UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA,

Plaintiff,

v

DANA NESSEL, in her official capacity as the Michigan Attorney General,

Defendant.
_____/

No. 19-13341

HON. MARK A. GOLDSMITH

MAG. R. STEVEN WHALEN

DEFENDANT'S MOTION TO DISMISS

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DEFENDANT'S MOTION TO DISMISS

Defendant Michigan Attorney General Dana Nessel moves for dismissal of Plaintiff Priorities USA's complaint pursuant to Fed. R. Civ. Proc. 12(b)(1) and (6), for the following reasons:

1. This complaint is a challenge to the constitutionality of several sections of the Michigan Election Law that concern the transportation of voters to elections and who may deliver a signed application for an absent voter ballot.

2. Plaintiff is an organization and does not allege that it has members who vote in Michigan.

3. The complaint does not identify any voters who have experienced any difficulties in transporting themselves to their polling locations or in obtaining and returning an absent voter ballot application due to the existence or operation of the statutes, and does not demonstrate any special relationship between Plaintiff and such unidentified voters that would support third-party standing.

4. Plaintiff has not alleged that it will incur any particularized injury as a result of the challenged statutes.

5. Plaintiff's claims are instead predicated upon abstract and generalized grievances that are indistinguishable from the interests of any citizen of the State.

6. Plaintiff lacks standing to bring claims challenging the statutes identified in the complaint.

7. Alternatively, Plaintiff's complaint should be dismissed because Plaintiff fails to state a claim upon which relief may be granted.

8. Regarding Mich. Comp. Laws § 168.931(1)(f), which prohibits hiring vehicles or other conveyances to transport voters to an election, the statute only minimally burdens a voter's right to vote or Plaintiff's right to speech and association. And the burden is outweighed by the State's interest in preserving the integrity of the conduct of elections. The statute is not unconstitutional.

9. Similarly, in regard to the statutes governing the absent voter ballot application process, *see* Mich. Comp. Laws § 168.759, the statutes only minimally burden a voter's right to vote or Plaintiff's right to speech and association. And the burden is outweighed by the State's interest in preserving the integrity of the absent voter ballot application process. The statutes are not unconstitutional.

10. Concurrence in the relief sought in this motion was denied.

For these reasons and the reasons stated more fully in the accompanying brief in support, Defendant Attorney General Nessel respectfully requests that this Honorable Court enter an order dismissing Plaintiff's complaint against her in its entirety and with prejudice, pursuant to Fed. R. Civ. Proc. 12(b)(1) and (6).

Respectfully submitted,

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Dated: December 20, 2019

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether Priorities USA's complaint should be dismissed because it lacks standing to challenge Michigan's Election Laws restricting the transportation of voters and prescribing the absent voter ballot application process, or alternatively because the complaint fails to state a claim as to the unconstitutionality of these statutes?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:
Mich. Comp. Laws § 168.931(1)(f)
Mich. Comp. Laws § 168.759(4), (5), (6), (7), and (8)
Mich. Const. 1963, art. 2, § 4

STATEMENT OF FACTS

The only named Plaintiff to this action is Priorities USA, a 501(c)(4) nonprofit corporation and a "voter-centric progressive advocacy and service organization." (R. 1, Compl., PgID 4, ¶ 6.) Its "mission is to build a permanent infrastructure to engage Americans by persuading and mobilizing citizens around issues and elections that affect their lives." (*Id.*) It alleges that it engages in activity to "educate, mobilize, and turn out voters" in Michigan, and states that it "expects to" make expenditures and contributions towards those objectives in upcoming Michigan state and federal elections. (*Id.*) Plaintiff has not alleged that it is incorporated in Michigan, or that it has any members, much less members that reside or vote in Michigan.

Plaintiff challenges several parts of Michigan's Election Law that limit who may deliver a signed application for an absent voter ballot to a local clerk, in addition to a prohibition on paying for the transportation of voters to elections.

A. Mich. Comp. Laws § 168.759 – Absent voter ballot applications

As amended by Proposal 3 in 2018, article 2, § 4 of the Michigan Constitution now provides that qualified electors shall have "[t]he right, 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." Mich. Const. 1963, art. 2, § 4(1)(g). Section 4 continues to provide, as it has since 1963, that:

> [T]he legislature shall 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.* [*Id.*, art. 2, § 4(2)(emphasis added).]

