

No. _____

**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,
Respondent.

**EMERGENCY 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 to the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit**

RESPONSE NEEDED BY SEPTEMBER 10, 2018

Now come Plaintiffs, pursuant to Supreme Court rule 21, and move this Court for an order vacating a stay issued by a divided panel of the Sixth Circuit Court of Appeals on September 5, 2018. The Sixth Circuit's order stayed a permanent injunction which barred implementation of a state election law which sought to eliminate straight party voting in Michigan. Straight party voting is the status quo – it has been in effect for 127 years, since 1891. The stay does not

preserve the status quo but rather upends it at the very time that ballot preparation is being finalized, and it conflicts with the orders which have consistently issued in this matter.

In *Purcell v Gonzalez*, 549 U.S. 1, 4-5 (2006)(per curiam), this court cautioned that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” For 127 years Michigan voters have had the option to vote straight party – to vote for all of the candidates of a party with a single mark. The legislature eliminated that option by the passage of 2015 PA 268. Plaintiffs filed suit alleging that the law would have a discriminatory impact on African-American voters because they vote straight party at a much higher rate than others. In July, 2016, the district court concluded that plaintiffs had a likelihood of prevailing and issued a preliminary injunction against PA 268. A unanimous panel of the Sixth Circuit Court of Appeals, also concluding that there was a likelihood of prevailing on the merits, refused to stay the injunction, 833 F.2d 656 (6th Cir. 2016), as did this court. Case No. 16A225 (September 9, 2016.) Following trial, the district court held for the plaintiffs on three separate counts, and issued a permanent injunction against PA 268 on August

1, 2018.¹ The district court concluded that the statute deprived African-American voters of Equal Protection both because of its discriminatory impact and because it was enacted with discriminatory intent, and also that it violated Section 2 of the Voting Rights Act. Responding to the state's August 14, 2018 motion for stay, the district court denied a stay of the injunction in an order dated August 23, 2018. Thus, five consistent orders, publicized extensively, have enjoined the implementation of PA 268 and preserved the status quo of straight party voting in Michigan.

On August 30, 2018, the defendant secretary of state filed an emergency motion for a stay from the Sixth Circuit,² the plaintiffs responded, as ordered, on September 1, 2018, and a stay was granted by a divided panel of the court on September 5, 2018. The 127 year status quo has been upended. The stay will require elections officials in all 83 Michigan counties to make significant changes in the ballot format and directions to voters just as the ballots have to be finalized and sent to the printers and will cause great confusion and delay in the polling places on election day. The irreparable impact of the stay will be greatest in the

¹ The district court issued an amended order on August 9, which added only a table of contents.

² The Secretary waited two weeks to appeal the district court's order and move the district court for a stay. After the district court denied the stay the Secretary waited an additional week to move for a stay in the court of appeals. Her characterization of her belated motion as an emergency is belied by her dilatory actions which also belied her claim of irreparable injury.

polling places where most of the voters are African-American because they have used the straight party option at a much higher rate. Voters will be deterred from voting by the long lines which will inevitably result.

The plaintiffs have not filed a motion in the court of appeals seeking vacation of the stay, as the stay issue was fully briefed; asking the court to reverse itself would be futile; and time is of the essence. The state bureau of elections is expected to certify the final form of the ballots by the close of business tomorrow, September 7, 2018.

Dissenting Judge Donald recognizes that the majority's conclusion "ignores the 150 years of shameful and painful history of disenfranchisement, suppression, and dilution of African American voters and the overt and covert mechanisms used to achieve that objective." Slip op at 24. Observing that the Voting Rights Act was passed to address the invidious and pervasive evil of racial discrimination in voting, Judge Donald noted that "many of the most 'insidious' forms of discriminatory barriers affecting racial minorities are facially guised in neutrality." Judge Donald recognized, as did the district court, that this purportedly neutral action is, in fact, an effort to suppress the votes of African-American voters.

The district court carefully and thoroughly set forth its factual conclusions, most of which were beyond dispute. Nearly half of Michigan voters voted straight party in 2016. In communities with an African-American majority the rate was

close to 78 percent. The panel majority correctly observed, as did the district court, that some communities with a low African-American population had high straight party voting rates. However, it was undisputed that all communities with a majority of African-Americans had exceptionally high straight party voting rates. The district court also carefully supported its conclusion that the elimination of straight party voting would increase the time it takes to vote. This conclusion was supported by the testimony of municipal clerks, county clerks and the state director of elections, as well as by an expert witness, who performed a simulation of the impact of this greater time. Finally, the court concluded that the longer lines which would be created would have the result of deterring voters, and particularly African-American voters. The district court concluded that while many states had eliminated straight party voting, it was important in the context of Michigan election law where efficient voting on election day is crucial given that Michigan does not allow early voting and allows absentee voting only for a limited number of reasons.

An appellate court reviewing a district court decision is directed to accord great deference to the lower court's factual findings. The majority made scarcely even a pretense of deference. In the words of dissenting Circuit Judge Donald, "The majority embarks on an outcome-determinative de novo review of the district court's factual findings."

As to the intentional discrimination claim, the district court credited undisputed testimony from the chair of the Michigan Republican Party, who was instrumental in the passage of PA 268 that a reason she wanted to eliminate straight party voting was that it would help Republicans win elections. As Circuit Judge Donald wrote, “[T]he district court reasonably found that eliminating the democratic party’s success with straight-party voting—success especially driven by African-Americans residing in communities with high voting-age African-Americans—was a motivating consideration in the Michigan legislature’s enactment of PA 268.” And she concluded, as did the district court, that this was evidence of race discrimination.

As noted, the district court’s permanent injunction was based on its conclusion that the plaintiffs had prevailed on all three counts of their complaint, discriminatory impact, discriminatory intent, and violation of the Voting Rights Act. The court of appeals panel majority concluded, notwithstanding that it was to review the district court’s decision for abuse of discretion, that the defendant secretary of state was likely to prevail on all three counts and that the balance of harms weighed in favor of the state.

This stay, sought and granted at the last minute, throws the administration of Michigan elections into confusion and chaos. The equities clearly favor the plaintiffs who respectfully request that equitable relief be granted, that the stay be

vacated so that the status quo is preserved and the longstanding Michigan law allowing straight party voting can remain in place pending a decision on the merits from the court of appeals.

Respectfully submitted,

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