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,

Case No. 19-13341

v.

HONORABLE STEPHANIE D. DAVIS
MAGISTRATE R. STEVEN WALEN

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

Defendants

and

THE MICHIGAN SENATE, THE
MICHIGAN HOUSE OF REPRESENTATIVES,
THE MICHIGAN REPUBLICAN PARTY and THE
REPUBLICAN NATIONAL COMMITTEE,

Intervening-Defendants.
______________________________/

THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES' RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY AND PERMANENT INJUNCTION

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Mich. Comp. Laws § 168.759

CONCISE STATEMENT OF ISSUES PRESENTED

1. Michigan's citizens, through the Michigan Constitution, compel the Legislature to pass laws "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." Mich. Const. 1963, art 2, § 4. Plaintiffs attack two such laws here: Mich. Comp. Laws § 168.759, which regulates the process of distributing and collecting absentee ballot applications, and Mich. Comp. Laws § 168.931(f), which prohibits hiring a motor vehicle to transport voters to the polls. Neither law regulates expressive conduct, thus both are subject to rational basis review. The state's compelling and oft-recognized interest in preventing fraud and corruption justifies these statutes. Both statutes use clear, everyday language and are clear about the conduct regulated, so neither is vague. And neither statute is preempted by federal law. Under those circumstances, should the Court take the extraordinary step of enjoining Michigan election laws in the run-up to an election?

The Legislature answers "No."

Plaintiffs answer "Yes."

Attorney General Nessel answers "No."

The Michigan Republican Party and National Republican Party answer "No."

This Court should answer "No."

I. INTRODUCTION

For over 160 years, the Michigan Legislature has "been specifically commanded by the people 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*, 740 N.W.2d 444 (Mich. 2007). The people of Michigan, through the 1963 Michigan Constitution, further command the Legislature to "regulate the time, place and manner of all nominations and elections" and to "provide for a system of voter registration and absentee voting." Mich. Const. 1963, art 2, § 4.

To further its constitutional imperative, the Legislature has passed various statutes, two of which are under attack here. Specifically, Plaintiffs attack Mich. Comp. Laws § 168.759, which regulates the process of distributing and collecting absentee ballot applications, and Mich. Comp. Laws § 168.931(f), which prohibits hiring a motor vehicle to transport voters to the polls. These laws are important protections against fraud and corruption, and they ensure the integrity of the ballot box. Plaintiffs argue that these statutes are unconstitutional. They are wrong.

Plaintiffs are not entitled to the extraordinary remedy of an injunction because they cannot demonstrate a likelihood of success on the merits. In addition, there is no imminent, irreparable harm, and the public interest militates against an injunction. Plaintiffs' motion should be denied.

II. STATEMENT OF FACTS

A. Michigan's Constitution compels the Legislature "to preserve the purity of elections," "to guard against abuses of the elective franchise," and "to provide for a system of . . . absentee voting."

Though Plaintiffs focus their attention on two narrow slices of the Michigan Election Code, an analysis of those sections requires a broader understanding of the Michigan Constitution's relevant provisions. The Michigan Constitution grants the Legislature the "legislative power of the State." Mich. Const. 1963, art 4, § 1. It also provides that it is exclusively the Legislature's role "to regulate the time, place and manner of all nominations and 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." Mich. Const. 1963, art 2, § 4. To carry out its constitutional duty, the Michigan Legislature has enacted statutes to protect the integrity of Michigan's elections, including those at issue here.

B. Mich. Comp. Laws § 168.759: Michigan's Prohibition of the Unauthorized Distribution and Solicitation of Absentee Ballot Applications.

Section 759 of the Michigan Election Law governs absentee ballot applications. Though Plaintiffs only attack several discreet provisions, an overall understanding of the framework is required. An elector may apply for an absentee 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 where the elector is registered. *Id.* Section 759 continues:

> (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.
> >
> > (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 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. [Mich. Comp. Laws §§ 168.759(3) – (5).]

A form application must contain the following warning:

> 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, a registered elector returning an absentee ballot application must sign a certificate affirming:

> 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 Section 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. [Mich. Comp. Laws § 168.759(6).]

Section 759(8) states 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).

Plaintiffs attack two aspects of this statute. First, they allege that it is unconstitutional to limit the individuals authorized to return an absentee ballot application to other registered electors. Second, they allege that the provisions preventing individuals from "soliciting or requesting to return" others absentee ballot applications are unconstitutional.

C. Mich. Comp. Laws § 168.931 – Michigan's Prohibition of Payment for Transportation to Elections.

Plaintiffs also challenge one specific provision of Section 931 of the Michigan Election Law, which consists of various protections against undue influence and corruption. For example, Section 931(1)(a) makes it a misdemeanor to promise or lend something of valuable consideration in exchange for a vote; Section 931(1)(d) makes it a misdemeanor to threaten someone's employment unless they vote for a particular candidate; and Section 931(1)(e) prohibits religious leaders from threatening religious penalties to influence votes. Plaintiffs do not challenge any of these protections. The particular section that Plaintiffs take issue with—Section 931(1)(f)—makes it a misdemeanor to pay for a voter's transportation to an election:

> (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).]

III. ARGUMENT

Plaintiffs ask this Court to grant the extraordinary remedy of enjoining long-established election statutes in the run-up to an election based strictly on questionable legal arguments and a promise to fill in gaps later. The Court must decline that invitation. Plaintiffs simply cannot meet the extremely high bar required for the relief they seek.