Section 759 of the Michigan Election Law prescribes the process for applying for an absent voter (AV) ballot. In order 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. With respect to both primaries and regular elections, an elector may apply for an AV ballot at any time during the 75 days before the primary or election. Mich. Comp. Laws § 168.759(1)-(2). In both cases, "the elector shall apply in person or by mail with the clerk" of the township or city in which the elector is registered. *Id.* Subsection 759(3) provides that:

> (3) An application for an absent voter ballot under this section may be made in any of the following ways:
>
> (a) By a written request signed by the voter.
>
> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.[1]
>
> (c) On a federal postcard application.
>
> (4) An applicant for an absent voter ballot shall sign the application. A clerk or assistant clerk shall not deliver an absent voter ballot to an

[1] AV ballot applications are available online at https://www.michigan.gov/documents/sos/ AVApp_535884_7.pdf.

> applicant who does not sign the application. *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.
>
> (5) The clerk of a city or township shall have absent voter ballot application forms available in the clerk's office at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request. [M.C.L. §§ 168.759(3)-(5) (emphasis added).]

Where a form application is used, under § 759(5), the "application shall be in substantially the following form," which then provides the body of the form and includes a general "warning" and a "certificate" portion for "a registered elector" delivering a completed application for a voter. Mich. Comp. Laws § 168.759(5). The warning must state that:

> 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 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. Ask to see his or her credentials before entrusting your application with a person claiming to have the clerk's authorization to return your application. [*Id*.]

Similarly, the certificate for a registered elector returning an AV ballot application must state that:

> I am delivering the absent voter ballot application of [the named 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.*]

Under § 759(6), the application form must include the following instructions for an 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. [M.C.L. § 168.759(6).]

Consistent with these statutes, § 759(8) provides that "[a] person who is not authorized in this act and who *both distributes* absent voter ballot applications to absent voters and *returns* those absent voter ballot applications to a clerk or

assistant of the clerk is guilty of a misdemeanor." Mich. Comp Laws § 168.759(8) (emphasis added). Section 931 also provides for penalties associated with distributing and returning AV ballot applications. *See* Mich. Comp. Laws §§ 168.931(1)(b)(iv) and (1)(n).

Based on these 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. Mich. Comp. Laws §§ 168.759(1), (2), (6). Clerks have also been instructed by the Department of State for a number of years to accept applications sent by facsimile and email.[2] If a voter cannot appear in person to deliver their application or cannot mail their application or return it by email or facsimile, they may have an immediate family member deliver his or her application, or the person may request another registered voter to return the application. Mich. Comp. Laws §§ 168.759(4), (5), (6).

Thus, only persons authorized by law, i.e. those described in § 759(4), may return a signed application for an AV ballot to a local clerk. Mich. Comp. Laws §§

[2] See, e.g., Chapter 6, Michigan's Absentee Voting Process, February 2019, p 2, available at https://www.michigan.gov/documents/sos/VI_Michigans_Absentee_Voting_Process_265992_7.pdf.

168.759(4)-(5). Defendant is not aware of any recent prosecutions under these provisions for the return of AV ballot applications.

Plaintiff refers to these statutes as an "Absentee Ballot Organizing Ban," and alleges that it would "expend resources to fund absentee ballot get-out-the-vote ('GOTV') activities which, but for" the ban "would include the collection of absentee ballot applications in Michigan." (R. 1, Compl., PgID 5, ¶ 6).

B. Mich. Comp. Laws § 168.931 – Transporting voters to elections

Mich. Comp. Laws § 168.931 provides, in part:

> (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. [Mich. Comp. Laws § 168.931(1)(f).]

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 language has existed in some form since 1895, *see* 1895 P.A. 35, and has been a part of Michigan's modern election law since it was reenacted in 1954 P.A. 116. It was amended by 1982 P.A. 201 to replace the term "carriage" with the current term "motor vehicle." Given its age, it is possible that people have been prosecuted under this statute, but Defendant has been unsuccessful in finding any cases involving a prosecution under § 931(1)(f).

Priorities USA refers to § 931(1)(f) as a "Voter Transportation Ban," and alleges that "but for" the ban it "would expend resources to fund rides to the polls for Michigan voters." (R. 1, Compl., PgID 4, ¶ 6).

ARGUMENT

I. Plaintiff's complaint should be dismissed where it lacks standing to sue and the complaint otherwise fails to state a claim upon which relief may be granted.

A. Plaintiff lacks standing to sue because it has not plead a sufficient injury-in-fact and cannot sue in a representational capacity.

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III, § 2. The doctrine of standing implements these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury "will be redressed by a favorable decision." *Lujan,* 504 U.S. at 560–561 (internal quotation marks omitted). " 'The party invoking federal jurisdiction bears the burden of establishing' standing." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 411-412 (2013) (internal citation omitted).

In order to establish organizational standing, a plaintiff organization, like Priorities USA, must establish the three traditional elements of standing. *See Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014). Here, Plaintiff has not sufficiently pled an injury-in-fact to support standing.

