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,

Intervening Parties,

and

Michigan House of Representatives, And Michigan Senate,

Intervening Parties.

_____/

NO. 19-13341

JUDGE STEPHANIE DAWKINS DAVIS

MAGISTRATE R. STEVEN WHALEN

INTERVENORS MICHIGAN REPUBLICAN PARTY AND REPUBLICAN NATIONAL COMMITTEE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY AND PERMANENT INJUNCTION

INTERVENORS MICHIGAN REPUBLICAN PARTY AND REPUBLICAN NATIONAL COMMITTEE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY AND PERMANENT INJUNCTION

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CONCISE STATEMENT OF ISSUES PRESENTED

I. Whether Plaintiffs' motion for a preliminary and permanent injunction should be denied where there is no likelihood of success on the merits and no demonstration of irreparable harm?

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INTRODUCTION

Due to the COVID-19 pandemic, there is a heightened focus on absentee voting, with local election officials across the country expecting significant increases of votes by absent ballots in the November General Election. The Michigan Secretary of State has stated her intent to send every registered voter an absent voter (AV) ballot application for the August primary and November General Election. Because they remove the act of voting from the controlled confines of the polling place, absent ballots are more susceptible to voter intimidation, fraud, and organizational mistakes.[1]

Michigan, like every other State, has in place long-standing rules to promote and preserve order and integrity in its elections. Plaintiffs challenge long-standing Michigan election laws that (1) prohibit strangers from soliciting and returning AV ballot applications from Michigan voters, MCL 168.759 ("Harvesting Ban"), and (2) prohibit drivers from being paid for transporting Michigan voters to the polls, MCL 168.931 ("Paid Driver Ban"). Both laws implement commonsense rules that prophylactically aim to curb "voter fraud" and ballot tampering, to prevent undue influence in voting, and to "safeguard[] voter confidence" in the State's elections. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191-200 (2008).

Plaintiffs bring disfavored facial challenges to the Harvesting Ban and Paid Driver Ban, seeking extraordinary relief: a preliminary and permanent injunction "short circuit[ing] the democratic process" and enjoining in their entirety two state

[1] *See, e.g.,* **Ex. 1**, Portnoy et al., *Voting problems in D.C., Maryland lead to calls for top officials to resign*, https://www.washingtonpost.com/voting-problems-in-dc-maryland.html (accessed June 5, 2020).

laws that "embody[] the will of the people" and reflect the Legislature's appropriate effort to uphold the integrity of Michigan's elections. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013). Plaintiffs offer no basis in law or fact for the Court to take such dramatic action. Instead, they raise free speech claims for non-protected conduct that conveys no political expression, conjure far-fetched hypotheticals in an attempt to manufacture vagueness, and point to inapposite federal law that neither expressly nor impliedly preempts Michigan's long-standing election laws. Importantly, as it relates to AV ballot applications, because there is no constitutional right to vote absentee, *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004), restrictions on absentee voting do not implicate the right to vote at all because in-person voting remains available. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969).

Plaintiffs have not carried—and cannot carry—their heavy burden to prove that they are entitled to the extraordinary relief of an injunction on any of their facial challenges. For these reasons, the only lawful course here is to deny Plaintiffs' motion for preliminary and permanent injunction.

CHALLENGED ELECTION LAWS

I. Harvesting Ban, MCL 168.759

Plaintiffs style MCL 168.759 as a restrictive "Absentee Ballot Organizing Ban." (ECF No. 22-1, PageID 154). In fact, it is a minimally burdensome law narrowly tailored to protect the integrity of absent voter (AV) ballots by prohibiting certain behavior. Specifically, the law prohibits certain third-parties from returning

AV ballot applications if they have "solicit[ed] or request[ed] to return the application." MCL 168.759(5). This narrowly tailored common-sense restriction clearly falls within the scope of the Michigan Legislature's power and responsibility to enact laws "to regulate the time, place and manner of all . . . elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Const. 1963, art. 2 § 4(2); *see also* U.S. Const. art. I, § 4, cl. 1. The safeguards established by § 759 protect and facilitate, rather than impinge, "[t]he right [of qualified electors], once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const. 1963, art. 2, § 4(1)(g).

Section 759 of the Michigan Election Law provides that to receive an AV ballot, a voter must request an application for an AV ballot and submit that application to his or her local clerk. A voter may apply for an AV ballot at any time during the 75 days before the primary or general election. MCL 168.759(1)-(2). "[T]he elector shall apply in person or by mail with the clerk" of the township or city in which the elector is registered. *Id.* Under the relevant provisions, there are two ways to apply for an AV ballot; (1) a written request signed by the voter, and (2) on an AV ballot application form provided for that purpose. In both cases, the voter applies by returning their written request or form application to their local clerk in person or by mail. MCL 168.759(1), (2), (6). Clerks have also been instructed by

the Secretary of State for many years to accept applications sent by facsimile and email. (**Ex. 2**, Michigan's Absentee Voting Process (Feb. 2019) p. 2).

Whether the voter uses an AV ballot application form or not, a voter may have an immediate family member deliver his or her application, or the voter may request that a registered voter return the application if he or she cannot appear in person to deliver their application or cannot mail their application or return it by email or facsimile. MCL 168.759(4), (5), (6). Section 759(4) provides in relevant part that:

> *A person shall not be in possession of a signed absent voter ballot application except for the applicant; a member of the applicant's immediate family; a person residing in the applicant's household; a person whose job normally includes the handling of mail, but only during the course of his or her employment; a registered elector requested by the applicant to return the application; or a clerk, assistant of the clerk, or other authorized election official*. A registered elector who is requested by the applicant to return his or her absent voter ballot application shall sign the certificate on the absent voter ballot application. [MCL 168.759(4)].

Where a form AV ballot application is used, the "application must be in substantially the . . . form" described in §§ 759(5), (6), which includes a general "warning" and a "certificate" portion to be completed by "a registered elector" delivering a completed application for a voter. MCL 168.759(5).[2] The "warning" must state in relevant part:

> *It is a violation of Michigan election law for a person other than those listed in the instructions to return, offer to return, agree to return, or*

[2] The 2020 Michigan AV Ballot Application is available online at: https://www.michigan.gov/documents/AbsentVoterBallot_105377_7.pdf (accessed June 5, 2020).

> *solicit to return your absent voter ballot application to the clerk.* An assistant authorized by the clerk who receives absent voter ballot applications at a location other than the clerk's office must have credentials signed by the clerk. [*Id*. (emphasis added).]

The certificate for an authorized registered elector returning an AV ballot application must state that:

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

Section 759(6) provides that the AV ballot application form must include the following instructions for the applicant:

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

> (d) If an applicant cannot return the application in any of the above methods, the applicant may select any registered elector to return the application. The person returning the application must sign and return the certificate at the bottom of the application. [MCL 168.759(6).]

As these forms make clear, only persons authorized by law, i.e. those described in § 759(4), may return a signed AV ballot application to a local clerk, and registered voters may not return a signed AV ballot application if they have solicited or requested to return the application. MCL 168.759(4)-(6).

Consistent with these statutes, § 759(8) provides that "[a] person who makes a false statement in an absent voter ballot application is guilty of a misdemeanor." MCL 168.759(8) (emphasis added). Section 931 also provides for penalties associated with distributing and returning AV ballot applications. *See* MCL 168.931(1)(b)(iv) and (1)(n). These provisions combine to have the effect of prohibiting the collection or return of AV ballot applications by third-parties who are not postal carriers or immediate family members and either (1) solicit or request the AV ballot application for return or (2) are not registered Michigan voters.

II. Paid Driver Ban, MCL 168.931(1)(f)

The Paid Driver Ban under MCL 168.931(1)(f) provides in full:

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

Under this provision, a person cannot pay for the transportation of a voter to the polls

unless the voter is physically unable to walk to the election. This criminal provision has existed in some form since 1895. *See* 1895 P.A. 35. Michigan's modern election law retained the provision when reenacted in 1954. 1954 P.A. 116. It was amended in 1982 to replace the term "carriage" with the term "motor vehicle," consistent with Michigan's Motor Vehicle Code. 1982 P.A. 201. A person who violates this provision is guilty of a misdemeanor. MCL 168.931(1).

