No. 18A240

In the Supreme Court of the United States

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

v.

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

RESPONSE TO APPLICATION TO VACATE THE STAY OF A PERMANENT 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 ARGUMENT

APRI's request to vacate the Sixth Circuit's stay rests on a flawed premise: it contends that the status quo is defined by the Michigan laws that allowed straight ticket voting from 1891 to 2015. But those laws are not the status quo, because the Michigan Legislature changed those laws in 2016. Straight-ticket voting has not been the law in Michigan for more than two and half years—since January 5, 2016.

This status quo question is fundamental, because the Constitution has always recognized that States have the authority to prescribe "[t]he times, places, and manner of holding elections." U.S. Const. art. I, § 4. Here, the Michigan Legislature exercised the democratic power of the people of Michigan and eliminated straight-ticket voting by passing Public Act 268, a law that under the usual rules is entitled to a presumption of constitutionality. As Justices of this Court have recognized, "[w]hen courts declare state laws unconstitutional and enjoin state officials from enforcing

them, our *ordinary practice* is to suspend those injunctions from taking effect pending appellate review." *Strange* v. *Searcy*, 135 S. Ct. 940 (2015) (emphasis added) (Thomas, J., & Scalia, J., dissenting) (discussing examples). Indeed, the Court has done so on numerous occasions. See, e.g., *San Diegans for Mt. Soledad Nat. War Mem'l* v. *Paulson,* 548 U.S. 1301, 1 (2006) (Kennedy, J., in chambers) (staying an injunction requiring a city to remove its religious memorial).

And here there is far more than a presumption: the Sixth Circuit has affirmatively held that Michigan's 2016 law—a law that follows the 40 other States that have also eliminated straight ticket voting—is likely to be upheld on appeal as constitutional.

Here, it was the district court that altered the status quo by enjoining the operation of Michigan's duly enacted statute. Indeed, this Court has recognized that stays, like the one issued by the Sixth Circuit, " 'simply suspend[s] *judicial alteration* of the status quo . . . .' " *Nken* v. *Holder*, 556 U.S. 418, 429 (2009) (emphasis added, quotation marks omitted). And the district court's alteration of the status quo harmed the State of Michigan, *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("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.") (quotation marks omitted), which is why the Sixth Circuit restored the status quo by staying the district court's decision.

APRI makes much of the timing point, arguing that upset will be occurring just when ballot preparation is being finalized. Pls.' Emergency Mot. at 2. One might

say that the upset is Plaintiffs' emergency motion, which was filed literally on the eve of ballot certification (which will occur tomorrow, September 6). But that point aside, Public Act 268 was enacted over two and a half years ago. Effectuating it will not be a surprise to anyone—the Michigan Secretary of State or voters.

APRI also makes much of the burden of non-straight-ticket voting on Michigan's 183 counties. Pls.' Emergency Mot. at 3. But in response to the Sixth Circuit stay, the Secretary of State has already communicated to the counties that they should complete their ballot programming *without* the straight-ticket option. The Secretary is prepared with a list of effective materials and instructions for clerks. And ballot programming is not yet complete—in fact, the counties cannot complete the ballot program until the ballot is certified, which will happen tomorrow. So counties have time to program for non-straight-ticket voting.

As to voters, the instruction will be simple, easy to communicate and effectuate, and it has already been drafted: "Vote for the individual candidates of your choice in each office." And clerks have over a month to complete this. Moreover, this instruction is not required to be available until absentee-voter ballots begin to be distributed, 45 days prior to the election (September 22). Revised ballot instructions can be timely communicated to clerks in order to allow for their use by the September 22 deadline. These instructions are separate from the ballots themselves.

APRI also raises the *Purcell* point—this Court's recognition that last-minute orders can be confusing. But the point of *Purcell* is not to discourage election litigation or penalize a party who, as here, has been granted a stay through timely filings.

It is to discourage litigants from unnecessary delay, and here there has been no unnecessary delay by the Secretary. Indeed, it would be extraordinary if the district court were allowed to deprive Michigan of the operation of its statute through two consecutive elections—first by preliminarily enjoining the statute during the 2016 election and now by permanently enjoining the statute for the 2018 elections—without Michigan having been allowed the opportunity for appellate review on the merits of the statute's constitutionality.

Additionally, all the stay factors are met. As the Sixth Circuit noted in its thorough opinion granting the stay, "there are very serious problems with both the factual underpinnings and the legal analysis of the district court's opinion," and "[t]he Secretary has demonstrated a likelihood of reversal" on all three counts of the complaint. 6th Cir. Op. p 21. And the Court concluded that, on balance, all the factors favor the stay. *Id*.

CONCLUSION

For these reasons, this Court should deny the request to vacate the stay of the permanent injunction pending a resolution of the appeal in the Sixth Circuit on the merits.

Respectfully submitted,

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