1. Plaintiff has not sufficiently alleged an injury-in-fact.

An injury sufficient to satisfy Article III must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.' " *Lujan*, 504 U.S. at 560 (some internal question marks omitted). "An allegation of *future* injury may suffice if the threatened injury is 'certainly impending,' or there is a ' "substantial risk' that the harm will occur.' " *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 409, 414, n. 5) (emphasis deleted and internal quotation marks omitted) (emphasis added).

Overlaying this analysis is the question of "when the threatened enforcement of a law creates an Article III injury." *Susan B. Anthony*, 573 U.S. at 158. On this point, the U.S. Supreme Court observed that an actual arrest or prosecution is not required, but enforcement must be imminent and the threat credible:

> When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement *sufficiently imminent*. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, *and there exists a*

> *credible threat of prosecution thereunder*." [*Id*. at 158-59 (internal citations omitted) (emphasis added).]

Thus, to establish injury-in-fact in a pre-enforcement case, as here, Plaintiff must demonstrate that enforcement of the challenged statutes is "sufficiently imminent," which it can do by demonstrating that there is a "credible threat of prosecution" under the statutes.

But here, Priorities USA fails to make allegations demonstrating a credible threat of prosecution. Instead, Plaintiff alleges only that the Voter Transportation Ban and the Absentee Ballot Organizing Ban will "directly harm Priorities by frustrating its mission of, and efforts in, educating, mobilizing, and turning out voters in Michigan by necessarily reducing the transportation options of Michigan citizens to get to polling places and by criminalizing the acts of individuals and organizations" that want to transport people to vote and assist voters "with registering for or returning absentee ballot applications." (R. 1, Compl., PgID 5, ¶ 7). Plaintiff alleges that because of these so-called Bans, it "will have to expend and divert additional funds and resources in GOTV efforts" in Michigan, and it "will also be prevented from fully exercising its associational rights to engage in these GOTV effort because of the Bans." *Id.*

But these alleged future injuries are not "certainly impending" nor does there appear to be a "substantial risk" that harm will occur. *Susan B. Anthony List*, 573 U.S. at 158. The complaint is devoid of any reference to recent prosecutions or

threatened prosecutions under § 931(1)(f) or under §§ 759(8), 931(1)(b)(iv), (n). The only specific instance Plaintiff points to is a press release from Uber stating that it was not offering discounted rides to the polls in Michigan for the November 2018 general election. (R. 1, Compl., PgID 9, ¶ 19). Plaintiff alleges that "[u]pon information and belief, Uber did not provide Michigan citizens with discounted rides to polling places because of the Voter Transportation Ban." (*Id*.) However, there is no allegation that Uber was threatened with prosecution under § 931(1)(f) in 2018.

Plaintiff has not alleged facts sufficient to support a "credible threat of prosecution" under any of the statutes discussed above. *See*, *e.g*., *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016) (finding credible threat of enforcement where agency letter contained valid threat of enforcement). As a result, Plaintiff has not sufficiently pled an injury-in-fact and thus lacks standing to bring its claims.

Further, to the extent Plaintiff alleges it will have to "divert" resources to combat the effects of these statutes, (R. 1, Compl., PgID 5, ¶ 7), this allegation also fails to show an injury-in-fact. The Sixth Circuit has previously rejected the "diversion of resources" theory in similar cases. In *Fair Elections Ohio*, 770 F.3d at 458, an organization conducting voter outreach sought to challenge a deadline for requesting an absent voter ballot on the theory that it prevented people jailed

after the deadline and held through election day from exercising their right to vote. The Sixth Circuit held that the organization did not have standing because the organization had not shown an injury in fact. *Id.* at 459. The Court held that the organization had only an, "abstract social interest in maximizing voter turnout," and that such abstract interests cannot confer Article III standing. *Id.* at 461 (citing *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati,* 56 F.3d 710, 716-17 (6th Cir. 1995)). Moreover, Plaintiff's First Amendment and equal protection claims are primarily based on alleged injuries to individual voters and are untethered to its alleged injury of having to divert its resources.

On the other hand, the Sixth Circuit also addressed the "diversion of resources" theory in *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016), where it found that the organization plaintiff had standing, but only because it had immediate plans to revise its voter education program to adapt to a *recent* change in law, and that a favorable decision enjoining the new laws would redress that injury. But that case is distinguishable from the situation Plaintiff faces here, because there have been no recent changes in the law. Rather, these are long-existing laws. Just as in *Fair Elections Ohio*, Plaintiff's injury is premised upon the rejected argument that it has standing "merely by virtue of its efforts and expense to advise others how to comport with the law, or by virtue of its efforts and expense to change the law." 770 F.3d at 460.