A. Legal Standard for Preliminary Injunction

Preliminary injunctions are "one of the most drastic tools in the arsenal of judicial remedies." *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001) (quoting *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 273 (2d Cir. 1986)). The standard is even higher where—as here—the injunction will *alter* rather than maintain the status quo. *See generally*, *Huron Valley Pub. Co. v. Booth Newspapers, Inc.*, 336 F. Supp. 659 (E.D. Mich. 1972); *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27 (2nd Cir. 1995); *Rathmann Group v. Tanenbaum*, 889 F.2d 787 (8th Cir. 1989).

In evaluating whether a Plaintiff is entitled to the extraordinary remedy of injunctive relief, courts in the Sixth Circuit consider whether Plaintiffs have established the following elements:

> (1) a strong or substantial likelihood of success on the merits;
>
> (2) the likelihood of irreparable injury if the preliminary injunction does not issue;
>
> (3) the absence of harm to other parties; and
>
> (4) the protection of the public interest by issuance of the injunction. *Id*.

These factors are not prerequisites to the grant or denial of injunctive relief, but factors that must be "carefully balanced" by the district court in exercising its equitable powers. *Frisch's Rest., Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985); see also *S. Galzer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017) ("[T]hese are factors to be balanced, not prerequisites to be met.").

"The party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances." *Cummings v. Washington*, No. 2:20-CV-65, 2020 WL 2764364, at *6 (W.D. Mich. May 28, 2020) (citing *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002); *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances

clearly demand it." *Overstreet*, 305 F.3d at 573 (cleaned up). This "extraordinary" remedy "should best be used sparingly." *Jerome–Duncan, Inc. v. Auto–By–Tel, L.L.C.*, 966 F.Supp. 540, 541 (E.D. Mich.1997).

B. Plaintiffs have not shown a strong likelihood of success on the merits.

Following this Court's decision on the Attorney General's Motion to Dismiss, which dismissed Plaintiffs' undue burden claims (Dkt. 59), six counts remain—three against each of the challenged provisions. But Plaintiffs are not likely to succeed on any of those claims.

1. Section 759—the prohibition on the unauthorized distribution and solicitation of absentee ballot applications—is a valid and constitutional exercise of the Legislature's authority.

Plaintiffs' challenge to Section 759 will fail on the merits. First, the distribution and collection of applications is non-expressive conduct, the regulation of which is reviewed for rational basis (which is easily met here). Second, the statute is not vague; it is easily understandable by a person of ordinary intelligence. Finally, the statute is not preempted by the Voting Rights Act.

a. Section 759 does not violate the First Amendment.

Plaintiffs urge this Court to apply exacting scrutiny to Section 759. That is not the correct test. Rather, the Court should apply the *Anderson-Burdick* balancing test, which in this case requires a rational-basis examination.

An allegation that a voting law unduly burdens the right to vote is properly

analyzed under the *Anderson-Burdick* framework set out in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020).

Under *Anderson-Burdick*, the Court first examines the burden the regulation imposes on the right to vote. *Burdick*, 504 U.S. at 434. When the regulation imposes "reasonable nondiscriminatory restrictions" on the right to vote, a court will apply rational basis review and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788). But when states impose severe restrictions on the right to vote, such as poll taxes, strict scrutiny applies. *Burdick*, 504 US at 434. Between these extremes, the flexible *Anderson-Burdick* test creates an intermediate level of scrutiny. Where the burden on the right to vote is moderate, courts weigh that burden against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Section 759 is a reasonable, nondiscriminatory statute that does not infringe on First Amendment rights and ought to be reviewed for rational basis.

Courts analyzing analogous statutes reject strict or exacting scrutiny. The Fifth Circuit's opinion in *Voting for Am., Inc. v. Steen* is instructive here. 732 F.3d 382 (5th Cir. 2013). The statute at issue in *Steen* governed various aspects of voter-

registration organization; one particular provision—especially on point here—prohibited non-Texas residents from serving as "Volunteer Deputy Registrars" who collect and handle completed registration forms. *Id.* at 385. *Steen*'s plaintiffs, like Plaintiffs here, argued that this violated their First Amendment rights of speech and association because their out-of-state members could not handle completed forms. *Id.* at 389. The Fifth Circuit rejected the plaintiffs' invitation to apply exacting scrutiny, holding that there "is nothing 'inherently expressive' about receiving a person's completed application and being charged with getting that application to the proper place." *Id.* at 392 (cleaned up). The Court therefore held that "rational basis scrutiny is appropriate." *Id.*

Just so here. Like Texas's limit on those permitted to serve as Volunteer Deputy Registrars, Section 759's limits on who can handle absentee ballot applications and restriction of the solicitation of absentee ballot applications "do not in any way restrict or regulate who can advocate" for absentee voting, "the manner in which they may do so, or any communicative conduct." *Id.* at 392. Rather, Section 759 merely regulates the mechanics of the completion and submission of applications—"non-expressive activities." *Id.* Indeed, as *Steen* noted, Michigan could constitutionally claim the distribution and receipt of absentee ballot applications for itself as a purely government function. *Id.* at 391 n. 4 ("Because collecting and delivering completed registration forms are not speech, Texas could

prohibit private persons from engaging in these activities.”). While Michigan’s lawmakers have not, in their collective wisdom, chosen to impose such a prohibition, it reinforces the point that Michigan’s protections on the absentee-voter-application process are subject to rational-basis scrutiny.

