th Cir. 1994) (holding in a FECA-preemption case that a "strong presumption exists against preemption, and courts have given [FECA's preemption

provision] a narrow preemptive effect in light of its legislative history" (cleaned up)).

The paid-transportation ban is harmonious with FECA. As the Legislature explained, the paid-transportation ban does not conflict with FECA. FECA allows corporations and unions to "[p]rovide transportation to the polls." 11 C.F.R. § 114.4(d)(1). The paid-transportation ban only prohibits *paying* for the transportation (and the attendant corruption and influence risk). Moreover, the paid-transportation ban does not create a cap on expenditures or contributions.

The anti-corruptive nature of the paid-transportation ban exempts it from FECA. Plaintiffs barely discuss the FECA carve-out for provisions that protect electoral integrity. They all but ignore the broad deference Congress gives to states to decide how to protect election integrity. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (noting that a state has power to engage in "substantial regulation of elections" to ensure they are fair, honest, and orderly). The paid-transportation ban is a law "similar" to those listed in the FECA carve-out. Ultimately, Plaintiffs and the district court ignore that FECA's "primary purpose" is to "regulate campaign contributions and expenditures to eliminate pernicious influence—actual or perceived—over candidates by those who contribute

large sums of money." *Karl Rove & Co.* 39 F.3d at 1281. Plaintiffs' reliance on the FECA only increases the risk of "pernicious influence—actual or perceived"—in our election. *Id.*

Plaintiffs say the paid-transportation ban is not anti-corruptive because they can imagine ways around it. Appellee's Br., pp. 17–18. This is plainly wrong: a law can be anti-corruptive without being *perfectly* comprehensive. Indeed, Plaintiffs' argument really shows that the paid-transportation ban carefully balances policy goals: it protects election integrity while leaving open many other, less corruption-prone ways to vote.

The paid-transportation ban does not implicate the First Amendment. Plaintiffs admit the district court's injunction is based purely on a non-constitutional basis and expressly avoids constitutional issues. Contrary to Plaintiffs' argument, the paid-transportation ban—which regulates non-expressive conduct only—does not implicate the First Amendment. The Fifth Circuit, in *Voting for Am., Inc. v. Steen*, correctly held that there "is nothing 'inherently expressive' about receiving a person's completed [voting] application and being charged with getting that application to the proper place." 732 F.3d 382, 392 (5th Cir. 2013). The same logic applies to the act of paying to get a person "to the proper place." *Id.* Because the regulated conduct is non-expressive, the law is not subject to exacting scrutiny (though it would survive any level of scrutiny). Indeed, 125 years ago, the people of

Michigan chose, through 1895 P.A. 135, to preserve electoral integrity and limit money's influence over voting—hence 1895 P.A. 135's ban on vote buying, quid pro quos, and paid transportation. This Court should not substitute its or Plaintiffs' judgment for the Legislature's—especially on the eve of the election.

III. The equities all favor staying the district court's injunction.

This Court—like others around the country—has repeatedly recognized that the district court's injunction irreparably harms the Legislature. Just last month, this Court explained that

> "[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*, 133 S. Ct. 1, 3 (2012). So "[u]nless the statute is unconstitutional, enjoining a 'State from conducting [its] elections pursuant to a statute enacted by the Legislature ... would seriously and irreparably harm [the State].'"

Thompson v. DeWine, No. 20-3526, --- F.3d ---, 2020 WL 5742621, at *6 (6th Cir. Sept. 16, 2020) (cleaned up). See also *New Georgia Project v. Raffensperger*, --- F.3d ---, 2020 WL 5877588, at *4 (11th Cir. Oct. 2, 2020) ("When the district court bars "the State from conducting this year's elections pursuant to a statute enacted by the Legislature," unless the statute is unconstitutional, an injunction would "seriously and irreparably harm the State") (citing *Abbott v. Perez*, ––– U.S. ––––, 138 S. Ct. 2305, 2324 (2018)).

A stay would not irreparably injure Plaintiffs. Election Day—when most of the paid transportation is likely to occur—is still three weeks away. Plaintiffs have

plenty of time to recalibrate their get-out-the-vote efforts. Nor will Michigan's voters be harmed, as they have weeks to arrange for alternate transportation to the polls or avail themselves of one of Michigan's many other options for absentee-ballot return. A stay would further benefit voters because voters have an interest in enforcing validly passed election laws—especially in contrast to a judge-made law that reduces election protections.

"The Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *A. Philip Randolph Inst. of Ohio v. Larose*, --- F. App'x ----, 2020 WL 6013117, at *1 (6th Cir. Oct. 9, 2020); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, --- U.S. ---, 140 S. Ct. 1205 (2020); *Raffensperger*, 2020 WL 5877588, at *4. This case involves the direr situation where "the district court went a step further and altered election rules *during* an election." *A. Philip Randolph Inst. of Ohio*, 2020 WL 6013117, at *1.

The factors advanced by the *amici* legal scholars favor a stay here, too. Far from a new statute, this one has been on the books for 125 years and in its current form for almost 40. Amici Br., p. 12 (citing *Crookston v. Johnson*, 841 F.3d 396, 397–98 (6th Cir. 2016), for the proposition that injunction was unwarranted where a plaintiff first sought injunctive relief challenging a 125-year old law just five weeks before an upcoming election). While "a last-minute event may require a last-minute

reaction," an injunction of a long-recognized statute weeks before an election is improper. *Democratic Nat'l Comm. v. Bostelmann*, --- F.3d ---, 2020 WL 5951359, at *2 (7th Cir. Oct. 8, 2020). What's more, the district court's preliminary injunction was not based on an anticipated infringement of constitutional rights; it is based on potential preemption by an obscure federal election regulation. Amici Br., pp. 14-15. All of this is on top of the indisputably eleventh-hour nature of the injunction.

