UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 20-1815, *Susana Castillo, et al v. Gretchen Whitmer, et al*
Originating Case No. : 1:20-cv-00751

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Bryant L. Crutcher
Case Manager
Direct Dial No. 513-564-7013

cc: Mr. Thomas Dorwin

Enclosure

No. 20-1815

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSANA CASTILLO, individually and on behalf of all others similarly situated, et al.,

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, et al.,

Defendants-Appellants.

O R D E R

Before: STRANCH, THAPAR, and READLER, Circuit Judges.

Plaintiffs are a group of agricultural business owners and employees who challenge the enforcement of an emergency order issued by the Michigan Department of Health and Human Services imposing COVID-19 testing protocols on employers and housing providers in certain agricultural settings beginning on August 24, 2020 (the "Order"). Plaintiffs claim that requiring them to administer or take COVID-19 tests violates the Equal Protection clause and sought a preliminary injunction barring enforcement of the Order. The district court denied the motion for a preliminary injunction and Plaintiffs appeal. They also move to expedite the appeal and seek a preliminary injunction while the appeal is pending. Defendants, Michigan's Governor and the Directors of the Department of Health and Human Services and the Department of Agricultural and Rural Development, oppose the motion for a preliminary injunction but do not address the motion to expedite. In addition, fourteen law and justice nonprofits; four labor unions; twelve

community organizations who advocate on behalf of farmworkers, low-wage workers, and Latino communities; two public health experts; a public health nonprofit; and a community health interest group move for leave to file an amicus brief in support of Defendants' opposition to an injunction and have tendered their brief.

We may "grant an injunction pending appeal to prevent irreparable harm to the [moving] party." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). In determining whether to grant an injunction, we examine four factors: (1) the movants' likelihood of success on appeal; (2) whether the movants will suffer irreparable harm in the absence of an injunction; (3) whether issuance of an injunction would cause substantial harm to the other interested parties; and (4) where the public interest lies. *Id.* at 573. "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Id.*

Plaintiffs are unlikely to succeed on the merits of their appeal. We review the denial of a motion for preliminary injunction for abuse of discretion. *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 717 (6th Cir. 2003); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003). Accordingly, "[t]he district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Nat'l Hockey League Players' Ass'n*, 325 F.3d at 717. "Under this standard, [we] must review the district court's legal conclusions de novo and its factual findings for clear error." *Taubman*, 319 F.3d at 774 (quoting *Owner–Operator Indep. Drivers Ass'n v. Bissell*, 210 F.3d 595, 597 (6th Cir. 2000)).

In essence, Plaintiffs argue that the district court applied the wrong legal standard. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any

person within its jurisdiction the equal protection of the laws.'" *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (quoting U.S. Const. amend. XIV, § 1). This is "essentially a direction that all persons similarly situated should be treated alike." *Id.* (citing *Plyer v. Doe*, 457 U.S. 202, 216 (1982)). Thus, "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect," *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting)), and "racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

In addition, facially race-neutral actions are also unconstitutional when they disproportionately affect a racial minority and can be traced to a discriminatory purpose. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). In this case, the district court determined that the Order is facially race-neutral, and Plaintiffs do not expressly challenge that determination. Likewise, the district court recognized that the Order does have a disparate impact on Latinos. But the district court rejected Plaintiffs' argument that the Order was motivated by an improper racially motivated purpose. That factual finding was not clearly erroneous.

To establish improper purpose, a plaintiff must show "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279. Courts may find evidence of improper purpose in the historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). "[C]ontemporary statements by members of the decisionmaking body" may also be relevant. *Id*. at 268.

Plaintiffs' proffered evidence is insufficient. They cite to an April publication entitled "COVID-19 Response & Mitigation Strategies For Racial & Ethnic Populations & Marginalized Communities" as proof that racial identity was top-of-mind for Defendants when drafting the Order. Likewise, Plaintiffs point to two earlier executive actions that referenced the disproportionate impact COVID-19 has had on communities of color and the desire to improve racial equity in healthcare, asserting a pattern of official activity with racial motivations. But considering the effects of government action on various racial groups is not evidence of improper purpose: "[i]f consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required to blind themselves to the demographic realities of their jurisdictions and the potential demographic consequences of their decisions." *Spurlock v. Fox*, 716 F.3d 383, 394 (6th Cir. 2013).