Further, Plaintiff also does not allege that it is comprised of members that include any Michigan voters, and it also does not sufficiently allege how it, as an institution, has been injured by the challenged provisions. *Lujan*, 504 U.S. at 560-61. In short, Plaintiff does not allege how the Bans have injured it in a manner that could be distinguishable from an alleged hypothetical harm incurred by any actual voter within the State.

To the contrary, Plaintiff raises only general grievances regarding what *may* occur to unidentified voters at some future time. Priorities USA's claims are similar to those considered and easily rejected by the Supreme Court, the Sixth Circuit, and this Court. *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 441 (2007) ("[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." (quotation omitted)); *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 126-28 (6th Cir. 1995) (no standing for resident challenging city charter amendment when she had "suffered no harm, nor will she suffer any greater harm than that of any other voter in the City of Cincinnati"); *Anthony v. Michigan*, 35 F. Supp. 2d 989, 1003 (E.D. Mich. 1999) (no standing for Detroit citizens challenging consolidation of Detroit Recorder's Court because plaintiffs did not "articulate how they [were] *particularly* harmed as a result of the merger") (emphasis in original).

Plaintiff simply has no standing to raise any claims challenging the statutes at issue, and so the Complaint must be dismissed.

2. Plaintiff lacks standing to sue in a representational capacity.

Plaintiff appears to be attempting to invoke the rights of unidentified third-party individuals who are not a party to this suit. But, even in a representational capacity, Plaintiff must still meet the prudential requirements for standing developed by the Supreme Court. *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 206 (6th Cir. 2011) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State* (*Valley Forge*), 454 U.S. 464, 474 (1982)). First, a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge*, 454 U.S. at 474 (internal quotation marks and citation omitted). Second, a plaintiff must present a claim that is "more than a generalized grievance." *City of Cleveland v. Ohio*, 508 F.3d 827, 835 (6th Cir. 2007) (internal quotation marks omitted). Finally, the complaint must "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge*, 454 U.S. at 475 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). "[E]ven when litigants have established a substantial injury from a government action, they 'cannot challenge its constitutionality unless [they] can show that [they are] within the class whose

constitutional rights are allegedly infringed.'" *Smith*, 641 F.3d at 207 (quoting *Barrows v. Jackson*, 346 U.S. 249, 256 (1953)).

Here, Plaintiff is attempting to advance the legal rights of others, i.e. voters and other organizations who purportedly may be affected by the Voter Transportation Ban and the Absentee Ballot Organizing Plan. In this respect, Plaintiff has no particularized injury, and its constitutional rights are not affected by the challenged statutes.

It is true, however, that the Supreme Court has observed that its salutary rule against third-party standing is not absolute. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). The rule "should not be applied where its underlying justifications are absent." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). In deciding when not to apply this rule, the Supreme Court has considered "two factual elements":

> The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Singleton, 428 U.S. at 114-15. "Elsewhere, the [Supreme] Court has described this test as requiring that 'the party asserting the right has a 'close' relationship with the person who possesses the right,' and that there is a 'hindrance' to the possessor's

ability to protect his own interests.'" *Smith*, 641 F.3d at 208 (citing *Kowalski*, 543 U.S. at 130).

But in this case, Plaintiff has neither alleged any "special relationship" to any person who might raise a claim that his or her rights have been violated by the Voter Transportation Ban or the Absentee Ballot Organizing Plan, nor identified any person by name. Moreover, there is no indication that such individuals are incapable of asserting their own rights. The underlying justifications against third-party standing thus apply, and Plaintiff lacks the requisite standing to bring claims based on injuries to third-parties.

Just as the Sixth Circuit observed in *Fair Elections Ohio,* 770 F.3d at 461, "[t]he plaintiffs are organizations and cannot vote; instead they assert the right to vote of individuals not even presently identifiable." The Sixth Circuit rejected the exceptions to the rule against third party standing, finding that none applied. *Id.* There, just as here, the relationship between the plaintiff organization and the persons whom it seeks to help—unidentified, future voters—does not resemble the close relationship of the lawyer-client or doctor-patient relationships recognized by the Supreme Court. (*Id*.)

B. Plaintiff's complaint fails to state a claim upon which relief may be granted regarding the "Absentee Ballot Organizing Plan."

Plaintiff alleges that the "Absentee Ballot Organizing Plan" statutes violate the First and Fourteenth Amendments because (1) the statutes severely burden the

right to vote, (R. 1, Compl., Count II, PgID 13-14), and (2) because they impermissibly infringe on Plaintiff's speech and associational rights, (*Id.*, Count III, PgID 14-15). But Plaintiff's allegations are without merit since the statutes, at best, only minimally burden the right to vote or to speak and associate and are supported by important regulatory interests.