Likewise, in *American Association of People With Disabilities v. Herrera*, the statute at issue imposed criminal penalties on third-party voter organizations for violations of various restrictions on the collection and handling of voter registration applications. 580 F. Supp. 2d 1195, 1206 (D.N.M. 2008). For example, New Mexico’s law criminalized handling ballots above a numerical limit and holding ballots longer than 48 hours. *Id.* Like Plaintiffs here, *Herrera*’s plaintiffs alleged that the New Mexico statute violated their First Amendment rights by imposing penalties on get-out-the-vote activities. *Id.* The court determined that the challenged law was “subject to the *Anderson* balancing and not to the strict scrutiny that the Plaintiffs urge.” *Id.* at 1227.

In rejecting strict scrutiny, the *Herrera* court relied on characteristics of the New Mexico law that are just like Section 759. The court noted that the New Mexico statute “is a content-neutral limitation” and “places reasonable limits on the manner in which the Plaintiffs conduct their association.” *Id.* at 1229. The same is true here. Section 759 is content neutral. Indeed, Section 759’s protections apply the same to *any* person or group distributing or soliciting absentee ballot applications—

conservative, progressive, party-affiliated, independent, and everything in between. *Herrera*'s holding that strict scrutiny is "improper" is therefore persuasive here. *Id.* at 1228. *See also League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1323 (S.D. Fla. 2008) (holding that "[s]trict constitutional scrutiny is . . . inappropriate" where law concerning handling of voter registration applications was "facially neutral.").

For their argument that Section 759 deserves exacting or strict scrutiny, Plaintiffs rely on *Meyer v. Grant,* 486 U.S. 414 (1988), and *Buckley v. Am. Constitutional Law Found.,* 525 U.S. 182 (1999). But those cases are easily distinguishable because they do not involve the sign-up of absentee voters. What *Meyer* and *Buckley* actually involve are petition drives—a political expression of the petition circulator. "Put otherwise, while voter registration drives [or drives to sign up absentee voters] involve core protected speech, they are factually distinct from the circulation of petitions addressed by the Supreme Court in *Meyer* and *Buckley*." *Steen*, 732 F.3d at 390 (cleaned up). "Petitions by themselves are protected speech, and unlike a completed voter registration form, they are the *circulator's* speech." *Id.* Assuming arguendo that an absentee ballot application is speech, "it is the voter's speech indicating his desire to [receive an absentee ballot;]" it is decidedly *not* the speech of the third-party organization seeking to collect absentee ballot applications. *Id.* Thus, there is no First Amendment expression in collecting an application and

delivering it the clerk.

Plaintiffs' reliance on *Tennessee State Conference of N.A.A.C.P. v. Hargett* is likewise misplaced. 420 F. Supp. 3d 683, 702 (M.D. Tenn. 2019). *Hargett* involved laws governing voter-registration drives, but there are critical distinctions that drove the result in *Hargett* and cut against exacting scrutiny here. The *Hargett* court emphasized that talking with a potential voter about whether to register is inherently political in nature. As the *Hargett* court noted, "the creation of a new voter is a political change—no less so than the inauguration of a new mayor or the swearing-in of a new Senator." *Id.* at 702. "A discussion of whether or not a person should register to vote, moreover, inherently 'implicates political thought and expression.'" *Id.* at 703 (quoting *Buckley*, 525 U.S. at 195). "Registering to vote is not a politically neutral act, and neither is declining to [register]. . . . The way that the person encouraging registration responds to or preempts the objections people have to voting will, therefore, often bear on fundamental questions at the heart of the political system." *Id.*

Distributing and soliciting absentee ballot applications—unlike the voter registration drives discussed in *Hargett*—*is* politically neutral. Distributing and soliciting absentee ballot applications does *not* create a new voter, rather it changes the *process* by which an existing voter will cast her ballot. Likewise, the decision to vote absentee instead of in-person is a decision of voter-convenience—hardly a

question "at the heart of the political system." *Hargett*, 420 F. Supp. 3d at 703. As explained above, laws affecting voter-registration drives do not warrant exacting scrutiny. See *Steen*, 732 F.3d 382; *Herrera*, 580 F. Supp. 2d 1195; *Browning*, 575 F. Supp. 2d 1298. But even if they did, laws concerning the distribution and collection of absentee ballot applications certainly do not. The appropriate scrutiny under the *Anderson-Burdick* framework is rational basis.

Having established that Section 759 is subject to rational-basis review, Plaintiffs' unlikelihood of success on the merits becomes apparent. The Sixth Circuit recognizes that when rational-basis review applies to election laws "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).

Michigan's compelling interests in regulating the distribution and return of absentee ballot applications would satisfy strict scrutiny and therefore easily satisfy the appropriate rational-basis standard. First, Michigan has an interest in regulating absentee voting applications to prevent fraud. There is no doubt that a state has an interest in preventing fraud and the dilution of valid votes. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (holding that "the State has a *compelling* interest in preventing fraud") (emphasis added); see also *Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 196 (2008) ("While the most effective

method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."); *Storer v. Brown,* 415 U.S. 724, 730 (1974) (noting that a state has the power to engage in "substantial regulation of elections" in order to ensure elections are fair, honest, and orderly). And the "purity of the ballot is more difficult to preserve when voting absent than when voting in person." *State ex rel. Whitley v. Rinehart*, 192 So. 819, 823 (Fla. 1939). This compelling interest justifies Section 759's protections.