Nor can Plaintiffs demonstrate invidious purpose based on the statistics referenced in the press release and in the Director's interview. Statements of fact about the high incidence of COVID-19 among the Latino community and throughout the agricultural industry may indicate that the Order will have a significant impact on Latinos, but they do not compel a finding that the impact motivated the Order.

Plaintiffs also argue that the scope of the Order is so inconsistent that the only logical explanation is an attempt to restrict Latinos. They argue that the Order cannot be based on living conditions because it requires testing of seasonal workers who do not stay at migrant camps. They argue that the Order cannot be based on working conditions because it requires testing of employees of meat, poultry, and egg processing facilities but not employees in other similar agricultural settings. They assert that many agricultural employers are exempt from testing requirements unless they hire migrant or seasonal workers, even while the working conditions

remain constant. Finally, they assert that Defendants offer no evidence of any COVID-19 outbreak at a greenhouse facility and that several other industrial settings, such as skilled nursing facilities and construction sites, account for significantly greater numbers of outbreaks. Concluding that there is no practical reason for singling out these groups, Plaintiffs argue that the real motivation behind the Order is its negative effects on Latinos.

Plaintiffs' asserted conclusion does not follow from the facts they cite. That most workers subject to the Order's testing requirements are Latino is evidence of disparate impact but does not indicate discriminatory intent. Likewise, Plaintiffs have not shown why failing to require testing of similar accommodations and agricultural settings where Latinos are not the majority is proof of improper purpose. They offer no legal authority for the proposition that the State must address all similar situations in unison. In any event, the Order references past outbreaks in migrant housing camps and food processing facilities, justifying the State's focus on those places. And while other settings might also benefit from compulsory testing, or might account for a greater number of outbreaks, that is not evidence that the Order's limited scope is racially motivated.

Put simply, Plaintiffs' argument requires us to view disparate impact as evidence of discriminatory motive. That is inconsistent with longstanding Supreme Court precedent requiring those asserting equal protection violations to show both impact and intent. *Pers. Adm'r of Mass.*, 442 U.S. at 272; *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger [strict scrutiny].") The requirement to show discriminatory impact is a high bar that Plaintiffs have not met.

Because Plaintiffs did not establish that the Order had a discriminatory purpose, the district court correctly determined that the Order is subject to rational basis review, under which the

government's action is presumed constitutional and Plaintiffs must "negate 'every conceivable basis which might support' it." *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020) (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012)). Likewise, the district court correctly concluded that Plaintiffs could not disprove all possible permissible justifications for the Order, including Defendants' assertion that the Order is motivated by the State's rational desire to protect migrant workers, their families, their communities, and the food supply chain. Accordingly, Plaintiffs are unlikely to succeed on the merits of their appeal.

In addition, Plaintiffs have not demonstrated that enforcement of the Order will cause them irreparable harm. It is true that irreparable harm is presumed in cases of constitutional violations, but as noted above, the Order is not unconstitutional. *See Am. Civil Liberties Union of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd sub nom. McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). The risks of a false positive, workers leaving the industry, or lost housing are too speculative to support injunctive relief. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (holding that "the harm alleged must be both certain and immediate, rather than speculative or theoretical"). Nor is monetary loss or logistical burden sufficient. *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (per curiam) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.").

Meanwhile, enjoining the testing scheme poses a substantial risk of harm to others given that identifying and isolating COVID-19-positive workers limits the spread of the virus. The virus's effects on individual and community health is well documented; to the extent the Order is

motivated by the legitimate government purpose of protecting migrant workers, their families, their communities, and the food supply chain, enforcing it serves the public interest. And interceding in a State's administrative processes is an extreme step the federal judiciary typically avoids, especially as the State attempts to manage a pandemic.

Finally, Plaintiffs' motion to expedite should be granted. "A party may move to expedite an appeal. The motion must show good cause to expedite." 6 Cir. R. 27(f). A party may move to expedite oral argument. 6 Cir. R. 34(c)(1). "[We] may expedite oral argument, even if the time to file briefs has not expired by the date of the expedited hearing." *Id.* If we schedule oral argument on an appeal from the grant or denial of a preliminary injunction, "argument will generally be expedited." 6 Cir. R. 34(c)(2). "When [we] grant[] a motion to expedite, the clerk will schedule oral argument at an early date. A judge may direct an earlier hearing." 6 Cir. R. 34(c)(3).

Defendants do not oppose expediting the case. The parties are cautioned that no extensions of the briefing schedule will issue absent a showing of good cause.

The motion for a preliminary injunction is **DENIED**. The motions to expedite and for leave to file an amicus brief are **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk