UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Priorities USA, Rise, Inc., and the Detroit/Downriver Chapter of the A. Philip Randolph Institute,

Plaintiffs,

v.

Dana Nessel, in her official capacity as Attorney General of the State of Michigan,

Defendant,

and

Michigan Republican Party And Republican National Committee,

Intervenor-Defendants,

and

Michigan House of Representatives, And Michigan Senate,

Intervenor-Defendants.

NO. 19-13341

JUDGE STEPHANIE DAWKINS DAVIS

MAGISTRATE R. STEVEN WHALEN

/

REPUBLICAN COMMITTEES' REPLY IN CONCURRENCE TO THE MICHIGAN LEGISLATURE'S EMERGENCY MOTION FOR A STAY PENDING APPEAL

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CONCISE STATEMENT OF ISSUE PRESENTED

I. Whether the Court should grant the Legislature's emergency motion for a stay pending appeal, now 31 days from the general election, where the Republican Committees have standing to appeal the Court's order enjoining the paid driver ban, are likely to prevail on the merits of their appeal, and will be irreparably harmed absent an emergency stay.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019)

Purcell v. Gonzalez, 549 U.S. 1 (2006)

Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005)

Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 2007)

Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008)

INTRODUCTION

The Republican Committees have standing to appeal the Court's order enjoining Michigan's long-standing election law that prohibits drivers from being paid for transporting Michigan voters to the polls shortly before the general election, MCL 168.931(1)(f) ("paid driver ban"). Although Defendant no longer plans to defend the paid driver ban,[1] the Republican Committees' have sufficiently demonstrated that the injunction will cause imminent and substantial harm (both competitively and financially) to the Republican Committees, their candidates, and their voters unless it is stayed pending appeal. Further, the principle against last-minute changes to election rules from *Purcell v. Gonzalez*, 549 U.S. 1 (2006), squarely applies here. The stay pending appeal simply enforces the status quo that has existed for over 100 years in Michigan elections, and therefore the Court should stay the preliminary injunction.

ARGUMENT

I. The Republican Committees have standing to appeal.

Article III standing "must be met by persons seeking appellate review." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). The Supreme

[1] Defendant's decision to stop defending the paid driver ban only confirmed the Republican Committees' contention that Defendant would not adequately protect their interests by making a different determination about defending the challenged laws "later down the road." (ECF No. 46, PageID.871-72).

Court has reiterated that standing requires that the party "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Republican Committees easily meet the standing requirements for appeal.

The Court found that the Republican Committees' competitive interests in the general election were sufficient for intervention because this case involves the "integrity of Michigan's election laws." (ECF No. 60, PageID.1026). Courts have recognized "competitive standing" when political parties or candidates have a substantial interest in preventing change to the structure of a competitive electoral environment. *See Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005); *Nader v. FEC*, 725 F.3d 226, 228 (D.C. Cir. 2013); *Drake v. Obama*, 664 F.3d 774, 782-84 (9th Cir. 2011) (citing multiple cases recognizing "competitor standing"). These competitive interests are sufficient to grant standing to appeal this Court's injunction of the paid driver ban, which affects resource allocation, shortly before the general election.

It is evident that the Republican Committees have suffered an injury from the Court enjoining the paid driver ban. An injunction at this late stage of the general election 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*, 414 F.3d at 85. By not staying the injunction, the Republican Committees 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 "fundamentally alter[s] the environment in which [they] defend their concrete interests (e.g. . . . winning reelection)." *Id*. The Republican Committees will need to reassess and reallocate resources in light of the broader permitted range of competitive tactics, rendering some portion of their past expenditures, developed in reliance on Michigan's election laws—including the paid driver ban—a waste. The Republican Committees may also need to divert resources to hire transportation to the polls on short notice if the injunction is not stayed. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding standing where challenged action required diversion of resources from other activities).

