No. _____

In the Supreme Court of the United States

RUTH JOHNSON,
IN HER OFFICIAL CAPACITY AS MICHIGAN SECRETARY OF STATE, APPLICANT

v.

MICHIGAN STATE A. PHILIP RANDOLPH INSTITUTE; ET AL.

EMERGENCY APPLICATION TO STAY THE PRELIMINARY INJUNCTION PENDING A MERITS DECISION BY THE COURT OF APPEALS

**To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit**

RESPONSE NEEDED BY SEPTEMBER 8, 2016

INTRODUCTION

Michigan has joined 40 other states by requiring voters to actually vote for each candidate they intend to support—in other words, by eliminating straight-ticket voting. This change is not a burden on voting—it is the very act of voting. Making this change through its democratically elected representatives, Michigan has exercised its authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. But a district court enjoined 2015 P.A. 268—the law that requires office-specific voting—on equal-protection and voting-rights grounds, and the Sixth Circuit refused to stay the injunction.

Because neither the Equal Protection Clause nor the Voting Rights Act require straight-ticket voting, and because these are questions of exceptional importance, implicating the upcoming election, the validity of a democratically enacted statute, and

the proper standard for § 2 cases, Michigan respectfully asks this Court to stay the district court's preliminary injunction as expeditiously as possible in light of the upcoming November 8, 2016 general election.

This Court has cautioned against last-minute injunctions like the one entered by the district court here. See, e.g., *Purcell* v. *Gonzalez*, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."); *William* v. *Rhodes*, 393 U.S. 23, 34–35 (1968) (addressing the risk of disrupting the election process). This Court's review is warranted to restore the status quo, which is applying presumptively constitutional state law. *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[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.") (internal quotation omitted).

The plaintiffs do not have a strong or substantial likelihood of success on the merits because this is a rational law that imposes a minimal burden—if any—on voting. Further, the law does not deny anyone what § 2 of the Voting Rights Act protects—a process that is "equal open" to all classes of citizens and that affords them the same opportunity to participate in the political process and to elect representatives of their choice. The other factors also support a stay. Requiring voters to actually vote for individual candidates would not be a harm to any voter, let alone an irreparable one. In contrast, the State suffered an irreparable harm when the district court

enjoined its statute, and the public interest—in the smooth administration of elections—favors a stay.

Immediate relief is necessary because the partisan portion of the ballot impacted by this litigation began being processed on August 30, 2016, after certification by the canvassers. (Def.'s Resp. to Pl.'s Mot. for Prelim. Inj. Ex. 3, 06/17/2016, R. 15–4, Page ID # 483–489.) By law, the ballot wording for the nonpartisan-statewide proposals are required to be certified to the county clerks by next Friday (September 9, 2016). (*Id.* at ¶10, Page ID # 628); Mich. Comp. Laws § 168.32(2). The Secretary needs a response by the previous day—**September, 8, 2016**—to comply with her statutory duties.

OPINIONS BELOW

The district court's opinion granting a preliminary injunction is not reported, but is available at 2016 WL 3922355. The district court's denial of a stay is also not reported, but available at 2016 WL 4267828. The Sixth Circuit's denial of the State's request for a stay is reported and currently available at 2016 WL 4376429. (Appendix A.) The Sixth Circuit's denial of the State's request for initial hearing en banc is not reported. (Appendix B.)

JURISDICTION

The Sixth Circuit denied the State's request for a stay in an order entered August 23, 2016. Because a Sixth Circuit internal operating procedure precludes *rehearing* en banc of a decision by a *motions* panel, 6 Cir. R. 35(h), the State immediately sought *initial* en banc review of the case on the *merits*. The Sixth Circuit denied that

request for initial hearing en banc yesterday (September 1, 2016), over the dissent of six judges. This Court has jurisdiction to review the Sixth Circuit's August 23, 2016 stay decision under Supreme Court Rule 23.2 and 28 U.S.C. § 2101(f), and may issue a stay under this Court's Rule 23.

STATEMENT OF THE CASE

Although the Legislature passed P.A. 268 on December 16, 2015, and the Governor signed it on January 5, 2016, the plaintiffs waited until May 24, 2016, before initiating this action. The district court granted a preliminary injunction, on July 21, which altered the status quo by preventing Michigan from applying its democratically enacted statute. Michigan promptly appealed and sought a stay in the district court, which scheduled that stay request for a hearing that would not occur until August 21. Because that schedule did not expedite the issue fast enough for resolution by August 30 (when ballots for the November 8 election were scheduled to begin being programmed, coded, and printed), Michigan sought a stay in the Sixth Circuit. The Sixth Circuit denied the stay, in a published opinion, on August 17. (The district court revised its schedule and issued its stay denial August 15.)

Under the Sixth Circuit rules, it is not possible to seek en banc review of the denial of the motion for a stay, so the State sought initial hearing en banc of the preliminary injunction decision. Because that was denied and the State has exhausted all possible lower-court avenues for relief, it now seeks review of the Sixth Circuit's denial of the stay. S. Ct. R. 23.3.

STANDARDS FOR GRANTING RELIEF

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). Further, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

Here, rather than seeking a stay pending the filing of a petition for a writ of certiorari, Michigan seeks a stay pending a decision on the merits by the court of appeals. This Court has repeatedly granted this lesser relief in the past. E.g., *Ashcroft* v. *N. Jersey Media Grp., Inc.*, 536 U.S. 954 (2002); *United States* v. *Oakland Cannabis Buyers' Co-op.*, 530 U.S. 1298 (2000); *McNary* v. *Haitian Centers Council, Inc.*, 503 U.S. 1000 (1992).

REASONS FOR GRANTING THE APPLICATION

I. Because the decision below conflicts in principle with *Crawford*, there is a reasonable probability that certiorari would be granted and the decision reversed.

Both the district court's and the Sixth Circuit's decisions conflicted with the reasoning of this Court's precedents. A claim based on a regulation that imposes the "usual burdens of voting" is not sufficient to show an equal-protection violation. See *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J). And that

is all that eliminating straight-ticket voting does. This statute impacts only the manner of voting—not the right to vote. Having voters actually cast a vote for their chosen candidate—rather than blindly voting for all candidates of a party—is the very *act* of voting, so it cannot rationally be characterized as a *burden* on the right to vote.

For example, in the 2012 general election in Wayne County, filling out an entire ballot using office-specific voting would have required 79 marks; using the straight-ticket option would still have required 62 marks (because of items such as non-partisan judicial positions and ballot measures). (Compl. Ex. 14, R. 1–15, Page ID # 288.) Whether the number of ovals or arrows to be completed on the form of the ballot is one, five, ten, or more, filling out multiple ovals imposes a usual burden, not a moderate or severe one. See *One Wisc. Inst., Inc.* v. *Thomsen*, No. 15-cv-324, 2016 WL 4059222, at *39 (W.D. Wisc. July 29, 2016) (finding that a Wisconsin statute eliminating straight-ticket voting "creates 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"). And any slight delay caused by another voter making individual decisions and taking longer to vote is also a usual aspect of voting, not a burden that justifies the injunction here. Taken to its logical conclusion, treating waiting in line as a burden would make a state-sponsored get-out-the-vote campaign, if successful in increasing voter turnout, unlawful.

The decision below conflicts with *Crawford*'s reasoning because the burden here is even smaller than the burden identified in *Crawford* as a usual burden of voting. *Crawford* involved voter-identification cards, and this Court reasoned that a

separate trip to a department of motor vehicles (a trip many citizens find burdensome) was a usual burden of voting: "For most voters who need [voter identification cards], the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198. If that step of obtaining identification before voting is a usual burden of voting, then it is even truer that filling in the ovals on a ballot is a usual burden of voting.

The Sixth Circuit diverged even further from *Crawford* and this Court's other precedents by subjecting this usual burden of voting to more than a rational-basis-like level of review. Under this Court's *Anderson-Burdick* framework, which derives from *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), and *Burdick* v. *Takashi*, 504 U.S. 428 (1992), "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' " on voters' rights, then " 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434. Here the State offered several rational bases for requiring office-specific voting by all voters. For one, eliminating straight-ticket voting increases the likelihood that voters will vote in the portion of the ballot pertaining to non-partisan offices and proposals, rather than overlooking those important offices and issues on the mistaken belief that a straight-ticket vote would cover everything on the ballot. For another, requiring office-specific voting encourages a more informed electorate and therefore could im-

proves the democratic process. By applying a heightened standard of review—something "more than rational basis, but less than strict scrutiny," *Michigan State A. Philip Randolph Inst.* v. *Johnson*, 2016 WL 4376429, at *6 (6th Cir. Aug. 17, 2016)—the Sixth Circuit's decision contravened this Court's guidance that these sorts of state interests are generally sufficient to justify the law.

Had the Sixth Circuit applied the proper deferential review, Michigan's law would have survived. Michigan's law is neutral, not discriminatory—it applies to all voters, regardless of race. And Michigan's law is just like that of forty other states who do not allow straight-ticket voting, see http://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx, and yet no case anywhere has suggested it was unconstitutional or violates § 2 of the Voting Rights Act. As the Sixth Circuit correctly recognized in a different case last month in upholding an Ohio election statute against an equal-protection challenge, "courts routinely examine the burden resulting from a state's regulation with the experience of its neighboring states," *Ohio Democratic Party* v. *Husted*, 2016 WL 4437605, at *6 (6th Cir. Aug. 23, 2016). Given that this is an equal-protection issue under our national constitution, it only makes sense that the test would consider whether voters are being treated equally across our country. Yet here, the Sixth Circuit and the district court found an equal-protection violation in the manner of voting even though all Michigan has done is adopt an approach that 40 other states already follow.

The *Ohio Democratic Party* decision also highlights another way the Sixth Circuit contravened this Court's *Anderson-Burdick* analysis: voter preferences (such as

preferring to vote straight ticket) do not amount to a burden. "The Equal Protection Clause, as applied under the *Anderson-Burdick* framework, simply cannot be reasonably understood as demanding recognition and accommodation of such variable personal preferences, even if the preferences are shown to be shared in higher numbers by members of certain identifiable segments of the voting public." *Id.* at *7. Yet in this case the Sixth Circuit and the district court converted personal preferences for straight-ticket voting into constitutional requirements.

II. The Sixth Circuit's erroneous interpretation of an important federal statute, the Voting Rights Act, also warrants review.

Both the Sixth Circuit and the district court analyzed the claim under § 2 of the Voting Rights Act under a case, *Ohio State Conference of the NAACP* v. *Husted*, 768 F.3d 524, 552 (6th Cir. 2014), that this Court stayed in the context of a likelihood-of-success analysis, 135 S. Ct. 42 (2014).

The proper § 2 test is laid out in the statutory language. Subsection (b) provides that subsection (a) is violated if, based on the totality of the circumstances, the political processes leading to nomination or election in the state or political subdivision are not "equally open" to participation by members of a class of citizens protected in subsection (a). 52 U.S.C. § 10301(b). There has been no showing that the political processes leading to nomination or election in this State is not equally open to participation by African-American citizens because of straight-ticket voting.

The district court opined (and the Sixth Circuit agreed) that eliminating straight-ticket voting would place disproportionate burdens on African-American

communities because African-Americans "are more likely to use straight party voting than white voters." 2016 WL 3922355, at *10. But the elimination of straight-ticket voting applies to all Michigan voters of all races and has never been held—in any of the other 40 states that do not allow it—to violate § 2 of the Voting Rights Act. See, e.g., *One Wisc. Inst., Inc.*, 2016 WL 4059222, at *49–50 (finding no voting rights violation under § 2).

Contrary to this erroneous ruling, the fact that one race disproportionately votes in a particular way does not mean that a law affecting that preference violates § 2. At the outset, § 2 does not prohibit an ordinary, race-neutral voting statute merely because it results in a statistical disparity. *Wesley* v. *Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986); accord *Frank* v. *Walker*, 768 F.3d 744, 753 (7th Cir. 2014) ("Section 2(b) tells us that § 2(a) does not condemn a voting practice just because it has a disparate effect on minorities."), vacated in part on other grounds by *Frank* v. *Walker*, 819 F.3d 384 (7th Cir. 2016).

Here, it is not a "burden" to cast a vote for one's preferred candidate, and minorities have precisely the same "opportunity" as nonminorities—all any voter has to do is fill in the oval next to the voter's desired candidate. This is thus not a situation where the State has established certain prerequisites to voting—e.g., voting in a particular precinct on Election Day—that arguably disproportionally exclude minority voters because of discriminatory racial effects—e.g., unequal lack of transportation or time to get to the polls. Michigan's law affects only people already qualified and able to vote and present at the polling place. There is no rational argument that

requiring *all* voters to vote for their candidates is a burdensome denial that deprives minorities of an *equal* opportunity. The conclusion that African-American voters disproportionately used the straight-ticket option when it was available in no way suggests it is a burden, much less a discriminatory burden, to vote for all candidates under the new law.

Relatedly, there is also no rational argument that voting for all preferred candidates imposes a discriminatory burden "linked to" race, as *NAACP v. Husted* required. 768 F.3d at 557. There is no basis for arguing that African-American voters as a whole are somehow less able or willing to vote for all of their preferred candidates because of prior discrimination. Accordingly, even if voting for one's candidate were a "burden," it still survives because there is no evidence that this alleged burden is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* (quoting *Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986)).

