No. 18-1910

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN STATE A. PHILIP RANDOLPH INSTITUTE, MARY LANSDOWN, ERIN COMARTIN, DION WILLIAMS, COMMON CAUSE,

Plaintiffs-Appellees,

v.

RUTH JOHNSON, in her official capacity as Michigan Secretary of State,

Defendant-Appellant.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Gershwin A. Drain

EMERGENCY MOTION FOR STAY OF PERMANENT INJUNCTION ON BEHALF OF DEFENDANT-APPELLANT

ACTION REQUESTED BY SEPTEMBER 5, 2018

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INTRODUCTION

This may be the first time in American history that a court has invalidated a statute that *gives* voters the right to vote for the candidates of their choice. Through P.A. 268, Michigan has joined the overwhelming majority of states (at least 40) that prohibit straight-ticket voting, with the laudable goal of encouraging voters to vote for individual candidates instead of voting across the board for one party.

This may also be the first time in modern American history that a significant portion of a state's citizens are deemed to lack the intelligence or patience to vote for individual candidates of their choosing based solely on the color of the voter's skin. It is certainly a first for Michigan, which must now grapple with the fact that the federal judiciary has credited Plaintiffs' offensive premise that African-American Michiganders cannot manage the ballot without the straight-ticket option.

P.A. 268 was duly enacted by Michigan's elected representatives, yet it has been enjoined not once, but twice—this time permanently and in its entirety. This law is the status quo, and it should be maintained pending expedited appellate review of this important election question.

SUMMARY OF ARGUMENT

The trial court erred and applied the incorrect legal standards in evaluating Plaintiffs' claims. The trial court lacked a sufficient factual basis to conclude that the elimination of straight-ticket voting would so increase wait time as to deny African-American voters the opportunity to vote. The trial court compounded this error by applying a more stringent standard than that required under the *Anderson-Burdick* to find a violation of the Equal Protection Clause. Although the trial court conceded that no racial animus existed when the legislature enacted P.A. 268, it nevertheless concluded that there was intentional discrimination based solely on the notion that the Republican Party sponsored the legislation and that African-American voters tend to vote for Democratic Party candidates. Upon the faulty notion that the challenged act disparately impacted African-American voters, the trial court applied a causation standard far lower than the but-for standard contemplated by Section 2 of the Voting Rights Act. The Secretary is likely to prevail in her appeal of the trial court's order permanently enjoining P.A. 268.

The other stay factors are met as well. The Secretary of State and Michigan's citizens will suffer irreparable injury if P.A. 268, a duly enacted law, cannot be effectuated. Plaintiffs will not be irreparably harmed by a stay because P.A. 268 does not prevent them or any other voter from having the opportunity to elect representatives of their choice.

This Court therefore should maintain the status quo of Michigan's duly enacted statute and immediately enter a stay of the trial court's order pending an expedited appeal.

ARGUMENT

I. This Court should immediately enter a stay pending expedited appeal because the status quo of current law (duly enacted P.A. 268) should be maintained and every stay factor has been met.

As a threshold issue, this Court should grant a stay that maintains the status quo pending this Court's expedited review of the merits. The status quo here is not a return to a former law that Michigan's elected lawmakers have decided to reject, but rather, the maintaining of P.A. 268, Michigan's duly enacted statute.

A stay of a permanent injunction balances four interrelated factors: the movant's likelihood of success on the merits of the appeal,

the likelihood that the moving party will be irreparably harmed absent a stay; the likelihood that others will be harmed if the court grants a stay; and the public interest in granting a stay. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

As set forth in detail, these familiar factors have been met here. Accordingly, a stay is warranted.