Further, the Republican Committees' injuries in this action are, at a minimum, equal to Plaintiffs'. Like Plaintiffs, the Republican Committees are subject to the paid driver ban's restrictions on transportations for the general election. The Republican Committees are "repeat player[s]" in Michigan elections, are "significant part[ies] which [are] adverse [to the plaintiff groups] in the political process," and are among the entities directly regulated by the paid driver ban. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1246-47 (6th Cir. 2007). Like Plaintiffs, "[the Republican Committees'] members are involved in voter registration, get-out-

the vote activities, political and community education, lobbying, legislative action, and labor support activities." (ECF No. 17, PageID.95). Like Plaintiffs, the Republican Committees "are required to expend additional resources and employee time to educate their employees, volunteers, and partners about" changes in election procedures, particularly after the Court enjoining the paid driver ban absent a stay. (*Id*. at PageID.99). In other words, if Plaintiffs had standing to challenge the paid driver ban, then the Republican Committees, as competitors, have an identical interest in defending against Plaintiffs' efforts to upend the law on appeal.

Further, last-minute changes in election laws, like the ones Plaintiffs requested and the Court imposed, "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. These changes also require the Republican Committees to "devot[e] resources away from other tasks and toward researching, or educating voters about, the" new rules created by the preliminary injunction, which the Republican Committees believe "to be unlawful" and are appealing. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 910 (W.D. Wis. 2016). And they require the Republican Committees "to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006). While these resource diversions are substantial given Michigan's electoral importance, they would suffice even if they "ha[ve] not been estimated and

may be slight," since "standing … requires only a minimal showing of injury." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), aff'd, 553 U.S. 181, 189 n. 7 (2008)

Indeed, courts "routinely" recognize that political parties are significantly interested in litigation over the rules governing the next election. After all, "the rights of their members to vote," "their overall electoral prospects," and "diver[sions] of their limited resources to educate their members" are at stake. *Issa v. Newsom*, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020); *see, e.g., Ohio Democratic Party v. Blackwell*, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005) ("[T]here is no dispute that the Ohio Republican Party had an interest in the subject matter of this case, given the fact that changes in voting procedures could affect candidates running as Republicans and voters who were members of the Ohio Republican Party."); *Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998) (finding that the Illinois Republican Party had standing regarding the election rules).

Plaintiffs argue that a stay will "reduce participation of lawful Michigan voters in the democratic process simply because they lack access to transportation." (ECF No. 88, PageID.1694). But Plaintiffs throughout this litigation have failed to identify a single voter who has been unable to secure transportation to the polls due to the paid driver ban. Plaintiffs further have presented no evidence that the paid driver ban "kept Uber from providing Michigan voters with free and discounted rides

to the polls in 2018," (*Id*. at PageID.1709), which could have been made for countless business reasons.

Therefore, the Republican Committees have standing to appeal.[2]

II. The preliminary injunction should be stayed under *Purcell*.

Plaintiffs erroneously argue that *Purcell* does not apply when the relief granted would (in Plaintiffs' view) "help" voters. (ECF No. 88, PageID.1693). Setting aside the validity of this dubious assumption, *Purcell* was equally concerned with giving proper consideration to election laws that foster "[c]onfidence in the integrity of our electoral processes." *Purcell*, 549 U.S. at 4. Again, the Court permitted the Republican Committees to intervene because this case involves the "integrity of Michigan's election laws." (ECF No. 60, PageID.1026). The paid driver ban prophylactically aims 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 U.S. 181, 191-200 (2008). And the Supreme Court has applied *Purcell* even when the proponents of last-minute relief contended it would avoid the disenfranchisement of votes. *Purcell* itself

[2] Moreover, "[b]ecause [the Republican Committees] clearly have standing to challenge the lower court's decision," the Court "need not consider whether the Legislature also has standing to do so." *Horne v. Flores*, 557 U.S. 433, 446 (2009) (cleaned up); *see also Carey v. Population Servs., Int'l*, 431 U.S. 678, 682 (1977) ("We conclude that [one] appellee … has the requisite standing and therefore have no occasion to decide the standing of the other appellees.").

reinstated a voter I.D. rule despite "the possibility that qualified voters might be turned away from the polls." *Id*. at 4. The stay pending appeal simply enforces the status quo that has existed for over 100 years in Michigan elections.

CONCLUSION

For the reasons stated above and reasons set forth in their concurrence, the Court should grant the Legislature's motion for a stay of enforcement of the preliminary injunction pending appeal.

Respectfully submitted,

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Dated: October 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all registered ECF participants listed for this case.

Respectfully submitted,

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