Nos. 20-1931 / 20-1940

In the United States Court of Appeals for the Sixth Circuit

PRIORITIES USA, RISE, INC.,
DETROIT/DOWNRIVER CHAPTER OF THE
A. PHILIP RANDOLPH INSTITUTE

Plaintiffs–Appellees

v.

DANA NESSEL

Defendant

MICHIGAN SENATE,
MICHIGAN HOUSE OF REPRESENTATIVES

Intervenors–Appellants

– and –

REPUBLICAN NATIONAL COMMITTEE,
MICHIGAN REPUBLICAN PARTY

Intervenors–Appellants

On Appeal from Preliminary Injunction
Eastern District of Michigan
HON. STEPHANIE DAWKINS DAVIS
Civil No. 19-13341

§§

REPUBLICAN NATIONAL COMMITTEE AND MICHIGAN REPUBLICAN PARTY REPLY BRIEF

BUTZEL LONG, P.C.

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REPLY

Plaintiffs' arguments do not withstand scrutiny. The Court should follow the motions panel's published opinion, rule that the district court's FECA preemption analysis was wrong, and reverse the preliminary injunction. The Court is generally not inclined to disregard a motions panel's decision. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 669 (CA6 2020); *Kraus* v. *Taylor*, 715 F.3d 589, 594 (CA6 2013) ("this court's interlocutory orders are rarely altered as a practical matter," although they may be changed); *Wallace* v. *FedEx Corp.*, 764 F.3d 571, 583 (CA6 2014) ("[l]ater panels cannot simply choose to disregard" decisions by the motions panel).

I. The appeal is not moot.

The Republican Committees have not argued that the preliminary injunction was limited to the 2020 Election, and thus this appeal remains ripe for review. Brief for Republican Comms. 24. The Court granted the Legislature's motion to stay the district court's injunction pending the appeal, which renders this appeal ongoing and leaves the underlying injunction to the paid driver ban in effect, albeit stayed. Nothing in this Court's order divests jurisdiction. Stay Order, 6th Cir. Doc. 28-2. The injunction of the paid driver ban was not limited to the 2020 Election. See *Priorities USA* v. *Nessel*, 487 F. Supp. 3d 599, 626 (ED Mich. 2020).

II. The Republican Committees have standing on appeal.

Plaintiffs erroneously contend that the Republican Committees lack derivative standing because the Legislature lacks standing. But the Legislature does have standing because the Attorney General has chosen not to defend the paid driver ban

on appeal. *League of Women Voters of Mich.* v. *Secretary of State*, 506 Mich. 561, 579 (2020). "An executive's nondefense of statutes … poses grave risks to our constitutional structure" and "greatly disrupts the proper functioning of our adversary system." *Id.*, at 578–79. The Legislature simply "tak[es] the place of [the Attorney General] … to ensure an actual controversy with robust contrary arguments." *Id.*, at 579 (citation omitted). Although Plaintiffs speculate why the Attorney General has decided against defending the paid driver ban on appeal, there is no denying that she has. Accordingly, the Legislature has standing on appeal under *League of Women Voters*, and the Republican Committees can piggyback on that standing. *Diamond* v. *Charles*, 476 U.S. 54, 64 (1986).

Alternatively, the Republican Committees have direct standing to appeal. Plaintiffs contend that the Republican Committees' injuries are too speculative to support direct standing, Brief for Plaintiffs 28–29, but their reasoning is unpersuasive. Plaintiffs try to twist *Diamond* to their own purposes by noting that the pediatrician-intervenor lacked direct standing, but the comparison is inapt. *Ibid.* The pediatrician tried to intervene based on his conscientious objections to abortions; to manufacture standing, he claimed that he would lose potential fee-paying patients to abortion if the pro-life law at issue was struck down. He also claimed standing to litigate "the standards of medical practice that ought to be applied to the performance of abortions" that he never intended to perform. *Id.*, at 66. These speculative injuries are a far cry from the Republican Committees who have a direct stake in enforcement of the paid driver ban. Because of the injunction, the Republican Committees and their candidates face "a broader range of

competitive tactics than [state] law would otherwise allow." *Shays* v. *Federal Election Comm'n*, 414 F.3d 76, 86 (CADC 2005). The injunction "fundamentally alter[s] the environment in which [they] defend their concrete interests (*e.g.*, … winning reelection)." *Ibid.* The Republican Committees will need to reassess and reallocate resources for future elections because of the broader range of competitive tactics authorized under the injunction. The injunction also requires 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." *One Wisc. Inst., Inc.* v. *Thomsen*, 198 F. Supp. 3d 896, 910 (WD Wis. 2016). These are concrete injuries in fact, not conjectural or hypothetical ones.