Indeed, this is undisputed: because the district court could not find that past discrimination somehow burdened minorities in voting for all preferred candidates, it instead embarked on an untethered examination of whether some of the Senate Report factors mentioned in *Gingles*—e.g. racial appeals in campaigns, responsiveness to minority's needs—exist in Michigan. 2016 WL 4267828, at *4. But this, of course, says nothing about whether banning straight-ticket voting disproportionately burdens minority voters. Even *NAACP v. Husted* said that plaintiffs must

prove that the "burden" must be "*caused by or linked to*" past or present societal discrimination. 768 F.3d at 557 (emphasis added). Here, no one, including the district court, suggests that there is some historical discrimination that affects the equal ability of African-American voters to vote without the straight-ticket option in Michigan.

The Senate Report factors have *nothing to do* with whether eliminating straight-ticket voting will affect African-American voters, or do so disproportionately because of prior discrimination. *Gingles*, 478 U.S. at 45. If it *did* disproportionately burden African-American voters, this would not be affected or ameliorated by the *absence* of factors like racial electoral appeals or racially polarized voting. Conversely, if it did *not* have such a disproportionate burden, then no such burden could be inferred from (or caused by) the *existence* of racial appeals, racially polarized voting, or other factors. The factors thus say nothing about whether eliminating straight-ticket voting has a discriminatory result on minority voters. These factors affect only whether minorities can "*elect* their preferred representatives" in an at-large or white-majority district, *Gingles*, 478 U.S. at 63, and therefore are only relevant in "vote dilution" cases (after plaintiffs satisfy the three *Gingles* preconditions, see *id.*, at 48–51). Because this case does not involve redistricting issues, the *Gingles* test and the related Senate Factors are "unhelpful" in resolving this § 2 claim. See *Frank*, 768 F.3d at 754. The Sixth Circuit and district court thus should not have examined the Senate Factors that normally apply to a § 2 case.

Further, to violate § 2 of the Voting Rights Act, a voting practice must proximately cause racial inequity. The VRA applies only if a voting practice "*imposed* . . . by [the] *State* . . . *results in* a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Thus, if the alleged "denial or abridgment" "results" from something other than the challenged state conduct, § 2 does not apply.

Here, the plaintiffs have not shown a causal link between the elimination of straight-ticket voting and the "denial or abridgeent" of the right to vote. Even the report of the plaintiffs' expert, Kurt Metzger, does not address causation between race and lines. For causation, the district court relied upon the conclusory affidavit of Joseph Rozell, a local clerk, who opined that it would take at least 13 minutes to mark a ballot without straight-ticket voting for all voters, resulting in an increase of wait times. (Compl. Ex. 14, R. 1–15, Rozell Decl. ¶ 14, Page ID # 73.) But this affidavit does not prove a causal link based on race. At most, it shows a ripple effect in wait times. But those wait times have not been shown in a "denial or abridgment" of the right to vote. Similarly, the district court's observation that wait times would increase "as much as forty minutes in Oakland County, which is *only* 13% African-American" does not advance the plaintiffs' theory that a racial connection exists. (Am. Op. & Order, R. 25, Page ID # 725).

The district court also ignored the MIT study cited by the plaintiffs. (Compl. Ex. 2, 05/24/2016, R. 1–3, Page ID # 73.) According to the MIT study, "[a]s lines get

longer, especially on Election Day, the problem voters experience becomes increasingly likely to occur at the *registration table*." (Compl. Ex. 2, 05/24/2016, R. 1–3, Page ID # 51 (emphasis added).) Accordingly, the study concludes that the most effective way to eliminate lines at the polls is to reduce the amount of time spent at the registration table. (*Id.*, Page ID # 67, 70.) Because there is "no one, silver bullet 'fix'" that will solve wait times at the polls—even the MIT study relied upon by the plaintiffs concedes this point (*id.*, Page ID # 75)—it was clear error for the district court to ignore this evidence, particularly without conducting an evidentiary hearing that would at least have allowed the State to conduct a cross-examination that would have brought to light the flaws inherent in the report. The district court's failure to give the State a meaningful opportunity to cross-examine Metzger, and its subsequent reliance on Metzger's report compounds that error resulting in prejudice to Defendant. And Metzger's statistics are suspect in any event, because the plaintiffs' expert ignored counties that have the highest percentages of straight-ticket voting but have small minority populations. (Compl. Ex. 10, R. 1–11, Page ID # 219–63.)

This point warrants further explanation. Metzger's analysis and the lower courts' reliance on Metzger are deficient, because Metzger's sample size is not representative of the entire State. The analysis only looks at 9 of the 83 counties in the State. (*Id.* at 7, Page ID # 225.) These 9 counties account for 58.2% of Michigan's total voting-age population but account for an overrepresented 88.6% of the African-

American voting-age population. (*Id.*) Also, by failing to include a more representative sample of counties, the analysis fails to take into account a large portion of non-African-American voting-age population who may also use straight-party ticket.

For example, one of the plaintiffs' own exhibits shows that a higher percentage of the voters in Ottawa County (a county Metzger chose to exclude from his analysis) used straight-party voting than in Wayne County (a county he included): 59.9% to 58.3%. (R. 1–14 at 4, Page ID # 276.) The population in Ottawa County, according to the U.S. census website, is 1.8% African-American and 92.8% Caucasian. QuickFacts, Ottawa County, Michigan, available at http://www.census.gov/quickfacts/table/PST045215/26139 (last accessed June 17, 2016). But Metzger disregarded Ottawa County, Washtenaw County, and Livingston County even though they were ranked in the top 12 most populous counties (8th, 11th, and 6th, respectively). (R. 1–14 at 4, Complaint, Page ID # 276.) The plaintiffs' selective citation to incomplete data falls apart when substantially similar percentages of the African-American and non-African-American voting population use straight-party voting across the state. (Def's. Resp. Ex. 4 (Aff. of Christopher Thomas), R. 20–5 ¶ 18, Page ID # 631) (roughly 50% of Michigan voters use straight-ticket voting).

By failing to properly apply this important statute, and by deviating from its causation requirement, the Sixth Circuit and the district court misapplied this important statute, immediately before an election, and in so doing deprived Michigan of its constitutionally protected authority to direct the manner of elections.

III. Denying the stay would result in irreparable harm, as irreparable harm occurs whenever a state statute is, as here, enjoined.

This third factor is also satisfied. Enjoining a duly enacted statute passed by a state legislature is a per se irreparable harm: "any 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*, 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)).

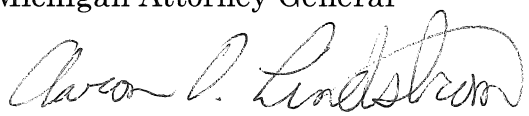
Enjoining this particular statute, this close to the general election, creates the possibility of voter confusion and runs contrary to the public's interest in the smooth administration of elections.

CONCLUSION

For these reasons, this Court should grant a stay of the preliminary injunction pending a resolution of the appeal in the Sixth Circuit on the merits.

Respectfully submitted,

Bill Schuette
Michigan Attorney General



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Dated: SEPTEMBER 2016

No. _____

In the Supreme Court of the United States

RUTH JOHNSON,
IN HER OFFICIAL CAPACITY AS MICHIGAN SECRETARY OF STATE, APPLICANT

v.

MICHIGAN STATE A. PHILIP RANDOLPH INSTITUTE; ET AL.

Appendix A – Sixth Circuit Order denying Stay

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case Nos. 16-2071/16-2115, *MI State A. Philip Randolph, et al v. Johnson*
Originating Case No. : 2:16-cv-11844

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. David J. Weaver

Enclosures

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0198p.06

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.

Nos. 16-2071/2115

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:16-cv-11844—Gershwin A. Drain, District Judge.

Decided and Filed: August 17, 2016

Before: MOORE, GILMAN, and STRANCH, Circuit Judges.

COUNSEL

ON MOTION AND REPLY: Denise C. Barton, Erik A. Grill, Adam Fracassi, Joseph Y. Ho, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. **ON RESPONSE:** Mary Ellen Gurewitz, SACHS WALDMAN, P.C., Detroit, Michigan, Mark Brewer, GOODMAN ACKER, P.C., Southfield, Michigan, for Appellees. **ON BRIEF:** John J. Bursch, BURSCH LAW PLLC, Caledonia, Michigan, John D. Pirich, Andrea L. Hansen, Kevin M. Blair, HONIGMAN MILLER SCHWARTZ AND COHN LLP, Lansing, Michigan, for Amici Curiae.

MOORE, J., delivered the opinion of the court in which GILMAN and STRANCH, JJ., joined. GILMAN, J. (pp. 16–18), delivered a separate concurring opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Defendant-Appellant Ruth Johnson, Michigan's Secretary of State (the "Secretary"), moves for a stay pending appeal of the district court's July 22, 2016 and August 1, 2016 orders granting the plaintiffs' motion for a preliminary injunction. The district court's preliminary injunction prohibits the Secretary from enforcing Public Act 268 ("PA 268"), a law that eliminates straight-party voting in Michigan. The district court found that Michigan's elimination of straight-party voting violated the Fourteenth Amendment of the U.S. Constitution because it placed a burden on voters—particularly African-American voters—and that this burden was not justified by Michigan's stated interests in enacting the law. The district court also found that PA 268 violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. For the reasons discussed below, we **DENY** the Secretary's motion for a stay pending appeal.

I. BACKGROUND

Michigan has offered "straight-party" (or "straight-ticket") voting since 1891. *See* 1891 PA 190, § 14. Straight-party voting allows a voter to vote for all candidates of their desired political party by making a single mark designating the selection of that political party, rather than voting for each partisan candidate individually. *See, e.g.*, R. 1-7 (2008 Macomb Cty. Ballot) (Page ID #206). Prior to 2015, Michigan attempted to abolish straight-party voting on two occasions: first in 1964, and again in 2001. R. 20-2 (State Fiscal Agency Bill Analysis at 2) (Page ID #579). On each occasion, the law was rejected by referendum. *Id*. Straight-party voting has thus been available to Michigan citizens for an uninterrupted period of 125 years.

In 2015, the Michigan legislature passed PA 268, which eliminated straight-party voting in Michigan. *See* 2015 PA 268. PA 268 also appropriates $5 million "to the department of state to purchase voting equipment to implement the elimination of straight party ticket voting." *Id.* at § 795c(2). Because PA 268 includes an appropriation, it cannot be repealed by referendum. *See Mich. United Conservation Clubs v. Sec'y of State*, 630 N.W.2d 297, 298 (Mich. 2001). PA 268

was signed into law by the governor in 2016 and became effective immediately; the law will thus remove straight-party voting from Michigan ballots beginning in the November 8, 2016 general election. *See* 2015 PA 268; R. 1-15 (Baxter Decl. at 4) (Page ID #289).

Plaintiffs—the Michigan State A. Philip Randolph Institute, Common Cause, and several individual voters—filed a complaint against the Secretary in the U.S. District Court for the Eastern District of Michigan on May 24, 2016, alleging that PA 268 violated the Fourteenth Amendment of the U.S. Constitution, Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301, and the Americans with Disabilities Act, 42 U.S.C. § 12132. R. 1 (Compl. at 1) (Page ID #1); *see also* R. 9 (Am. Compl. at 5–6, 24–30) (Page ID #394–95, 413–19).

Plaintiffs included with their complaint an expert report prepared by Kurt Metzger, a demographer and former Regional Information Specialist with the U.S. Census Bureau in Detroit, Michigan. R. 1-11 (Metzger Report at 2–4) (Page ID #221–24). Metzger's statistical analysis demonstrated "that African Americans are more likely to use the straight party voting option and that its elimination will disproportionately affect African American voters." *Id.* at 12 (Page ID #231). The plaintiffs also attached declarations from several county election administrators that estimated that the elimination of straight-party voting would increase the time that it takes an individual to vote and thus cause a demonstrable increase in wait times for voting. *See, e.g.*, R. 1-15 (Rozell Decl. at 3) (Page ID #283); R. 1-15 (Baxter Decl. at 4) (Page ID #289); R. 1-15 (Swope Decl. at 4) (Page ID #297).

Plaintiffs moved for a preliminary injunction on May 27, 2016. R. 4 (Mot. for Prelim. Inj. at 1) (Page ID #318). The Secretary filed a response in opposition, R. 20 (Def. Resp. in Op. at 1) (Page ID #536), and the plaintiffs replied, R. 21 (Pl. Reply to Def. Am. Resp. at 1) (Page ID #532). The district court held a hearing on the motion on July 14, 2016. R. 26 (Prelim. Inj. H'rg Tr. at 1) (Page ID #743).

On July 21, 2016, the district court issued an opinion and order granting the plaintiffs' motion for a preliminary injunction. *Michigan State A. Philip Randolph Institute v. Johnson*, --- F. Supp. 3d ----, 2016 WL 3922355, at *1 (E.D. Mich. July 21, 2016). The district court first concluded that the plaintiffs were not likely to succeed on the merits of their ADA claim because

it did not appear that any of the plaintiffs had standing to bring such a claim. *Id.* at *5. The district court found that the plaintiffs were likely to succeed on their claims brought under the Equal Protection Clause and Section 2 of the Voting Rights Act, however. First, with regard to the Equal Protection Clause claim, the district court evaluated PA 268 under the *Anderson/Burdick* framework and determined that the state's asserted interests did not outweigh the burden that PA 268 placed on voters. *Id.* at *7–9. Second, in analyzing the plaintiffs' claim under Section 2 of the Voting Rights Act, the district court concluded that the plaintiffs had demonstrated that the elimination of straight-party voting would disproportionately impact African-American voters and, applying the factors articulated in *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986), the district court concluded that the disproportionate burden was, in part, "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against" African-American voters. *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *10 (quoting *Gingles*, 478 U.S. at 47). Because the district court found that the plaintiffs would suffer an irreparable injury—the restriction of their right to vote—if the law were to go into effect, and because "the burden on the state would be to merely reinstate the ballots used in the 2014 election cycle," the district court concluded that the preliminary injunction factors favored the plaintiffs. *Id.* at *13–14. The district court subsequently issued two revised orders imposing the preliminary injunction. R. 25 (Prelim. Inj. at 1–37) (Page ID #706–42); R. 30 (Prelim. Inj. at 1–3) (Page ID #835–37).