PROCEDURAL HISTORY

Intervenors Michigan Republican Party ("MRP") and Republican National Committee ("RNC") fully set forth the procedural history in its brief in support of its motion to intervene, which is incorporated herein. (ECF No. 33). On January 28, 2020, Plaintiffs Priorities USA ("Priorities"), Rise, Inc. ("Rise"), and the Detroit/Downriver Chapter of the A. Philip Randolph Institute Detroit/Downriver Chapter ("DAPRI") (collectively "Plaintiffs") filed the present motion for a preliminary and permanent injunction. (ECF No. 22). The Court ordered Intervenors and the Michigan Legislature to respond to Plaintiffs' Motion by June 5, 2020. (ECF No. 60, PageID.1027). Now, Intervenors respond in opposition to Plaintiffs' motion for preliminary and permanent injunction.

ARGUMENT

"[A] preliminary injunction is an extraordinary and drastic remedy . . . that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The movant "bears the burden of justifying such relief," and it is "never awarded as of right." *ACLU*

Fund of Mich. v. Livingston Cnty., 796 F.3d 636, 642 (6th Cir. 2015). Indeed, "the proof required is much more stringent than the proof required to survive a summary judgment motion." *Farnsworth v. Nationstar Mortg., LLC*, 569 F. App'x 421, 425 (6th Cir. 2014).

When determining whether to grant a party's request for such a remedy, district courts must balance four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014).

As to the first factor, a plaintiff must establish a "strong" likelihood of success, *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012); a mere "possib[ility]" of success does not suffice, *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). Similarly, on the second factor, the plaintiff must show a likelihood, not just a possibility, of irreparable injury. *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008).

A movant is entitled to a permanent injunction only if it can establish that it "suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Schmitt v. LaRose*, 933 F.3d 628, 637 (6th Cir. 2019).

I. Plaintiffs Have Failed to Demonstrate a Likelihood of Success on the Merits of Their Claims.

A. The Harvesting Ban is constitutional and not preempted by federal law.

Plaintiffs allege that the Harvesting Ban violates the First and Fourteenth Amendments because it is unconstitutionally vague and overbroad (Count I), and impermissibly infringes on Plaintiffs' speech and associational rights (Count II). Plaintiffs further allege that the Voting Rights Act of 1965 preempts the challenged law (Count IV). The Court has dismissed Plaintiffs' claim that the Harvesting Ban unduly burdens the right to vote (Count III). (ECF No. 59, PageID.1015).

There is no dispute that "voting is of the most fundamental significance under our constitutional structure." *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). "It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see also Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (explaining that the Elections Clause grants states the ability to regulate "notices, registration, supervision of voting, protection of voters, [and the] *prevention of fraud and corrupt practices*," among other things) (emphasis added). The Constitution explicitly provides state legislatures with authority to regulate the "Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. Federal courts should not casually "become entangled, as overseers and micromanagers, in the minutiae of state election processes, without careful

consideration." *Ohio Dem. Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016). Federal law generally defers to the states' authority to regulate the right to vote. *Id.* at 626 (citing *Crawford*, 553 U.S. at 203-04).

1. The Harvesting Ban does not unconstitutionally infringe on First Amendment rights.

Plaintiffs fail to establish that the Harvesting Ban burdens its speech and associational rights, specifically, their ability to broadly engage in political expression when interacting with Michigan voters to encourage them to participate in the political process. (ECF No. 17, ¶ 62).

Plaintiffs—as parties invoking the First Amendment—have the burden to prove it applies. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984). Plaintiffs bring facial challenges to the challenged Michigan election laws, which are generally disfavored.[3] That is because facial challenges "often rest on speculation," raising "the risk of premature interpretation of statutes on the basis of factually barebones records," and "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party Wash. State Grange*, 552 U.S. 442, 450 (2008). "[F]acial challenges threaten to short circuit the democratic process by

[3] Although Plaintiffs do not expressly state that their claims are facial challenges, their claims and the relief that would follow—an injunction barring Defendant from enforcing the challenged laws—reach beyond the particular circumstances of these plaintiffs. Plaintiffs accordingly must satisfy standards for a facial challenge to the extent of that reach. *See United States v. Stevens*, 559 U.S. 460, 472-73 (2010).

preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id*.

A law implicating the right to expression may be invalidated on a facial challenge if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange*, 552 U.S. at 449, n. 6). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Nat'l Fed. Of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012).

a. The First Amendment is not applicable as the Harvesting Ban does not affect political speech or associational rights.

The First Amendment protects speech as well as certain kinds of conduct, but only conduct that is "inherently expressive" is entitled to First Amendment protection. *See Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 66 (2006). To determine whether conduct is protected under the First Amendment, courts look to (1) whether the conduct shows an "intent to convey a particular message" and (2) whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson,* 491 U.S. 397, 404 (1989). Conduct does not become speech for purposes of the First Amendment merely because the person engaging in the conduct intends to express an idea. *See Rumsfeld,* 547 U.S. at 66 (holding that conduct regulated by the challenged law, which denied federal funding to universities that prohibited military recruiting on campus, was not inherently expressive conduct).

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

Plaintiffs argue that § 759 prevents their organizations from (1) educating Michigan voters about their options to use and request AV ballot applications; (2) distributing AV ballot applications; (3) offering to return AV ballot applications; and (4) returning AV ballot applications. (ECF No. 59, PageID. 992). It does not. As discussed above, § 759 does not restrict Plaintiffs' freedom to educate Michigan voters about how to request AV ballot applications or vote absentee. MCL 168.759, supra pp. 4-8. Section 759 bears only on Plaintiffs' ability to engage in certain conduct relating to the mechanism of AV ballot applications return, specifically, their desire to return AV ballot applications after soliciting or requesting to return them—conduct most akin to the non-discretionary act of delivering the mail.

The Harvesting Ban regulates the mechanics of the absentee voting process. It does not regulate an elector's ability to vote by absent ballot, nor does it regulate any individual or organization's right to engage in political speech. Accordingly, the

First Amendment protection does not apply. Plaintiffs err in their contention that § 759 inhibits their protected political speech under the broad umbrella of "political expression" when interacting with Michigan voters. (ECF No. 17, ¶ 62). That a solicitation or request to return a voter's AV ballot application may be initiated by or lead to a political conversation, does not transform (nonprotected) conduct into (protected) speech under the First Amendment. *See Clark*, 468 U.S. at 297-98; *Rumsfeld*, 547 U.S. at 66; *O'Brien*, 391 U.S. at 376. In sum, § 759 targets solely conduct, and does not "directly regulate[] core political expression." (ECF No. 17, ¶ 63).

The process of returning an AV ballot application (or requesting to return an application) is neither inherently expressive nor inextricably entwined with protected speech. *See Voting for Am.*, 732 F.3d at 389-90 (emphasizing that provisions regulating Texas's volunteer deputy registrars were not intertwined with voter registration efforts). Stated differently, the Court can easily distinguish the prohibited, nonprotected conduct from otherwise protected speech by Plaintiffs or voters. Further, the "registered elector" requirement does not restrict or regulate who can advocate for absentee voting; it merely regulates the receipt and return of completed AV ballot applications—two non-expressive activities.

At least one court has concluded that "the collection and handling of voter registration applications is not inherently expressive activity." *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008) (citing *Rumsfeld*, 547 U.S. at 66). And another court has followed the Fifth Circuit's reasoning to conclude that "there is nothing inherently expressive or communicative

about collecting a voter's completed early ballot and delivering it to the proper place." *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 851 (D. Ariz. 2018), *rev'd and remanded on other grounds sub nom*. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc), *cert. petition pending*. The same conclusion should follow the collection and handling of AV ballot applications, which have no expressive activity, even if done by a third-party collector.