A. This Court should maintain the status quo of Michigan's duly enacted statute.

The United States Supreme Court has reiterated that the "maintenance of the status quo is an important consideration in granting a stay." *Dayton Bd. of Educ. v. Brinkman*, 99 S. Ct. 28 (1978) (Rehnquist, J.). This consideration is especially strong where, as here, a duly enacted state statute is at issue. "When courts declare state laws unconstitutional and enjoin state officials from enforcing them, our *ordinary practice* is to suspend those injunctions from taking effect pending appellate review." *Strange v. Searcy*, 135 S. Ct. 940 (2015) (emphasis added) (Thomas, J., & Scalia, J., dissenting) (discussing examples). Indeed, the Court has done so on numerous occasions. *See, e.g., San Diegans for Mt. Soledad Nat. War Mem'l v. Paulson,* 548 U.S.

1301, 1 (2006) (Kennedy, J. in chambers) (staying an injunction requiring a city to remove its religious memorial).

P.A. 268 is a duly enacted statute, the election law at issue is the law in the overwhelming majority of the states, and voters are not being denied their right to vote. Under these circumstances, the status quo should be preserved pending review.

B. Secretary Johnson is likely to prevail on the merits because the district court opinion contains manifest legal errors.

Although a stay is not a matter of right, federal courts' *ordinary practice* of suspending injunctions that enjoin state officials from enforcing duly enacted state law "reflects the particularly strong showing that States are often able to make in favor of such a stay." *Strange*, 135 S. Ct. at 940. Secretary Johnson can make that strong showing here.

The district court's August 9, 2018 amended opinion and order contains a number of manifest errors that warrant appellate review, and the Secretary is likely to prevail on those issues. Moreover, Plaintiffs raised a facial challenge to P.A. 268, without providing evidence sufficient to bear the "heavy burden of persuasion" required in

the context of such a challenge. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 200 (2008); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 691-692 (6th Cir. 2015).

1. There is no equal-protection violation.

In determining that there was an equal-protection violation, the district court made significant legal errors.

a. The district court misapplied the Anderson-Burdick test.

To begin, the court misapplied the *Anderson-Burdick* balancing test by evaluating whether P.A. 268 disproportionately "burdens African-Americans' voting rights." (8/9/18 Am. Op. & Order, R. 153, Page ID # 4650.) The appropriate question in the *Anderson-Burdick* framework is not whether the challenged statute disproportionately burdens African-Americans or any other subsection of the population, but instead "single burden that the law uniformly imposes on all voters." *Crawford*, 553 U.S. at 205-206 (Scalia, J., concurring, joined by Thomas and Alito). Supreme Court precedents "refute the view that individual impacts are relevant to determining the severity of the burden [a law] imposes." *Id.* at 205.

Here, it is undisputed both that P.A. 268 is a generally applicable voting regulation and that Plaintiffs lodge a facial challenge to this statute. (Pls.' Resp. to Def.'s Mot. Sum. J., R. 108, Page ID # 2363.) Whatever the perceived burdens of P.A. 268, they are imposed on *every* Michigan voter. P.A. 268 modified the design of *every* ballot presented in Michigan to remove the option of voting the partisan portion of the ballot through a single mark.

When the *Anderson-Burdick* test is correctly applied, Plaintiffs have not demonstrated any burden on all voters—and certainly not a burden that outweighs the State's justification for the Act. The only potential "burden" is the "burden" of selecting the specific candidate one wants for a particular office—in other words, the "burden" is the very act of voting itself.

Even if the *Anderson-Burdick* test were geared toward examining whether the Act disproportionately burdens African-Americans, such a burden is not cognizable under the Fourteenth Amendment. *Washington v. Davis,* 426 U.S. 229, 242 (1976) (holding that a law "neutral on its face and serving ends otherwise within the power of government to pursue" is not "invalid under the Equal Protection

Clause simply because it may affect a greater proportion of one race than another.") The *Anderson-Burdick* test is not about disproportionate effect; it is about whether a fundamental right is burdened.

One of the reasons for *Burdick's* "flexible standard" is that "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). P.A. 268 reflects the desire of Michigan's elected representatives that this State's voters engage with the ballot and select individual candidates on the ballot, facilitating or encourage "more participation in the actual election, the actual voting process." (Def.'s Trial Br. Ex. W, Robertson Dep., R. 141-26, Page ID # 4257; *see also* Def.'s Trial Br. Ex. X, Knollenberg Dep., R. 141-27, Page ID # 4264; Def.'s Trial Br. Ex. Y, Lyons Dep., R. 141-28, Page ID # 4277.)

b. The district court erred in finding intentional discrimination.