The Secretary filed her first notice of appeal on July 25, 2016. R. 27 (Notice of Appeal) (Page ID #795). The Secretary also moved in the district court for a stay of the preliminary injunction pending appeal. R. 29 (Def. Mot. for Stay Pending Appeal) (Page ID #797). On August 2, 2016, the Secretary filed a separate notice of appeal to the second revised order. R. 33 (Notice of Appeal) (Page ID #861). Unhappy with the district court's briefing schedule on the emergency motion, *see* Appellant Mot. at 2, the Secretary filed an emergency motion in this court for a stay of the injunction pending appeal. On August 15, 2016, the district court issued an opinion and order denying the Secretary's emergency motion to stay the preliminary injunction. *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-cv-11844, 2016 WL 4267828, at *1 (E.D. Mich. Aug. 15, 2016). The Secretary asked that we rule on her motion for a stay pending appeal by August 17, 2016.

II. DISCUSSION

We evaluate four factors in considering a motion for a stay pending appeal under Federal Rule of Appellate Procedure 8(a):

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Serv. Emp. Int'l Union Local 1 v. Husted, 698 F.3d 341, 343 (6th Cir. 2012) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). These four factors "are interconnected considerations that must be balanced together." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "As the moving party, [the Secretary] has the burden of showing" that a stay is warranted. *Serv. Emp. Int'l Union Local 1*, 698 F.3d at 343. We conclude that the Secretary has not met this burden.

We first consider the likelihood that the Secretary will prevail on the merits of the appeal, and thus we must consider the likelihood that the Secretary can "show that the district court abused its discretion in granting the preliminary injunction." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008). Under the abuse-of-discretion standard, "[t]he injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

A. Equal Protection Clause Challenge

The Secretary first asserts that the district court erred in holding that the plaintiffs were likely to succeed on their Equal Protection Clause challenge. "The right to vote is a 'precious' and 'fundamental' right," *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966)), and it is clear that this right "'is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.'" *Id.* (quoting *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008)). Specifically, "[t]he Equal Protection Clause applies when a state either classifies voters in disparate ways, or places restrictions on the right to vote." *Id.* (internal

citations omitted). Here, the plaintiffs have asserted that their right to vote is restricted by PA 268 because, in eliminating straight-party voting, PA 268 will increase waiting times at polling locations and will cause more voters to miscast ballots due to confusion.

We apply the framework established by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983), to evaluate Equal Protection Clause challenges to voting restrictions. *See Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015). "Under the *Anderson-Burdick* test, the court must first 'consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.'" *Id.* at 693 (quoting *Anderson*, 460 U.S. at 789). Second, the court "must 'identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Id.* "Finally, it must 'determine the legitimacy and strength of each of those interests' and 'consider the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.*

"Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent" of the burden that the law imposes on the rights of voters. *Burdick*, 504 U.S. at 434. If a statute imposes a "'severe'" burden on the right to vote, we apply strict scrutiny and the law "must be narrowly tailored and advance a compelling state interest." *Hargett*, 791 F.3d at 693 (quoting *Burdick*, 504 U.S. at 434). By contrast, if the law imposes a "'reasonable' and 'nondiscriminatory'" burden, "the statute will be subject to rational basis [review] and survive if the state can identify 'important regulatory interests' to justify it." *Id.* "If the burden lies somewhere in between, courts will weigh the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.* (internal quotation marks and alterations omitted).

In granting the plaintiffs' motion for a preliminary injunction, the district court determined that PA 268 imposed a burden that fell in between the two extremes of this framework, and accordingly balanced the injury imposed by the law with the state's asserted interest in eliminating straight-party voting. *See Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *6. In its motion for a stay pending appeal, the Secretary insists that PA 268 "impacts only the manner of voting—not the right to vote." Appellant Mot. at 3. It is clear,

however, that how a state chooses to regulate the *manner* that a person must cast a ballot undoubtedly impacts the individual right. Indeed, the very premise of the *Anderson/Burdick* framework is that "all election regulations[] have an impact on the right to vote" to some degree. *Burdick*, 504 U.S. at 434. The question that we must answer is what the "character and magnitude of the asserted injury" on the right to vote is here, *see Anderson*, 460 U.S. at 789, and we do not believe that the Secretary has shown a likelihood that the district court erred in finding that PA 268 imposes a burden on the right to vote that justifies the application of more than rational-basis review, but less than strict scrutiny.

The district court identified two primary burdens that PA 268 would impose on the right to vote. First, by increasing the time that it takes to vote, the elimination of straight-party voting would increase the wait times for voting; and second, because the ballots maintained the same graphics identifying the political parties on the top of the ballot—removing only the bubble to vote for all candidates of that party—PA 268 would cause voter confusion and thus increase the risk of individuals not having their votes counted. *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *7–8. Moreover, because Metzger's report demonstrated that there were "extremely high" correlations between the African-American voting population and the use of straight-party voting, the district court found that African Americans would be disproportionately burdened by PA 268. *Id.* at *7.

We first consider the district court's conclusion that PA 268 would impose a burden on voters by increasing the time that it takes to vote. The district court credited the testimony of Joseph Rozell, the Director of Elections in the Elections Division of the Office of the Oakland County Clerk, who testified that "[t]he use of straight party voting significantly reduces the amount of time that it takes a voter to mark his or her ballot and its elimination will significantly increase the amount of time that it takes to vote the ballot." R. 1-15 (Rozell Decl. at 3) (Page ID #283); *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *7; *see also* R. 1-15 (Baxter Decl. at 4) (Page ID #289); R. 1-15 (Swope Decl. at 4) (Page ID #297). The evidence presented to the district court suggested that nearly 50% of all voters use straight-party voting in Michigan. *See* R. 1-11 (Metzger Report at App. A) (Page ID #250–56). By increasing the time that it takes for an individual voter to complete his or her ballot, PA 268 will accordingly cause longer lines

at polling places and increase the wait time to cast a vote. R. 1-15 (Rozell Decl. at 3) (Page ID #283). Indeed, Rozell estimated that "the elimination of straight-party voting could increase wait time as much as forty minutes in Oakland County." *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *7 (citing R. 1-15 (Rozell Decl. at 4) (Page ID #284)). Longer lines at the polls "reduce[] the confidence voters have that their votes are counted," impose additional monetary costs on voters that must stand in line, and may even turn some voters away from voting at all. R. 1-3 ("Managing Polling Place Resources" Caltech/MIT Study at 11–12) (Page ID #52–53).

Of particular significance is Metzger's conclusion that African-American voters in Michigan "are more likely to use the straight party voting option" in Michigan, and to a significant degree. R. 1-11 (Metzger Report at 1) (Page ID #220). Specifically, the district court noted that, "although the average straight-party voting rate in Michigan is about 50%, the straight-party voting rate in African-American majority districts was 67% in 2012, and 73.5% in 2014." *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *2, 7 (citing R. 1-11 (Metzger Report at App. A) (Page ID #250–56)). In Royal Oak Charter Township and Highland Park—cities with population that are 95.6% and 93.1% black, respectively—the straight-party voting rate was approximately 82% in 2014. R. 1-11 (Metzger Rep. at App. A) (Page ID #254, 256). Indeed, "[t]he five cities with straight-party voting rates greater than 75%[] were all majority African American." *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *2. The district court accordingly found "that PA 268 presents a disproportionate burden on African Americans' right to vote" and, "as Metzger concludes, the elimination of straight-party voting would likely have a larger impact on African-American voters." *Id.* at *7; *see* R. 1-11 (Metzger Report at 13) (Page ID #231). Because African-American majority districts in Michigan such as Detroit have also historically faced some of the longest wait times in the state, *see* R. 1-15 (Baxter Decl. at 5–6) (Page ID #290–91), the increase in long lines occasioned by the elimination of straight-party voting will impact these voters to an even more significant degree.

The district court also concluded that PA 268 would place a burden on the right to vote because the law would cause voter confusion and thus increase the risk that ballots would be marked incorrectly and would not be counted by the ballot scanner. *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *8. Specifically, the ballots that Michigan intends to use

in the 2016 general election maintain a listing of each political party at the top of the ballot, along with a graphic representing each party. *See* R. 1-16 (Gongwer Report at 1) (Page ID #396). These are substantially the same graphics that appeared on previous ballots in the straight-party voting section, and are in substantially the same location, but the bubble for selecting the party to vote that party's candidates on a straight-party ticket has been removed. *Compare* R. 1-16 (Gongwer Report at 1) (Page ID #396), *with* R. 1-7 (2008 Macomb Cty. Ballot) (Page ID #206). The district court credited testimony from county election officials that "[t]he uniform opinion among the county clerks is that this is going to cause great confusion and that voters, used to being able to vote straight-party, will circle the party they want or otherwise seek to mark this new ballot display, thinking that this is the way to vote straight-party as they have done in the past." *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *8 (quoting R. 1-15 (Rozell Decl. at 5–6) (Page ID #284–85)).

The Secretary presented no testimony or expert reports in the district court to counter these facts, nor does the Secretary present arguments in her motion for a stay that persuasively demonstrate that the district court committed clear error in its factual conclusions. Rather, the Secretary insists that the district court made an error in its legal conclusion regarding the degree of the burden imposed by PA 268 because filling out bubbles for candidates "is the very *act* of 'voting,'" and thus cannot constitute a burden, or at least a burden that deserves more than rational-basis review. Appellant Mot. at 3–4. But again, this proves too much. In assessing the burden imposed on voters by a state's electoral mechanisms, courts may undoubtedly consider whether the state's practices will cause long lines and delays at polling places and how these lines and delays may impact the right of a voter to cast his or her ballot. *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008).

The Secretary also places a strong emphasis on the fact that most states do not have straight-party voting; if the clear majority of states do not offer straight-party voting, the Secretary asserts, it is impossible to conclude that the absence of straight-party voting imposes an unconstitutional burden. *See* R. 26 (Prelim. Inj. H'rg Tr. at 29) (Page ID #771). Importantly, however, comparing the isolated voting practice of one state with the isolated voting practice of another state is not always an apples-to-apples comparison. This law presents a strong example.

Declarations submitted by the plaintiffs report that Michigan ballots contain substantially more candidates than other states, and thus the practice of straight-party voting in Michigan may save far more time than straight-party voting in other states. *See* R. 1-15 (Baxter Decl. at 2) (Page ID #287); R. 1-15 (Swope Decl. at 2) (Page ID #295). Moreover, Michigan does not allow early voting,[1] and Michigan does not permit no-excuse absentee voting, *see* Mich. Comp. Laws §§ 168.758 & 168.759, making the average wait times at physical polling locations on Election Day of tremendous significance to Michigan voters. In the 2012 general election, Michigan had the sixth-highest estimated average wait time as compared to other states. *See* 1-3 ("Managing Polling Place Resources" Caltech/MIT Study at App. 1) (Page ID #78). Each of these facts demonstrates that the option of straight-ticket voting may impact Michigan voters in a way that it does not impact voters in Ohio, for example. It is accordingly not enough for Michigan to simply rely on the lack of straight-party voting in other states; the necessary question is how this law interacts with other voting practices in Michigan, and the burdens this law places on voters who vote within Michigan's electoral framework.

In considering the above, we conclude that the Secretary has not shown a likelihood of demonstrating that the district court erred in finding that the burden placed on voters by PA 268 requires more than rational basis, but less than strict scrutiny. We next turn to consider the district court's evaluation of the state's asserted interests. Here, the state has advanced two primary interests for PA 268: "fostering an engaged electorate that vote for candidates and issues" and "encouraging the electorate to vote for the nonpartisan issues on the ballot." R. 20 (Def. Mot. in Op. at 23) (Page ID #562).

In eliminating straight-party voting, PA 268 requires voters to fill in individual bubbles for each candidate. A voter will now have to look, at least briefly, at each section of the partisan ballot in order to identify and fill in the desired bubble. Contrary to the state's assertions, it is far from evident that this will "foster[] an engaged electorate." *Id.* As the district court noted, "the new ballot will still inform the voters of the party affiliation of every partisan candidate," *Mich. State A. Philip Randolph Inst. v. Johnson*, 2016 Wl 3922355, at *8, and as discussed above,

[1]*See* Michigan Dep't of State, *Elections & Voting: Early Voting*, *available at* http://www.michigan.gov/sos/0,1607,7-127-29836-202483--F,00.html (last accessed August 12, 2016).

graphics representing each of the parties appearing on the partisan ballot are prominently on display at the top of the ballot, just as before. The ballot will still inform voters of the available political parties, and the party affiliation of each partisan candidate will still appear beside the candidate's name. Accordingly, a voter desiring to vote for all of the candidates of his or her desired political party may still do so without reading any of the candidates' names, without knowing the office for which the candidate is running, and without knowing a single fact about either—the only change, as the state admits, will be that a voter now "can't do it through one bubble." R. 26 (Prelim Inj. H'rg Tr. at 31–32) (Page ID #773–74). The state has presented nothing apart from vague speculation that suggests that a voter will make a more informed choice in filling in each individual bubble rather than choosing to fill in one bubble for a straight-party vote.

The state also asserts that eliminating straight-party voting will reduce the likelihood that a voter will skip the non-partisan section of the ballot. *Id.* at 37 (Page ID #779). As discussed above, however, the district court credited testimony from county election officials that there is a likelihood that voters will still circle the party graphic at the top of the ballot, believing that they are casting a straight-party vote (as, perhaps, they have consistently done for decades). Accordingly, although we acknowledge that the state has a legitimate interest in reducing confusion over which section of the ballot needs to be individually completed, this interest is diminished by the new confusion that PA 268 will likely cause.

