UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

	100 EAST FIFTH STREET, ROOM 540	
Deborah S. Hunt	POTTER STEWART U.S. COURTHOUSE	Tel. (513) 564-7000
Clerk	CINCINNATI, OHIO 45202-3988	www.ca6.uscourts.gov

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Ms. Danielle Rae Allison Yokom
Office of the Attorney General
of Michigan
P.O. Box 30755
Lansing, MI 48909

Mr. Samuel R. Bagenstos
Samuel Bagenstos
625 S. State Street
Suite LR 910
Ann Arbor, MI 48104

Ms. Katherine Jean Bennett
Office of the Attorney General
of Michigan
P.O. Box 30736
Lansing, MI 48909

Mr. Ronald Grant DeWaard
Varnum
P.O. Box 352
Grand Rapids, MI 49501-0352

Ms. Anna Marie Hill
Michigan Immigrant Rights Center
15 S. Washington Street
Suite 201
Ypsilanti, MI 48197

Diana Marin
Michigan Immigrant Rights Center
15 S. Washington Street
Suite 201

Ypsilanti, MI 48197

Mr. Aaron M. Phelps
Varnum
P.O. Box 352
Grand Rapids, MI 49501-0352

Mr. Mark G. Sands
Office of the Attorney General
of Michigan, Alcohol & Gambling Enforcement Division
2860 Eyde Parkway
East Lansing, MI 48823

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

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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.

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