The district court also erred in finding intentional discrimination, despite finding no evidence that P.A. 268 was enacted with discriminatory intent. (8/9/18 Am. Op. & Order, p. 81, R. 153, Page ID

4685.) It did so by first relying on statements from non-state actors to support its finding that Michigan's legislators were motivated by more than just policy in enacting P.A. 268. (8/9/18 Am. Op. & Order, R. 153, Page ID # 4679.) Neither McDaniel or Weiser were among the members of the Michigan legislature who passed the Act, and their position cannot be attributed to the actions of the Legislature. In any event, "[i]solated statements of individual legislators represent neither the intent of the legislature as a whole nor definitive interpretations of the language enacted by Congress." *In re Davis*, 170 F3d 475, 480 (5th Cir. 1999) (citing *Bd. of Educ. v. Rowley,* 458 U.S. 176, 204 n. 26 (1982)). The district court erred in second-guessing legislative policy in the absence of discriminatory intent. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 670 (1981) ("[T]he courts are not empowered to second-guess the wisdom of state policies. Our review is confined to the *legitimacy* of the purpose." (quotation omitted, emphasis in original)).

Even if the record had supported a finding that P.A. 268 was enacted to benefit the Republican Party, it was error for the district court to equate alleged discrimination based on politics with

discrimination based on race. It is well-established that discrimination on the basis of political affiliation is not racial discrimination. Indeed, a finding of politically based discrimination is a defense to, and defeats, a racial discrimination finding. *Hunt v. Cromartie,* 526 U.S. 541, 551-52 (1999). At a minimum, "political and racial reasons are capable of yielding similar oddities in a district's boundaries," *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017), necessitating a " 'sensitive inquiry' into all 'circumstantial and direct evidence of intent' to assess whether the plaintiffs have managed to disentangle race from politics." *Easley v. Cromartie*, 532 U.S. 234, 243 (2001).

The district court did not engage in this type of inquiry. Instead, it simply determined that the "goal" of P.A. 268 was to "end[ ] the *Democratic Party's* success with straight-ticket voters," and reasoned that since straight party voting was disproportionately used "by [the] African-American populations," therefore the "Michigan Legislature intentionally discriminated against African-Americans." (8/9/18 Am. Op. & Order, pp. 79-80, R.153, Page ID # 4685-86) (emphasis added). This analysis is contrary to *Cromartie,* conflating racial and political

discrimination simply because there is an alleged correlation between Democratic Party affiliation and the African-American population.[1]

For this same reason, the two cases on which the district court relied—*North Carolina State Conference of the NAACP v. McCrory,* 831 F.3d 204 (4th Cir. 2016), and *One Wisconsin Institute., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wisc. July 29, 2016)—are inapposite. Both those courts considered legislation with broader election reforms. And neither found the elimination of the straight-ticket voting option to be unconstitutional, despite the fact that this reform was included in the election reform legislation at issue. In *McCrory*, the straight-ticket voting portion of the election-revision bill was not even challenged. *N.C. State Conf. of the NAACP v. McCrory,* 182 F. Supp. 3d 320, 339-40 (M.D.N.C. 2016). In *Thomsen*, the district court found that provision eliminating straight-ticket voting provision created "only a slight burden on the right to vote, even among populations with lower levels of educational attainment or who have less time to spend voting." 198 F. Supp. 3d at 945-46.

[1] Unlike North Carolina, Michigan has no ability to trace the race of voters and how many voters of a particular race in a given precinct voted STV.

Also, in both cases, the court pointed to statements from legislative representatives or from the legislative record supporting a finding that the reform targeted African Americans or communities with a higher percentage of African American voters. In *McCrory,* the "General Assembly… placed in the law a finding that it had 'take[n] note] that African Americans disproportionately used OOP [out-of-precinct voting] on Election Day' " in a prior election. 182 F. Supp. 3d at 336. In *Thomsen,* the court pointed to "repeated" statements by state legislators "objecting" to extending hours for voting in two urban centers, including one where "two thirds of [Wisconsin's] African American citizens live." 198 F. Supp. 3d at 924.

No similar evidence is present here. In fact, the district court acknowledged that "[t]here is no evidence of racial animus." (Am. Op., R. 153, Page ID # 4687.) The court found a disparate impact by accepting Plaintiffs' argument that African-Americans have "relatively lower levels of educational attainment" and their attendant presumption that African-Americans "will have greater difficulty completing a ballot than whites." (8/9/28 Am. Op. & Order, R.153, Page ID # 4678.) The court relied on data from the Pew Research Center and

deposition testimony from Ms. McDaniel (again, not a member of the state legislature at the time P.A. 268 was passed) to find that P.A. 268 was passed to benefit the Republican party and that a large percentage of Michigan voters (without reference to race) supported past referenda to repeal laws eliminating straight ticket voting. (*Id*. at 4680-81.) State legislators took note of this, and a lobbyist opined that eliminating straight-ticket voting would "cause state-wide problems impacting urban, suburban, and rural precincts across the state." (*Id*.at 4682-83.)

In short, neither the district court's analysis nor the record cited in support of that analysis supports a finding disparate treatment on racial grounds. At most it demonstrates that P.A. 268 is a facially neutral law that was promoted by a leading Republican citizen and developed to allegedly hurt *Democrats generally*, including African-American Democrats.

c. There is insufficient proof that P.A. 268 imposes a burden on African-American voters.

Although the district court conclusively determined that P.A. 268 imposed a burden on African-American voters that, although not severe, was also "not minimal," (Am. Op. & Order, p. 47, Page ID # 4653), all

the supposed inequities are speculative. The court's finding was based on two main unsupported hypotheses: first, that P.A. 268 will increase wait times and African-Americans use the straight-party option far more than Caucasians, so they will be disproportionately impacted; and second, that there is a low lower literacy rate among Michigan's African-Americans. (Am. Op. & Order, pp. 48-49, Page ID # 4654-55.)

As to the first hypothesis, the district Court made no factual finding on any of the points that would be needed to find that P.A. 268 imposes a burden, or a racially disproportionate burden (even if that was the proper Fourteenth Amendment issue): *current* wait times (in any jurisdiction but, especially in a jurisdiction where a high percentage of voters use the straight-ticket option); the *increase* in wait time at any Michigan polling location if the ballot design changed in accordance with P.A. 268; and the tipping point between constitutionally acceptable and unacceptable wait times. Put another way, there is no factual finding on what wait time will cause any Michigan voter to leave the polling place or forego voting.

The district court also discounted one way to avoid any delay resulting from an increased time to complete the ballot using the design

implemented by P.A. 268—adding more voting booths. Former Director of Elections for the State of Michigan, Christopher Thomas, testified that, in his more-than-35 years' experience, he has never seen a polling location where it is impossible to add voting booths. (C. Thomas Dep., Def.'s Trial Br. Ex. P, C. R. 141-19l, Page ID 4052.) He further testified that voting stations are available that allow four voters to vote in the same space as one station, which would more than offset any alleged increase in time necessary to complete a ballot without straight-ticket voting. (*Id.*). And both Thomas and the current Director of Elections, Sally Williams, testified to plans to use the $5 million appropriation included with this legislation for the purchase of voting booths.[2] (*Id.*, Page ID # 4051; Def.'s Trial Br. Ex. Q, S. Williams Dep., R. 141-20, Page ID # 4081-4082.)