Assuming arguendo that an AV ballot application is speech, the speech at issue is the *elector's* speech indicating his or her desire to vote by absent ballot. Plaintiffs' volunteers or employees may engage in protected speech when they encourage the elector to return the application, but the statute does not prohibit that speech, and only the elector "speaks" by actually submitting the AV ballot application. "One does not 'speak' in this context by handling another person's 'speech.'" *Voting for Am.*, 732 F.3d at 390. Plaintiffs cannot turn their non-expressive conduct into First Amendment-protected speech solely by nature of its proximity to the elector's protected speech.

Plaintiffs' reliance on *Meyer* and *Buckley* for applying exacting scrutiny is in error. In *Meyer v. Grant*, the Court held that the circulation of a petition to amend the Colorado Constitution by ballot initiative involved political speech, and Colorado's prohibition against the use of paid circulators violated the First Amendment. 486 U.S. 414, 425, 428 (1988). The Court in *Buckley v. Am. Constitutional Law Found.*, extended *Meyer* in holding that other Colorado statutes regulating initiative-petition circulators violated the First Amendment, including a requirement that circulators be registered voters. 525 U.S. 182 (1999). Both Courts

held that initiative petitions are protected speech of the petition circulators. *Meyer*, 486 U.S. 414 at 421-22; *Buckley*, 525 U.S. at 192. The challenged restrictions in both cases were found to "limi[t] the number of voices who will convey [the initiative proponents'] message" and, consequently, cut down "the size of the audience [proponents] can reach." *Buckley*, 525 U.S. at 194-95 (quoting *Meyer*, 486 U.S. at 422). Finally, the Courts held that Colorado had failed to justify these restrictions on the circulators' speech. *Meyer*, 486 U.S. at 425-28; *Buckley*, 525 U.S. at 196-97.

Plaintiffs further rely on *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706 (M.D. Tenn. 2019), in which the plaintiff organizations challenged Tennessee election laws restricting voter registration drives. The district court recognized that "encouraging others to register to vote" is "pure speech" and organizing others in support of voter registration efforts involves political association. *Id*. at 720.

The Harvesting Ban is factually and legally distinguishable from *Meyer*, *Buckley*, and *Hargett*. The results in *Meyer* and *Buckley* were contingent on the Court's finding that petition circulation is protected as speech because the "circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer*, 486 U.S. at 422. The act of returning or delivering an AV ballot application, on the other hand is a non-discretionary, content-neutral act that does not of necessity involve the expression of any political view or the discussion of any political view. If the AV ballot application itself were speech, it would be the speech of the voter, not the speech of the third-party returning the ballot. Returning or requesting to

return a voter's AV ballot application on their behalf contains no inherently political expression by the third-party that would be protected by the First Amendment.

Here, the Harvesting Ban does not discriminate against any particular point of view. The solicitation ban applies equally to Plaintiffs and the MRP and RNC—despite their opposing political viewpoints. Intervenors are often adverse to Plaintiffs in the political process, and are among the entities directly regulated by the challenged provisions. Defendant confirms these statutes "are intended to protect voters from political parties, their candidates, and others, who would improperly seek to manipulate or influence their vote." (ECF No. 46, PageID.870-71). And the "registered elector" requirement applies equally to all third-parties not meeting the familial relationship in § 759.

Therefore, strict scrutiny is not applicable as the Harvesting Ban restricts only the mechanisms of voting, value-neutral conduct that cannot be construed to convey any political viewpoint or expression.

b. If the First Amendment is applicable, then Plaintiffs' speech and association claim fails under the *Anderson-Burdick* framework.

The *Anderson-Burdick* framework is tailored to the regulation of election mechanics. *See Crawford*, 553 U.S. at 190. The Sixth Circuit has applied the *Anderson-Burdick* framework in cases where it is alleged that a state election law burdens voting, from ballot-access laws, *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015), to early-voting regulations, *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012), to prohibitions on party-line voting. *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 662 (6th Cir. 2016). Sixth Circuit

precedent dictates that district courts "evaluate First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework." *Thompson v. DeWine*, ___ F.3d ___; 2020 WL 2702483, *2 (6th Cir. 2020).[4]

This case is akin to *Schmitt*, 933 F.3d 628, which rejected First Amendment exacting scrutiny in applying the *Anderson-Burdick* framework. The plaintiffs in *Schmitt* relied on *Meyer* and *Buckley* to challenge Ohio's system of reviewing ballot initiatives. The Sixth Circuit rejected their argument and applied the *Anderson-Burdick* framework, finding that the challenged laws "regulate the process by which initiative legislation is put before the electorate, which has, at most, a second-order effect on protected speech." *Id*. at 638. Here, the process of returning AV ballot applications, if anything, has only a "second-order effect on protected speech."

The *Anderson-Burdick* framework is a balancing test. First, the court first must consider the character and magnitude of the asserted injury to the rights protected by the Constitution that the plaintiffs seeks to vindicate. *Ohio Dem. Party*,

[4] The Sixth Circuit has seen a recent split on applying the *Anderson-Burdick* framework in election law cases. *See, e.g.*, *Moncier v. Haslam*, 570 F. App'x 553, 559 (6th Cir. 2014) (declining to apply *Anderson-Burdick* to a challenge to state judicial qualifications law as the framework does not "mandate[] that states organize their governments in a particular manner"); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344–45 (1995) (declining to apply *Anderson-Burdick* where "we are not faced with an ordinary election restriction"); *Schmitt*, 933 F.3d 628, 644 (6th Cir. 2019) (Bush, J., concurring) (noting that "this circuit has generally limited the application of *Anderson* and *Burdick* to . . . laws that burden candidates from appearing on the ballot"); *Daunt v. Benson*, 956 F.3d 396, 422-23 (6th Cir. 2020) (Readler, J., concurring) (declining to apply *Anderson-Burdick* to challenges to Michigan's new Independent Citizens Redistricting Commission).

834 F.3d at 626-27. Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. *Id*. Finally, the court must determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights. *Id*.

If a state imposes "severe restrictions" on a plaintiff's constitutional rights, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Id*. at 627. On the other hand, "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "the State's important regulatory interests are generally sufficient to justify the restrictions." *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016). Regulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a "flexible" analysis, "weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Hargett*, 767 F.3d at 546.

First, the Harvesting Ban, if anything, minimally burdens any alleged protected speech for a voter applying and returning his or her application. Plaintiffs bear a "heavy constitutional burden" to demonstrate that a state's minimally burdensome law is unconstitutional. *See Burdick*, 504 U.S. at 434; *Ohio Council*, 814 F.3d at 338. For not unduly burdensome regulations, the *Anderson-Burdick* framework does not require a state to *prove* "the sufficiency of the evidence." *Ohio Dem. Party*, 834 F.3d at 632.

Section 759 provides numerous ways for Michigan voters to return their written requests or form applications to the local clerk: (1) in person, (2) by US mail or some other mail service, (3) email, (4) fax, (5) through in-person, mail, or other delivery by an immediate family member, which includes in-laws and grandchildren, (6) through in-person, mail, or other delivery by a person residing in the same household, and (7) if none of those methods are available, through in-person, mail, or other delivery "by any registered elector." *See* MCL 168.759(4)-(6).

Further, since filing the present Motion, the Michigan Secretary of State announced her plan to send every registered voter an AV ballot application in Michigan before the August primary and General Elections. (**Ex. 3**, Benson, *All voters receiving applications to vote by mail*, https://www.michigan.gov/sos.html (accessed June 3, 2020)). The Secretary intends that every registered elector will receive an AV ballot application with instructions on how to apply, and a letter stating that the elector has a right to vote by mail in every election.

Because of these many avenues provided to a Michigan voter in returning his or her AV ballot application or written request, the Harvesting Ban is "minimally burdensome and nondiscriminatory," which results in "a less-searching examination." *NEOCH v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016).