But the Court need not wade into considerations of outright fraud to recognize Michigan's substantial interest in protecting the absentee-voter-application process. By regulating the distribution and collection of absentee ballot applications and limiting those who are permitted to transport the applications, the state increases accountability and protects against instances of carelessness. They increase the faith that an individual voter has that her vote will be delivered properly and counted. Courts recognize various problems with third-party collection of absentee-ballot applications, ranging from "hoard[ing]" applications, to "fail[ing] to submit applications" by the deadline, to "fail[ing] to submit applications at all." *Browning*, 575 F.Supp.2d at 1324. By only allowing registered electors to transport absentee ballot applications, Section 759 ensures that the person is a civic-minded individual, whose information is already on record with the state, and who is subject to subpoena power in Michigan. And by requiring that the voter "request" assistance from

anyone other than a relative or house-hold member, it ensures that the registered elector is someone the voter trusts. These important checks ensure accountability on the part of those handling the applications and promote faith in the absentee-voting system.

These interests are especially pronounced in Michigan, where the Michigan Constitution itself provides that it is the exclusive role and duty of the Legislature "to regulate the time, place and manner of all nominations and 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." Mich. Const. 1963, art 2, § 4.

Moreover, Plaintiffs' requested relief—a declaration that the entirety of Section 759 is unconstitutional—makes their row to hoe even tougher. Plaintiffs facially challenge Section 759. "Facial challenges are disfavored for several reasons." *Washington State v. Grange*, 552 U.S. 442, 450 (2008). First, "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Id.* (cleaned up). Facial challenges "also 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 applied." *Id.* (cleaned up).

Finally, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451. Because facial challenges are frowned upon, Plaintiffs "bear a heavy burden in demonstrating a substantial likelihood of success[.]" *Browning*, 575 F. Supp. 2d at 1314; see also *Crawford*, 553 U.S. at 200 ("Given the fact that petitioners have advanced a broad attack on the constitutionality of [the election regulation], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.").

Section 759 is a valid and constitutional exercise of the Legislature's duty to enact laws to "preserve the purity of elections," "to guard against abuses of the elective franchise," and "to provide for a system of . . . absentee voting." Mich. Const. 1963, art 2, § 4. The appropriate standard of review is for rational basis. And Michigan's compelling state interests satisfy any standard of review. Accordingly, Plaintiffs are not likely to succeed on the merits of this claim.

b. Section 759 is clear and understandable.

The Sixth Circuit is clear: a statute should not be struck as facially vague unless a plaintiff has "demonstrated that the law is impermissibly vague in *all* of its applications." *Green Party v. Hargett,* 700 F.3d 816, 825 (6th Cir. 2012), quoting *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates Inc.,*455 U.S. 489, 497 (1982). "[P]erfect clarity and precise guidance have never been required even of regulations

that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 1845, 170 L. Ed. 2d 650 (2008), quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). "[F]ederal courts must construe challenged state statutes, whenever possible, so as "to avoid constitutional difficulty." *Davet v. City of Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006) (cleaned up). "Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Chapman v. United States*, 500 U.S. 453, 464, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

There are two circumstances under which a law may be challenged for vagueness: "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), citing *Chicago v. Morales*, 527 U.S. 41, 56–57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Section 759 is not vague under either test.

Plaintiffs argue that Section 759 is vague in prohibiting a person from "solicit[ing] or request[ing] to return" an absentee ballot application. Dkt. 22-1, Plfs' P.I. Brf., p 29. Plaintiffs lament that Section 759 "does not provide any guidance on what it means to solicit or request to return an absentee ballot application." *Id.* at 30.

Plaintiffs' suggestion that Section 759 needs additional guidance is meritless. The language that Plaintiffs complain about is readily understandable to a person of ordinary intelligence. The statute plainly prohibits a person—other than those specifically permitted under Section 759—from asking to return another person's absentee ballot application. No additional interpretation is necessary; the statute's words are common, everyday words that an ordinary person can understand without difficulty. And because the statute's protections are constitutional, as explained at length above, Plaintiffs' attempt to graft a vagueness challenge onto the First Amendment challenge must be rejected.

Plaintiffs attempt to draw the Court in with a misleading parade of "what ifs." But that is not the appropriate analysis. "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill*, 530 U.S. at 733 (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)). Section 759 is valid and understandable; that Plaintiffs can draw up hypotheticals in which their members might not know whether their conduct is proscribed by Section 759 does not defeat it. The law requires just the opposite.

To the extent any part of Section 759 could be deemed vague, this Court should abstain from interpreting an unsettled element of state law, in accordance with *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). "[T]o invoke

Pullman abstention, a district court must ask whether the state statute is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question . . . ." *Jones v. Coleman*, 848 F.3d 744, 752 (6th Cir. 2017) (cleaned up). "[T]raditional abstention principles apply to civil rights cases." *Romero v. Coldwell*, 455 F.2d 1163, 1167 (5th Cir. 1972) (abstaining in a one-man, one-vote case). Here, no Michigan court has interpreted the provisions that Plaintiffs object to. Thus, abstaining to allow a Michigan Court to interpret the statute may eliminate the federal constitutional question.

At bottom, Plaintiffs are not likely to succeed on the merits of their vagueness claim.

c. The Voting Rights Act does not preempt Section 759.

Plaintiffs argue that Section 759's prohibition on the unauthorized distribution and solicitation of absentee ballot applications violates the Voting Rights Act and is therefore preempted. But this claim is individual to a voter who is aggrieved by the purported violation. No individual voter is a party here, so this claim fails for that reason alone. Moreover, there is no conflict between Section 759 and the Voting Rights Act.

The Court has already determined as a matter of law that Plaintiffs do not have standing, in a representative capacity, to bring claims that are individual in nature. *See* May 22, 2020 Opinion and Order, Dkt. 59, p. 26. The Voting Rights Act

preemption claim is just such an allegation. That is, the Voting Rights Act protects individual voters—*not* organizations like Plaintiffs. The person aggrieved by the purported conflict that Plaintiffs identify is the *voter* who Plaintiffs claim will not be able to have her absentee ballot application returned. Any cause of action alleging that the Voting Rights Act preempts Michigan election law belongs to that individual voter, not a third-party organization trying to help them.

This view is consistent with the language and intent of the Voting Rights Act. Congress amended the Voting Rights Act in 1975 to confer standing upon all "aggrieved persons." The Supreme Court has reiterated that "any person whose right to vote is impaired has standing to sue." *Gray v. Sanders*, 372 U.S. 368, 375 (1963) (emphasis added). The Plaintiffs are institutions, not "aggrieved persons" under the Voting Rights Act. Accordingly, they lack standing to bring the Voting Rights Act claim.

Even if Plaintiffs had standing to bring claims under the Voting Rights Act, their claim that Section 759 is preempted fails. 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). Because Michigan's prohibition on the unauthorized prohibition and solicitation of absentee ballots does not "stand[] as an obstacle to the

accomplishment and execution" of Congress's objectives, there is no preemption.

Section 208 of the Voting Rights Act provides as follows:

> Any 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.

Plaintiffs ask this Court to construe "a person of the voter's choice" to mean that the voter may choose *any* person, without limitation, so the "registered elector" requirement in Section 759 must conflict. Under Plaintiffs' interpretation, Michigan would have to let an incarcerated person out of prison or tolerate a six-year-old transporting absentee ballot applications if those were the "persons" the applicant requested. Such a construction is absurd; indeed, nothing in Section 208 bars a state from reasonably restricting the individuals permitted to return absentee ballot applications.

It is beyond debate that the Supreme Court allows the states to regulate elections, provided that those restrictions are reasonable and non-discriminatory. "The language of Section 208 allows the voter to choose a person who will assist the voter, but it does not grant the voter the right to make that choice without limitation." *Ray v. Texas*, No. 06-CV-385, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008). Section 208's legislative history supports the view that it does *not* usurp a state's right to impose reasonable regulations in this area of election law: "[T]he committee has concluded that the only kind of assistance that will make fully 'meaning' the

vote of the blind, disabled, or those who are unable to read or write is to permit them to bring into the voting booth a person whom the voter trusts and who cannot intimidate him." S. Rep. 97-417, 1982 U.S.C.C.A.N. 177. Indeed, at least one other district court has recognized that "[t]he legislative history evidences an intent to allow the voter to choose a person whom the voter trusts to provide assistance. It does not preclude all efforts by the State to regulate elections by limiting the available choices to certain individuals." *Ray*, 2008 WL 3457021, at *7.

State courts confronted with this same preemption question on similar laws have held reached the same conclusion. In *Qualkinbush v. Skubisz*, the Appellate Court of Illinois held that an Illinois statute limiting the persons eligible to return an absentee ballot did not conflict with the Voting Rights Act. 826 N.E.2d 1181 (Ill. Ct. App. 2004). *See also DiPietrae v. City of Philadelphia*, 666 A.2d 1132, 1133 (Pa. Commw. Ct. 1995) (upholding a Pennsylvania statute limiting the persons for whom individuals may act as agents to obtain absentee ballot applications, deliver absentee ballot applications, obtain absentee ballots, or deliver completed absentee ballots).

The prohibition on the unauthorized distribution and solicitation of absentee ballot applications is nearly identical to the laws addressed in *Ray*, *Qualkinbush*, and *DiPietre*. In each of those cases, the courts recognized the states' right to impose reasonable, non-discriminatory restrictions on who could assist with the delivery of

absentee ballots or applications, notwithstanding Section 208. In each case, the court found that the statute at issue did not conflict with Section 208 and, therefore, upheld the statute. Michigan's prohibition on the unauthorized distribution and collection of absentee ballots is not preempted by Section 208.

2. Section 931(1)(f) - The prohibition of payment for transportation to elections is a valid and constitutional exercise of the Legislature's authority.

Plaintiffs' challenge to Section 931(1)(f), which prohibits hiring a motor vehicle to transport a voter to the polls, will also fail on the merits. First, it governs non-expressive conduct, regulations of which are reviewed for rational basis—a standard easily met here. Second, the statute is not vague; people of ordinary intelligence can easily understand it. Finally, the statute is not subjection to express or conflict preemption.

a. The prohibition of payment for transportation to elections is constitutional.