In sum, the district court credited unrebutted evidence in the record demonstrating that PA 268 will increase the time that it takes to vote, particularly in African-American communities where straight-party voting is prominent and where lines are often already long. The district court also found that the law was likely to increase voter confusion and miscast ballots. Although this burden is not severe, it is also not slight. In the face of this burden, the state has offered only vague and largely unsupported justifications of fostering voter knowledge and engagement. As the plaintiffs assert, there is nothing in the record "that straight party voters vote blindly, that they are less informed than other voters or that they fail to complete their ballot at a lower rate." Appellee Resp. at 11 (emphasis removed). After evaluating the burdens imposed by the law and the state's asserted justifications, we hold that the Secretary has not shown that there

is a substantial likelihood that she will prevail on appeal in demonstrating that the district court erred in evaluating the plaintiffs' Equal Protection Clause claim.

B. Voting Rights Act Challenge

The Secretary further asserts that she can demonstrate a substantial likelihood that the district court erred in its analysis under Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. Appellant Mot. at 6. Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 52 U.S.C. § 10301(a). Importantly, "Section 2, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent." *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002). Rather, Section 2(b) provides:

> A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The Supreme Court in *Gingles* listed several factors "that might be probative of a § 2 violation," drawing from the Senate Judiciary Committee Majority Report that accompanied the bill. *Id.* at 36. These factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or

other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 36–37. The Section 2 framework discussed above is most often used in assessing vote-dilution claims, rather than vote-denial or vote-abridgement claims. *See Veasey v. Abbott*, --- F.3d ----, 2016 WL 3923868, at *17 (5th Cir. July 20, 2016). Nonetheless, "courts have entertained vote-denial claims regarding a wide range of practices," and "Section 2's plain language makes clear that vote denial is precisely the kind of issue Section 2 was intended to address." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014); *see also Gingles*, 478 U.S. at 45 n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution.").[2]

[2]In *Ohio State Conference of the NAACP v. Husted ("Husted II")*, we held that Section 2 of the Voting Rights Act applied to the plaintiffs' challenge to Ohio's early-voting procedures because the statutory language of Section 2 indicates that "Section 2 applies to *any* discriminatory 'standard, practice, or procedure . . . which results in a denial or abridgement' of the right to vote." 768 F.3d 524, 552 (6th Cir. 2014). Our opinion "read the text of Section 2 and the limited relevant case law as requiring proof of two elements for a vote denial claim. First, as the text of Section 2(b) indicates, the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.* at 554. "Second, the Supreme Court has indicated that that burden must be in part caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class.'" *Id.* (quoting *Gingles*, 478 U.S. at 47). We noted that "[i]n assessing both elements, courts should consider 'the totality of the circumstances,'" including consideration of the *Gingles* factors. *Id.*

Husted II affirmed the district court's order granting the plaintiffs a preliminary injunction, but the Supreme Court stayed the district court's preliminary injunction on September 29, 2014, in advance of the 2014 election. *See Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42 (2014). Because the plaintiffs' request for a preliminary injunction became moot after the 2014 election, we vacated our *Husted II* opinion. *Ohio State Conf. of the NAACP v. Husted*, No. 14-3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014). In setting out the framework for its Section 2 analysis in the present case, the district court acknowledged that *Husted II* was not binding because it had been vacated, but considered *Husted II* persuasive authority. 2016 WL 3922355, at * 6 n.2.

The district court concluded that the plaintiffs had demonstrated that PA 268 imposed a disproportionate effect on African-American voters because the Metzger report "demonstrated that African-Americans are more likely to use straight-party voting than white voters, and 'its elimination will disproportionately affect African-American voters.'" 2016 WL 3922355, at *10 (quoting R. 1-10 (Metzger Report at 1) (Page ID #220)). The district court further found that this burden was "linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class,'" citing *Gingles* factors 2, 5, 6, 7, 8, and 9 as relevant. *Id.* at *13. The district court drew from available news articles and facts from Metzger's report that demonstrated that African Americans in Michigan "tend to vote overwhelmingly for Democrats," that African Americans "continue to bear the harmful effects of past discrimination," and that "[r]ecent political campaigns in Michigan . . . have been marred with direct and indirect racial appeals." *Id.* at *11–13.

We do not doubt that these facts are true; it is a more challenging question, however, to say that the plaintiffs have established that PA 268 "interacts with" these conditions "to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The district court found that "racist policies such as redlining and housing discrimination" in Michigan contributed to the racial polarization of metropolitan areas. *Mich. State A. Philip Randolph Inst.*, 2016 WL 392355, at *13. If black voters in Michigan disproportionately use straight-party voting, and the absence of straight-party voting in Michigan will increase wait times, then PA 268 may "interact[] with" the racial polarization of communities in Michigan "to cause an inequality" because African-American communities will likely face longer wait times in the absence of PA 268 than non-African-American communities. *Gingles*, 479 U.S. at 47. Although it is a closer question whether the Secretary can establish a likelihood of success on appeal with regard to the Section 2 claim, nonetheless, this does not alter the fact that the likelihood-of-success-on-appeal factor weighs in

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The Secretary argues that it was inappropriate for the district court to do so. Appellant Mot. at 4. The framework set forth in our *Husted II* opinion for evaluating a Section 2 vote-denial claim, however, has recently been adopted both by the Fifth Circuit sitting en banc and the Fourth Circuit. *See Veasey v. Abbott*, No. 14-41127, --- F.3d----, 2016 WL 3923868, at *17 (5th Cir. July 20, 2016) (en banc); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). We agree with *Husted II*—and our sister Circuits—that the two-part framework discussed above is appropriate when evaluating a Section 2 vote-denial claim, and the district court did not err in its decision to use the *Husted II* framework to evaluate the plaintiffs' challenge here.

favor of the plaintiffs because of our conclusion regarding the Equal Protection Clause claim discussed above.

C. Irreparable Injury and the Public Interest

We also conclude that the Secretary is not likely to establish that the district court abused its discretion in granting an injunction because we find the district court appropriately evaluated the remaining preliminary-injunction factors. As the district court stated, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Mich. State A. Philip Randolph Inst.*, 2016 WL 3922355, at *13 (quoting *Obama for America*, 697 F.3d at 436). Of particular significance here, the district court's grant of a preliminary injunction maintained the status quo in Michigan that was in place for 125 years: maintaining straight-party voting, where "the record does not show that there were any problems with the old ballot" that contained the straight-party option. *Id.* at *14. Consideration of the factors evaluated by the district court in granting a preliminary injunction also informs the remaining factors that we must evaluate in determining whether to stay the district court's opinion. *See Serv. Emp. Int'l Union Local 1*, 698 F.3d at 343. This case does not involve the potential disruption of complicated election-administration procedures on the eve of Election Day; rather, denying 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. We find that the Secretary has not met her burden to demonstrate that a stay pending appeal of the district court's order is warranted.

III. CONCLUSION

For the foregoing reasons, the motion for a stay pending appeal is **DENIED**.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring. I fully concur in the lead opinion and write separately only to emphasize a few points. First, our ruling today is not the end of the case. We are simply deciding that the Michigan Secretary of State has not met her burden of demonstrating that a stay of the district court's preliminary injunction is warranted. In reaching this decision, we are limited to the admittedly one-sided proof available at this stage of the litigation because the Secretary, for whatever reason, did not timely submit any proof contradicting the plaintiffs' evidence.

For instance, various appellate briefs supporting the Secretary's position now characterize Metzger's report, which was included with the plaintiffs' complaint, as "junk science" and attack its alleged "cherry picking" of data. But the Secretary never submitted any contrary proof to the district court. She did not even request limited discovery until July 13, 2016, the day before the hearing on plaintiffs' motion for a preliminary injunction and over seven weeks after the motion was filed. By that point, the district court reasonably concluded that her request was not timely.

The Secretary will have an opportunity to present contrary evidence in subsequent proceedings. Perhaps the Secretary's proof at later stages of this case will overcome the plaintiffs', but at this early stage of the case we are limited to the proof that is presently in the record.

Turning to that record, the lead opinion concludes that PA 268 burdens the right to vote by increasing voter disenfranchisement in at least two ways. First, voter confusion resulting largely from the continued existence of the party vignettes on the ballots is likely to cause an increase in erroneous ballots due to some voters circling the vignettes rather than marking the bubbles in the partisan section of the ballot. The second burden involves longer lines at polling places, particularly in the African-American community.

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.

Among plaintiffs' proof is a declaration from Daniel Baxter, the Director of Elections in the Office of the Detroit City Clerk. He flatly states that "[l]onger lines will deter voters from voting." Chris Swope, the Ingham County Clerk, makes a similar a statement. Taken together, along with Metzger's report identifying the positive correlation between straight-party voting and the African-American community, the above declarations support the district court's preliminary injunction. And, unlike the potential disruptions in other cases that involve voter-identification requirements or the elimination of early voting, I see no grave harm to the state of Michigan in allowing straight-party voting to remain on the ballot this November, as it has for the past 125 years.

I next want to allay the unwarranted intimations by the Secretary and the amici supporting her that, by denying the stay, we are establishing a permanent constitutional entitlement to straight-party voting. This framing is misleading for two reasons. First, as mentioned above, we are at the preliminary stage of this case, and the ruling that the evidence now supports might well be different at a later stage. Second, even if the proof does not change, voting-regulation challenges under the Equal Protection Clause and Section 2 of the Voting Rights Act are jurisdiction-specific inquires. Whether a practice is permissible under a given set of facts is thus not legally determinative of whether it is permissible under a different set of facts.

The lead opinion identifies several Michigan-specific factors—the unusually long ballots and the unavailability of both early voting and no-excuse absentee voting—that exacerbate the burdens that the elimination of straight-party voting will have in Michigan. These conditions might not always exist in Michigan. Record evidence implicitly acknowledges this point. For instance, the declaration of Mary Lansdown, the President of the Randolph Institute's Flint

Chapter, notes that "the line problems would not be so bad if we had early voting like some states have, or if some people could vote absentee without a reason."

Moreover, the confusion concern that we have identified could be greatly reduced by, for example, eliminating the party vignettes from the ballots. The continued presence of the vignettes on the ballots certainly appears to be a legislative oversight—perhaps one precipitated by the Michigan legislature's haste to create a purportedly better-informed electorate. In any event, just because the present record supports the district court's preliminary injunction maintaining the option of straight-party voting for this November's general election does not mean that the state must always permit straight-party voting.

For all of the above reasons, I concur in the lead opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 16-2071/2115

FILED
Aug 17, 2016
DEBORAH S. HUNT, Clerk

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.

Before: MOORE, GILMAN, and STRANCH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and submitted on Defendant's motion and reply, and on the response of Plaintiffs.

IN CONSIDERATION WHEREOF, it is ORDERED that the motion for a stay pending appeal is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. _____

In the Supreme Court of the United States

RUTH JOHNSON,
IN HER OFFICIAL CAPACITY AS MICHIGAN SECRETARY OF STATE, APPLICANT

v.

MICHIGAN STATE A. PHILIP RANDOLPH INSTITUTE; ET AL.

Appendix B – Sixth Circuit Denial of Request for Initial Hearing En Banc

Nos. 16-2071/2115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 01, 2016
DEBORAH S. HUNT, Clerk

MICHIGAN STATE A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Plaintiffs-Appellees,

v.

RUTH JOHNSON, IN HER OFFICIAL CAPACITY AS MICHIGAN SECRETARY OF STATE,

Defendant-Appellant.

O R D E R

MOORE, J. (pp. 2–4; app. 5–17) delivered a concurrence to the court's denial of initial hearing en banc, in which WHITE and STRANCH, JJ., joined. BOGGS, J. (pp. 18–19; app. 20–25), delivered a dissent to the court's denial of initial hearing en banc, in which BATCHELDER, SUTTON, McKEAGUE, and GRIFFIN, JJ., joined. KETHLEDGE, J. (pg. 26), delivered a dissent to the court's denial of initial hearing en banc.

The court received a petition for initial hearing en banc. The petition was circulated to all of the active judges of the full court. Less than a majority of the active judges voted in favor of initial hearing en banc.

Therefore, the petition for initial hearing en banc is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring in the denial of initial hearing en banc.

The panel assigned this case promptly considered the motion for a stay and denied a stay pending appeal of the district court's preliminary injunction. *See* Appendix *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-2071, 2016 WL 4376429 (6th Cir. Aug. 17, 2016). This case has received expedited treatment: it was appealed on July 25 and immediately assigned to a merits panel. The State did not file its emergency motion to stay until August 10, but received a decision on August 17, as it had requested. The State then filed a petition for an initial hearing en banc on August 18. After consideration by all active Sixth Circuit judges, initial hearing en banc was not granted. Upon expedited merits briefs from the parties, the panel will proceed promptly to consider the appeal of the preliminary injunction.

As explained in the attached panel opinions on the stay, the preliminary injunction keeps in place the law of Michigan for the past 125 years allowing straight-party voting. On two prior occasions (in 1964 and 2001), the people of Michigan rejected by referendum the efforts of the legislature to eliminate this practice begun in 1891. A referendum by the people regarding Michigan's most recent legislative enactment, Public Law 268, is not allowed under state law only because an appropriation of $5 million was attached to the legislation. The district court granted the preliminary injunction to preserve the 125-year status quo, finding that the plaintiffs were likely to succeed in their challenge to Public Act 268 based on the burden imposed on voters—particularly African-American voters—in violation of the Equal Protection Clause of the U.S. Constitution and section 2 of the Voting Rights Act, 52 U.S.C. § 10301. In light of the

record developed in the district court, both the district court and this Circuit have denied a stay pending appeal.