The "right to vote in any manner . . . [is not] absolute," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted); the Constitution recognizes the states' clear prerogative to prescribe time, place, and manner restrictions for holding elections. U.S. Const. art. I, § 4, cl. 1. Indeed, there "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." *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Federal law thus generally defers to the states' authority to regulate the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (Stevens, J., op.) (recognizing that neutral, nondiscriminatory regulation will not be lightly struck down, despite partisan motivations in some lawmakers, so as to avoid frustrating the intent of the people's elected representatives).

When a constitutional challenge to an election regulation requires courts to resolve a dispute concerning these competing interests, courts apply the *Anderson-*

Burdick analysis from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, *supra*, which requires the following considerations:

> [T]he court must first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate. Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally, it 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.

Green Party of Tenn. v. Hargett (Hargett II), 791 F.3d 684, 693 (6th Cir. 2015)(internal quotation marks and citations omitted). "Though the touchstone of *Anderson-Burdick* is its flexibility in weighing competing interests, the 'rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.' " *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (quoting *Burdick*, 504 U.S. at 434).

If a state imposes "severe restrictions" on a plaintiff's constitutional right to vote, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But "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) (citing *Green Party of Tenn. v.*

Hargett (Hargett I), 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at 434). 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.' " *Ohio Democratic Party*, 834 F.3d at 627 (quoting *Hargett I*, 767 F.3d at 546).

1. The statutes only minimally burden the right to vote and are supported by important regulatory interests.

Plaintiff grounds the burden to voters in the fact that "third parties" cannot assist a voter by delivering a voter's AV ballot application to the local clerk unless the third party is a registered voter and the voter affirmatively requests the third party's assistance. (R. 1, Compl., PgID 11, ¶ 23). This is a correct statement of the law. But let's recount the numerous ways voters can return their written requests or form applications to the local clerk; (1) in person, (2) by US mail or some other mail service, (3) by email, (4) by facsimile, (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 household with the voter, and (7) if none of those methods are available, through in-person, mail, or other delivery "by any registered elector." Mich. Comp. Laws §§ 168.759(4)-(6).

There are six methods of delivery a voter may utilize before even getting to the "registered elector" option. And even then, the "registered elector" option does not burden voters. A voter can ask any registered elector in Michigan to deliver or return his or her application. If there is any burden it inures to the registered elector who may wish to assist a voter by delivering his or her application. This is because, as Plaintiff notes, the registered elector cannot solicit or request to deliver the application. Mich. Comp. Laws § 168.759(5). Rather, the voter must ask or request the registered elector to do so. But the law does not prohibit a registered elector from simply reading to, or giving a basic explanation of, the statutorily required instructions as to methods of delivery to a voter. If after doing so the voter requests that the registered elector return his or her form, and the registered elector completes the certificate, there is no violation of the law.

Thus, if Plaintiff wants to engage in GOTV activities in Michigan that include handing out blank AV ballot applications, Plaintiff can staff the event with Michigan registered electors who can read the instructions regarding delivery to the voters, and staff can deliver forms for the voters if the voters thereafter ask staff to do so, and staff completes the certificate.

The burden on the right to vote itself here is non-existent, or at most, minimal. Indeed, Plaintiff has not identified or alleged one single instance where any voter – elderly, a minority, economically disadvantaged or otherwise – was

disenfranchised because he or she was unable to deliver his or her AV ballot application. *See e.g., Northeast Ohio Coal for the Homeless*, 837 F.3d at 631 (6th Cir. 2016) (determining it is error for a court to weigh "the burden that the challenged provisions uniquely place" on a subgroup of voters in he absence of "quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of [those provisions]." While the "registered elector" option for delivery is slightly more involved than the other third-party options, e.g., delivery by family or a person residing in the household, there is a rational reason for this difference. With family members or persons in the household, the State assumes a relationship of trust or accountability between the voter and these third parties where the voter can be assured that his or her application has been properly delivered and can readily inquire as to that fact. And the State will assume, based on these relationships, that the application delivered to the local clerk was properly completed and delivered. In other words, that the identified voter does, in fact, wish to receive and vote an AV ballot.

Outside these relationships, the elements of trust and accountability are or may be reduced. For instance, if a voter attends a GOTV event sponsored by Plaintiff, the "registered elector" with whom a voter interacts may be a complete stranger. In that instance, the State requires more caution. It should be the voter

who decides to entrust a stranger with delivering his or her application. And the State is less trusting as well, requiring that stranger to complete the certificate on the application form identifying himself or herself. That way if there are questions about the application, the local clerk can contact the voter or the registered elector.

