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

RESPONSE OF PLAINTIFFS-APPELLEES TO DEFENDANT-APPELLANT'S EMERGENCY MOTION FOR STAY OF PERMANENT INJUNCTION PENDING APPEAL

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INTRODUCTION

The Secretary misrepresents what the challenged statute, 2015 PA 268, would do and what the district court decided, stating that, "This may be the first time in American history that a court has invalidated a statute which gives voters the right to vote for the candidates of their choice." This is a patently ridiculous claim. Voters in Michigan have always had the right to vote for the candidates of their choice. PA 268 did not give them that right and the injunction against it does not take it away. What PA 268 does, as the Secretary well knows, is take away the ability of voters to vote for all of the candidates for partisan office with a single mark if they chose to do so, requiring them instead to make a mark for each individual candidate. The district court recognized that the consequences of the elimination of the straight party option were, in the specific context of Michigan's restrictive election laws, injurious to all voters, but more particularly to African-American voters; that these injurious consequences were intended; and that African-Americans were deprived of Equal Protection and of rights protected by the Voting Rights Act. In support of her motion for stay the Secretary repeatedly misstates the law and either distorts or ignores what the court decided in its thorough, careful, and extremely important decision.

The Secretary further asserts that the district court has determined that African-American citizens in Michigan lack the patience or intelligence to vote

without the straight party option. This is a deliberately offensive mischaracterization of the plaintiff's arguments and the district court's conclusion. The district court recognized that straight party voting currently plays an important role in Michigan's elections because Michigan does not allow early voting and allows absentee voting only in limited circumstances, thus making election day voting particularly crucial as it is the only voting opportunity for most voters. The district court also found as a fact that African-Americans use straight party voting at a much higher rate than others, so that causing them to take more time to vote on election day would create longer lines and deter voters. The district court did not conclude that it was a lack of patience or intelligence but rather a lack of time which would deter voters if straight party voting were eliminated.

Moreover, the Secretary misrepresents the effect of the stay she seeks, asserting that it would preserve the status quo. It would not. Since 1891 Michigan voters have had the option of voting straight party. Being able to vote straight party is the status quo. PA 268, if implemented, would change the status quo. This was recognized by this court two years ago, when it considered the Secretary's request for a stay of the preliminary injunction and observed that, "[D]enying the Secretary's request for a stay here will merely require Michigan to use the same straight-party procedure that it has used since 1891." 833 F.3d 656, 669.

CHRONOLOGY OF PROCEEDINGS

1. Plaintiffs alleged in this case that 2015 PA 268, a law which eliminated the option of straight party voting in Michigan partisan elections, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it has a discriminatory impact on African-American voters. Plaintiffs further alleged that the law violated Section 2 of the Voting Rights Act.

2. The district court issued a preliminary injunction against the implementation of PA 268 on July 22, 2016.

3. This court denied the Secretary's motion for a stay pending appeal, 833 F.3d 656 (6th Cir. 2016) and the United States Supreme Court also denied the request to stay the preliminary injunction.

4. In their Second Amended Complaint, the plaintiffs added a third claim, that the law violated the Equal Protection Clause of the Fourteenth Amendment because it was intentionally enacted to discriminate against African-Americans.

5. The parties completed extensive discovery and on April 18, 2018, the case was submitted for trial on briefs and the record. Opening arguments were held, closing arguments were waived, and each party submitted extensive proposed findings of fact and conclusions of law.

6. On August 1, 2018, the district court issued its Opinion and Order Granting Plaintiffs' Request for Permanent Injunctive Relief. In its thorough and extensive opinion, the court made detailed findings of fact and concluded, based on the facts and the law, that PA 268 violates the Equal Protection Clause, as it burdens African-Americans' voting rights and the asserted reasons for imposing this burden did not warrant its imposition. The court further concluded that by enacting PA 268, the Michigan legislature had also violated the Equal Protection Clause by intentionally discriminating against African-Americans. Finally, the court concluded that PA 268 violated Section 2 of the Voting Rights Act. The court concluded that a permanent injunction against the implementation of PA 268 was warranted by each of these violations of the constitution and law and permanently enjoined the implementation of the statute.