A majority of the active judges has denied initial hearing en banc. This comports with our usual and established practice in election cases of allowing the panel to consider the merits of an appeal before involving the en banc court. *See, e.g.*, *Ohio Democratic Party v. Husted*, No. 16-3561 (Order Denying Initial Hearing En Banc, June 20, 2016) (denying State of Ohio's petition for initial hearing en banc). Particularly here, where the panel has denied a stay pending appeal, and then the Secretary filed a petition for initial hearing en banc, the Secretary is essentially seeking en banc review of our panel opinions denying the Secretary's motion for a stay pending appeal. This is a clear attempt at an end-run around our Sixth Circuit I.O.P. 35(h), which directs that petitions for rehearing en banc from an order denying a motion for a stay "be circulated only to the panel judges," not to the en banc court.

As the panel explained in our opinions denying the Secretary's motion for a stay pending appeal, "[t]his case does not involve the potential disruption of complicated election-administration procedures on the eve of Election Day." *Mich. State A. Philip Randolph Inst. v. Johnson*, --- F.3d ----, 2016 WL 4376429, at *8 (6th Cir. Aug. 17, 2016). Rather, the district court's preliminary-injunction order "merely require[s] Michigan to use the same straight-party procedure that it has used since 1891." *Id.*; *see also id.* at *9 (Gilman, J., concurring) ("[U]nlike the potential disruptions in other cases that involve voter-identification requirements or the elimination of early voting, I see no grave harm to the state of Michigan in allowing straight-party voting to remain on the ballot this November, as it has for the past 125 years.").

Further, as both the majority and concurring opinions addressed in our opinions denying the Secretary's motion for a stay, "[t]he Secretary presented no testimony or expert reports in the

district court to counter [the plaintiffs'] facts." *Mich. State A. Philip Randolph Inst.*, 2016 WL 4376429, at *5; *see also id.* at *9 (Gilman, J., concurring) ("[T]he Secretary, for whatever reason, did not timely submit any proof contradicting the plaintiffs' evidence."). The evidence that was presented to the district court demonstrated that the elimination of straight-party voting would cause longer lines at polling places, particularly in areas where straight-party voting was disproportionately utilized, and that these lines would "deter voters from voting." R. 1-15 (Swope Decl. at 4) (Page ID #297). The uncontradicted evidence also demonstrated that the elimination of straight-party voting was likely to cause confusion and result in miscast ballots. *See* R. 1-15 (Rozell Decl. at 5–6) (Page ID #284–85). On the basis of this evidence—and without any contrary expert or lay testimony from the Secretary—the district court imposed a preliminary injunction that would maintain the same straight-party voting procedure that has existed in Michigan since 1891.

Upon return of jurisdiction to the panel, expedited briefing on the merits will be ordered and a prompt decision will follow.

APPENDIX TO CONCURRENCE

Michigan State A. Philip Randolph Institute v. Johnson, --- F.3d ---- (2016)

2016 WL 4376429
Only the Westlaw citation is currently available.
United States Court of Appeals,
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.

Nos. 16-2071/2115
|
Decided and Filed: August 17, 2016

Synopsis

Background: Voting rights advocacy organizations and individual voters brought action against Michigan's Secretary of State, seeking to challenge Michigan law that eliminated straight-party voting in state under Fourteenth Amendment's Equal Protection Clause and § 2 of Voting Rights Act. The United States District Court for the Eastern District of Michigan, Gershwin A. Drain, J., --- F.Supp.3d ----, 2016 WL 3922355, granted plaintiffs' motion for preliminary injunction to bar enforcement, and, 2016 WL 4267828, denied Secretary's emergency motion for stay pending appeal. Secretary then moved Court of Appeals for stay pending appeal.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:

[1] district court appropriately evaluated equal protection challenge by weighing burden on plaintiffs against state's asserted interest and chosen means of pursuing it;

[2] evidence indicated potential for inequality, thus supporting claim under § 2 of Voting Rights Act; and

[3] irreparable injury and public interest factors weighed against stay.

Motion denied.

Ronald Lee Gilman, Circuit Judge, filed concurring opinion.

West Headnotes (15)

[1] **Federal Courts**
Supersedeas or Stay of Proceedings

Court of Appeals will evaluate four factors in considering a motion for a stay pending appeal, with the factors being interconnected considerations that must be balanced together: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Fed. R. App. P. 8(a).

Cases that cite this headnote

[2] **Federal Courts**
Supersedeas or Stay of Proceedings

Moving party has the burden of showing that a stay pending appeal is warranted. Fed. R. App. P. 8(a).

Cases that cite this headnote

[3] **Federal Courts**
De novo review in general

On a motion for a stay pending appeal, under the abuse-of-discretion standard applicable when considering the likelihood that the moving party will prevail on the merits of the appeal, an injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. Fed. R. App. P. 8(a).

Cases that cite this headnote

[4] **Constitutional Law**
Voting rights and suffrage in general

Constitutional Law

Elections, Voting, and Political Rights

Right to vote is a precious and fundamental right, and this right is protected in more than the initial allocation of the franchise, as equal protection also applies to the manner of its exercise. U.S. Const. Amend. 14.

Cases that cite this headnote

[5] **Constitutional Law**

Elections, Voting, and Political Rights

Equal Protection Clause applies when a state either classifies voters in disparate ways or places restrictions on the right to vote. U.S. Const. Amend. 14.

Cases that cite this headnote

[6] **Constitutional Law**

Elections, Voting, and Political Rights

To evaluate Equal Protection Clause challenges to voting restrictions, the court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate, second, the court must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule, and third, the court must determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[7] **Constitutional Law**

Voting and political rights

On Equal Protection Clause challenges to voting restrictions, the rigorousness of the court's inquiry into the propriety of the challenged state law depends upon the extent of the burden that the law imposes on the rights of voters: if a statute imposes a severe burden on the right to vote, the court will apply strict scrutiny and the law must be narrowly tailored and advance a compelling state interest; by contrast, if the law imposes a reasonable and nondiscriminatory burden, the statute will be subject to rational basis review and survive if the state can identify important regulatory interests to justify it; and if the burden lies somewhere in between, the court will weigh the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it. U.S. Const. Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**

Elections, Voting, and Political Rights

Constitutional Law

Conduct of Elections

Election Law

Voting for entire or part of ticket by single mark or designation

District court appropriately evaluated equal protection challenge to Michigan law that eliminated straight-party voting by applying more than rational basis review, but less than strict scrutiny, and weighing burden on voting rights advocacy organizations and individual voters against state's asserted interest and chosen means of pursuing it, where court credited unrebutted evidence demonstrating that law would increase time that it would take to vote, particularly in African–American communities where straight-party voting was prominent and where lines were often already long, and it found that law was likely to increase voter confusion and miscast ballots, and, while this burden was not severe, state offered only vague and largely unsupported justifications of fostering voter knowledge and engagement. U.S. Const. Amend. 14; Fed. R. App. P. 8(a).

Cases that cite this headnote

[9] **Election Law**

Discriminatory practices proscribed in general

Section 2 of the Voting Rights Act, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a, b).

Cases that cite this headnote

[10] Election Law

Discriminatory practices proscribed in general

Essence of a claim under § 2 of the Voting Rights Act is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a, b).

Cases that cite this headnote

[11] Election Law

Dilution of voting power in general

Courts will consider several factors that might be probative of a violation of § 2 of the Voting Rights Act, including (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process, (2) the extent to which voting in the elections of the state or political subdivision is racially polarized, (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group, (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process, (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process, (6) whether political campaigns have been characterized by overt or subtle racial appeals, and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a, b).

Cases that cite this headnote

[12] Election Law

Discriminatory practices proscribed in general

Framework of § 2 of the Voting Rights Act is most often used in assessing vote-dilution claims, but the plain language of § 2 makes clear that vote denial is precisely the kind of issue it was intended to address. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a, b).

Cases that cite this headnote

[13] Election Law

Voting procedures

Evidence that black voters in Michigan disproportionately used straight-party voting, and that absence of straight-party voting in Michigan would increase wait times, indicated that Michigan law eliminating straight-party voting in state could interact with racial polarization of communities in Michigan to cause inequality, thus supporting voting rights advocacy organizations' and individual voters' challenge to that law under § 2 of Voting Rights Act. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a, b).

Cases that cite this headnote

[14] Federal Courts

Injunction and temporary restraining order cases

Irreparable injury and public interest factors weighed against stay pending appeal of preliminary injunction enjoining enforcement of Michigan law eliminating straight-party voting in state, pending appeal in challenge to law under Equal Protection Clause and

§ 2 of Voting Rights Act, where law placed restriction on fundamental right to vote, injunction merely maintained status quo that was in place in Michigan for 125 years, rather than potential disruption of complicated election-administration procedures on eve of Election Day, and record did not show that there were any problems with status quo. U.S. Const. Amend. 14; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a, b).

Cases that cite this headnote

[15] Civil Rights
Preliminary Injunction
Injunction
Presumptions and burden of proof

When constitutional rights are threatened or impaired, irreparable injury factor for a preliminary injunction is presumed, and thus a restriction on the fundamental right to vote constitutes an irreparable injury.

Cases that cite this headnote

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:16–cv–11844—Gershwin A. Drain, District Judge.

Attorneys and Law Firms

ON MOTION AND REPLY: Denise C. Barton, Erik A. Grill, Adam Fracassi, Joseph Y. Ho, Office of the Michigan Attorney General, Lansing, Michigan, for Appellant. ON RESPONSE: Mary Ellen Gurewitz, Sachs Waldman, P.C., Detroit, Michigan, Mark Brewer, Goodman Acker, P.C., Southfield, Michigan, for Appellees. ON BRIEF: John J. Bursch, Bursch Law PLLC, Caledonia, Michigan, John D. Pirich, Andrea L. Hansen, Kevin M. Blair, Honigman Miller Schwartz and Cohn LLP, Lansing, Michigan, for Amici Curiae.

Before: MOORE, GILMAN, and STRANCH, Circuit Judges.

MOORE, J., delivered the opinion of the court in which GILMAN and STRANCH, JJ., joined. GILMAN, J. (pp. ——– ——), delivered a separate concurring opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge.

***1** Defendant–Appellant Ruth Johnson, Michigan's Secretary of State (the "Secretary"), moves for a stay pending appeal of the district court's July 22, 2016 and August 1, 2016 orders granting the plaintiffs' motion for a preliminary injunction. The district court's preliminary injunction prohibits the Secretary from enforcing Public Act 268 ("PA 268"), a law that eliminates straight-party voting in Michigan. The district court found that Michigan's elimination of straight-party voting violated the Fourteenth Amendment of the U.S. Constitution because it placed a burden on voters—particularly African–American voters—and that this burden was not justified by Michigan's stated interests in enacting the law. The district court also found that PA 268 violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. For the reasons discussed below, we **DENY** the Secretary's motion for a stay pending appeal.

I. BACKGROUND

Michigan has offered "straight-party" (or "straight-ticket") voting since 1891. *See* 1891 PA 190, § 14. Straight-party voting allows a voter to vote for all candidates of their desired political party by making a single mark designating the selection of that political party, rather than voting for each partisan candidate individually. *See, e.g.*, R. 1–7 (2008 Macomb Cty. Ballot) (Page ID # 206). Prior to 2015, Michigan attempted to abolish straight-party voting on two occasions: first in 1964, and again in 2001. R. 20–2 (State Fiscal Agency Bill Analysis at 2) (Page ID # 579). On each occasion, the law was rejected by referendum. *Id.* Straight-party voting has thus been available to Michigan citizens for an uninterrupted period of 125 years.

In 2015, the Michigan legislature passed PA 268, which eliminated straight-party voting in Michigan. *See* 2015 PA 268. PA 268 also appropriates $5 million "to the

department of state to purchase voting equipment to implement the elimination of straight party ticket voting." *Id.* at § 795c(2). Because PA 268 includes an appropriation, it cannot be repealed by referendum. *See Mich. United Conservation Clubs v. Sec'y of State*, 464 Mich. 359, 630 N.W.2d 297, 298 (2001). PA 268 was signed into law by the governor in 2016 and became effective immediately; the law will thus remove straight-party voting from Michigan ballots beginning in the November 8, 2016 general election. *See* 2015 PA 268; R. 1–15 (Baxter Decl. at 4) (Page ID # 289).

Plaintiffs—the Michigan State A. Philip Randolph Institute, Common Cause, and several individual voters—filed a complaint against the Secretary in the U.S. District Court for the Eastern District of Michigan on May 24, 2016, alleging that PA 268 violated the Fourteenth Amendment of the U.S. Constitution, Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301, and the Americans with Disabilities Act, 42 U.S.C. § 12132. R. 1 (Compl. at 1) (Page ID # 1); *see also* R. 9 (Am. Compl. at 5–6, 24–30) (Page ID # 394–95, 413–19).

Plaintiffs included with their complaint an expert report prepared by Kurt Metzger, a demographer and former Regional Information Specialist with the U.S. Census Bureau in Detroit, Michigan. R. 1–11 (Metzger Report at 2–4) (Page ID # 221–24). Metzger's statistical analysis demonstrated "that African Americans are more likely to use the straight party voting option and that its elimination will disproportionately affect African American voters." *Id.* at 12 (Page ID # 231). The plaintiffs also attached declarations from several county election administrators that estimated that the elimination of straight-party voting would increase the time that it takes an individual to vote and thus cause a demonstrable increase in wait times for voting. *See, e.g.*, R. 1–15 (Rozell Decl. at 3) (Page ID # 283); R. 1–15 (Baxter Decl. at 4) (Page ID # 289); R. 1–15 (Swope Decl. at 4) (Page ID # 297).