Balanced against these minimally burdensome steps is the State's important regulatory interest in protecting the integrity and security of the AV ballot process. Michigan's Constitution expressly provides that the Legislature "shall enact laws . . . to preserve the purity of elections," and to "guard against abuses of the elective franchise[.]" Mich. Const. 1963, art 2, § 4(2). The U.S. Supreme Court has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson* 460 U.S. at 788, n. 9 (1983). In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). And the Supreme Court has held that legislatures are permitted to respond to potential deficiencies in the electoral process with "foresight" rather than "reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

Here, the requirements with respect to delivery by a "registered elector" protect both the voter and the process by helping to ensure that the voter's application is properly delivered, and that the voter identified on an application for an AV ballot does in fact wish to obtain and vote by AV ballot. The very minimal burden created by the requirements, even for elderly or economically disadvantaged voters, is outweighed by the State's important interest in protecting the integrity of the AV ballot process. Plaintiff has thus failed to state a claim in Count II as to unconstitutionality of these statutes.

2. The statutes only minimally burden the right to speech and association.

Plaintiff argues that the AV ballot application statutes burden its speech and associational rights. Plaintiff argues that it "engages in core political speech when it interacts with Michigan voters to educate them on the issues, persuades them to register to vote, and encourages them to vote." (R. 1, Compl., PgID 14, ¶ 33). That may be true, but that is not what is at issue here. Plaintiff seeks to assist voters by delivering their AV ballot applications to their local clerk. This act, however, is not speech.

The U.S. Supreme Court has held that conduct is not "speech" whenever the person engaging in the conduct intends thereby to express an idea. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). Courts have held, for example, that ballot collecting is not presumptively expressive, *Feldman v. Arizona Sec of State's*

Office, 840 F.3d 1057 (9th Cir. 2016), en banc decision on other grounds, 843 F3d 366 (2016), because unlike burning an American flag or wearing a military medial, which "would reasonably be understood by the viewer to be communicative," *U.S. v Swisher*, 811 F.3d 299, 311 (9th Cir. 2016) (internal citation omitted), ballot collection does not convey that type of expressive message. Indeed, ballot collecting does not acquire First Amendment protection just because it is carried out along with protected activities and speech. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (concluding that "combining speech and conduct" is not enough to create expressive conduct); *Voting for Am v. Steen*, 732 F.3d 382, 389 (5th Cir., 2013) ("The Court also has repeatedly explained that non-expressive conduct does not acquire First Amendment protection whenever it is combined with another activity that involves protected speech."). Delivering AV ballot applications arguably falls into this category and is therefore not speech protected by the First Amendment.

But even if it was, as discussed above, any burden imposed by the AV ballot application statutes on Plaintiff is minimal and outweighed by the State's interest in preserving the integrity of the AV ballot application process. Moreover, Plaintiff may assist voters by delivering their AV ballot applications, as long as the voters request Plaintiff's assistance. Plaintiff has thus failed to state a claim in Count III as to unconstitutionality of these statutes.

C. Plaintiff's complaint fails to state a claim upon which relief may be granted regarding the "Voter Transportation Ban."

Plaintiff argues that Mich. Comp. Laws § 168.931(1)(f) is preempted, as to federal elections, by 11 C.F.R. § 114.4, and that it is otherwise unconstitutional under the First and Fourteenth Amendments.

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.

By 1929, the additional language in the provision had been placed elsewhere, and it simply 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. [M.C.L. 1929, § 3298.]

And finally, it was amended[3] to its current version:

> 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*. [Mich. Comp. Laws § 168.931(1)(f) (emphasis added)].

[3] *See*1982 P.A. 201 and 1995 P.A. 261.

The Michigan Election Law does not define "person." But Mich. Comp. Laws § 8.3l provides that "[t]he word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals." *See also*, Mich. Comp. Laws § 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language[.]"). Similarly, the act does not define the term "hire." But the Michigan Court of Appeals has interpreted the term in another context to mean " '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, Inc.*, 2008 WL 2357643, at *3 (Mich. Ct. App., June 10, 2008), quoting *Random House Webster's College Dictionary* (1997). However, it does define "[e]lection" to mean "an election or primary election at which the electors of this state or of a subdivision of this state choose or nominate by ballot an individual for public office or decide a ballot question lawfully submitted to them." Mich. Comp. Laws § 168.2(g).

Under this provision, a person cannot engage the service of a vehicle for payment to transport a voter to an election unless the voter is physically unable to walk to the election. The statute does not otherwise prohibit a person from paying for expenses incurred in transporting a voter by vehicle so long as it does not

amount to hiring for the service.[4] And it does not prohibit a person from providing a voter with free transportation to an election.