Plaintiffs remain free to engage in get-out-the-vote (GOTV) drives, persuade others to register to vote, distribute registration forms, and assist others in filling them out. Plaintiffs are also free to educate Michigan voters about voting absentee and the process for requesting absent voter ballot in the event the applications sent by the Secretary of State do not arrive, or even distribute AV ballot applications

themselves. Such conduct is not prohibited under MCL 168.759. But Plaintiffs are prohibited from soliciting or requesting to return AV ballot applications, and returning AV ballot applications. This is a minimum burden on their overall voter outreach efforts. *See Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("To deem ordinary and widespread burdens . . . severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.").[5]

Second, Michigan has important regulatory interests in preventing voter fraud and preserving the integrity of its elections justifying the minimal restrictions of the Harvesting Ban. As to a minimally burdensome regulation triggering rational-basis review, the Court accepts a justification's sufficiency as a "legislative fact" and defers to the findings of Michigan's legislature so long as its findings are reasonable. *Ohio Dem. Party*, 834 F.3d at 632. Defendant, or Intervenors, need not produce "evidence of actual instances of corruption." *Schickel v. Dilger*, 925 F.3d 858, 870 (6th Cir. 2019).

The Michigan Legislature has a constitutional duty to enact "laws to regulate the time, place and manner of all . . . elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise,

[5] Plaintiffs argue that the Harvesting Ban is "particularly troublesome given the recent changes to absentee voting laws" after Proposal 3. (ECF No. 17, PageID 110-11). This argument carries zero weight because the Michigan Legislature amended the Michigan Election Law, including MCL 168.759, *after* and specifically because of the passage of Proposal 3. *See* 2018 PA 603. Thus, the Legislature intentionally retained the Harvesting Ban restrictions despite increased absentee voting rights in the Michigan Constitution and Michigan Election Law, presumably to protect the absentee voting process.

and to provide for a system of voter registration and absentee voting." Const. 1963, art. 2, § 4(2). Under art. 2, § 4, the Legislature also has been specifically commanded by citizens of Michigan to "preserve the purity of elections" and "to guard against abuses of the elective franchise." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 17 (2007). These election provisions have been a part of Michigan's Constitution for almost as long as Michigan has been a state. *Id*.[6]

The State has compelling interests in both preserving the integrity of its election and preventing fraud in the absent voting process. It is indisputable that states have a "compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Id*. "While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008). And *Crawford* identified "fraudulent

[6] The constitutional authority to prevent fraudulent voting was given to the Legislature in the 1850 Michigan Constitution. *See* Const. 1850, art. 7, § 6 ("Laws may be passed to preserve the purity of elections and guard against abuses of the elective franchise."). The 1908 Constitution altered the language to express that the duty was obligatory, explicitly providing that "[l]aws shall be passed to preserve the purity of elections and guard against abuses of the elective franchise . . . ." Const. 1908 art. 3, § 8. When the 1963 Constitution was ratified, the responsibility to pass laws preventing fraudulent voting was explicitly vested in the Legislature, and the Address to the People stated that "[t]he legislature is *specifically directed* to enact corrupt practices legislation." 2 Official Record, Constitutional Convention 1961, p. 3366 (emphasis added). *See In re Request for Advisory Opinion Regarding 2005 PA 71*, 479 Mich. at 17 n. 33.

voting" that was "perpetrated using absentee ballots." 553 U.S. at 195-196; *see also Veasey v. Abbott*, 830 F.3d 216, 256 (5th Cir. 2016) ("The district court credited expert testimony showing mail-in ballot fraud is a significant threat—unlike in-person voter fraud.").

The State's regulatory interests are sufficient to justify these reasonable, nondiscriminatory restrictions. Unlike the restrictions struck down in *Meyer* and *Buckley* involving petition circulators, the challenged Michigan election laws do not directly reduce the number of voices by preventing out-of-state residents from advocating political or civic messages—only from harvesting voters' AV ballot applications. *Cf. Meyer*, 486 U.S. at 422-23; *Buckley*, 525 U.S. at 194-95. In fact, *Meyer* recognized that the prospect of fraud during the electoral process—such as here—is far greater than in the initiative or candidate petition process. 486 U.S. at 427 ("the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting").

The "registered elector" requirement is important to maintaining a credible possibility of prosecution for AV ballot application fraud. "Election law violations typically carry low penalties and are hard to prosecute against local violators. Requiring the state to authorize itinerant out-of-state [canvassers] could render enforcement ineffective." *Voting for Am.*, 732 F.3d at 395; *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (holding that "[t]he residency requirement allows North Dakota's Secretary of State to protect the petition process from fraud and abuse by ensuring that circulators answer to the Secretary's subpoena power"). Thus, the "registered elector" requirement subjects the deliverer to the

State's subpoena power, which acts as a deterrent from any foul-play and ensures that the voter's application is properly delivered.

Michigan has an important interest in protecting the integrity of the AV Ballot process. These interests are not only legitimate, they are compelling. *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir. 2008) ("[E]liminating election fraud is certainly a compelling state interest[.]"). Prohibiting unlimited AV ballot application harvesting is a commonsense means of preventing undue influence, voter fraud, application tampering, and voter intimidation. The Harvesting Ban preserves the integrity of absentee voting by increasing the likelihood that a voter will entrust her application with someone who is both familiarly trustworthy and legally accountable.

The State's interest in protecting its elections against fraud is particularly acute in the context of absentee voting, including at the application stage. Numerous courts and commentators have recognized the legitimacy of states' concerns about voter fraud—and especially in the context of absentee voting. *See, e.g., Crawford*, 553 U.S. at 195-96 (explaining history of in-person and absentee fraud "demonstrate[s] that not only is the risk of voter fraud real but that it could affect the outcome of a close election"); *Griffin*, 385 F.3d at 1130-31 ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting." (citing John C. Fortier & Norman J. Ornstein, Symposium: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform, 36 U. Mich. J.L. &

Reform 483 (2003))); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill. App. Ct. 2004) ("It is evident that the integrity of a vote is even more susceptible to influence and manipulation when done by absentee ballot."); see also Khan & Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, https://votingrights.news21.com/article/election-fraud (accessed June 5, 2020) (study of election crimes from 2000–2012 finding that more fraud crimes involved absentee ballots than any other categories).

If any doubt remained that the Absent-Ballot Application Harvesting Ban is sensible, the ban on AV ballot application harvesting is consistent with the recommendations of the bipartisan Carter−Baker Commission. Specifically, the Commission Report states that "[a]bsentee ballots remain the largest source of potential voter fraud. . . . States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." (**Ex. 4**, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*, p. 46 (Sept. 2005) (emphasis added)). In short, the compelling rationale for prohibiting interested third-parties from harvesting absent ballots applies equally to harvesting voter's applications for absent ballots consistent with the recommendations of the Carter−Baker Commission.

Despite Plaintiffs' attempt to minimalize concerns, absentee voting invites some level of election fraud, including in the application process. In one recent example of alleged AV ballot application fraud, a Vanderburgh County (Ind.) Democratic Party activist was accused of illegally sending hundreds of absentee

ballot applications with instructions leaving voters no option other than participating in the June Democratic primary. (**Ex. 5**, Langhorne, *Vanderburgh Democratic activist accused of hundreds of illegal mailings*, https://www.courierpress.com/vanderburgh-democratic-activist-accused (accessed June 5, 2020)).

In another recent example, a West Virginia mail carrier was charged with attempted election fraud after eight electors submitting mail-in requests for absentee ballots had their party affiliations switched from Democrat to Republican. (**Ex. 6**, Raby, *West Virginia Mail Carrier Charged With Altering Absentee Ballot Requests*, https://time.com/west-virginia-mail-carrier-fraud (accessed June 5, 2020)). That a mail carrier, entrusted with handling our most important documents, may be tempted to misuse absent ballot applications in the alleged commission of election fraud, is significant evidence that the State has a compelling interest in limiting third-parties without supervision from harvesting AV ballot applications, and that it is both reasonable and appropriate for the State to do so. For these reasons, Plaintiffs' First Amendment claims fail under the *Anderson-Burdick* framework.

c. The Harvesting Ban survives exacting scrutiny.