***2** Plaintiffs moved for a preliminary injunction on May 27, 2016. R. 4 (Mot. for Prelim. Inj. at 1) (Page ID # 318). The Secretary filed a response in opposition, R. 20 (Def. Resp. in Op. at 1) (Page ID # 536), and the plaintiffs replied, R. 21 (Pl. Reply to Def. Am. Resp. at 1) (Page ID # 532). The district court held a hearing on the motion on July 14, 2016. R. 26 (Prelim. Inj. H'rg Tr. at 1) (Page ID # 743).

On July 21, 2016, the district court issued an opinion and order granting the plaintiffs' motion for a preliminary injunction. *Michigan State A. Philip Randolph Institute v. Johnson*, —— F.Supp.3d ——, ——, 2016 WL 3922355, at *1 (E.D. Mich. July 21, 2016). The district court first concluded that the plaintiffs were not likely to succeed on the merits of their ADA claim because it did not appear that any of the plaintiffs had standing to bring such a claim. *Id.* at ——, 2016 WL 3922355, at *5. The district court found that the plaintiffs were likely to succeed on their claims brought under the Equal Protection Clause and Section 2 of the Voting Rights Act, however. First, with regard to the Equal Protection Clause claim, the district court evaluated PA 268 under the *Anderson/Burdick* framework and determined that the state's asserted interests did not outweigh the burden that PA 268 placed on voters. *Id.* at ——, 2016 WL 3922355, at *7–9. Second, in analyzing the plaintiffs' claim under Section 2 of the Voting Rights Act, the district court concluded that the plaintiffs had demonstrated that the elimination of straight-party voting would disproportionately impact African–American voters and, applying the factors articulated in *Thornburg v. Gingles*, 478 U.S. 30, 36–37, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the district court concluded that the disproportionate burden was, in part, "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against" African–American voters. *Mich. State A. Philip Randolph Inst.*, —— F.Supp.3d at ——, 2016 WL 3922355, at *10 (quoting *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752). Because the district court found that the plaintiffs would suffer an irreparable injury—the restriction of their right to vote—if the law were to go into effect, and because "the burden on the state would be to merely reinstate the ballots used in the 2014 election cycle," the district court concluded that the preliminary injunction factors favored the plaintiffs. *Id.* at ——, 2016 WL 3922355, at *13–14. The district court subsequently issued two revised orders imposing the preliminary injunction. R. 25 (Prelim. Inj. at 1–37) (Page ID # 706–42); R. 30 (Prelim. Inj. at 1–3) (Page ID # 835–37).

The Secretary filed her first notice of appeal on July 25, 2016. R. 27 (Notice of Appeal) (Page ID # 795). The Secretary also moved in the district court for a stay of the preliminary injunction pending appeal. R. 29 (Def. Mot. for Stay Pending Appeal) (Page ID # 797). On August

2, 2016, the Secretary filed a separate notice of appeal to the second revised order. R. 33 (Notice of Appeal) (Page ID # 861). Unhappy with the district court's briefing schedule on the emergency motion, *see* Appellant Mot. at 2, the Secretary filed an emergency motion in this court for a stay of the injunction pending appeal. On August 15, 2016, the district court issued an opinion and order denying the Secretary's emergency motion to stay the preliminary injunction. *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16–cv–11844, 2016 WL 4267828, at *1 (E.D. Mich. Aug. 15, 2016). The Secretary asked that we rule on her motion for a stay pending appeal by August 17, 2016.

II. DISCUSSION

***3** **[1]** **[2]** We evaluate four factors in considering a motion for a stay pending appeal under Federal Rule of Appellate Procedure 8(a):

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Serv. Emp. Int'l Union Local 1 v. Husted, 698 F.3d 341, 343 (6th Cir. 2012) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). These four factors "are interconnected considerations that must be balanced together." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "As the moving party, [the Secretary] has the burden of showing" that a stay is warranted. *Serv. Emp. Int'l Union Local 1*, 698 F.3d at 343. We conclude that the Secretary has not met this burden.

[3] We first consider the likelihood that the Secretary will prevail on the merits of the appeal, and thus we must consider the likelihood that the Secretary can "show that the district court abused its discretion in granting the preliminary injunction." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008). Under the abuse-of-discretion standard, "[t]he injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

A. Equal Protection Clause Challenge

[4] **[5]** The Secretary first asserts that the district court erred in holding that the plaintiffs were likely to succeed on their Equal Protection Clause challenge. "The right to vote is a 'precious' and 'fundamental' right," *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)), and it is clear that this right " 'is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.' " *Id.* (quoting *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008)). Specifically, "[t]he Equal Protection Clause applies when a state either classifies voters in disparate ways, or places restrictions on the right to vote." *Id.* (internal citations omitted). Here, the plaintiffs have asserted that their right to vote is restricted by PA 268 because, in eliminating straight-party voting, PA 268 will increase waiting times at polling locations and will cause more voters to miscast ballots due to confusion.

[6] We apply the framework established by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788–89, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), to evaluate Equal Protection Clause challenges to voting restrictions. *See Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015). "Under the *Anderson–Burdick* test, the court must first 'consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.' " *Id.* at 693 (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564). Second, the court "must 'identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.' " *Id.* "Finally, it must 'determine the legitimacy and strength of each of those interests' and 'consider the extent to which those interests make it necessary to burden the plaintiff's rights.' " *Id.*

***4** **[7]** "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent" of the burden that the law imposes on the rights of voters. *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. If

a statute imposes a " 'severe' " burden on the right to vote, we apply strict scrutiny and the law "must be narrowly tailored and advance a compelling state interest." *Hargett*, 791 F.3d at 693 (quoting *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059). By contrast, if the law imposes a " 'reasonable' and 'nondiscriminatory' " burden, "the statute will be subject to rational basis [review] and survive if the state can identify 'important regulatory interests' to justify it." *Id.* "If the burden lies somewhere in between, courts will weigh the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.* (internal quotation marks and alterations omitted).

[8] In granting the plaintiffs' motion for a preliminary injunction, the district court determined that PA 268 imposed a burden that fell in between the two extremes of this framework, and accordingly balanced the injury imposed by the law with the state's asserted interest in eliminating straight-party voting. *See Mich. State A. Philip Randolph Inst.*, —— F.Supp.3d at ——, 2016 WL 3922355, at *6. In its motion for a stay pending appeal, the Secretary insists that PA 268 "impacts only the manner of voting—not the right to vote." Appellant Mot. at 3. It is clear, however, that how a state chooses to regulate the *manner* that a person must cast a ballot undoubtedly impacts the individual right. Indeed, the very premise of the *Anderson*/*Burdick* framework is that "all election regulations[ ] have an impact on the right to vote" to some degree. *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. The question that we must answer is what the "character and magnitude of the asserted injury" on the right to vote is here, *see Anderson*, 460 U.S. at 789, 103 S.Ct. 1564, and we do not believe that the Secretary has shown a likelihood that the district court erred in finding that PA 268 imposes a burden on the right to vote that justifies the application of more than rational-basis review, but less than strict scrutiny.

The district court identified two primary burdens that PA 268 would impose on the right to vote. First, by increasing the time that it takes to vote, the elimination of straight-party voting would increase the wait times for voting; and second, because the ballots maintained the same graphics identifying the political parties on the top of the ballot—removing only the bubble to vote for all candidates of that party—PA 268 would cause voter confusion and thus increase the risk of individuals not having their votes counted. *Mich. State A. Philip Randolph Inst.*, —— F.Supp.3d at ——, 2016 WL 3922355, at *7–8. Moreover, because Metzger's report demonstrated that there were "extremely high" correlations between the African–American voting population and the use of straight-party voting, the district court found that African Americans would be disproportionately burdened by PA 268. *Id.* at ——, 2016 WL 3922355, at *7.

We first consider the district court's conclusion that PA 268 would impose a burden on voters by increasing the time that it takes to vote. The district court credited the testimony of Joseph Rozell, the Director of Elections in the Elections Division of the Office of the Oakland County Clerk, who testified that "[t]he use of straight party voting significantly reduces the amount of time that it takes a voter to mark his or her ballot and its elimination will significantly increase the amount of time that it takes to vote the ballot." R. 1–15 (Rozell Decl. at 3) (Page ID # 283); *Mich. State A. Philip Randolph Inst.*, —— F.Supp.3d at ——, 2016 WL 3922355, at *7; *see also* R. 1–15 (Baxter Decl. at 4) (Page ID # 289); R. 1–15 (Swope Decl. at 4) (Page ID # 297). The evidence presented to the district court suggested that nearly 50% of all voters use straight-party voting in Michigan. *See* R. 1–11 (Metzger Report at App. A) (Page ID # 250–56). By increasing the time that it takes for an individual voter to complete his or her ballot, PA 268 will accordingly cause longer lines at polling places and increase the wait time to cast a vote. R. 1–15 (Rozell Decl. at 3) (Page ID # 283). Indeed, Rozell estimated that "the elimination of straight-party voting could increase wait time as much as forty minutes in Oakland County." *Mich. State A. Philip Randolph Inst.*, ——F.Supp.3d at ——, 2016 WL 3922355, at *7 (citing R. 1–15 (Rozell Decl. at 4) (Page ID # 284)). Longer lines at the polls "reduce[ ] the confidence voters have that their votes are counted," impose additional monetary costs on voters that must stand in line, and may even turn some voters away from voting at all. R. 1–3 ("Managing Polling Place Resources" Caltech/MIT Study at 11–12) (Page ID # 52–53).

***5** Of particular significance is Metzger's conclusion that African–American voters in Michigan "are more likely to use the straight party voting option" in Michigan, and to a significant degree. R. 1–11 (Metzger Report at 1) (Page ID # 220). Specifically, the district court noted that, "although the average straight-party voting rate in Michigan is about 50%, the straight-party voting rate in African–American majority districts was 67% in 2012, and 73.5% in 2014." *Mich. State A. Philip Randolph*

Inst., —— F.Supp.3d at ——, ——, 2016 WL 3922355, at *2, 7 (citing R. 1–11 (Metzger Report at App. A) (Page ID # 250–56)). In Royal Oak Charter Township and Highland Park—cities with population that are 95.6% and 93.1% black, respectively—the straight-party voting rate was approximately 82% in 2014. R. 1–11 (Metzger Rep. at App. A) (Page ID # 254, 256). Indeed, "[t]he five cities with straight-party voting rates greater than 75%[ ] were all majority African American." *Mich. State A. Philip Randolph Inst.*, —— F.Supp.3d at ——, 2016 WL 3922355, at *2. The district court accordingly found "that PA 268 presents a disproportionate burden on African Americans' right to vote" and, "as Metzger concludes, the elimination of straight-party voting would likely have a larger impact on African–American voters." *Id.* at ——, 2016 WL 3922355, at *7; *see* R. 1–11 (Metzger Report at 13) (Page ID # 231). Because African–American majority districts in Michigan such as Detroit have also historically faced some of the longest wait times in the state, *see* R. 1–15 (Baxter Decl. at 5–6) (Page ID # 290–91), the increase in long lines occasioned by the elimination of straight-party voting will impact these voters to an even more significant degree.

The district court also concluded that PA 268 would place a burden on the right to vote because the law would cause voter confusion and thus increase the risk that ballots would be marked incorrectly and would not be counted by the ballot scanner. *Mich. State A. Philip Randolph Inst.*, —— F.Supp.3d at ——, 2016 WL 3922355, at *8. Specifically, the ballots that Michigan intends to use in the 2016 general election maintain a listing of each political party at the top of the ballot, along with a graphic representing each party. *See* R. 1–16 (Gongwer Report at 1) (Page ID # 396). These are substantially the same graphics that appeared on previous ballots in the straight-party voting section, and are in substantially the same location, but the bubble for selecting the party to vote that party's candidates on a straight-party ticket has been removed. *Compare* R. 1–16 (Gongwer Report at 1) (Page ID # 396), *with* R. 1–7 (2008 Macomb Cty. Ballot) (Page ID # 206). The district court credited testimony from county election officials that "[t]he uniform opinion among the county clerks is that this is going to cause great confusion and that voters, used to being able to vote straight-party, will circle the party they want or otherwise seek to mark this new ballot display, thinking that this is the way to vote straight-party as they have done in the past." *Mich. State A. Philip Randolph Inst.*, —— F.Supp.3d at ——, 2016 WL 3922355, at *8 (quoting R. 1–15 (Rozell Decl. at 5–6) (Page ID # 284–85)).

The Secretary presented no testimony or expert reports in the district court to counter these facts, nor does the Secretary present arguments in her motion for a stay that persuasively demonstrate that the district court committed clear error in its factual conclusions. Rather, the Secretary insists that the district court made an error in its legal conclusion regarding the degree of the burden imposed by PA 268 because filling out bubbles for candidates "is the very *act* of 'voting,' " and thus cannot constitute a burden, or at least a burden that deserves more than rational-basis review. Appellant Mot. at 3–4. But again, this proves too much. In assessing the burden imposed on voters by a state's electoral mechanisms, courts may undoubtedly consider whether the state's practices will cause long lines and delays at polling places and how these lines and delays may impact the right of a voter to cast his or her ballot. *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008).

