UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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.

NO. 19-13341

JUDGE STEPHANIE DAWKINS DAVIS

MAGISTRATE JUDGE R. STEVEN WHALEN

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

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INTRODUCTION

The Court should enjoin these unconstitutional statutes. Defendant acknowledges that the Absentee Ballot Organizing Ban prohibits political speech and restricts the pool of individuals who can assist voters with their absentee ballot applications. Her (new) interpretation of the Voter Transportation Ban only highlights its vagueness, overbreadth, and unconstitutionality.

ARGUMENT

I. The Court has jurisdiction.

Defendant's jurisdictional arguments here are identical to those she raised in her motion to dismiss and they fail for the same reasons. Dkt. 40 at 15–28.

II. The Absentee Ballot Organizing Ban claims are meritorious.

A. The Absentee Ballot Organizing Ban is vague and overbroad.

Defendant argues that the "conduct" prohibited by the Absentee Ballot Organizing Ban "is clear," based on some *undisclosed* "ordinary, contemporary, and common meaning[]" of the word solicit. Dkt. 30 at 31.[1] It remains unclear however,

[1] Other courts have not found the term so easily defined. *See, e.g.*, *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 106 (D.C. Cir. 2005) (interpreting "solicit" to include so-called "winks, nods, and circumlocutions to channel money in favored directions"); *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992) ("solicitation" included "any speech or conduct that implicitly invites" the proscribed act, "not just explicit verbal requests for" the proscribed act).

for both the public and law enforcement, what is considered solicitation. This lack of clarity chills protected conduct, for Plaintiffs and others. Dkt. 22-1 at 23–25.[2]

B. The Absentee Ballot Organizing Ban regulates election-related speech and cannot withstand any level of scrutiny.

1. The Absentee Ballot Organizing Ban regulates speech.

Defendant argues the Absentee Ballot Organizing Ban restricts only unprotected *conduct* in the form of returning an absentee ballot application. But she expressly acknowledges that the Ban directly regulates, and indeed outlaws, speech: "these statutes prohibit a person from *asking* to return an AV ballot application." Dkt. 30 at 31 (emphasis added). That request is protected political activity, directly involving voting and information about candidates or ballot measures. Defendant does not contest this point. Dkt. 22-1 at 22–23.

2. The restrictions cannot withstand constitutional scrutiny.

When a challenged law implicates protected speech, it must withstand either strict or exacting scrutiny, but the Absentee Ballot Organizing Ban does neither.

Defendant asserts that the Absentee Ballot Organizing Ban's restrictions are based on its "important regulatory interest in protecting the integrity and security of the [absentee voting] ballot process." Dkt. 30 at 36. But Defendant fails to address

[2] Defendant also ignores that it is a misdemeanor to make a false statement on the absentee ballot application, Mich. Comp. Laws § 168.759(8), which includes a certification that the individual returning the application "did not solicit or request to return the application," *id.* §168.759(5).

how the ban is related, in any way, to this interest. She provides no evidence that a voter being asked by someone who is a non-family or household member (who may not be a stranger) poses a greater risk of fraud than a voter making an affirmative request of that same person. Nor does Defendant explain why a registered Michigan voter is more trustworthy than an unregistered Michigan citizen. These unsupported assertions are insufficient to support Defendant's purported interest. *See Meyer v. Grant*, 486 U.S. 414, 426 (1996) (rejecting unsupported allegation that paid petition circulators are more likely to engage in corrupt behavior than volunteers).

Moreover, Defendant fails to even address that the Absentee Ballot Organizing Ban's registered-voter requirement is nearly identical to the one the Supreme Court struck down in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). In fact, Defendant's justification here is identical to the justification the Court rejected in *Buckley*—the desire to follow up with individuals who return the application if questions arise. *Id.* at 196. But, as in *Buckley*, that interest is served by the certification requiring the person returning the application to provide their name, birth date, and address. *Id.* (finding certification "has an immediacy, and corresponding reliability" voter registration lacks).

C. The Absentee Ballot Organizing Ban burdens the right to vote.

Defendant concedes that the Absentee Ballot Organizing Ban at least "minimally burden[s] the right to vote." Dkt. 30 at 33. The court must weigh the

magnitude of that burden "against the precise interests put forward by the State as justifications for the burden imposed by its rule," considering "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quotation marks omitted). Regardless of the burden's magnitude, the court "must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The burden on the right to vote here is severe, but even if it were minimal, the ban would be unconstitutional. Defendant does not address how the registered-voter requirement or prohibition on asking to return an application are connected to a legitimate government interest, let alone what makes them necessary.