7. On August 9, 2018, the district court issued an Amended Opinion and Order Granting Plaintiffs' Request for Permanent Injunctive Relief, (R. 160) which amended the August 1, 2018 Opinion and Order by adding a Table of Contents, presumably so as to make the extensive opinion easier to review.

8. On August 13, 2018, the Secretary filed a Notice of Appeal in this court.

9. On August 14, 2018, nearly two weeks after the issuance of the Opinion and Order, the Secretary filed an Emergency Motion for Stay Pending Appeal in the district court.

10. On August 23, 2018, the district court issued an Opinion and Order denying the emergency motion for stay pending appeal.

11. On August 30, 2018, having waited an additional week, the Secretary filed the instant Emergency Motion for Stay of the Permanent Injunction, requesting that this court act by September 5, 2018.

ARGUMENT

I. THE SECRETARY FAILS TO DEMONSTRATE THE GROUNDS FOR STAYING THE PERMANENT INJUNCTION PENDING APPEAL.

A. The four factor analysis for a stay pending appeal.

The court must consider four factors: (1) the likelihood that the party seeking the stay will prevail on appeal, (2) the likelihood that the moving party will be irreparably injured unless the stay is granted, (3) the prospect that others will be harmed if a stay is granted, and (4) the public interest in granting the stay. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006).

Earlier in this matter, as noted, the Secretary sought a stay of the preliminary injunction, and this court, applying the four factor analysis, denied the stay,

concluding that the Secretary did not have a strong likelihood of prevailing on the merits. The case now comes to the court in a different posture as "[a] motion for stay pending appeal is made after significant factual development and after the court has fully considered the merits." *Mich. Coal.of Radioactive Material Users, Inc. v. Griepentrog*, 945 F. 2d 150, 153 (6th Cir. 1991). Therefore, it is incumbent upon the moving party to demonstrate a likelihood of reversal. *Id.* at 153.

B. The Secretary has no likelihood of prevailing on the merits of the appeal.

It is of particular significance to this motion that the district court found for the Plaintiffs on all three counts of the complaint. These findings were reached after extensive discovery and the opportunity for plaintiffs and defendant to present all evidence and arguments in support of their positions. As to each count, the district court made detailed factual findings and legal conclusions as to all of the factors which warrant injunctive relief. A finding in favor of the plaintiffs on any of the three counts would warrant the injunctive relief which issued. Only if the district court's findings and conclusions on all three counts were reversed on appeal would the permanent injunction be vacated. The likelihood of this is negligible. For this reason alone, the request for a stay must be denied.

1. The Secretary has no likelihood of prevailing on the merits of the Count I discriminatory impact claim.

The Secretary asserts that there is no Equal Protection violation, stating that the district court has misapplied the *Anderson-Burdick* balancing test. The *Anderson-Burdick* test, from the cases *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), is the framework for analyzing allegations of discriminatory impact, and it was properly applied by the District Court (and by this Court earlier in this action when it denied a stay of the preliminary injunction). In rejecting the Secretary's motion for stay of the permanent injunction, the district court correctly observed that the Secretary "overlooks the wealth of Sixth Circuit precedent distilling the appropriate standard under the *Anderson-Burdick* framework, This analytical structure requires an identification of the burden imposed on protected rights and a balancing of the burden against the interest the state seeks to advance by the law.

The Secretary has continued to incorrectly argue that the only burden is marking the ballot for each candidate individually. In denying a stay of the preliminary injunction in this case, Judge Gilman in a separate concurrence properly framed the issue:

> With regard to the longer lines, I believe that precisely defining the burden at issue in this case is paramount. The consequential burden in my view is not—as the Secretary and the amici who support her argue— simply the extra time that each straight-party voter will have

> to spend marking additional bubbles. Nor is it the longer lines at polling places resulting from the aggregation of that extra time per se. Rather, it is the fact, as supported by the current record, that the longer lines will deter citizens from voting. 833 F.3d at 670.