Nor did Plaintiffs present any evidence that long lines deter African-Americans specifically. Indeed, the district court pointed to a "national" study conducted at least six years ago, to find that Michigan already has notably long wait times. (8/9/18 Am. Op. & Order, R. 153, Page ID # 4623.) This same national study—according to Plaintiffs—

[2] The injunction blocked this appropriation.

stated that "minority voters wait twice as long on average as white voters…and voters in densely populated areas wait on average, 3 times longer to vote than voters in less densely populated areas." (Pls.' Proposed Findings of Fact, R. 146, Page ID # 4396.) The point is that African-Americans *have* been waiting—and still voting. And while the goal is to lower wait times for all voters, there is no evidence in the record that Michigan's African-Americans have not been fully participating in the political system due to the purportedly long wait times.

Moreover, to the extent this national study found wait times twice as long in less densely populated areas, former Director of Elections Thomas explained that "townships have a much longer ballot than cities" in Michigan. (Def.s' Trial Br., R. 141-9, Page ID # 4049.) Moreover, precinct populations in Detroit, for example, are much smaller than in other areas, which should translate into shorter lines and wait times. (Def.s' Trial Br., R. 141-9, Page ID # 4053.)

The Court's discussion of roll-off is not based on data in Michigan and is beside the point. Once the voter has the ballot in hand, any delay has already occurred. This is demonstrated by the observation

data gathered for Plaintiffs' expert Theodore Allen's report and testimony. (Def.s' Trial Br., R. 141-8, Page ID # 3684.) Contrary to Allen's testimony, Michigan law does *not* mandate that people may not be released from the check-in or registration table prior to the opening of a voting booth. (Contra *id.*) More importantly, roll-off does not suggest any burden on the right to vote; it reflects only the voter's right to vote how he or she chooses. The absence of straight-ticket voting does not deprive the voter of the opportunity to vote. Any roll-off simply reflects a voter's decision not to cast a vote for offices or candidates he or she does not care or know about.

On the second hypothesis, Plaintiffs' expert, Dr. Daphne Ntiri, opined only that a disproportionate percentage of Michigan's African-Americans have lower literacy levels. She did not hold herself out as an expert on how low literacy voters are affected by specific types of ballots, nor was she familiar with the options available for any voter who struggles with lower literacy at the polling location. (Def.'s Trial Br., Ex.V, Nitri Dep., R. 141-25, Page ID # 4201.) Even if Ntiri's opinion about literacy levels is true, she never linked lower literacy with the inability to fill out a ballot. She merely speculated that African-

Americans' lower literacy levels would frustrate and cause them to abandon their ballot prior to completion. (*Id.* at p. 59, Page ID # 4559, citing Dkt. No. 108-5, p. 18, Page ID # 2527). That proposition is, at best, speculative and empirically flawed, and at worst, racially offensive.

Finally, there is no finding or allegation that voting for one's chosen candidate—rather than voting straight ticket—burdens one's right to vote for one's chosen candidate. Plaintiffs' theory is that a downstream consequence of voting for one's chosen candidate—longer wait times—will somehow deter voting. In addition to the absence of findings on wait times, there was no finding on the first link in the district court's attenuated chain of causation: longer time to fill out a ballot. According to the district court, "it is self-evident" that straight-ticket voting is quicker. (8/9/18 Op. & Order, p. 18, R. 153, Page ID # 4624.) But unrefuted data collected by Dr. Herrnson and other researchers through an independent study outside of this litigation refutes this. (Def.'s Mot. Summ. J. Ex. 5, Herrnson Report, R. 102-6, Page ID ## 2008–2020 (discussing Paul S. Herrnson, et al, *Voting Technology: The Not-So- Simple Act of Casting a Ballot* (Washington,

DC: Brookings Institution Press, 2008)).) And Plaintiffs' own witnesses agree that "faster" and "easier" are not the significant factors in elections. (Ex. I, Dep. of D. Baxter, R. 141-11, Page ID # 3853.)

Relatedly, the district court erroneously placed significance on the fact that Michigan has no early voting or no-reason voting (presumably minimizing the fact that most states do not allow straight-party voting). (8/9/18 Am. Op. & Order, pp. 60-61, R. 153, Page ID ## 4666-4766.) But those issues are distinct from this case, which addresses the Legislature's desire regarding ballot design. With or without P.A. 268, there will be no early voting or no-reason voting. P.A. 268 does not limit anyone's opportunity to vote; it simply changes the manner in which all Michigan voters vote the partisan section of the ballot.