1. The statute is not preempted.

Plaintiff alleges that the statute is preempted by 11 C.F.R. § 114.4 and that Defendant should be enjoined from enforcing it with respect to federal elections. (R. 1, Compl., PgID 12, ¶¶ 27-29). Although Plaintiff is not specific as to the type of preemption, based on the text of both the federal and state provisions, it is assumed that Plaintiff is alleging conflict preemption. But there is no conflict between 11 C.F.R. § 114.4 and § 931(1)(f), and therefore, no preemption.

11 C.F.R. § 114.4(d)(1) provides:

> Voter registration and get-out-the-vote drives permitted. A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public. Voter registration and get-out-the-vote drives *include providing transportation* to the polls or to the place of registration. [Emphasis added.]

[4] Such expenses, however, may have to be reported. Michigan's Campaign Finance Act, Mich. Comp. Laws § 169.201 *et seq*., includes within the definition of a reportable "expenditure" an "expenditure made for . . . transporting voters to the polls," Mich. Comp. Laws § 169.206(1)(c), unless it is "[a]n expenditure for . . . nonpartisan get-out-the-vote activities made by an organization that is exempt from federal income tax under section 501(c)(3) of the internal revenue code, 26 USC 501[.]" Mich. Comp. Laws § 169.206(2)(f). Plaintiff is not entitled to the exemption because it is a 501(c)(4) corporation.

The federal statute does not define the word provid[ing], but the American Heritage Dictionary defines it as 1. To furnish; supply. 2. To make ready; prepare. 3. To make available; afford. *American Heritage Dictionary* (2nd Ed, 1982).

Even as to state elections where there is a federal candidate on the ballot, § 931(1)(f) does not conflict with 11 C.F.R. § 114.4. Conflict preemption occurs where compliance with both a federal and state regulation is physically impossible, or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 98 (1992). The federal provision allows Plaintiff to provide transportation to the polls. Consonant with that, the state provision allows Plaintiff to itself provide transportation to the polls. It can utilize its employees or rally volunteers. It simply cannot "hire" or pay a person or entity to transport voters to the polls, unless the voters are physically unable to walk to the polls. Plaintiff argues that in most instances, organizations will "hire individuals to drive." (R. 1, Compl, PgID 7, ¶ 15.) But the federal statute does not guarantee Plaintiff the right to "hire" or pay a person or entity to transport voters, only the opportunity to "provide" transportation. And because the challenged state statute allows Plaintiff to "provide" transportation to the polls, there is no conflict preemption. Plaintiff fails to state a claim as to Count I.

2. The statute only minimally burdens the right to vote and is supported by important regulatory interests.

Plaintiff argues that § 931(1)(f) severely burdens the right to vote because by prohibiting paid drivers the statute reduces the number of drivers able to transport voters, particularly elderly and minority voters, to the polls for an election.

But § 931(1)(f) does not severely burden the right to vote. Surely if this was true Plaintiff could identify at least one instance in which a voter was disenfranchised because he or she was unable to obtain transportation to the polls. *See e.g., Northeast Ohio Coal for the Homeless*, 837 F.3d at 631 (6th Cir. 2016). Notably, as a result of the passage of Proposal 3 in 2018, all qualified electors have "[t]he right, once registered, to vote an absent voter ballot without giving a reason[.]" Mich. Const. 1963, art. 4, § 1(g). Once registered, all voters can vote an AV ballot at all future elections. And the process for obtaining an AV ballot is simple, as discussed above. Voters who do not have or cannot obtain transportation to an election can avail themselves of the AV ballot process.

And if a voter cannot vote an AV ballot for some reason, he or she can still receive free transportation from family, friends, or volunteers of organizations such as churches, labor organizations, and party organizations, or numerous other organizations or entities, including Plaintiff. Indeed, this case is principally about transporting physically *able* voters to the polls. Under the plain language of § 931(1)(f), Plaintiff may provide these voters with free rides to an election or it may

assist voters in obtaining free rides to an election. Moreover, Plaintiff can incentivize volunteer drivers by offering to cover their expenses, such as the cost of gas. Ultimately, any secondary burden on voters, who are not the target of § 931(1)(f), is minimal.