Even if the Court concludes that the Harvesting Ban is subject to exacting scrutiny, the challenged law nevertheless passes constitutional muster. Exacting scrutiny "requires a 'substantial relation' between the [challenged law] and a 'sufficiently important' governmental interest." *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (quoting *Buckley*, 525 U.S. at 64, 66). To withstand this scrutiny,

"the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Reed*, 561 U.S. at 196.

The Supreme Court's ruling in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010) is instructive here. There the Court held that disclosure requirements of Washington's Public Records Act were sufficiently related to the state's interest in protecting the integrity of the electoral process to satisfy exacting scrutiny. The speakers, whose First Amendment rights were at issue, were those who sign referendum petitions. *Id*. at 194-95. An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. But the Court held that the State's interest of preserving the integrity of the electoral process by combating fraud was sufficiently important to satisfy exacting scrutiny. *Id*. at 197. "The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government.' " *Id*. (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

As the Court has previously noted, Defendant here has identified Michigan's interest in "preserv[ing] the integrity of absentee voting" and "preventing fraud" by "increasing the likelihood that a voter will entrust her application with someone who is trustworthy and accountable." (ECF No. 59, PageID. 997-98). The Harvesting Ban is narrowly tailored to "help[] prevent certain types of … fraud otherwise difficult to detect" such as might occur if a bad actor were to bully or fraudulently entice a voter into giving the bad actor the voter's AV ballot application only for the bad actor to destroy or fail to deliver the AV ballot application. *Reed*, 561 U.S. at 198.

So even if the Court applies exacting scrutiny, the Harvesting Ban passes constitutional muster. As detailed above, the application law has a significantly important interest of "preserving the integrity of the electoral process by combating fraud," *Id.* at 197, in absentee voting, including the application process. For all these reasons, the Harvesting Ban is constitutional and not preempted by federal law.

2. The solicitation ban is not vague.

Plaintiffs allege that the Harvesting Ban on strangers "solicit[ing] or request[ing] to return" AV ballot applications is void for vagueness because the term "solicitation" is not defined under Michigan Election Law. This Court declined to address whether there is an appropriate limiting construction of the solicitation ban in the context of Defendant's motion to dismiss. (ECF No. 59, PageID.996).

Federal courts must construe challenged state statutes, whenever possible, "to avoid constitutional difficulty." *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012). The Sixth Circuit has stated that a statute will be struck down as facially vague only if the plaintiff has "demonstrate[d] that the law is impermissibly vague in all of its applications." *Id*. The purpose of the vagueness doctrine is to ensure that both those who enforce a statute and those who must comply with it "know what is prohibited." *Id.* (quoting *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)). It is not "to convert into a constitutional dilemma the practical difficulties" of crafting a law that is "general enough to take into account a variety of human conduct" yet specific enough "to provide fair warning," *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). Moreover, federal courts must construe challenged state statutes,

whenever possible, so as "to avoid constitutional difficulty." *Davet v. Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006).

To succeed on a void-for-vagueness challenge, Plaintiffs must show either that the challenged provisions (1) "fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorize or even encourage arbitrary and discriminatory enforcement." *Platt v. Bd. of Com'rs on Grievances & Discipline of Ohio Supreme Court*, 894 F.3d 235, 246 (6th Cir. 2018). Criminal statutes violate the due process clause if they are "too vague to give ordinary people fair notice of the criminalized conduct or so standardless as to invite arbitrary enforcement." *United States v. Parrish*, 942 F.3d 289, 295 (6th Cir. 2019) (internal quotations omitted).

The plain language of MCL 168.759(4), (5) plainly prohibits a person from "solicit[ing]" or "request[ing] to return" an AV ballot application. The solicitation ban must be read in context with the Harvesting Ban as a whole. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007).

The terms "solicit" and "request" are not ambiguous or vague, but are readily understood using their ordinary and common meaning. Where a statutory term is undefined, courts give it its ordinary meaning. *United States v. Wright*, 774 F.3d 1085, 1088 (6th Cir. 2014). The Sixth Circuit recently defined "solicit" as "to make petition to . . . especially: to approach with a request or plea (as in selling or begging)." *Platt*, 894 F.3d at 250 (quoting *O'Toole v. O'Connor*, No. 15-1446, 2016

WL 4394135, at *16 (S.D. Ohio Aug. 18, 2016) (quoting *Webster's Third New International Dictionary*, Unabridged (2016)). Thus, the plain language of the Harvesting Ban prohibits a stranger from "approaching" an elector "with a request to return" his or her AV ballot application.

"When the common meaning of a word provides adequate notice of the prohibited conduct, the statute's failure to define the term will not render the statute void for vagueness." *United States v. Hollern*, 366 F. App'x 609, 612 (6th Cir. 2010). Stated differently, where the challenged language "is commonly used in both legal and common parlance," it often will be "sufficiently clear so that a reasonable person can understand its meaning." *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees*, 411 F.3d 777, 798 (6th Cir. 2005) (en banc). The term "solicit" is commonly used in various substantive areas ranging from criminal law to employment law without issue.

Plaintiffs assert various hypotheticals in its attempt to show vagueness. A rule is not unconstitutionally vague because a plaintiff presents a tough hypothetical. *See Grayned*, 408 U.S. at 112 n. 15 ("It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question." "Close cases can be imagined under virtually any statute." *United States v. Williams*, 553 U.S. 285, 306 (2008). Just as in *Platt*, "[s]pecific facts matter," and it would be irresponsible of Defendant to respond definitively. *See* 894 F.3d at 248. "[S]ome degree of ambiguity is unavoidable in statutory drafting, and even a well-drafted statute may be 'susceptible to clever hypotheticals testing its reach.' " *Hargett*, 400 F. Supp. 3d at 727 (quoting *Platt*, 894

F.3d at 251). Defendant need not bat away endless hypotheticals that counsel for Plaintiffs may throw to survive a vagueness challenge.

In the alternative, the Court may abstain from addressing Plaintiffs' constitutional challenges on unsettled Michigan election laws under the *Pullman* doctrine.[7] The Court correctly states, in the interests of federalism, a federal court in evaluating a facial challenge to a state law "must, of course, consider any limiting construction that a state court or enforcement agency has proffered." (ECF No. 59, PageID. 996 (citing *Grayned*, 408 U.S. at 110)). Michigan courts have never interpreted the challenged Michigan election laws, and thus these interpretive questions remain unsettled state law.

Pullman's abstention doctrine provides that a federal court may abstain so that state courts will have an opportunity to settle an underlying state law question whose resolution may avert the need to reach a federal constitutional question. *See Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). "[W]hen a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 739 (6th Cir. 2000). *Pullman* abstention is appropriate "when state law is unclear and a clarification of that law would preclude the need to

[7] Intervenors have raised the *Pullman* abstention argument in its Answer (ECF No. 61, PageID.1033), Affirmative Defenses (*Id*. at PageID.1047), and Reply Brief in Support of Motion to Intervene (ECF No. 46, PageID.869).

adjudicate the federal question." *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). The Court thus may alternatively abstain from deciding these issues of first impression of Michigan election law, and certify questions for the Michigan Supreme Court to provide a limiting construction of the challenged laws. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997); MCR 7.308(A)(2).[8]

3. Plaintiffs have not established a likelihood of success on their Voting Rights Act claim.

Plaintiffs allege that the registration requirement of the Harvesting Ban conflicts with and thus is preempted by § 208 of the Voting Rights Act (VRA), 52 U.S.C. § 10508. Conflict preemption refers to circumstances "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wimbush v. Wyeth*, 619 F.3d 632, 643 (6th Cir. 2010).

Section 208 has limited application. It provides in full: "[a]ny voter who requires assistance to vote *by reason of* blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508 (emphasis added).