Michigan has a clear interest in having voters choose the individual candidates of their choice, rather than blindly selecting parties. Plaintiffs' hypothetical burdens do not cannot outweigh this important interest.

2. There is no Section 2 violation.

The district court held that P.A. 268 violates Section 2 of the Voting Rights Act (VRA) by denying African-Americans the right to

vote. (8/9/18 Op. & Order, R. 153, Page ID ## 4687-88.) The court noted that the law governing Section 2 vote-denial claims is not well settled, but nevertheless acknowledged that proof of a disparate impact is insufficient to a valid Section 2 vote-denial claim. (*Id.* at p. 83, Page ID # 4689 (case citations omitted)); *see also Michigan State A. Philip Randolph Institute v. Johnson*, 833 F.3d 656, 668 (6th Cir. 2016). So even if Plaintiffs had shown that P.A. 268 has a disparate impact on African-Americans, this is insufficient in itself for a Section 2 violation.

In any event, no disparate impact was shown. Assuming African-Americans disproportionately use straight-ticket voting, this has no exclusionary impact because, as discussed below, *filling out a ballot* is not a cognizable or alleged barrier—the supposed barrier is *increased wait times*. And the disparate impact of straight-ticket voting use itself is very thin. The Secretary presented evidence of the popularity of that option statewide and that the difference between the percent of straight-ticket votes that went to the Republicans (about 40%) and the percent going to Democrats at this time (about 60%) is not a particularly significant difference—certainly not enough to think that

eliminating straight-ticket voting will exclusively or largely affect only wait times in African-American (or Democratic) precincts.

Moreover, for a Section 2 violation based on vote-denial to be pled, the law at issue must create a *barrier* that *prevents* voting based on protected status, not just present a delay. Obviously, ballots that simply require citizens to vote for their chosen candidate cannot be rationally viewed as a barrier to voting for one's chosen candidate. At best, the district court found that Plaintiffs established a collateral consequence of increased wait times in the absence of straight-ticket voting. This collateral consequence of increased wait times will create a barrier to voting *only* if the increase in wait times converts a tolerable delay into one that deters voting—and *only* if election officials do nothing to accommodate for the change in wait time. The district court did not—and, on this record, could not—make any such finding.

There is another reason why disparate impact on African-Americans is insufficient in itself for a Section 2 violation: Section 2 requires that a plaintiff demonstrate that "the challenged *voting standard or practice* causes the discriminatory impact as *it* interacts with social and historical conditions." *Ohio Democratic Party (ODP) v.*

Husted, 834 F.3d 620, 638 (6th Cir. 2016). The plaintiff must demonstrate a causal relationship between the disparate impact on African-American voters and the social and historical conditions affecting those voters.

Here, the district court analysis links the burden of longer lines to social conditions, without evidence showing how the lack of the straight-ticket voting option interacts with social conditions "to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Even assuming *arguendo* that social conditions may contribute to longer lines, nothing in the record suggests that the preference of straight-ticket voting was attributable to social and historical conditions.

Finally, the district court emphasized that Michigan has the sixth longest average wait time in the country. (Am. Op. & Order, p. 23, Page ID # 4629.) If anything, this conclusively establishes that there is no link between straight-ticket voting and wait times because Michigan, on average, has much longer wait times than states without straight-ticket voting. Michigan's relatively long wait times are thus necessarily

attributable to reasons other than straight-ticket voting. And the fact that, notwithstanding the sixth-longest wait time, African-Americans have vigorously participated in voting on equal terms with other groups demonstrates that delays at the polling place do not deter African-American's from voting, disproportionately or otherwise.

In short, P.A. 268 causes no inequities in the voting context. Rather, it enables African-American voters to vote for each candidate of choice—the very right Section 2 protects.