Therefore, the Republican Committees have standing on appeal, either by piggybacking off the Legislature or independently on their own.

III. The paid driver ban is not preempted by FECA.

The Court not only must give deference to the motions panel's published decision, *Wallace*, 764 F.3d, at 583, but also must "be narrow and precise, to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Downhour* v. *Somani*, 85 F.3d 261, 266 (CA6 1996). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 77 (2008).

A. Michigan's paid driver ban is a criminal law protecting against voter fraud and undue influence in elections—not a campaign finance regulation.

Plaintiffs argue that the paid driver ban narrowly seeks to limit election-related spending (*i.e.*, a campaign finance regulation). Brief for Plaintiffs 35. When read as a whole, *Keeley* v. *Whitaker*, 910 F.3d 878, 884 (CA6 2018) ("[u]nder accepted canons of statutory interpretation, we must interpret statutes as a whole …."), the paid driver ban is a state criminal law protecting voters against undue influence and preventing quid pro quo arrangements. The "associated-words" canon provides that, when words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012). The paid driver ban must be read as a whole with the other provisions in §931 of the Election Code (entitled in part "Prohibited conduct"), Mich. Comp. Laws §168.931. As the Court highlighted, "Michigan's ban on paid voter transportation is one provision among several others in [§931] intended to prevent fraud and undue influence." *Priorities USA* v. *Nessel*, 978 F.3d 976, 984 (CA6 2020). Anyone who violates §931, including the paid driver ban, is guilty of a misdemeanor. Mich. Comp. Laws §168.931(1). When read as a whole, the text is clear that this criminal law seeks to preserve the integrity of elections, specifically to protect voters against undue influence and to prevent quid pro quo arrangements. The paid driver ban is "assuredly aimed at preventing a kind of voter fraud known as 'vote-hauling.'" *Priorities USA*, 978 F.3d, at 983–94. In short, the paid driver ban is a criminal law—not a campaign finance regulation.

The paid driver ban's location in §931 of the Election Code, rather than under the Campaign Finance Act, Mich. Comp. Laws §169.201 *et seq.*, underscores that the law aims to prevent voter fraud and undue influence. Cf. *Yates* v. *United States*, 574 U.S. 528, 538–39 (2015) (using the location of a statute to interpret its meaning). Unlike the Election Code, the Campaign Finance Act was enacted to, among other things, "regulate campaign financing" and "restrict campaign contributions and expenditures." 1976 Mich. Pub. Act 388, title.

Plaintiffs engage in an exercise of semantics over the meaning of "vote-hauling"—a term not found in the paid driver ban. Brief for Plaintiffs 48–50. Besides the motions panel, the Court has previously analyzed vote-hauling. The Court stated that "[v]ote hauling involves transporting voters who otherwise lack transportation to the polls on election day," and noted that "[p]aying workers to provide transportation to voters in need is legal in Kentucky if done legitimately." *United States* v. *Turner*, 465 F.3d 667, 669 n.1 (CA6 2006). *Turner* involved a candidate's campaign issuing checks that were labeled for "vote hauling" and direct payments of cash to voters to influence their votes. *Id.*, at 670. Then, in another case out of Kentucky, the Court stated that "[v]ote hauling in this case … refers to the illegal practice of bringing voters to polls to be paid to vote." *United States* v. *Adams*, 722 F.3d 788, 798 n.1 (CA6 2013). *Adams* involved candidates pooling their money to pay voters to vote for a specified slate or ticket and also paying the "vote haulers" (*i.e.*, drivers) to deliver these voters to the polls. *Id.*, at 798–99. The fact that these vote-hauling schemes included payments to voters actually bolsters Michigan's rationale for enacting the paid driver ban. Michigan, as a