Like Section 759, Section 931(1)(f) is subject to rational-basis review rather than the strict scrutiny Plaintiffs seek. Again, under *Anderson-Burdick*, the Court first examines the burden the regulation imposes on the right to vote. *Burdick*, 504 U.S. at 434. As explained in detail above, when the regulation imposes "'reasonable nondiscriminatory restrictions'" on the right to vote, a court will apply rational basis review, and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788). Closer scrutiny

accompanies severe restrictions like poll taxes, and a flexible intermediate scrutiny exists between the two poles. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The protections in Section 931(1)(f) are reasonable and nondiscriminatory and do not burden Plaintiffs' rights. Thus, rational-basis review is appropriate, and Michigan's crucial regulatory interests support the statute's constitutionality.

Section 931(1)(f) provides:

> 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).

Contrary to Plaintiffs' argument, this provision—which regulates non-expressive conduct only—does not implicate the First Amendment. The Fifth Circuit's decision in *Steen* is again instructive. As discussed, *Steen* concerned various aspects of voter-registration organization, including the process by which certain individuals could be deputized to transport completed registration forms. 732 F.3d at 385. The Fifth Circuit rejected the plaintiffs' invitation to apply exacting scrutiny to this law, holding that there "is nothing 'inherently expressive' about receiving a person's completed application and being charged with getting that application to the proper place." *Id.* at 392 (cleaned up).

Driving a voter is exactly like driving a completed application or a completed ballot. There is nothing inherently political or expressive about the act of ensuring that voters get from Point A to Point B—unless the purpose of the transportation is

to influence the voter's choice, which even Plaintiffs agree is improper. Thus, Section 931(1)(f) is subject to rational-basis scrutiny.

Trying to invoke strict scrutiny, Plaintiffs again point the Court to *Meyer* and *Buckley*. But those cases are easily distinguishable here, too, because they involve petitions. *Meyer,* 486 U.S. 414; *Buckley*, 525 U.S. 182. "Petitions . . . are the *circulator's* speech." *Steen*, 732 F.3d at 390. But a voter's decision to get herself to the polls "is the voter's speech," not the "speech" or "expression" of the person or group that endeavors to get that voter to the polls. *Id.* Because there is no expressive conduct in the act of transporting a person from Point A to Point B (nor in paying for that action to take place) *Meyer* and *Buckley* do not apply and the proper scrutiny is rational basis.

Plaintiffs also argue that Section 931(1)(f) unconstitutionally imposes a $0 spending limit on an avenue of political speech. But transporting voters from Point A to Point B is not political speech or expressive conduct, as explained above. Plaintiffs would have the Court apply *Citizens United*, where an organization was prohibited from spending money to air a documentary critical of a particular candidate. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 354 (2010). But the two situations could hardly be more different. Perhaps *Citizens United* would matter if Michigan law prohibited paying a billboard truck or a sky-writer, but that is not this case. Michigan law simply prohibits paying for transportation—

an inherently non-expressive action that does not implicate the First Amendment.

Moreover, Section 931(1)(f) is content-neutral. The prohibition on paying for voter transportation applies to all candidates, political parties, unions, corporations, and individuals—anyone considered a "person" under Michigan law. See Mich. Comp. Laws § 8.31. In its collective wisdom, the Michigan Legislature prohibited *anyone* from paying for voters' transportation to the election.

Michigan's compelling interest in the prevention of fraud and undue influence justifies any minimal burden on Plaintiffs. The Sixth Circuit has recognized that under these circumstances—that is, where the minimally burdensome statute is subject to rational-basis review—"the State's important regulatory interests are generally sufficient to justify the restrictions." *Ohio Council 8*, 814 F.3d at 335.

There is no doubt that a state has an interest in preventing fraud and the dilution of valid votes. *Initiative & Referendum Inst.*, 241 F.3d at 616 (holding that "the State has a *compelling* interest in preventing fraud") (emphasis added); see also *Crawford,* 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."); *Storer,* 415 U.S. at 730 (noting that a state has the power to engage in "substantial regulation of elections" in order to ensure elections are fair, honest, and orderly). Likewise, "it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and

campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

The potential for fraud and corruption in this area is apparent on its face. One potential evil thwarted by Section 931(1)(f) is a *quid pro quo* exchange for transportation to the polls. Indeed, as the Attorney General compellingly explains in her response to the Motion for Preliminary Injunction, earlier versions of this provision specifically prohibited *quid pro quo* arrangements. But the elimination of the *quid pro quo* language shows the Legislature recognized that injecting money into this otherwise innocuous part of the voting process creates an unnecessary risk of corruption, even in the absence of an express exchange.

The Legislature disagrees with Attorney General Nessel's suggestion in her response that "Plaintiffs can 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 of particular candidates or ballot proposals supported by Plaintiffs." Dkt. 30, AG's Resp to Mot. for P.I., p. 45. This interpretation is not consistent with the statutory language, which prohibits paying for others transportation to the polls. See *Fluor Enterprises, Inc. v. Revenue Div., Dep't of Treasury*, 730 N.W.2d 722, 725 (Mich. 2007) ("If the statute is unambiguous it must be enforced as written") (cleaned up). As explained above, the statute makes good sense as written. Surely, the state has an interest in preventing an organization from sending a bus loaded with opulent

food and drink and plastered with a preferred candidate's face to undecided voters' homes. The statute is valid as written and should be interpreted without further construction.