[8] In recognizing that *Pullman* may apply, the Western District of Michigan set for hearing to consider whether issues of statutory interpretation of the Governor's emergency powers under Michigan law should be certified to the Michigan Supreme Court. (**Ex. 7**, *Midwest Inst. of Health, PLLC v. Whitmer*, No. 20-414 (W.D. Mich., May 28, 2020) (ECF No. 23)). This issue remains pending.

Plaintiffs' VRA preemption claim does not warrant the extraordinary relief Plaintiffs seek. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (recognizing that preemption is disfavored in areas traditionally regulated by the state). In passing § 208, Congress explained that it would preempt state election laws "only to the extent that they unduly burden the right recognized in [Section 208], *with that determination being a practical one dependent upon the facts.*" S. REP. NO. 97-417, at 63 (1982) (emphasis added) [hereinafter, "Senate Report"]. Plaintiffs, however, have not presented facts sufficient to show that § 208 preempts the Harvesting Ban. Indeed, Plaintiffs have not presented evidence of any identified Michigan voters covered under § 208 who have been unable to vote or to use their assistants of choice because of the registration requirement.

This record stands in stark contrast to the records presented in the cases that Plaintiffs cite in support of their claims. For example, in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), one of the plaintiffs was an English-limited voter who had been unable to complete her ballot due to the challenged state law limiting those eligible to assist as an interpreter. 867 F.3d at 615. Similarly, in *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 530 (E.D. Pa. 2003), the Government presented specific evidence of English-limited voters denied the right to use a voting assistant of choice by poll workers. Without any evidence of the sort adduced here, it is impossible to determine whether the registration requirement imposes any burden whatsoever on the rights of voters covered under § 208 of the VRA.

Furthermore, it is not clear that the Absent Ballot Harvesting Ban conflicts with § 208 protections for covered voters. The VRA defines "voting" in pertinent as

"all action *necessary* to make a vote effective in any primary, special, or general election." 52 U.S.C. § 10310(c)(1) (emphasis added). This definition encompasses a broad range of activities that precede, include, and follow the physical act of reading, marking, and casting a ballot. *See OCA-Greater Houston*, 867 F.3d at 615. But § 208's legislative history focuses on election day assistance and in-person voting—not absent ballot voting. *See, e.g.*, Senate Report 62 ("Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth."). Absentee voting would not seem "necessary to make a vote effective" under the VRA, since there is no broad constitutional or federal statutory right to vote by absent ballot, which is a merely a legislative "indulgence—not a constitutional imperative." *Crawford*, 553 U.S. at 209 (Scalia, J., concurring); *see also McDonald*, 394 U.S. at 807-08.

B. The Paid Driver Ban is constitutional and not preempted by federal law.

1. The Paid Driver Ban does not unconstitutionally infringe on First Amendment rights.

Plaintiffs allege that the Paid Driver Ban violates their First and Fourteenth Amendment right to engage in political expression, specifically (1) limiting political spending on transporting voters to the polls, and (2) regulates rides-to-the-polls efforts. (ECF No. 17, PageID 122).

The Paid Driver Ban does not unconstitutionally infringe on First Amendment speech as the payment for transporting voters to the polls is not "inherently expressive," and thus not speech protected by the First Amendment. *See Rumsfeld*, 547 U.S. at 66. Plaintiffs fail to cite any case law recognizing that paying for

transportation for voters to the polls in itself is protected speech under the First Amendment. Similar to their arguments above, Plaintiffs attempt to seek cover under a general umbrella of GOTV efforts. But the Supreme Court has long held that non-expressive conduct does not acquire First Amendment protection whenever combined with protected speech. *See Clark*, 468 U.S. at 297-98; *Rumsfeld*, 547 U.S. at 66; *O'Brien*, 391 U.S. at 376.

Plaintiffs again try erroneously to analogize the Paid Driver Ban to *Meyer* and *Buckley*, arguing that exacting scrutiny applies. (ECF No. 17, ¶ 84). *Meyer* held that a prohibition on paid circulators triggered exacting scrutiny because circulators are engaged in core political speech. 486 U.S. at 425, 428. Transporting voters to the polls, in contrast, involves no political communication of any sort by either the driver or the person subsidizing it.

The Paid Driver Ban targets only conduct—payment of money for transporting voters to the polls. This law does not prohibit any political speech or association whatsoever. As discussed in more detail below, the plain language of the Paid Driver Ban does not even prohibit organizations or individuals from providing transportation for voters to polls. Rather, it regulates commercial activity without prohibiting anyone from transporting voters for free. Thus, for the same reasons outlined above with respect to the Harvesting Ban, it does not directly impinge upon Plaintiffs' First Amendment rights, and should be subject only to a reasonableness analysis under *Anderson-Burdick*.

Plaintiffs argue that the Paid Driver Ban prohibits people from subsidizing voter registration efforts. (ECF No. 17, PageID.104-03). The Amended Complaint

points out that the Paid Driver Ban prohibits anyone from paying to have voters transported "to an election." (*Id.*). In Michigan, people can now register to vote at the polling place. Plaintiffs reason that the statute prohibits plaintiffs from "spending money to register voters." (*Id.*). To the contrary, organizations like Plaintiffs may still conduct voter registration drives, bring voter registration forms to voters, transport voters to most voter registration sites or even to election officials' offices. Michigan also allows for online voter registration; Plaintiffs may also spend money to facilitate such efforts, as well. The fact that voter registration happens to now be permitted at polling places does not somehow transform the Paid Driver Ban into a prohibition on paid voter registration efforts.

Further, the fact that other Michigan statutes prohibit vote buying does not mean that the Paid Driver Ban somehow lacks a rational basis. To the contrary, the Paid Driver Ban "helps prevent certain types of . . . fraud otherwise difficult to detect" that other prophylactic measures may not prevent, such as bad actors pressuring or extorting a promise to vote a certain way from vulnerable voters. *Reed*, 561 U.S. at 198. Thus, for the same reasons outlined above with respect to the Harvesting Ban, the Paid Drive Ban should survive either rational basis review under *Anderson-Burdick*, or exacting scrutiny under the First Amendment.

2. Paid Driver Ban is not unconstitutionally vague and overbroad.

Plaintiffs allege that the phrase "hire a motor vehicle" or cause a motor vehicle to be hired in the Paid Driver Ban is vague and overbroad. (ECF No. 22-1, PageID.183-84). It bears repeating that "every reasonable construction must be

resorted to, in order to save a statute from unconstitutionality." *Nat'l Fed. Of Indep. Bus.*, 567 U.S. at 563. And "federal courts must construe challenged state statutes, whenever possible, so as "to avoid constitutional difficulty." *Green Party of Tenn.*, 700 F.3d at 825. Like their arguments regarding the "solicitation ban" under MCL 168.759, Plaintiffs' similarly fail because the Paid Driver Ban can be given a limited construction that does not violate First Amendment rights.

A review of the statutory history of the Michigan Election Law provides guidance on the limited scope of the Paid Driver Ban. This statute was originally enacted by 1895 P.A. 135, which provided:

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

By 1929, the "for the purpose of" language in the provision had been divided along with the other described illegal acts and placed elsewhere in the law. *See* C.L. 1929, § 3298.[9] The Paid Driver Ban was finally amended to its current version, which provides in full: "A person shall not *hire a motor vehicle* or other conveyance

[9] C.L. 1929, § 3298 provided: "Any person who shall hire any carriage or other conveyance, or cause the same to be done, for conveying voters, other than voters physically unable to walk thereto, to any election or primary election conducted hereunder shall be deemed guilty of a misdemeanor."

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) (emphasis added).

The statutory language of words of the Paid Driver Ban, specifically the prohibition on "hir[ing] a motor vehicle," are understandable by a person of ordinary intelligence according to the common meaning of the words. The verb "hire" is defined as "to engage the services of for wages or other payment," or "to engage the temporary use of at a set price." *Tech & Crystal, Inc. v. Volkswagen of Am.*, 2008 WL 2357643, at *3 (Mich. App. 2008) (quoting *Random House Webster's College Dictionary* (1997)).[10] In either definition, the critical factor is the exchange of services or use for a fee.