The Secretary also places a strong emphasis on the fact that most states do not have straight-party voting; if the clear majority of states do not offer straight-party voting, the Secretary asserts, it is impossible to conclude that the absence of straight-party voting imposes an unconstitutional burden. *See* R. 26 (Prelim. Inj. H'rg Tr. at 29) (Page ID # 771). Importantly, however, comparing the isolated voting practice of one state with the isolated voting practice of another state is not always an apples-to-apples comparison. This law presents a strong example. Declarations submitted by the plaintiffs report that Michigan ballots contain substantially more candidates than other states, and thus the practice of straight-party voting in Michigan may save far more time than straight-party voting in other states. *See* R. 1–15 (Baxter Decl. at 2) (Page ID # 287); R. 1–15 (Swope Decl. at 2) (Page ID # 295). Moreover, Michigan does not allow early voting,[1] and Michigan does not permit no-excuse absentee voting, *see* Mich. Comp. Laws §§ 168.758 & 168.759, making the average wait times at physical polling locations on Election Day of tremendous significance to Michigan voters. In the 2012 general election, Michigan had the sixth-highest estimated average wait time as compared to other states. *See* 1–3 ("Managing Polling Place Resources" Caltech/MIT Study at App. 1) (Page ID # 78). Each of these facts –demonstrates that the option

of straight-ticket voting may impact Michigan voters in a way that it does not impact voters in Ohio, for example. It is accordingly not enough for Michigan to simply rely on the lack of straight-party voting in other states; the necessary question is how this law interacts with other voting practices in Michigan, and the burdens this law places on voters who vote within Michigan's electoral framework.

***6** In considering the above, we conclude that the Secretary has not shown a likelihood of demonstrating that the district court erred in finding that the burden placed on voters by PA 268 requires more than rational basis, but less than strict scrutiny. We next turn to consider the district court's evaluation of the state's asserted interests. Here, the state has advanced two primary interests for PA 268: "fostering an engaged electorate that vote for candidates and issues" and "encouraging the electorate to vote for the nonpartisan issues on the ballot." R. 20 (Def. Mot. in Op. at 23) (Page ID # 562).

In eliminating straight-party voting, PA 268 requires voters to fill in individual bubbles for each candidate. A voter will now have to look, at least briefly, at each section of the partisan ballot in order to identify and fill in the desired bubble. Contrary to the state's assertions, it is far from evident that this will "foster[ ] an engaged electorate." *Id.* As the district court noted, "the new ballot will still inform the voters of the party affiliation of every partisan candidate," *Mich. State A. Philip Randolph Inst. v. Johnson*, —— F.Supp.3d at ——, 2016 WL 3922355, at *8, and as discussed above, graphics representing each of the parties appearing on the partisan ballot are prominently on display at the top of the ballot, just as before. The ballot will still inform voters of the available political parties, and the party affiliation of each partisan candidate will still appear beside the candidate's name. Accordingly, a voter desiring to vote for all of the candidates of his or her desired political party may still do so without reading any of the candidates' names, without knowing the office for which the candidate is running, and without knowing a single fact about either—the only change, as the state admits, will be that a voter now "can't do it through one bubble." R. 26 (Prelim Inj. H'rg Tr. at 31–32) (Page ID # 773–74). The state has presented nothing apart from vague speculation that suggests that a voter will make a more informed choice in filling in each individual bubble rather than choosing to fill in one bubble for a straight-party vote.

The state also asserts that eliminating straight-party voting will reduce the likelihood that a voter will skip the non-partisan section of the ballot. *Id.* at 37 (Page ID # 779). As discussed above, however, the district court credited testimony from county election officials that there is a likelihood that voters will still circle the party graphic at the top of the ballot, believing that they are casting a straight-party vote (as, perhaps, they have consistently done for decades). Accordingly, although we acknowledge that the state has a legitimate interest in reducing confusion over which section of the ballot needs to be individually completed, this interest is diminished by the new confusion that PA 268 will likely cause.

In sum, the district court credited unrebutted evidence in the record demonstrating that PA 268 will increase the time that it takes to vote, particularly in African–American communities where straight-party voting is prominent and where lines are often already long. The district court also found that the law was likely to increase voter confusion and miscast ballots. Although this burden is not severe, it is also not slight. In the face of this burden, the state has offered only vague and largely unsupported justifications of fostering voter knowledge and engagement. As the plaintiffs assert, there is nothing in the record "that straight party voters vote blindly, that they are less informed than other voters or that they fail to complete their ballot at a lower rate." Appellee Resp. at 11 (emphasis removed). After evaluating the burdens imposed by the law and the state's asserted justifications, we hold that the Secretary has not shown that there is a substantial likelihood that she will prevail on appeal in demonstrating that the district court erred in evaluating the plaintiffs' Equal Protection Clause claim.

B. Voting Rights Act Challenge

***7** **[9]** **[10]** **[11]** **[12]** The Secretary further asserts that she can demonstrate a substantial likelihood that the district court erred in its analysis under Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. Appellant Mot. at 6. Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...." 52 U.S.C. § 10301(a). Importantly, "Section 2, unlike other federal legislation that prohibits racial discrimination,

does not require proof of discriminatory intent." *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002). Rather, Section 2(b) provides:

> A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752. The Supreme Court in *Gingles* listed several factors "that might be probative of a § 2 violation," drawing from the Senate Judiciary Committee Majority Report that accompanied the bill. *Id.* at 36, 106 S.Ct. 2752. These factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 36–37, 106 S.Ct. 2752. The Section 2 framework discussed above is most often used in assessing vote-dilution claims, rather than vote-denial or vote-abridgement claims. *See Veasey v. Abbott*, —— F.3d ——, ——, 2016 WL 3923868, at *17 (5th Cir. July 20, 2016). Nonetheless, "courts have entertained vote-denial claims regarding a wide range of practices," and "Section 2's plain language makes clear that vote denial is precisely the kind of issue Section 2 was intended to address." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014); *see also Gingles*, 478 U.S. at 45 n.10, 106 S.Ct. 2752 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution."). [2]

***8** **[13]** The district court concluded that the plaintiffs had demonstrated that PA 268 imposed a disproportionate effect on African–American voters because the Metzger report "demonstrated that African–Americans are more likely to use straight-party voting than white voters, and 'its elimination will disproportionately affect African–American voters.' " —— F.Supp.3d at ——, 2016 WL 3922355, at *10 (quoting R. 1–10 (Metzger Report at 1) (Page ID # 220)). The district court further found that this burden was "linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class,' " citing *Gingles* factors 2, 5, 6, 7, 8, and 9 as relevant. *Id.* at ——, 2016 WL 3922355, at *13. The district court drew from available news articles and facts from Metzger's report that demonstrated that African Americans in Michigan "tend to vote overwhelmingly for Democrats," that African Americans "continue to bear the harmful effects of past discrimination," and that "[r]ecent political campaigns in Michigan ... have been marred with direct and indirect racial appeals." *Id.* at ——, 2016 WL 3922355, at *11–13.

We do not doubt that these facts are true; it is a more challenging question, however, to say that the plaintiffs have established that PA 268 "interacts with" these conditions "to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752. The district court found that "racist policies such as redlining and housing discrimination" in Michigan contributed to the racial polarization of metropolitan areas. *Mich. State A. Philip Randolph Inst.*, — F.Supp.3d at ——, 2016 WL 392355, at *13. If black voters in Michigan disproportionately use straight-party voting, and the absence of straight-party voting in Michigan will increase wait times, then PA 268 may "interact[ ] with" the racial polarization of communities in Michigan "to cause an inequality" because African–American communities will likely face longer wait times in the absence of PA 268 than non–African–American communities. *Gingles*, 479 U.S. at 47, 107 S.Ct. 353. Although it is a closer question whether the Secretary can establish a likelihood of success on appeal with regard to the Section 2 claim, nonetheless, this does not alter the fact that the likelihood-of-success-on-appeal factor weighs in favor of the plaintiffs because of our conclusion regarding the Equal Protection Clause claim discussed above.

C. Irreparable Injury and the Public Interest

[14] **[15]** We also conclude that the Secretary is not likely to establish that the district court abused its discretion in granting an injunction because we find the district court appropriately evaluated the remaining preliminary-injunction factors. As the district court stated, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Mich. State A. Philip Randolph Inst.*, — F.Supp.3d at ——, 2016 WL 3922355, at *13 (quoting *Obama for America*, 697 F.3d at 436). Of particular significance here, the district court's grant of a preliminary injunction maintained the status quo in Michigan that was in place for 125 years: maintaining straight-party voting, where "the record does not show that there were any problems with the old ballot" that contained the straight-party option. *Id.* at ——, 2016 WL 3922355 at *14. Consideration of the factors evaluated by the district court in granting a preliminary injunction also informs the remaining factors that we must evaluate in determining whether to stay the district court's opinion. *See Serv. Emp. Int'l Union Local 1*, 698 F.3d at 343. This case does not involve the potential disruption of complicated election-administration procedures on the eve of Election Day; rather, denying 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. We find that the Secretary has not met her burden to demonstrate that a stay pending appeal of the district court's order is warranted.

III. CONCLUSION

***9** For the foregoing reasons, the motion for a stay pending appeal is **DENIED**.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring.

I fully concur in the lead opinion and write separately only to emphasize a few points. First, our ruling today is not the end of the case. We are simply deciding that the Michigan Secretary of State has not met her burden of demonstrating that a stay of the district court's preliminary injunction is warranted. In reaching this decision, we are limited to the admittedly one-sided proof available at this stage of the litigation because the Secretary, for whatever reason, did not timely submit any proof contradicting the plaintiffs' evidence.

For instance, various appellate briefs supporting the Secretary's position now characterize Metzger's report, which was included with the plaintiffs' complaint, as "junk science" and attack its alleged "cherry picking" of data. But the Secretary never submitted any contrary proof to the district court. She did not even request limited discovery until July 13, 2016, the day before the hearing on plaintiffs' motion for a preliminary injunction and over seven weeks after the motion was filed. By that point, the district court reasonably concluded that her request was not timely.

The Secretary will have an opportunity to present contrary evidence in subsequent proceedings. Perhaps the Secretary's proof at later stages of this case will overcome the plaintiffs', but at this early stage of the case we are limited to the proof that is presently in the record.

Turning to that record, the lead opinion concludes that PA 268 burdens the right to vote by increasing voter disenfranchisement in at least two ways. First, voter confusion resulting largely from the continued existence of the party vignettes on the ballots is likely to cause an increase in erroneous ballots due to some voters circling the vignettes rather than marking the bubbles in the partisan section of the ballot. The second burden involves longer lines at polling places, particularly in the African–American community.

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.

Among plaintiffs' proof is a declaration from Daniel Baxter, the Director of Elections in the Office of the Detroit City Clerk. He flatly states that "[l]onger lines will deter voters from voting." Chris Swope, the Ingham County Clerk, makes a similar a statement. Taken together, along with Metzger's report identifying the positive correlation between straight-party voting and the African–American community, the above declarations support the district court's preliminary injunction. And, unlike the potential disruptions in other cases that involve voter-identification requirements or the elimination of early voting, I see no grave harm to the state of Michigan in allowing straight-party voting to remain on the ballot this November, as it has for the past 125 years.

***10** I next want to allay the unwarranted intimations by the Secretary and the amici supporting her that, by denying the stay, we are establishing a permanent constitutional entitlement to straight-party voting. This framing is misleading for two reasons. First, as mentioned above, we are at the preliminary stage of this case, and the ruling that the evidence now supports might well be different at a later stage. Second, even if the proof does not change, voting-regulation challenges under the Equal Protection Clause and Section 2 of the Voting Rights Act are jurisdiction-specific inquires. Whether a practice is permissible under a given set of facts is thus not legally determinative of whether it is permissible under a different set of facts.

The lead opinion identifies several Michigan-specific factors—the unusually long ballots and the unavailability of both early voting and no-excuse absentee voting—that exacerbate the burdens that the elimination of straight-party voting will have in Michigan. These conditions might not always exist in Michigan. Record evidence implicitly acknowledges this point. For instance, the declaration of Mary Lansdown, the President of the Randolph Institute's Flint Chapter, notes that "the line problems would not be so bad if we had early voting like some states have, or if some people could vote absentee without a reason."

Moreover, the confusion concern that we have identified could be greatly reduced by, for example, eliminating the party vignettes from the ballots. The continued presence of the vignettes on the ballots certainly appears to be a legislative oversight—perhaps one precipitated by the Michigan legislature's haste to create a purportedly better-informed electorate. In any event, just because the present record supports the district court's preliminary injunction maintaining the option of straight-party voting for this November's general election does not mean that the state must always permit straight-party voting.

For all of the above reasons, I concur in the lead opinion.

All Citations

--- F.3d ----, 2016 WL 4376429

Footnotes

1 *See* Michigan Dep't of State, *Elections & Voting: Early Voting*, *available at* http://www.michigan.gov/sos/0,1607,7-127-29836-202483--F,00.html (last accessed August 12, 2016).