CONCLUSION

For the reasons explained here and in its initial brief, the Legislature respectfully requests that this Court grant its emergency motion to stay the district court's injunction.

Respectfully submitted,

BUSH SEYFERTH PLLC
Attorneys for the Michigan Senate and the Michigan House of Representatives

By: /s/ Patrick G. Seyferth
Patrick G. Seyferth (P47475)
Michael K. Steinberger (P76702)
100 W. Big Beaver Rd., Ste. 400
Troy, MI 48084
(248) 822-7800
seyferth@bsplaw.com
steinberger@bsplaw.com

Dated: October 16, 2020

Certificate of Compliance

I hereby certify that this document contains **2,490** countable words. The document complies with all other formatting requirements under this Court's rules.

/s/ Patrick G. Seyferth
Bush Seyferth PLLC
100 W Big Beaver Rd, Suite 400
Troy, MI 48084
(248) 822-7800
steinberger@bsplaw.com

EXHIBIT 1

HOUSE of REPRESENTATIVES
STATE OF MICHIGAN

ANDERSON HOUSE OFFICE BUILDING
124 N. CAPITOL AVE., PO BOX 30014, LANSING, MICHIGAN 48933-7514
TEL (517) 373-6339 FAX (517) 373-4763 HOUSE.MI.GOV

Policies

General
LEGAL COUNSEL
Revised: June 10, 2020
LEG 01.01

The Office of Legal Counsel provides legal services and representation to the House of Representatives. In accordance with Rule 1.13 of the Michigan Rules of Professional Conduct, House attorneys ultimately represent the House as an institution acting through its duly authorized constituents and do not represent House members, staff, or other employees individually or personally.

Communications between House attorneys and House members, staff, or other employees may be subject to the attorney-client privilege. That privilege belongs solely to the House of Representatives. The House, in its sole discretion, may elect to waive the privilege and reveal communications to third-parties.

The Office of Legal Counsel is led and managed by the General Counsel, who is appointed by the Speaker of the House. The General Counsel reports directly to and takes direction from the Speaker and his or her Chief of Staff. On legal matters involving the Minority Caucus, the General Counsel shall not disclose information to the Majority Caucus unless necessary to represent the House as the client and shall make every reasonable effort to ensure such information is not utilized for partisan purposes.

The Office of Legal Counsel employs the Minority Counsel to administer the provision of legal services to the Minority Caucus. The Minority Counsel is nominated by the Minority Leader and appointed by the Speaker of the House. On legal matters only, the Minority Counsel reports directly to and takes direction from the General Counsel. On legal matters involving the Majority Caucus, the Minority Counsel shall not

disclose information to the Minority Caucus unless necessary to represent the House as the client and shall make every reasonable effort to ensure such information is not utilized for partisan purposes.

The General Counsel or Minority Counsel may additionally serve as an advisor to a member, committee, or caucus on non-legal matters so long as such is consistent with and subordinate to the attorney's duties to the House as the client.

The Office of Legal Counsel is authorized to do all of the following:

I. Represent the House in relation to any anticipated or pending civil or criminal claim, action, investigation, or proceeding.

II. Provide legal representation to House members and employees for claims arising out of the performance of their official duties.

III. Deputize a qualified caucus policy advisor to serve as a House attorney. In such capacity, the attorney's duties as an advisor to his or her caucus shall always be subordinate to the attorney's duties to the House as the client.

IV. Retain outside counsel for services that the Office of Legal Counsel is authorized to provide. The Office of Legal Counsel shall review and approve all invoices for outside services prior to issuance of payment by the Business Office.

V. Compromise, settle, and pay any claim for or against the House, including claims against House members and employees relating to the performance of their official duties.

VI. Assist the House Business Office with any legal matter.

The General Counsel shall receive an annual salary equal to 95%, plus or minus 5% at the discretion of the Speaker of the House, of the annual salary of a judge of the court of appeals under MCL 600.304.

The Minority Counsel shall receive an annual salary equal to 75%, plus or minus 5% at the discretion of the Speaker of the House, of the annual salary of a judge of the court of appeals under MCL 600.304.

EXHIBIT 2

STATE OF MICHIGAN

COURT OF CLAIMS

PRIORITIES USA and RISE, INC,

Plaintiffs,

v

Case No. 19-000191-MZ

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State,

Hon. Christopher M. Murray

Defendant.
_____/

ORDER REGARDING FEBRUARY 27, 2020 MOTION TO INTERVENE

At a session of said Court held in the City of
Detroit, County of Wayne, State of Michigan.

Currently pending before the Court is a motion to intervene filed by the Michigan House and Senate, i.e., the Michigan Legislature. Plaintiffs have opposed the motion, and defendant had by agreement of the parties until March 26 to file a response, but did not. Typically, the Court would provide a more detailed analysis, but given the timing for dispositive motions and of the state of emergency that exists, the Court will simply say that, for the reasons stated in proposed intervenor's motion and supporting brief, as well as that set forth in *Priority USA v Benson*, __ F Supp 3d __ (ED MI, 2020), slip op at 11-19, the Court will grant intervention to the Legislature. MCR 2.209(A)&(B). The Michigan Legislature acted promptly enough, it has a significant interest in ensuring the validity of not only its statutes but particularly those involving the mechanisms for elections given each member of that body is elected, and the Court would benefit from an additional source of argument. No party would be prejudiced by its intervention.

Should intervenor pursue filing a motion for summary disposition, it should proceed promptly and comply with the amended order regarding the timing of dispositive motions.

IT IS SO ORDERED.

Date: March 31, 2020

Christopher M. Murray
Judge, Court of Claims