Also, subsection (1)(f) prohibits hiring vehicles or conveyances "for voters," which necessarily contemplates acting on behalf of others, not oneself. And the statutory history of the Paid Driver Ban demonstrates that the statute addresses hiring such services "for the purpose" of influencing voters. "Unlike legislative history, statutory history—the narrative of the 'statutes repealed or amended by the statute under consideration'—properly 'form[s] part of the context of the statute . . . .'" *People v. Pinkney*, 501 Mich. 259, 276 n. 41 (2018) (quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 256). Therefore, the plain language of the Paid Driver Ban prohibits the exchange of money for transportation of voters to the polls for the purpose of influencing voters.

[10] The legal definition of "hire" is consistent: "[t]o engage the labor or services of another for wages or other payment" or "[t]o procure the temporary use of property, usu. at a set price." *Black's Law Dictionary* (11th ed. 2019).

Plaintiffs' hypotheticals attempt to obfuscate a reasonable reading of the Paid Driver Ban. With the exception of an article stating that Uber would not provide a promotion to Michigan voters in the 2018 Election, (ECF No. 17, PageID.105), which could have been made for countless business reasons, Plaintiffs have failed to produce any evidence demonstrating that their ability to provide transportation to the polls has been impeded. Moreover, it is not clear why the advancement in technology has any bearing with construing the Paid Driver Ban within the constitutional bounds.

Even if an application of the Paid Driver Ban could be construed to impinge on protected speech, the statute would still be constitutional so long as the Court could limit the construction of the statute to only the conduct that is clearly included. The Paid Driver can be read to narrowly capture only quid pro quo activities; that is, to ban payment or expenditures for rides to the polls in exchange for a vote on an issue or for a specific candidate.

3. FECA does not preempt Paid Driver Ban.

Plaintiffs allege the Federal Election Campaign Act (FECA) and FEC regulations either expressly or impliedly preempt Paid Driver Ban. "Express preemption exists where either a federal statute or regulation contains explicit language indicating that a specific type of state law is preempted." *State Farm Bank v. Reardon*, 539 F.3d 336, 341-42 (6th Cir. 2008). Conflict preemption refers to circumstances "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress." *Wimbush*, 619 F.3d at 643. When analyzing conflict preemption, the court "should 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 (6th Cir. 1996). The Supreme Court has described impossibility preemption as a "demanding defense." *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). Plaintiffs' FECA preemption theory fails for many reasons.

a. Plaintiffs have failed to allege a cause of action for its FECA preemption theory.

As a threshold matter, Plaintiffs stated that their "claims alleging vagueness and overbreadth (Counts I and V), First and Fourteenth Amendment violations of speech and associational rights (Counts II and VI), and preemption (Counts IV and VIII) all rely on Plaintiffs' own rights and injuries as organizations." (ECF No. 40, PageID. 754-55). This is a mischaracterization of Plaintiffs' alleged causes of action.

The Amended Complaint provides one cause of action, 42 U.S.C. § 1983. (ECF No. 17). Preemption alone is not a cause of action. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 325 (2015) ("It is . . . apparent that the Supremacy Clause is not the 'source of any federal rights' and certainly does not create a cause of action."). Plaintiffs must point to a separate cause of action for their preemption counts.

Because Plaintiffs have chosen to proceed with § 1983 as their cause of action, they must identify some federal right that would be infringed by Defendant acting under color of state law. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002).

FECA and the regulations cited by Plaintiffs do not create or guarantee any rights under federal law, but rather restrict political conduct which would be protected, if at all, by the First and Fourteenth Amendments. Accordingly, because FECA and the cited regulations do not secure Plaintiffs' "rights, privileges, or immunities," FECA cannot provide the basis for Plaintiffs' § 1983 action. Without a separate cause of action, Plaintiffs' FECA preemption theory fails for that reason alone.

b. This Court is not a proper venue for adjudication of Plaintiffs' FECA preemption claim.

Plaintiffs request equitable relief, and presumably seek to proceed in equity under the doctrine established in *Ex Parte Young*, 209 U.S. 123 (1908). Federal courts, however, cannot entertain suits brought in equity on the basis that a state law has been preempted by Congress when there is an "express [or] implied statutory limitation[]" on the ability of the court to hear that case. *Armstrong*, 575 U.S. at 327 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996)). In other words, "'[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" *Id*. at 327-28 (quoting *INS v. Pangilinan*, 486 U.S. 875, 883 (1988)). Courts may determine that Congress has evinced an "intent to foreclose equitable relief" when the allegedly pre-empting statute contains "the express provision of one method of enforcing [the] substantive rule" created by the statute. *Id*. at 328.

FECA vests enforcement power with the Federal Election Commission (FEC). 52 U.S.C. § 30106(b). It further requires any person to file an administrative complaint with the FEC alleging a violation of the statute. 52 U.S.C. § 30109(a)(1); 11 C.F.R. § 111.4. A private party may only proceed to court, exclusively the D.C. District Court, after the FEC has completed its investigation and determined to dismiss the complaint, and the complainant may only do so to seek review of the dismissal. 52 U.S.C. § 30109(a)(8)(A). The complainant's recourse to the courts is essentially limited to an action for review of the FEC's action or inaction. Jurisdiction in this Court is therefore improper on Plaintiffs' FECA challenge.

c. Courts have narrowly interpreted the FECA preemption clause, which does not preempt the Paid Driver Ban.

FECA provides a uniform national regulation of political spending in federal elections. (ECF No. 59, PageID.1010). This act generally "imposes limits and restrictions on contributions; provides for the formation and registration of political committees; and mandates reporting and disclosure of receipts and disbursements made by such committees." *Bunning v. Kentucky*, 42 F.3d 1008, 1011 (6th Cir. 1994). "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978), "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *Cal. Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987). Such reasoning is a variant of the familiar principle of

expressio unius est exclusio alterius: Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted. "Under the *expressio unius* principle, when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Millsaps v. Thompson*, 259 F.3d 535, 546-47 (6th Cir. 2001).

As to their argument that FECA preempts the Paid Driver Ban, Plaintiffs rely on the FECA preemption clause, which states: "the provisions of this Act, and the rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to federal office." 52 U.S.C. § 453. While § 453 at first glance appears to have an exceedingly broad scope, courts have not interpreted the clause in that manner. A "strong presumption" exists against FECA preemption. *Karl Rove & Co. v. Thornburg*, 39 F.3d 1273, 1280 (5th Cir. 1994) (quoting *Stern v. General Elec. Co.*, 924 F.2d 472, 475 n. 3 (2d Cir. 1991). In addition, "courts have given [§] 453 a narrow preemptive effect in light of its legislative history." *Id*.

Further, Congress did not intend criminal sanctions under FECA to substitute for all other possible criminal sanctions, including under state law. *See Dewald v. Wriggelsworth*, 748 F.3d 295, 298 (6th Cir. 2014) (ruling that FECA not preempting Michigan election fraud convictions was a reasonable application of clearly established law). Plaintiffs have failed to cite any caselaw stating that FECA preempts state criminal laws targeting election fraud, such as the Paid Driver Ban.

Section 453 further incorporates by reference "rules prescribed under" FECA. Plaintiffs selectively quote the FEC preemption regulation, arguing that the Paid Driver Ban is a "[l]imitation on contributions and expenditures" regarding federal

elections. 11 C.F.R. § 108.7(b)(3). This regulation continues stating that FECA does not supersede state laws for the "[p]rohibition of false registration, *voting fraud*, theft of ballots, and *similar offenses*[.]" *Id*. at § 108.7(c)(4) (emphasis added). The Paid Driver Ban has long preserved the integrity of Michigan's elections, specifically to protect voters against undue influence and to prevent quid pro quo arrangements when money is exchanged. Although the Paid Driver Ban does not criminalize traditional voter fraud, the provision protects against fraudulent behavior involving voters or similar offenses in Michigan elections. Thus, the Paid Driver Ban is expressly not preempted by the FEC preemption regulation.