D. The Absentee Ballot Organizing Ban is preempted.

Section 208 of the Voting Rights Act expressly provides that "[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*." 52 U.S.C. § 10508 (emphasis added). Full stop. Defendant concedes that the Absentee Ballot Organizing Ban restricts individuals who (a) request to return absentee ballot applications, or (b) are not registered Michigan voters, from returning absentee ballot applications. Dkt. 30 at 31, 33. Michigan voters covered by Section 208 are thus denied the assistance of a person of their choice. Because the laws cannot coexist, the Voting Rights Act preempts the Absentee Ballot Organizing Ban.

III. The Voter Transportation Ban claims are meritorious.

A. The Voter Transportation Ban is vague.

Defendant's interpretation of the Voter Transportation Ban only underscores its vagueness: Defendant contends the statute permits Plaintiffs to "spend any amount of money to transport voters to elections so long as the transportation is not a 'quid pro quo' for the voters' support." Dkt. 30 at 45. But the statutory text cannot and does not bear that construction. Moreover, this new interpretation does not appear in any Attorney General opinions providing guidance for the public or law enforcement, and even if it did, it would not carry the force of law. *Mich. Beer & Wine Wholesalers Ass'n v. Att'y Gen.*, 370 N.W.2d 328, 331 (Mich. Ct. App. 1985).

B. The Voter Transportation Ban cannot withstand scrutiny.

1. The Voter Transportation Ban regulates political expression.

Defendant asserts that driving people to the polls is unprotected conduct, ignoring that organizations that work to transport voters to the polls are part of a common and critical organizing tactic for political and advocacy organizations that seek to encourage voters to participate. Often these efforts are part of a strategy to convince and assist individuals with exercising their fundamental right to vote and build political strategy, which is core political expression. Dkt. 22-1 at 36–37. Indeed, spending money on get-out-the-vote efforts like transporting voters to the polls is itself political speech protected by the First Amendment. *Emily's List v. Fed.*

Election Comm'n, 581 F.3d 1, 16 (D.C. Cir. 2009); *see Buckley v. Valeo*, 424 U.S. 1, 23 (1976).

2. Defendant fails to justify the Voter Transportation Ban.

Defendant's sole justification for the Voter Transportation Ban is to avoid a quid pro quo transaction. But Defendant is curiously silent about the many laws that already address quid pro quo arrangements in voting. *E.g.*, Mich. Comp. Law § 168.931(b)(i). In addition, there is no evidence to suggest that paying drivers, renting cars, or otherwise paying money to convey voters to the polls would contribute to corruption any more or less than using employee or volunteer drivers.[3]

C. The Voter Transportation Ban burdens the right to vote.

Defendant concedes the Voter Transportation Ban at least minimally burdens the right to vote, and her justification for this burden fails for the same reason she cannot justify the burden on speech or political expression.

D. The Voter Transportation Ban is preempted.

The Federal Election Campaign Act ("FECA") contains an express preemption provision, 52 U.S.C. § 30143, which is further defined by regulation, 11 C.F.R. § 108.7. Defendant completely fails to address the text, let alone the scope, of FECA's express preemption provision, addressing only conflict preemption.

[3] *Cf. Meyer*, 486 U.S. at 426 (refusing to accept unsupported allegations that paid petition circulators are more likely to engage in corrupt behavior than a volunteer motivated by an interest in the outcome).

And even that limited analysis is flawed. Defendant argues that the Voter Transportation Ban allows "providing transportation" under 11 C.F.R. § 114.4(d)(1). But the words "provide transportation" appear in regulations relating exclusively to *disbursement*s. That is, FECA allows the spending of money to provide transportation. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (holding words of a statute must be read in their context).

IV. The remaining factors favor Plaintiffs.

While Plaintiffs will be irreparably harmed absent an injunction, Defendant will be unaffected, a point she concedes by arguing only that the State is harmed when an existing law cannot be enforced.

Dated: March 3, 2020

Respectfully submitted,

By: /s/ Marc E. Elias

Kevin J. Hamilton
PERKINS COIE LLP
1201 3rd Ave.
Seattle, WA 98101
Telephone: (206) 359-8000
Facsimile: (206) 359-9741
khamilton@perkinscoie.com

Sarah S. Prescott, Bar No. 70510
SALVATORE PRESCOTT & PORTER, PLLC
105 E. Main Street
Northville, MI 48168

Attorneys for Plaintiffs

Marc E. Elias
Christopher J. Bryant
Courtney A. Elgart*
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
melias@perkinscoie.com
cbryant@perkinscoie.com
celgart@perkinscoie.com

Attorneys for Plaintiffs

*Seeking Admission to E.D. Mich.

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 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.

LOCAL RULE CERTIFICATION

I, Marc Elias, certify that this document and complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that this reply brief complies with the page limit for reply briefs. Local Rule 7.1(d)(3).

Respectfully submitted,

By: /s/ Marc E. Elias

Marc E. Elias
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
melias@perkinscoie.com