2 In *Ohio State Conference of the NAACP v. Husted ("Husted II")*, we held that Section 2 of the Voting Rights Act applied to the plaintiffs' challenge to Ohio's early-voting procedures because the statutory language of Section 2 indicates that "Section 2 applies to *any* discriminatory 'standard, practice, or procedure ... which results in a denial or abridgement' of the right to vote." 768 F.3d 524, 552 (6th Cir. 2014). Our opinion "read the text of Section 2 and the limited relevant case law as

requiring proof of two elements for a vote denial claim. First, as the text of Section 2(b) indicates, the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " *Id.* at 554. "Second, the Supreme Court has indicated that that burden must be in part caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class.' " *Id.* (quoting *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752). We noted that "[i]n assessing both elements, courts should consider 'the totality of the circumstances,' " including consideration of the *Gingles* factors. *Id.*

Husted II affirmed the district court's order granting the plaintiffs a preliminary injunction, but the Supreme Court stayed the district court's preliminary injunction on September 29, 2014, in advance of the 2014 election. *See Husted v. Ohio State Conference of the NAACP*, ——U.S. ——, 135 S.Ct. 42, 189 L.Ed.2d 894 (2014). Because the plaintiffs' request for a preliminary injunction became moot after the 2014 election, we vacated our *Husted II* opinion. *Ohio State Conf. of the NAACP v. Husted*, No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014). In setting out the framework for its Section 2 analysis in the present case, the district court acknowledged that *Husted II* was not binding because it had been vacated, but considered *Husted II* persuasive authority. 2016 WL 3922355, at * 6 n.2. The Secretary argues that it was inappropriate for the district court to do so. Appellant Mot. at 4. The framework set forth in our *Husted II* opinion for evaluating a Section 2 vote-denial claim, however, has recently been adopted both by the Fifth Circuit sitting en banc and the Fourth Circuit. *See Veasey v. Abbott*, No. 14–41127, —— F.3d ——, ——, 2016 WL 3923868, at *17 (5th Cir. July 20, 2016) (en banc); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). We agree with *Husted II*—and our sister Circuits—that the two-part framework discussed above is appropriate when evaluating a Section 2 vote-denial claim, and the district court did not err in its decision to use the *Husted II* framework to evaluate the plaintiffs' challenge here.

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DISSENT

BOGGS, Circuit Judge, dissenting from denial of initial hearing en banc.

This case began with a district court issuing a preliminary injunction outlawing Michigan's change to an "office-block" ballot system, requiring a separate mark for each office, from one that allowed a vote for all candidates of a given party with one mark. *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-cv-11844, 2016 WL 3922355 (E.D. Mich. July 21, 2016). The will of Michigan's people, expressed through their legislature, was to have the same system as the large majority of states, containing the large majority of voters, of all types of races and parties.

This type of radical departure, imposed in the midst of a national campaign season, has frequently been stayed in similar circumstances, to allow time for full appellate consideration before judicial action that would affect the political process. In many cases, the Supreme Court has made an ultimate decision, either to stay, or not stay, a lower-court decision that would affect the electoral process.

In this case, partly as a result of our local Sixth Circuit practice, it has become exceedingly difficult to get this issue into a position for such consideration. A panel of our court refused to stay the district-court decision, as did the district court itself. *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-2071, 2016 WL 4376429 (6th Cir. Aug. 17, 2016); *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-cv-11844, 2016 WL 4267828 (E.D. Mich. Aug. 15, 2016). Under our procedures, such a panel decision is not subject to review by the full court, as would be the case with most decisions of a three-judge panel. *See* 6 Cir. I.O.P. 35(h).

In any event, with no permanent order entered, the state's option was to appeal the district court's preliminary injunction, which it did, and it then asked for an initial hearing en banc, presumably in an effort to expedite consideration, which would otherwise be in the hands of a panel of our court in the regular order, only eventually subject to en banc consideration.

I requested a vote on that motion, believing that the most expeditious way for a final result on this issue was for the whole court to consider the issue, hopefully to issue a stay that would allow for full consideration of this (in my view) erroneous decision without the radical step of affecting the current election. A summary of my views on the errors of this attack on the voting system used in most of the country is attached as an appendix.

In the event, less than a majority of the judges in active service (see Fed. R. App. P. 35) supported that motion, so the case will remain in the hands of the duly selected panel, which will rule in whatever time it chooses. In my view, this has the unfortunate effect that the circuit has taken no action that can be presented to the Supreme Court, such as by review of a merits decision, or of the grant of a stay.

The only avenues now open for a Supreme Court ruling in time to avoid the lower courts' affecting the election are either to seek a stay of the district court's order from the Supreme Court, even while the merits of the district court's order are still pending before our merits panel, *see, e.g.*, *Ashcroft v. N. Jersey Media Grp., Inc.*, 536 U.S. 954 (2002) (mem.); *Heckler v. Lopez*, 463 U.S. 1328, 1328 (Rehnquist, Circuit Justice 1983), or the quite unusual step of seeking certiorari before judgment. *See* 28 U.S.C. § 1254(1); Sup. Ct. R. 11.

I therefore dissent from the denial of initial hearing en banc.

APPENDIX TO DISSENT

I believe that the district court erred in both the facts and the law when outlawing a practice common throughout the country and a commonplace subject of political and political-science debate, not racial impact.

The gravamen of the district court's holding, that a switch to a simple "office-block" voting method as opposed to one including a "straight-ticket" option violates both the Constitution and the Voting Rights Act, is that it might take some voters a bit longer to fill out their ballots than they would otherwise and that there is a racially disparate impact from that format.

To begin with, ballot formats have varied throughout our history. Originally, parties printed and provided ballots containing only their candidates, which voters could simply deposit in the ballot box. That was certainly a very fast and easy way to vote, and often favored even today in one-party countries. However, beginning around 1880, most states introduced government-printed ballots containing all candidates, and a secret ballot. Alan Ware, *The American Direct Primary* 31–32 (2002). That certainly slowed down the voting process, but provided a variety of benefits. The general encouragement of one-party voting was thought to discourage thoughtful consideration of each office. For better or worse (and the issue has been contested and discussed by academics for a century), that impulse led a number of states, beginning with Massachusetts in 1888, to adopt the "office-block" (or "Massachusetts") ballot, where candidates were grouped by office, rather than party. *See* Arthur Ludington, *Present Status of Ballot Laws in the United States*, 3 Am. Pol. Sci. Rev. 252, 257 (1909). The shift was intended "to make the voters stop and think about each office in turn," and to move away from

straight-ticket voting. *Id.* at 259–60. This change was advocated by the Progressive movement in the early twentieth century, and was considered a "good-government" policy that provided at least a "nudge" (in the words of Professor Cass Sunstein) for consideration of the merits of each candidate. *See* Benjamin Parker De Witt, *The Progressive Movement* 210 (1915).

Forty states other than Michigan have voting methods that do not permit straight-ticket voting,[1] including such Democratic-leaning states as Massachusetts, California, New York, and Washington State. Rhode Island, which like Michigan lacks early voting and no-excuse absentee voting, similarly banned straight-ticket voting in 2014. Act of July 1, 2014, 2014 R.I. Pub. Laws chs. 279, 280. As a logical matter, the office-block system without straight-ticket voting is often favored by whichever party is in the general minority in an area, hoping that some of its candidates may prevail if voters can be "nudged" to consider their individual merits, against a generally adverse party tide. The only challenge to this system (other than ours) failed when a Wisconsin district court that found constitutional and Voting Rights Act violations in many other sections of newly passed Wisconsin elections laws upheld the straight-ticket ban. *One Wis. Inst., Inc. v. Thomsen*, 2016 WL 4059222, at *39–40, *49–50 (W.D. Wis. 2016).

At any rate, the district court determined that this widespread practice violated the Constitution as an undue burden on all voters' right to vote, and violated the Voting Rights Act as a practice that disproportionately burdened racial minorities' opportunity to participate in the political process and elect representatives of their choosing. In my view, the opinion has the following flaws:

[1]*Straight Ticket Voting States*, Nat'l Conf. St. Legislatures (Jan. 8, 2016), http://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx.

The opinion rests on two factual premises—that minorities are more likely to vote straight-ticket, and that there is a very substantial increase in the time required to vote, for many voters, in absence of the straight-ticket format, leading to many alleged evils.

As to the second, although one elections clerk's unsupported estimation suggested that the elimination would increase the time required to vote by six minutes, Rozell Decl. at 4, this seems most improbable. From the record, many or most ballots in Michigan may require in the vicinity of seventy marks, if the voter wishes to exercise all voting rights. The absence of straight-ticket voting might require, depending the county, about seventeen additional marks. *See* Baxter Decl. at 3. For a determined straight-ticket voter, any increase might well be under one minute.

Even more importantly, there was no consideration of how this would actually slow down the overall process. As discussed by the MIT study cited by the court, there can be three major sources of delay in the voting process. The first is the time to check in, sign a register, and receive a ballot. The ballot format has no effect on this process. The second is taking the ballot to a secret booth, and marking the ballot. The third is taking the ballot to a particular location, in Michigan usually an electronic tabulating machine, and feeding the ballot into the machine. And the time the voter takes to mark ballot is not sequential. That is, the voting areas provide many small booths, where many voters can be marking their ballot simultaneously. Unless there was evidence, and I saw none, quantifying that in general the bottleneck is at the booths rather than the check-in desks, and lines form to use them, then the format has no effect at all. And if some voters in fact take more time to consider and choose candidates individually, then that is a feature, not a bug, and not illegal.

As to the first, the alleged expert report emphasizes that in the nine counties he chose to analyze (out of Michigan's eighty-three), there was some correlation with more prevalent straight-ticket use in minority areas. It is important to note that, in contrast to many election cases (*cf. Ne. Ohio Coalition for the Homeless v. Husted*, No. 2:06-cv-896, 2016 WL 3166251, at *47 (S.D. Ohio June 7, 2016)), he made no effort to assess or control for the effects of factors such as income, education, etc. A casual inspection of the data presented in the Metzger Report would indicate that straight-ticket voting is more prevalent in areas that may have lower education and income levels, and less prevalent in the reverse. For instance, in Wayne County, most of the lowest straight ticket numbers are in the various Grosse Pointe districts, generally noted for higher income and education levels. Metzger Report App. A, at 8.

On the other hand, by omission or design, he did not analyze the whole state. Michigan notes that there are very high straight-ticket rates in Ottawa County, the most Republican county in the state in 2012 and an overwhelmingly nonminority area. Emergency Mot. for Stay 14; Alexander Kent et al., *The Most Republican Counties in Every State*, USA Today (Feb. 4, 2016, 5:25 p.m.), http://www.usatoday.com/story/money/business/2016/02/04/most-republican-counties-every-state/79508136; *QuickFacts Ottawa County, Michigan*, U.S. Census Bureau (2015), http://www.census.gov/quickfacts/table/PST045215/26139,26. (The court refused to consider such evidence, but the raw data are in government records of which notice can be taken.) In truth, any area with a very strong tendency to one party or the other will usually have higher straight-ticket rates, while "swing" areas will have lower. Thus, Democratic-leaning minorities or other voters in Ottawa County may be aided in electing a representative of their choice by the abandonment of straight-ticket voting. The expert took no account of this.

In short, a careful consideration of the *Anderson-Burdick* methodology seems to lead to the conclusion that the minimal impact on length of voting time is well outweighed by the desire (permissible, whether right or wrong as a matter of governance) to increase individual consideration of the candidates for each office and increase voting in nonpartisan elections.[2]

As to the Voting Rights Act claim, there appear to be several major flaws. First, it simply is not a reduction of the opportunity to vote or to elect a representative of one's choice when the state uses a uniform method of voting to all voters, even if (assuming the validity of the expert's methodology) a larger number of minorities than nonminorities would prefer a system that was marginally quicker. Every voter can still vote. Every voter has the same opportunity to continue to choose all candidates of the same party, or to "split the ticket" (formerly considered a good thing, in an age when "political polarization" is widely lamented). Every voter will have to mark the ballot as many times as desired, which will take the same time for minorities and nonminorities. If the state were to permit straight-ticket voting in majority areas but not in minority areas, that would potentially be a serious violation. But that is not what occurs in Michigan.

Finally, the district court appears to have compared the new waiting times against older waiting times in determining any disparate impact. *Michigan State A. Philip Randolph Inst. v. Johnson*, 2016 WL 3922355, at *10 (E.D. Mich. July 21, 2016) ("[V]oter wait times *will increase* greatly in African-American communities in comparison to other communities.") (emphasis added). But the question at issue is whether there exists an obstacle to equal

[2]Indeed, straight-ticket voting appears to significantly contribute to errors by voters. *See* Paul S. Herrnson, Michael J. Hanmer & Richard G. Niemi, *The Impact of Ballot Type on Voter Errors*, 56 Am. J. Pol. Sci. 716, 728 (2012) ("[V]oters who use standard office-bloc ballots make fewer candidate selection errors and fewer total errors than those who use ballots with a straight-party option.").

opportunity at the current time, not based on a change over time (which is characteristic of a Section 5 claim, not a Section 2 claim). *Cf. Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000).

A VRA violation additionally requires a finding that the alleged impact is in some way related to the congeries of *Gingles* factors. The existence of such factors is not the relevant consideration. A number of the factors alleged to impact minorities' desire to vote straight ticket might equally cause nonminorities to do so as well, though in the opposite direction. And as there is no argument that past discrimination causes lower education levels that make minorities incapable of giving individual consideration (a claim I am sure Plaintiffs would be reluctant to make), there is no relation of such factors to the *opportunity* to vote for and elect a representative of one's choice.

In short, the district court's opinion, though placed in the context of Michigan, uses such a jumble of suppositions and assertions that it would very likely apply to the office-block ballot throughout the country, which has been chosen in states that lean in different directions politically and with widely varying proportions of minorities in their electorates.

DISSENT

KETHLEDGE, Circuit Judge, dissenting from the denial of initial hearing en banc.

I would grant the State's petition for the reasons stated in the appendix to Judge Boggs's dissenting opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: September 01, 2016

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Re: Case No. 16-2071/16-2115, *MI State A. Philip Randolph, et al v. Ruth Johnson*
Originating Case No. : 2:16-cv-11844

Dear Ms. Barton,

The Court issued the enclosed Order today in these cases.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Kevin M. Blair
Mr. Mark C. Brewer
Mr. John J. Bursch
Mr. Adam Lee Spinelli Fracassi
Mr. Erik A. Grill
Ms. Mary Ellen Gurewitz
Ms. Andrea L. Hansen
Mr. Joseph Yung-Kuang Ho
Mr. John D. Pirich

Enclosure