The Sixth Circuit has accepted the narrow reading of FECA's preemption provision. In *Dewald*, the court held that FECA not preempting Michigan criminal fraud law was a reasonable application of clearly established law. 748 F.3d at 303. The facts involved a habeas petitioner seeking to overturn his fraud convictions for unlawfully diverting campaign contributions through PACs. The Michigan Court of Appeals upheld the convictions, rejecting that FECA preempts his state-law charges. *Id*. at 298; *People v. Dewald*, 267 Mich. App. 365, 375 (2005). On habeas review, the district court found preemption based on inapplicable preemption cases. *Id*. at 299-300.

The Sixth Circuit reversed. The court rejected the lower court's reliance on preemption cases that never addressed FECA preemption. "[N]o Supreme Court case had held that FECA preempts state-law fraud claims, let alone interpreted the key statutory provisions at issue." *Id.* at 300.

The court seemingly adopted the state appellate court's narrow interpretation

of the FECA preemption clause. "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." *Id*. at 302. "An ambiguous statute is fertile ground from which fair-minded disagreements grow, and we find that the Michigan Court of Appeals' narrow construction of the FECA's preemption provision" is reasonable. *Id.*

The court further relied on the FEC preemption regulation listing state activities and laws not preempted by FECA, specifically "[p]rohibition of false registration, *voting fraud,* theft of ballots, *and similar offenses.*" *Id*. at 302 (emphasis 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." *Id*. at 302. Thus, Sixth Circuit precedent follows that the FECA preemption clause has a narrow interpretation, and that state criminal laws directed at preventing election fraud are not preempted under FECA.[11]

d. The plain text of the FEC regulations cited by Plaintiffs do not preempt the Paid Driver Ban.

Plaintiffs rely on 11 C.F.R. § 114.4(d)(1) and 114.3(c)(4)(i), which are not

[11] In *Krikorian v. Ohio Elections Com'n*, No. 10-103, 2010 WL 4117556 (S.D. Ohio, Oct. 19, 2010), the plaintiff argued that FECA preempted the state statute to the extent it regulates a federal election. After analyzing caselaw narrowly interpreting FECA preemption, the court held that the federal preemption claim is not facially conclusive to avoid *Younger* abstention. *Id*. at *10; 12. The court distinguished *Bunning*, 42 F.3d at 1012, which preempted a Kentucky campaign finance statute and prevented the Registry of Election Finance from investigating polling expenditures made by a federal PAC. *Bunning* was distinguishable because it involved "state law related to campaign financing—an area in which FECA has often been found to preempt state law." *Id*. at *11.

empowering regulations—they do not give a party any affirmative rights. These regulations are merely exceptions to FECA's broad prohibitions against corporations and labor unions making campaign contributions, expenditures, and electioneering communications. The FEC regulations must be read in context with FECA as a whole. "The language of a regulation must necessarily be interpreted in the context of its statutory origin." *Armstrong v. U.S. Fire Ins. Co.*, 606 F. Supp. 2d 794, 820 (E.D. Tenn. 2009).

The plain language of these regulations do not conflict with the Paid Driver Ban because they allow corporations and labor unions to *provide* transportation; whereas, the Paid Driver Ban expressly prohibits *payment* for transportation. As stated, the Paid Driver Ban protects voters against undue influence and prevents quid pro quo arrangements when money is exchanged. Nothing prohibits Plaintiffs from providing transportation for the General Election. Thus, even when read in isolation, Plaintiffs' cited FEC regulations are still not conflicting with the Paid Driver Ban.

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In short, Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims in the Amended Complaint. The Sixth Circuit has stated that "a finding that there is simply no likelihood of success on the merits is usually fatal" to a request for injunctive relief. *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000). The Court may end its analysis here, and deny Plaintiffs' request for an injunction.

II. Plaintiffs Cannot Establish That They Will Suffer Irreparable Harm Without the Injunction.

Plaintiffs have failed to establish any irreparable harm necessary for injunctive relief. To establish irreparable harm, Plaintiffs must show that, unless their motion is granted, they will suffer actual and imminent harm rather than harm that is speculative or unsubstantiated. *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006). The Court's role on a preliminary injunction motion is to assess not whether a particular outcome or harm is possible or certain, but whether "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

"As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018).

"[T]he purpose of the preliminary injunction is simply to prevent irreparable harm during the period before a jury trial can be held to decide the merits." 11A Fed. Prac. & Proc. Civ. § 2950 (3d ed.). Plaintiffs cannot adequately show irreparable harm when the challenged election laws have been on the books for many years and set forth the competitive electoral environment.

Granting Plaintiffs' preliminary injunction would work needlessly "chaotic and disruptive effect upon the electoral process," *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976), and because the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Preservation of the status quo means enforcement of the challenged Michigan election laws that have controlled election cycles in Michigan for many years.

Plaintiffs further cannot show irreparable harm in allegedly "educat[ing] voters about their options to vote absentee" or "encourage[ing] voters to take advantage of the conveniences of absentee voting" (ECF No. 22-1, PageID.164), when the Secretary of State plans to send every registered voter an AV ballot application in Michigan before the Primary and General Elections. (**Ex. 3**).

Moreover, to the extent Plaintiffs argue that they have been injured based on their "diversion of resources" and thus have standing, these injuries would be quantifiable through ordinary discovery process. The "general rule is that a plaintiff's harm is not irreparable if it is fully compensable by money damages." *Nat'l Viatical, Inc. v. Universal Settlements Intern., Inc.*, 716 F.3d 952, 957 (6th Cir. 2013). Therefore, Plaintiffs have failed to establish any irreparable harm necessary for injunctive relief.

III. The Balance of Harms Weighs Heavily Against Plaintiffs Because Their Requested Relief is Inappropriate as a Matter of Law and Because it Would Harm the Public Interest.

The balance of harms further militates against granting Plaintiffs the extraordinary relief of an injunction on any of their facial challenges. "Simply put, federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Esshaki v. Whitmer*, No. 20-1336; 2020 WL 2185553, *2 (6th Cir. May 5, 2020). And it is well-established that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Courts can only "provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

Unless 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]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006).

The Harvesting Ban and Paid Driver Ban are long-standing Michigan election laws. Plaintiffs admit they have known of these laws, as they have been active in Michigan in several election cycles and claim that the challenged election laws have caused them to adjust their behavior in prior election cycles. (ECF No. 22-1, PageID 153-54). Yet Plaintiffs never sought to remedy their perceived concerns with the challenged election laws until now. Plaintiffs further do not identify a single voter who has been unable to apply for an absent ballot due to the Harvesting Ban or unable to secure transportation to the polls due to the Paid Driver Ban.

Plaintiffs' requested relief would harm the public interest in Michigan. The State has a compelling public interest in preserving the integrity of its election processes. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *cf. also Crawford*, 553 U.S. at 194-97. "[C]aution" granting injunctions is "especially" warranted "in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important public works or to control the action of another department or government." *Country Club v. Jefferson Metropolitan*, 5 Ohio App.3d 77, 80 (7th Dist. 1981). Such significant impact cuts against the interest of Michigan, and the public, in orderly elections. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018).

Further, if the Court were to grant Plaintiffs' request for an injunction, there would be no restrictions on harvesting AV ballot applications leading up to the General Election, when states are expected to see increases in absentee voting due to COVID-19.

Michigan's public interest would not be served in allowing out-of-state individuals to solicit, harvest, and return AV ballot applications. Nor would the public interest be served by paid drivers transporting voters to the poll booths with even an implication of quid-pro-quo.

CONCLUSION

In sum, Intervenors Michigan Republican Party and Republican National Committee respectfully request that the Court deny Plaintiffs' motion for preliminary and permanent injunction.

Respectfully submitted,

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DATED: June 5, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 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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