The district court concluded that because of their much higher use of straight party voting, the citizens deterred from voting would be more likely to be African-Americans. The Secretary fails to demonstrate how the court's conclusion that the burden is the deterrence of voting by African-American voters is erroneous and will likely be reversed on appeal.

The Secretary further misapplies *Anderson-Burdick* by asserting that the question to be addressed is not whether PA 268 disproportionately burdens African-Americans (as plaintiffs alleged and the district court found) but whether it burdens all voters, selectively quoting a few phrases from a concurring opinion in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). The district court in refusing to stay its injunction correctly held that this proposed standard was not the standard adopted by the Supreme Court in *Crawford* and does not govern in this matter.

The Secretary also argues that there is insufficient proof that PA 268 burdens African-American voters. In fact, the district court's detailed and careful opinion set forth in detail the demographic evidence that (1) African-Americans use straight party voting at a much higher rate than other voters, (2) that the elimination of this efficient way of voting, in the context of Michigan's restrictive

voting laws, will cause longer lines in the polling places, (3) that these longer lines will have the effect of deterring voters, who will not enter the lines or who will leave them because they are unable to wait for the excessively long times, and 4) that this deterrence will fall disproportionately on African-American voters. The Secretary asserts that there is "no factual finding on what wait time will cause any Michigan voter to leave the polling place or forego voting." Of course, there could be no such factual finding and suggesting that such a precise estimate could be made is utterly unrealistic. The district court cited and credited abundant evidence, from the long-serving director of the Bureau of Elections, from municipal and county clerks, from the survey done in the 2016 election relied upon by expert witness Theodore Allen, and from Professor Allen's simulation. All of this evidence supported the conclusion that the time to vote would increase significantly without straight party voting, and that this increased wait time would be experienced to a much greater extent in communities with a high percentage of African-American voters because of their much higher use of straight party voting. The Secretary fails to show why the district court clearly erred in relying on this analysis and all of the other evidence.

In sum, the Secretary fails to show that the district court's decision on Count I is likely to be reversed. To the contrary, the decision is fully supported by all of the evidence in the record.

2. The Secretary has no likelihood of prevailing on the Count II intentional discrimination claim.

The Secretary claims that the court erred in finding intentional discrimination because there was no evidence of discriminatory intent. The Secretary never even mentions the controlling case, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*,429 U.S. 252 (1977), in which it is acknowledged that racial animus is seldom overtly expressed. *Arlington Heights* requires the examination of a number of factors to determine the existence of discriminatory intent or purpose. Legislative history is one of the most important factors to be examined and in this matter there was abundant evidence, cited by the district court, that officials of the Michigan Republican Party were essential participants both in the efforts to pass PA 268 and in the defeat of an effort to tie-bar PA 268 to a bill which would have mitigated the effects of the longer lines created by allowing for no-reason absentee voting. Their essential involvement, and the acknowledgment that this bill was sought to help Republicans win elections was relevant evidence on the issue of legislative intent and purpose.

Defendant criticizes the district court's reliance on statements from Ronna McDaniel simply because she was not a member of the Legislature. However, she was the chair of the Michigan Republican Party, she acknowledged that it was her passion to eliminate straight party voting, and Senator Marty Knollenberg, sponsor

of the bill in the Senate, enlisted McDaniel and Ron Weiser (her predecessor and successor as Republican Party Chair) to help enact PA 268 by successfully lobbying Republican legislators. As the district court noted, Knollenberg testified that he sought their help because he didn't have the votes to pass PA 268. The record showed that both the legislature and the Republican Party relied on statistics showing the straight party vote going about 60% for Democrats. These facts, and others summarized in the district court's opinion, were evidence that the legislature's goal, as the district court concluded, was to eliminate the Democratic Party's advantage with straight ticket voters and that, "The goal of ending the Democratic Party's success with straight-ticket voters, therefore, was achieved at the expense of African-Americans' access to the ballot."