That Michigan may not have suffered a recent spate of voter-intimidation or vote-buying incidents associated specifically with paid transportation to the polls is no help to Plaintiffs. Indeed, the U.S. Supreme Court easily dispensed with such an argument in *Burson v. Freeman*, 504 U.S. 191 (1992). "The fact that these laws have been in effect for a long period of time," it reasoned, "makes it difficult for the States to put on witnesses who can testify as to what would happen without them." *Id.* at 208; *see also id.* at 214–16 (Scalia, J., concurring). And to the extent Plaintiff tries "to minimize the risk of vote buying as a relic of a bygone electoral era," the Sixth Circuit has recognized that "plenty of cases—in this circuit alone—show otherwise." *Crookston v. Johnson*, 841 F.3d 396, 400 (6th Cir. 2016), citing *United States v. Robinson*, 813 F.3d 251, 254 (6th Cir. 2016) (affirming a vote-buying conviction); *United States v. Turner*, 536 Fed. App'x 614, 615 (6th Cir. 2013) (same); *United States v. Young*, 516 Fed. App'x 599, 600–01 (6th Cir. 2013) (same).

Plaintiffs also suggest that Michigan has no interest in regulating paid voter transportation because other Michigan statutes prohibit *quid pro quo* arrangements. But that flips the analysis on its head. In Plaintiffs' world, the Court would be obligated to strike down a law restricting the sale of fireworks because we already

have statutes that criminalize arson. Surely nobody disputes the state's interest in regulating the sale and possession of dangerous pyrotechnics, despite the existence of laws that say not to shoot them inside buildings. The same logic supports Section 931(1)(f). Yes, Michigan has statutes protecting various parts of the election process. But that does not amount to a prohibition on the Legislature's ability to protect a specific aspect of the voting process from a particular evil.

Further, as with Section 759, Plaintiffs' decision to mount a facial challenge heightens the wall they must scale. "Facial challenges are disfavored for several reasons." *Grange*, 552 U.S. at 450. First, "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Id*. (cleaned up). Facial challenges "also 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 applied." *Id*. (cleaned up). Because facial challenges are frowned upon, Plaintiffs "bear a heavy burden in demonstrating a substantial likelihood of success[.]" *Browning*, 575 F. Supp. 2d at 1314; see also *Crawford*, 553 U.S. at 200 ("Given the fact that petitioners have advanced a broad attack on the constitutionality of [the election regulation], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of

persuasion.”).

Because Section 931(1)(f) is a content-neutral law that does not govern expressive conduct, it is subject to rational-basis review. Michigan’s compelling interest in preventing vote-buying, fraud, and undue influence easily satisfies any level of scrutiny. Thus, Plaintiffs are unlikely to succeed on the merits of this claim.

b. Section 931(1)(f) is clear and understandable.

As explained above, a statute should not be struck as facially vague unless a plaintiff has “demonstrated that the law is impermissibly vague in *all* of its applications.” *Hargett,* 700 F.3d at 825 (quoting *Vill. Of Hoffman Estates*, 455 U.S. at 497). “[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Williams*, 553 U.S. at 304 (2008) (quoting *Ward*, 491 U.S. at 794 (1989)). “[F]ederal courts must construe challenged state statutes, whenever possible, so as “to avoid constitutional difficulty.” *Davet*, 456 F.3d at 554 (cleaned up). “Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Chapman*, 500 U.S. at 464.

There are two circumstances under which a law may be challenged for vagueness: “First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill*, 530 U.S. at 732 (citing *Morales*, 527 U.S. at 56–57). Section 759 is not vague under either test.

Plaintiffs—with a straight face—argue that no ordinary person could possibly understand what it means "to hire a motor vehicle." Dkt. 22-1, Plfs' P.I. Br., p. 41. Plaintiffs suggests that "people can differ in their interpretation of this restriction." *Id.* Even if that were true, and it's not, the possibility that some people might differ in their interpretation is not the standard—the question is whether the law is understandable by people of ordinary intelligence. Section 931(1)(f) far exceeds this bar.

The notion that Section 931 requires additional guidance is not grounded in reality. The words Plaintiffs say are confusing—"to hire a motor vehicle"—are plain, everyday words. "Hire" means "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). And motor vehicle is self-evident, particularly in home state of the Big 3 automakers and the Motor City. Thus, the statute prohibits engaging the services (for a wage or set price) of a motor vehicle to transport a voter to the polls. No additional interpretation is necessary; the statute's words are common, everyday words that ordinary people can understand without difficulty, and they must be interpreted as written. See *Fluor Enterprises, Inc.*, 477 Mich. at 174 ("If the statute is unambiguous it must be enforced as written") (cleaned up).

Plaintiffs again unleash a cascade of hypothetical situations to suggest that the statute is vague. But "[s]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill*, 530 U.S. at 733 (quoting *Raines*, 362 U.S. at 23). While creative, Plaintiffs' ginned-up what-ifs will not defeat Section 931(1)(f) because it is clear and understandable in the vast majority of its applications. Plaintiffs likely will not succeed on the merits of this claim.[1]

c. Federal law neither expressly nor impliedly preempts Section 931(1)(f).

Plaintiffs argue that Section 931(1)(f) is expressly preempted by the Federal Election Campaign Act (FECA). Not so. FECA purports to expressly preempt any limitations on contributions and expenditures with respect to Federal Elections, but Section 931(1)(f) does not limit such contributions and expenditures. Moreover, Plaintiffs' ignore FECA's carve-out for state statutes that protect against abuses of the franchise. Thus, Plaintiffs' preemption claim fails.