3. Plaintiffs lack standing and the district court incorrectly relied on the law-of-the-case doctrine.

In the context of Defendant Johnson's motion for summary judgment, the district court did not address standing, believing that the law-of-the case doctrine prevented it from reexamining standing. This is contrary to law. This Court has held that the doctrine is particularly unsuitable to a court's ruling on a party's standing. *Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 660 (6th Cir. 2011). The court should have reexamined standing.

The test for standing is familiar. Plaintiffs must identify a "concrete and particularized" "injury in fact" and a "causal connection"

between removing straight-ticket voting from the ballot and their alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Associational standing requires that the organization's "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 181 (2000).

These elements are not met here. No individual Plaintiff will experience a concrete injury causally connected to P.A. 268.[3] (Def.'s Mot. Summ. J., R. 102, Page ID # 1782; Def.'s Mot. Summ. J. Ex. 12, Comartin Dep., pp. 18:20-23:9-10, R. 102-13, Page ID ## 2107–2108.) As to Plaintiffs Lansdown and Williams, the only alleged "injury" is speculation that either will wait in a line so long as to dissuade them from voting. This is (irrational) conjecture for Lansdown, who has not voted in person for 23 years, is automatically entitled to vote absentee given her age, and testified that she would wait in line no matter what. (Def.'s Mot. Summ. J. Ex. 11, Lansdown Dep., pp 7:22-8:18, R. 102-12,

[3] Erin Comartin has been dismissed from the case.

Page ID # 2099.) Likewise, no line would prevent Williams from voting. (Def.'s Mot. Summ. J. Ex. 13, Williams Dep., pp. 18:23-19:19; 22:23-23:16, R. 102-14, Page ID ## 2117–2118.) The record refutes a finding that any individual Plaintiff will suffer a concrete injury causally connected to P.A. 268.

The same is true for the organizational Plaintiffs. None has identified a Michigan member who is African-American and who used straight-ticket voting in a jurisdiction that will experience long lines, or identified an injury to their organizations. Even if the standard is an increased risk of vote-denial, Plaintiffs fail to identify a member in this category. Allegations of potential diversion of limited resources and "abstract social interest in maximizing voter turnout" are insufficient. *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459-61 (6th Cir. 2014). There is no evidence that either Plaintiff organization had "immediate plans" to mobilize resources to revise voter education materials on account of P.A. 268, or that they took any action, prior to receiving the report of Plaintiffs' expert, Kurt Metzger. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016). Plaintiffs lack standing.

C. The Secretary will be irreparably harmed without a stay.

The U.S. Supreme Court has already recognized that "anytime 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*, 133 S. Ct. 1, *3 (2012) (Roberts, C.J. in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). P.A. 268 was enacted by Michigan's elected representatives. The fact that it cannot now be effectuated because of the permanent injunction is irreparable harm.

D. The public interest in a stay is strong.

The people of Michigan have a strong interest in having P.A. 268 (a law enacted by their representatives) effectuated. See *Maryland*, 133 S. Ct. at *3.

E. Plaintiffs and other voters will not be irreparably harmed by a stay.

Plaintiffs are not irreparably harmed if a stay is granted. Under P.A. 268, Michigan's voters, regardless of race, have the opportunity to vote for the candidate of their choice, and, in fact, are aided by a ballot that is less confusing and encourages individual selections due to the removal of the straight-ticket voting option. The district court's

findings are insufficient to support any claim of a link between the prohibition on straight-ticket voting and lines long enough to tip Michigan's current electoral scheme beyond a constitutionally acceptable wait time. And there is no evidence that a stay would burden African-American voters. Under P.A. 268, African-American voters will have the opportunity both to participate in the political process and to elect representatives of their choice.

CONCLUSION AND RELIEF REQUESTED

The status quo—Michigan's duly enacted law, P.A. 268—should be maintained pending this Court's review. Additionally, the factors for an emergency stay are met here. Accordingly, Defendant Secretary of State Ruth Johnson respectfully requests that this Court grant a stay of the district court's August 9, 2018 amended opinion and order pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 5,200 words. This document contains 5,197 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on August 30, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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