Balanced against these minimal burdens is the State's interest in preserving the integrity of its elections. *See* Mich. Const. 1963, art. 2, §4(2); *Anderson,* 460 U.S. at 788, n. 9. As is plain from the original language of § 931(1)(f), and is true today, the purpose of the prohibition is to protect voters against undue influence. Or more specifically, it is to prevent "quid pro quo" arrangements that may occur when money is exchanged and voters might perceive that they are being offered something of value in exchange for a vote in favor of the candidates or proposals supported by the individual or organization who hired the transportation. This is an important, if not compelling, State interest and Plaintiff has not sufficiently alleged that the State's interest does not outweigh the minimal burden on voting rights. *See Burson v Freeman*, 504 U.S. 191, 199 (1992) (citing *Eu v. San Francisco County Democratic Cen Committee*, 489 U.S. at 228, 229 (1989) (explaining that a State has a compelling interest in protecting voters from undue influence); *Sheldon v. Grimes*¸18 F. Supp. 3d 854 (ED Ky., 2014) (state's interest in protecting absentee voters from undue influence weighed against granting

injunction). Plaintiff thus fails to state a claim in Count II as to the unconstitutionality of § 931(1(f).

3. The statute only minimally burdens the right to speech and association.

Plaintiff argues that § 931(1)(f) impermissibly infringes on its speech and associational rights. (R. 1, Compl., PgID 14-15, ¶33). But driving a voter to an election or arranging for the voter to be driven to an election, like the delivery of AV ballot applications, is not speech. *See, e.g., O'Brien*, 391 U.S. at 376; *Feldman*, 840 F.3d 1057; *Rumsfeld*, 547 U.S. at 66; *Voting for Am*, 732 F.3d at 389. But even if it was, as explained above, any burden imposed by § 931(1)(f) on Plaintiff is minimal and outweighed by the State's important interest in protecting voters from undue influence, which helps preserve the integrity of Michigan's elections. Plaintiff thus fails to state a claim in Count III as to the unconstitutionality of § 931(1(f).

4. The statute does not violate the Equal Protection Clause.

Plaintiff alleges § 931(1)(f), "[a]s applied to voters who are disabled . . . burdens their fundamental right" to vote by "reducing" their opportunity to do so. (R. 1, Compl., PgID 15, ¶ 37). Plaintiff alleges that the statute discriminates on its face against voters who are disabled because it is a carve-out that is "underinclusive." (R. 1, Compl., PgID 16, ¶ 38.) Plaintiff alleges that it "should have included individuals with sight impairments as well as other physical

impairments," (*id.*), and because it does not, it burdens fundamental voting rights (*id.* at § 39). But Plaintiff's interpretation of the statute is overly narrow and not supported by its text.

Subsection 931(1)(f)'s prohibition on hiring transportation does not apply to voters "physically unable to walk [ ] to an election." Mich. Comp. Laws § 168.931(1)(f). The statute does not define the term "physically." But giving it its plain and ordinary meaning, *see* Mich. Comp. Laws 8.3a, it can be understood to mean "in respect to the body." *The American College Dictionary* (1961). Thus, § 931(1)(f) permits paying for transporting voters who cannot walk themselves to an election due to some disability or impairment, whether temporary or permanent, of their "body." This is exception is broad, and as the remedial portion of the statute, it should be liberally construed. *See, e.g*, *Dudewicz v. Norris-Schmid, Inc.,* 503 N.W.2d 645 (1993) (Remedial statutes are to be liberally construed in favor of the persons intended to be benefited.). Contrary to Plaintiff's suggestion, a voter with impaired vision would certainly fall within it. Blindness is an impairment of the body. Plaintiff also mentions "epilepsy, or other motor control impairments that limit the ability to walk unaided." (R. 1, Compl., PgID 8, ¶ 17). But these, too, would fall within the exception. Indeed, Defendant interprets the exception to include any physical impairment or disability that renders a voter temporarily or permanently unable to walk unaided, whether by another individual or by device,

such as a walker, wheelchair, *etc*., to an election. The exception would cover inability to walk due to old age, a temporary illness, or any other physical condition that renders the voter unable to walk to an election.

The Equal Protection Clause prevents states from making distinctions that burden a fundamental right like the right to vote without an important or compelling basis to do so. *Obama for America v. Husted*, 697 F.3d 423, 428-29 (6th Cir. 2012). While Plaintiff alleges that the fundamental right to vote of some subset of disabled voters is burdened by § 931(1)(f), Plaintiff has not sufficiently alleged that the statute draws any lines or makes any meaningful distinctions among disabled voters. *See e.g., Ryan v. City of Detroit*, 174 F.Supp 3d 964, 981 (E.D. Mich 2016) ("Disparate treatment between classes is a threshold requirement for a traditional equal-protection claim.") (citing *Marie v. Am. Red Cross*, 771 F.3d 344, 361 (6th Cir. 2014). Plaintiff thus fails to state a claim in Count IV as to the unconstitutionality of § 931(1(f).

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed above, Plaintiff Priorities USA lacks standing to raise the claims alleged in the Complaint. Alternatively, the Complaint fails to state a claim upon which relief may be granted. For either reason, the Complaint should be dismissed in its entirety.

Respectfully submitted,

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Dated: December 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, 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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