matter of election integrity, has prohibited paid transportation due to the threat of money "finding its way" to voters and the difficulty in enforcement. See, *e.g.*, Hasen, *Vote Buying*, 88 Calif. L. Rev. 1323, 1328, n. 25 (Oct. 2000) ("A related practice is paying 'street money' to 'haulers' and 'flushers' to get out the vote … No doubt, some of the money paid to these haulers and flushers ends up in the hands of voters."). Any semantic distinction between legitimate and illegitimate vote-hauling cannot diminish Michigan's reasonable rationale for outlawing the practice, which, as shown in *Turner* and *Adams*, can be rife with corruption.

Plaintiffs repeatedly argue that the Election Code prohibits voter fraud with multiple other statutes. Brief for Plaintiffs 36. "But a statute can be a prophylactic rule intended to prevent the potential for fraud where enforcement is otherwise difficult." *Priorities USA*, 978 F.3d, at 984. Michigan has in place rules to promote and preserve order and integrity in its elections. These long-standing, commonsense rules are aimed at curbing voter fraud and ballot tampering, preventing undue influence in voting, and "safeguarding voter confidence" in the state's elections. *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 191–200 (2008). The paid driver ban is just another tool in the state's toolbox to curb voter fraud and illegitimate vote hauling.

For the first time on appeal, Plaintiffs rely on legislative history not raised before the district court from the United Kingdom House of Commons' Parliamentary Debates on the Corrupt and Illegal Practices Prevention Act 1883 to argue that Michigan's paid driver ban was enacted to reduce the cost for candidates to participate in elections. Brief for Plaintiffs 37–41. The Court "does not

ordinarily address new arguments raised for the first time on appeal." *Michigan Bell Tel. Co.* v. *Strand*, 305 F.3d 580, 590 (CA6 2002). Plaintiffs also admit that "[t]here is no ambiguity in the Voter Transportation Law's statutory language." *Id.*, at 35. Because the paid driver ban is unambiguous, there is no need to resort to legislative history, "an often treacherous path in its own right." *Royal Truck & Trailer Sales & Serv., Inc.* v. *Kraft*, 974 F.3d 756, 761 (CA6 2020) (citing *United States* v. *Woods*, 571 U.S. 31, 46 n.5 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous.")). The use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy* v. *Aniskoff*, 507 U.S. 511, 519 (1993) (SCALIA, J., concurring).

Even if reviewing legislative history was proper, Plaintiff fails to show that the legislative history of the Corrupt and Illegal Practices Prevention Act 1883 (a different election law from the paid driver ban) enacted by the United Kingdom's Parliament (a foreign country's unique legislative branch) may be persuasively relied upon to give meaning to Michigan's paid driver ban. There is nothing to establish that when enacting the paid driver ban about 125 years ago, the Michigan Legislature's intentions mirrored those of Parliament's from "across the pond" when deciding how to best protect election integrity in Michigan.

In fact, the Parliamentary Debates cut against Plaintiffs' argument, often referring to payment of transportation of voters as a "corrupt election practice." Members expressed concern about paid transportation to the polls leading to corruption or bribery in elections. H.C. Deb. 25 Jun. 1883 col. 1497 (U.K.) (Mr.

Horace Davey) ("allow[ing] the candidate to incur expense for the conveyance of voters to the poll would lead to corruption."); *id.* at 1498 (Mr. Ashmead-Bartlett) (specifically in large boroughs "the employment of a great number of vehicles might not only be the cause of large expense, but of a very serious amount of corruption."). One member expressed that hiring vehicles "was a means of bribery on another account" and that "it was a much larger bribe than the offer of refreshments [half glass of whiskey]." H.C. Deb. 20 Mar. 1879 col. 1379 (U.K.) (Mr. O'Donnell). The Parliamentary Debates show that increased election expenses was one concern for paid transportation, but members of the House of Commons were just as concerned, if not more, about protecting voters against undue influence and preventing quid pro quo arrangements—as the Michigan Legislature did through the paid driver ban.