In an effort to overcome the district court's finding of intentional race discrimination, the Secretary relies on the inapposite jurisprudence of racial gerrymandering. In racial gerrymandering cases, political gerrymandering may be a *defense* because "racial identification is highly correlated with political affiliation," *Easley v Cromartie*, 552 U.S. 234, 243 (2001). In order to overcome that defense, plaintiffs in racial gerrymandering cases must "disentangle race from politics." *Id*. However, in voting rights cases a different legal standard applies. Here, there is no need for the Plaintiffs or the Court to "disentangle race from politics" because unlike gerrymandering political discrimination is *not* a defense to

racial discrimination *in the voting rights context*. In the latter context the link between race and politics is important evidence to be considered.

The Secretary dismisses the Court's reliance upon *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), and *One Wisc. Inst., Inc. v. Thomsen*, 198 F.Supp.3d 896 (W.D. Wisc. 2016), because neither of these courts found the elimination of straight party voting to be unconstitutional. This simplistic dismissal reflects the Secretary's unwillingness or inability to address the import of the applicable law. *McCrory* recognized "the manner in which race and party are inexorably linked in North Carolina." They are also inexorably linked in Michigan. The evidence relied upon by the district court demonstrated that African-Americans voted Democratic at a very high rate and that they voted straight party at a very high rate. In the North Carolina case, the court found that election law changes were made to make it more difficult for African-Americans to vote. While they were targeted because they voted Democratic, the court concluded that even if this was done for partisan ends it constituted race discrimination. Similar reasoning was behind the district court's decision in *One Wisconsin*. The same rationale supported the conclusion of the district court in the instant case. The Secretary has failed to demonstrate a likelihood that this conclusion will be reversed on appeal.

3. The Secretary has not demonstrated a likelihood that she will prevail on Count III, a violation of the Voting Rights Act.

The Secretary challenges the district court's conclusions regarding the disparate impact of PA 268. She simply denies the facts found and the conclusions reached by the court but is unable to say why they are clearly erroneous or why they would be rejected on appeal. She makes a particularly illogical argument, asserting that there is no link between wait times and straight party voting because Michigan with straight party voting has longer wait times than states which don't have it. As the district court noted in denying the stay motion, this point only bolsters its conclusion. Because the elimination of straight party voting will increase voting time, and waiting time in Michigan is already exceptionally long, the already long lines will become significantly longer, which will result in the discriminatory impact – the deterrence of voters -- and the violation of the Equal Protection Clause and the Voting Rights Act.

The Secretary further argues that the district court has not shown that the discriminatory practice interacts with social and historical conditions, but in fact the district court did precisely that, writing that because of housing discrimination many African-Americans live and vote in the same precincts so that the effect of longer voting times will be aggravated. Additionally, the court concluded that historic discrimination in education has contributed to lower levels of literacy,

which will also amplify the effects of taking longer to vote and having to vote individually for each office on the ballot.

4. Plaintiffs have standing.

The Secretary continues to advance an extraordinary and erroneous proposition: that African-American voters do not have standing to enforce the Fourteenth Amendment and the Voting Rights Act which were enacted to protect their voting rights.

The Plaintiffs are the Michigan State A. Philip Randolph Institute (APRI), Common Cause, and two African-American voters. A white voter was dismissed because the district court concluded she lacked standing. APRI members "are predominantly African-Americans and many of them use the straight party voting device." (Affidavit of APRI President Anita Dawson, ¶4, R 108-6, Pg. ID No. 2534). In addition "Common Cause has thousands of members and supporters in Michigan, including African-Americans who use the straight party voting device." (Affidavit of Allegra Chapman, Director of Voting and Elections and Senior Counsel to Common Cause, ¶3, R 108-7, Pg. ID No. 2536).[2]

The organizational and individual plaintiffs all have standing. However, even if only *one* of them has standing in *any* capacity, that is sufficient because it is well-established that only one plaintiff with standing is required for injunctive

relief. *See, e.g., Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007) (citing authorities), *aff'd*, 553 U.S. 181, 189 n.7 (2008).

The Secretary claims that the injuries to Lansdown and Williams are "conjecture" and that APRI and Common Cause have failed to identify specific African American members who use straight party voting and will experience long lines if it is eliminated.

