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)).

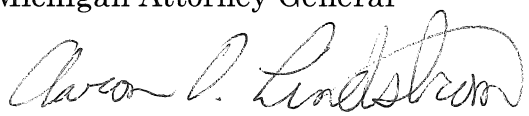
Enjoining this particular statute, this close to the general election, creates the possibility of voter confusion and runs contrary to the public's interest in the smooth administration of elections.

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



Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Denise C. Barton
Erik A. Grill
Adam Fracassi
Assistant Attorneys General

Attorneys for Applicant Ruth Johnson

Dated: SEPTEMBER 2016