The Federal Regulations at issue, 11 C.F.R. § 108.7, provide:

(b) Federal law supersedes State law concerning the—

* * *

[1] To the extent Section 931(1)(f) could be interpreted as constitutionally vague, the same reasons justifying *Pullman* abstention with respect to Section 753 also support abstention here.

> (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

Plaintiffs' reliance on *Weber v. Heaney*, 995 F.2d 872, 874 (8th Cir. 1993) to argue express preemption is misplaced. *Weber* concerned a Minnesota law that limited *total* campaign contributions and expenditures. *Id.* at 874. The Minnesota law at issue was clearly within the ambit of §108.7 and FECA.

Unlike the restriction in *Weber*, Section 931(1)(f) does *not* limit expenditures of Federal candidates or political committees. Rather, it eliminates one item on which a candidate or committee might spend their budget. But there is no limitation on total contributions or expenditures like in *Weber*.

The Legislature's reading is easier than Plaintiffs' reading to harmonize the carve-outs contained in 11 C.F.R. § 108.7. Specifically, the federal regulations expressly carved out from preemption, "[s]tate laws which provide for the prohibition of false registration, voting fraud, theft of ballots, and similar offenses." 11 C.F.R. §108.7(c)(4). As explained above, Section 931(1)(f) is such a state law because it protects against *quid pro quo* and voter fraud. Thus, it is consistent with FECA—rather than conflicting—that candidates and political committees would be barred from spending money in one particular area that is fraught with a risk of fraud.

Nor does Section 931(1)(f) conflict with the federal regulations that allow corporations and unions to "[p]rovide transportation to the polls." 11 C.F.R. § 114.4(d)(1). Under Section 931(1)(f), a corporation or union may, for example,

provide such transportation, through their own employees or through volunteers. These organizations are only prohibited from paying *someone else* to transport voters. These provisions are in harmony with each other; they do not conflict. Accordingly, Plaintiffs' claims fail on the merits here as well.

C. Plaintiffs cannot show any harm, much less irreparable harm, in the absence of an injunction.

Plaintiffs cannot show that they will be imminently and irreparably injured in the absence of a preliminary injunction. *See Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 22 (2008); *Wreal, LLC v. Amazon.com, Inc*., 840 F.3d 1244, 1247–48 (11th Cir. 2016). "A showing of irreparable injury is the *sine qua non* of injunctive relief." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (*en banc*) (cleaned up). Thus, "even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Id.*

With respect to Section 759, the state has already pledged to issue statewide absentee ballot applications. See Detroit Free Press, *Secretary of State: All Michigan voters will get absentee ballot applications at home* <https://bit.ly/2Ax8878> (May 19, 2020). Under Section 759(8), a person violates Michigan Election Law when she "distributes" *and* "solicits" absentee ballot applications. Unless Plaintiffs intend a redundant distribution—and none have suggested that they intend to waste money in such a fashion—they cannot violate the statute during the

August primary election or the November general election because they would not be distributing applications. Thus, the emergencies that Plaintiffs initially raised alarm bells about no longer exists. The Secretary of State has done Plaintiffs' work for them.

Plaintiffs' argument that they will suffer irreparable injury unless this Court enjoins these laws rings especially hollow here. These laws have been on the books for decades, through countless elections. Yet Plaintiffs took no action until late 2019, when they filed suit and asked the Court to rush through an "expedited" case schedule. The law is clear "that a party's failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm." *Wreal*, 840 F.3d at 1248; see also *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (holding that the plaintiffs' claim of "a serious injury become less credible by their having slept on their rights"). Plaintiffs provide no explanation for not challenging these laws sooner.

Moreover, even if Plaintiffs could demonstrate a harm, their motion should still be denied. "[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).

D. Issuing a Preliminary Injunction is Contrary to the Public Interest.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted

by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012). Thus, the public interest cuts against enjoining a Michigan law that has been on the books for decades.

Additionally, it is contrary to the public interest for courts to interfere in election laws in the run-up to an election. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 34 (1968) (declining to order new ballots printed at a "late date" even where existing ballots unconstitutionally excluded a certain candidate); *North Carolina v. League of Women Voters of N Carolina*, 574 U.S. 927 (2014) (granting stay to prevent interference with election procedures roughly one month before election); *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (staying a district court's injunction "given the imminent nature of the election"); *Serv Emps Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012) ("As a general rule, last-minute injunctions changing election procedures are strongly disfavored."); *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F3d 999, 1012 (6th Cir. 2006) (vacating in part a temporary restraining order that "creates disorder in electoral processes"). The August 4, 2020, primary election is quickly approaching, and the November election comes close on its heels. Indeed, we are already within the 75-day window during which a voter can apply for an absentee ballot for the August 4 primary election. If the Court issues the injunction Plaintiffs request, it will upend a process that has

worked in Michigan for decades. Surely, the public interest weighs in favor of judicial restraint.

IV. CONCLUSION

The Legislature respectfully requests that the Court deny Plaintiffs' motion for preliminary 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 foregoing with the Clerk of the Court using the ECF System, which will send notification to all ECF counsel of record.

By: /s/ Patrick G. Seyferth
Patrick G. Seyferth