The district court, in reliance on the Sixth Circuit precedent, correctly rejected such arguments in its opinion granting a preliminary injunction:

> In the voting context, the Sixth Circuit has recognized that voters can have standing *based on an increased risk that their voting rights will be infringed*. *Sandusky*, 387 F.3d at 574. In *Sandusky*, the Sixth Circuit held that the Sandusky County Democratic Party had standing to bring a claim on behalf of Ohio voters. The organization alleged that the Secretary of State's directives regarding provisional ballots in Ohio elections violated the Help American Vote Act ("HAVA").…
>
> The Sixth Circuit held that failure to identify which specific voters that would be harmed was "understandable." *Id.* ("...by their nature, mistakes cannot be specifically identified in advance."). That because Election Day is fixed, and because human error is likely inevitable, the issues raised were" real and imminent."

(R 25, Pg ID No. 716-18). The increased risk to the voting rights of thousands of African American members of APRI and Common Cause created by PA 268, even if they cannot be individually identified, gives those organizations standing here to challenge PA 268 as representatives of those members. *See MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332-33 (6th Cir. 2002).

Finally, the district court held that the fact that Lansdown can vote by absentee ballot due to her age does not deprive her of standing as Defendant argues. Voting an absentee ballot is simply an option and if she chooses to exercise her right to vote at a polling place, she will be subject to the same risk of harm to her right to vote as all other African-American voters under PA 268.

The individual African-American plaintiffs as well as APRI and Common Cause have standing.

C. Balancing the harms requires that the stay be denied. Defendant will not be irreparably harmed if a stay is not granted while plaintiffs and others would be irreparably injured if a stay were granted.

As to the remaining factors to be considered, Defendant asserts 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." The district court was correct in observing that this "harm" to the state is merely abstract, while, "Courts presume irreparable injury where constitutional rights are imperiled or abridged." *Obama for America v Husted*, 697 F.3d 423 (6th Cir. 2012). The district court summarized the effect of staying the injunction as follows:

> All Michigan voters will wait in significantly longer lines and will encounter much greater wait times if Michigan were to implement PA 268. These effects would deter a substantial number of people from voting by discouraging them from attending the polls or having them arrive at a polling station only to leave because of long lines and wait

> times. And African-Americans would disproportionately bear all of these consequences. (R. 160, Pg. ID 4781)

Furthermore, the permanent injunction against the enforcement of PA 268 simply maintains an election practice which has existed in Michigan for 127 years. It maintains the status quo. The state cannot be injured by the enjoining of an unconstitutional law where it has been found that it would cause disproportionately harsh burdens on African-American voters. And finally, it is important to recognize that Michigan voters would be harmed by a stay here in precisely the ways the U.S. Supreme Court warned against in *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (*per curiam*)

> Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.

As set forth in the Chronology of Proceedings above, there have been seven consistent decisions by the district court and this court maintaining the now 127-year old Michigan status quo – the option to vote a straight party ticket – in the last two years. All of these decisions have been accompanied by extensive media coverage that straight party voting remains as an option for voters. A conflicting decision issuing a stay now runs afoul of *Purcell*.

The Secretary has added to the risk of election chaos and voter confusion by her own dilatory conduct in seeking a stay. While the general election ballot must be finalized by September 7, she waited *two weeks* after the district court's August

1 decision to even file a claim of appeal, followed by her "Emergency" motion for a stay. She then waited a week after the district court denied that motion to file her "Emergency" motion with this court. Not only has the Secretary's dilatory conduct made time too short to make such a drastic change to the ballot, but based on the highest primary election turnout in 40 years, *see* *Secretary of State Express Bulletin, August 17, 2018,* Michigan may be headed for unprecedented general election turnout which will only compound the long lines and chaos caused by eliminating straight party voting at this late hour in contradiction to the unanimous federal court decisions of the last two years. *Purcell* alone provides the basis to deny a stay.

CONCLUSION AND RELIEF SOUGHT

The Motion for Stay should be denied.

Respectfully submitted,

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Dated: September 1, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with theClerk of the Court using the ECF system on September 1, 2018, which will sendnotice of this filing to all registered parties via electronic transmission.

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