Moreover, Plaintiffs' attempt to bridge the Parliamentary Debates from the late 1800s with current voter transportation laws in Louisiana and Alabama prohibiting some transportation to the polls has no bearing on Michigan's long-standing paid driver ban. Brief for Plaintiffs 41–42. The Louisiana voter transportation law is inapplicable as it is located in Louisiana's Campaign Finance Disclosure Act, La. Rev. Stat. Ann. §18:1481 *et seq.*, unlike Michigan's paid driver ban, which again is a criminal law protecting against voter fraud and undue influence in elections. The Alabama voter transportation law prohibits any candidate from *providing* transportation to the polls, which evidences that transportation to the polls by an interested party inflicts some level of undue influence on voters. Ala. Code §11-44E-161. The fact that Plaintiffs aren't

candidates does not eliminate the risk that they can exert improper influence over those they would transport to the polls.

B. The paid driver ban—because it protects against voter fraud—satisfies an express non-preemption clause, 11 C.F.R. §108.7(c)(4).

Plaintiffs erroneously argue that the paid driver ban does not meet the express non-preemption clause, 11 C.F.R. §108.7(c)(4). Subsection (c) emphasizes that FECA does not supersede state laws for the "[p]rohibition of false registration, *voting fraud*, theft of ballots, and *similar offenses*." 11 C.F.R. §108.7(c)(4) (emphases added). Because the paid driver ban aims to prevent voter fraud and undue influence, it is expressly *not* preempted by the FEC non-preemption clause.

Plaintiffs' attempt to distinguish *Dewald* v. *Wriggelsworth*, 748 F.3d 295 (CA6 2014), ignores the Court's analysis that the FECA preemption provision, 52 U.S.C. §453, should be read narrowly and does not preempt state criminal law aimed at preserving the integrity of the electoral process. In *Dewald*, this Court endorsed a narrow interpretation of the FECA preemption provision. It explained, "The Michigan Court of Appeals' observation that courts have given [§]453 a narrow preemptive effect in light of its legislative history is a reasonable one." *Dewald*, 748 F.3d, at 302. The Court further relied on the FEC regulation exempting state laws prohibiting "false registration, *voting fraud*, theft of ballots, *and similar offenses*" from preemption under FECA. *Ibid.* (emphases in original). Although the case did not address "voting fraud in the traditional sense of someone casting a ballot under false pretenses[,]" it involved "the fraudulent acquisition of money by an individual

purporting to represent a federally registered PAC." *Ibid.* Under this Court's approach in *Dewald*, the district court erred in concluding that FECA preempts a state law aimed at preserving the integrity of the electoral process, even when it targets variations of "voting fraud in the traditional sense." *Ibid.*

It is hyperbole to argue, as Plaintiffs do, that the exception swallows the rule if the paid driver ban falls within §108.7(c)(4)'s exception. Brief for Plaintiffs 47. Section 108.7(c)(4) can be read to at least encompass provisions that preserve the integrity of elections, specifically to protect voters against undue influence and to prevent quid pro quo arrangements when money is exchanged—such as the paid driver ban.

Even if the Court were to accept Plaintiffs' interpretation of §108.7(c)(4), Brief for Plaintiffs 44–45, this reading supports that the FEC non-preemption clause expressly protects the paid driver ban from preemption. The legal definition of "prohibit" is "[t]o forbid by law" or "[t]o prevent, preclude, or severely hinder." *Id.*, at 45 (quoting *Black's Law Dictionary* (11th ed. 2019)). Under the plain language, the paid driver ban forbids or prevents, precludes, or at least severely hinders voter fraud or similar offenses in Michigan elections, and accordingly, the paid driver ban is exempted under §108.7(c)(4). Such reading further comports with the "strong presumption" against FECA preemption. *Karl Rove & Co.* v. *Thornburg*, 39 F.3d 1273, 1280 (CA5 1994). "[C]ourts have given [§]453 a narrow preemptive effect in light of its legislative history." *Ibid.*

C. The FEC carve out regulations relied on by Plaintiffs do not preempt the paid driver ban.

Plaintiffs also argue that the FEC carveout regulations permit the activity that the paid driver ban prohibits. Brief for Plaintiffs 34. Sections 114.3(c) and 114.4(d), however, are not empowering regulations; they do not give a party any affirmative rights. These regulations merely carve out exceptions to FECA's broad prohibitions against corporations and labor unions making campaign contributions, expenditures, or electioneering communications. See 52 U.S.C. §30118(a); 11 C.F.R. §114.2(a). By creating an exception to that prohibition, Sections 114.3(c) and 114.4(d) simply leave corporate spending on voter transportation unregulated by federal law; they neither grant corporations an affirmative right to engage in such spending nor preempt state laws prohibiting it. Plaintiffs wrongly argue that FECA and its enacting regulations somehow create an affirmative federal right protecting paid transportation to the polls in state and federal elections. Moreover, they have presented no evidence that they intend to make disbursements related to paid transportation that are tied to a specific candidate or party or "for the purpose of influencing any election for Federal office." 52 U.S.C. §30101(9)(A)(i). Therefore, any alleged disbursements for paid transportation would be non-expenditures, which are not regulated under FECA and prohibited under the paid driver ban. It would be absurd to conclude that federal law lets states prohibit paid transportation and other activities when performed by nonpartisans, but prevents states from reaching the same activities when performed by partisan actors—despite the greatest risk of improper pressure or intimidation of voters coming from partisans.

In short, the paid driver ban is not preempted by FECA, and accordingly, the district court erred in enjoining the law under federal preemption grounds.

IV. The Court should decline to address Plaintiffs' First Amendment challenge in the first instance.

Because the district court enjoined the paid driver ban based on preemption, it declined to address Plaintiffs' additional challenges to the law. *Priorities USA*, 487 F. Supp. 3d, at 626 n.5. The Court should decline to address Plaintiffs' First Amendment challenge in the first instance; nevertheless, the paid driver ban does not unconstitutionally infringe on protected political speech.

The paid driver ban does not unconstitutionally infringe on First Amendment speech because the payment for transporting voters to the polls is not "inherently expressive," and thus not speech protected by the First Amendment. See *Rumsfeld* v. *Forum for Academic & Inst. Rights*, 547 U.S. 47, 66 (2006). Throughout this litigation, Plaintiffs have failed to cite any case law recognizing that paying to transport voters to the polls is protected speech under the First Amendment. They instead seek cover under the general umbrella of get-out-the-vote efforts. But the Supreme Court has long held that nonexpressive conduct does not acquire First Amendment protection whenever combined with protected speech. See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 297–98 (1984); *Rumsfeld*, 547 U.S., at 66; *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). The paid driver ban targets only nonexpressive commercial activity, not political speech or association whatsoever. The law permits voters to be transported for free; it merely prohibits

paying a fee. Therefore, the paid driver ban does not directly impinge upon Plaintiffs' First Amendment rights and would thus survive either the *Anderson-Burdick* framework, or levels of scrutiny under the First Amendment.[1]

CONCLUSION

In sum, this Court should reverse the district court's preliminary injunction to Michigan's long-standing paid driver ban.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: May 21, 2021

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[1] Plaintiffs have previously claimed that the phrase "hire a motor vehicle" or cause a motor vehicle to be hired in the paid driver ban is vague and overbroad. Am. Compl., R.17, PageID#121–22. The district court correctly found that the paid driver ban is "relatively straightforward and unambiguous." *Priorities USA*, 487 F. Supp. 3d, at 621. By not raising their vagueness or overbreadth claim in their response brief and admitting that "[t]here is no ambiguity in the Voter Transportation Law's statutory language," Brief for Plaintiff 35, it can be concluded that Plaintiffs have waived any such claim.

CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
COUNTY OF OAKLAND) §

This brief complies with the word limit in Appellate Rule 33(a)(7)(B)(ii). It contains 3,390 countable words.

This brief also complies with the typeface and typestyle requirements of Appellate Rule 32(a)(5)–(a)(6) because it has been prepared in 14-point Equity font, proportionally-spaced typeface, with exactly 28-point line spacing.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: May 21, 2021

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CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND) §

On May 21, 2021, I caused Intervenors–Appellants Republican Committees' reply brief to be filed with the Clerk of the Court using the CM/ECF system, which will electronically service counsel of record with a Notice of Docket Activity under Sixth Circuit Rule 25(f)(1)(A).

There are no non-ECF participants in this case.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: May 21, 2021

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