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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Wesley W. Harris, *et al.*,

Plaintiffs,

vs.

Arizona Independent Redistricting
Commission, *et al.*,

Defendants.

No.: 2:12-CV-00894-ROS-NVW-RRC
**DEFENDANTS' REPLY IN SUPPORT OF
MOTION FOR JUDGMENT ON THE
PLEADINGS AND/OR ORDER
REGARDING
STANDARD OF REVIEW (DOC 95)**

(ASSIGNED TO THREE-JUDGE PANEL)

All along Plaintiffs have led this Court to believe that this case was all about partisan politics. Faced with actually trying their claims, Plaintiffs know that reality does not match up with their partisan-driven theory and are doing all they can to shift their theories in whatever way they think might fit the facts. Plaintiffs have a single goal: force a re-drawing of the legislative districts. They do not care what theory leads to that result so long as they can get the judiciary to force a legislative do-over. But that is not how redistricting litigation works; federal courts are cautious about intervening in

1 local districting legislation because to do so is “a serious intrusion on the most vital of
2 local functions.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

3 The law is straightforward: strict scrutiny applies only “where race for its own
4 sake, and not other districting principles, was the legislature’s dominant and controlling
5 rationale in drawing its district lines . . . and the legislature subordinated traditional race-
6 neutral districting principles . . . to racial considerations.” *Bush v. Vera*, 517 U.S. 952,
7 958 (1996) (internal quotation marks and citation omitted). Plaintiffs’ whole theory is
8 the opposite: that the Commission subordinated districting principles, including racial
9 considerations, to partisan motivations. (*See, e.g.*, Second Am. Comp., Doc. 55 at 33 ¶
10 135 (alleging that Commission “refused” to move certain Hispanic voters “for the sole
11 reason of increasing the Democrat percentages of the vote”).)

12 The Response does not contest that Plaintiffs’ claim is subject to a highly
13 deferential standard of review, requiring Plaintiffs to overcome the strong presumption
14 that the minor population deviations at issue in this case are constitutional. *See Brown v.*
15 *Thomson*, 462 U.S. 835, 842-43 (1983). Nor do Plaintiffs contest that their partisanship
16 theory is not subject to strict scrutiny. Instead, they argue that the Second Amended
17 Complaint is general enough to “capture” a race-based theory. (*See* Response, Doc. 105
18 at 4:18-22, 6:18-21.) Plaintiffs further argue that strict scrutiny applies if: **(1)** the
19 Commission’s population deviations are justified, in part, by an effort to comply with
20 the Voting Rights Act (the “VRA”); and **(2)** the Commission created more ability-to-
21 elect districts than would be mandatory as a minimum under the VRA. (*See* Doc. 105 at
22 2:8-13.)

23 Plaintiffs’ Response fails for several reasons.

24 **First**, Plaintiffs have not alleged a claim that the Commission improperly under-
25 populated districts predominantly because of race, and they lack standing to do so. They
26 allege that the map’s minor deviations are based on partisan bias, not race. And they do
27 not dispute that they have suffered no injury-in-fact based on improper race-based
28

1 redistricting. Their only claimed injury is based on the fact that their districts exceed the
2 ideal populations for legislative districts.

3 **Second**, Plaintiffs have the burden to show that any population deviation is the
4 result of “an arbitrary or discriminatory policy” and that “the asserted unconstitutional or
5 irrational state policy is the *actual reason* for the deviation.” (11/16/2012 Oder, Doc. 54
6 at 4-5.) The fact that one of the legitimate justifications for minor population deviations
7 may be the Commission’s effort to ensure compliance with the VRA does not flip the
8 burden of proof by requiring the Commission to satisfy strict scrutiny.

9 Moreover, Plaintiffs confuse what the VRA **mandates** with what is
10 constitutionally permissible as a matter of legislative discretion. “States may
11 intentionally create majority-minority districts, and may otherwise take race into
12 consideration, without coming under strict scrutiny.” *Bush v. Vera*, 517 U.S. at 993
13 (O’Connor, J., concurring) (summarizing governing law).

14 **Third**, Plaintiffs discursion into Professor Cain’s report and Legislative Districts
15 8, 24, and 26 is irrelevant, premature, and wrong.

16 **A. Plaintiffs Have Not Alleged a Race-Based Claim Subject to Strict Scrutiny.**

17 As discussed in the Motion (Doc. 95), Plaintiffs have alleged a claim that, on its
18 face, precludes application of strict scrutiny because they have alleged that all districting
19 factors **including race** were subordinated to partisanship. (See Doc. 95 at 5.) Plaintiffs
20 now contend, however, that the Second Amended Complaint “never limited their
21 allegations of improper motive to partisanship” and “made alternative allegations that
22 alleged that race was an impermissible reason for drawing district lines.” (Doc. 105 at
23 4.) Plaintiffs also suggest that they would only have to allege that “race was the
24 predominant factor” if they were making a racial gerrymander claim. (Doc. 105 at 6.)

25 Plaintiffs are mistaken. First, in support of the “alternative” race theory,
26 Plaintiffs point to several paragraphs in the Second Amended Complaint, “particularly
27 135-138.” (Doc. 105 at 4.) But the central purpose of those allegations is that racial
28 considerations were subordinated to political considerations. Paragraph 135, for

1 instance, states that “the IRC moved substantial numbers of Hispanic voters into
2 neighboring non-Hispanic white Democrat districts *to shore up the Democrats’ partisan*
3 *advantage* in such districts.” (Doc 55 ¶ 135 (emphasis added).) Paragraph 136 is even
4 clearer: “The IRC systematically spread Hispanic Democrats into predominantly non-
5 Hispanic white Democrat districts to increase the strength of Democratic registration
6 pluralities in them.” These paragraphs do not allege an “alternative” theory that racial
7 considerations were an improper basis for districting decisions; rather, they are a more
8 specific allegation of the ways in which Plaintiffs think that partisanship took primacy
9 over all other factors.

10 Moreover, Plaintiffs’ partisanship theory is not merely an “alternative;” it is
11 inherently incompatible with the type of race-based claim Plaintiffs would have to prove
12 to invoke strict scrutiny. Two companion Supreme Court cases show that the presence
13 of a political motive defeats strict scrutiny. *Hunt v. Cromartie (Cromartie I)*, 526 U.S.
14 541 (1999); *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234 (2001). In *Cromartie I*,
15 the Court reversed summary judgment on a racial gerrymandering claim because the
16 evidence was insufficient “to show, on summary judgment, the unconstitutional race-
17 based objective that plaintiffs claimed. That is because there was a genuine issue of
18 material fact as to whether **the evidence also was consistent with a constitutional**
19 **political objective, namely, the creation of a safe Democratic seat.**” *Cromartie II*,
20 532 U.S. at 239 (emphasis added) (citing *Cromartie I*, 526 U.S. at 549-551). In
21 reversing the lower court’s finding that race was the “predominant factor,” the Court
22 explained:

23 [G]iven the fact that the party attacking the legislature’s decision
24 bears the burden of proving that racial considerations are dominant
25 and controlling, . . . given the demanding nature of that burden of
26 proof, . . . and given the sensitivity, the extraordinary caution, that
27 district courts must show to avoid treading upon legislative
28 prerogatives, . . . the attacking party has not successfully shown that
race, rather than politics, predominantly accounts for the result.

Cromartie II, 532 U.S. at 257 (internal quotation marks and citations omitted). These
cases show that strict scrutiny does not apply when, as Plaintiffs allege, political

1 objectives motivated districting decisions. Plaintiffs have premised their whole case on
2 a theory that political motive drove the Commission's population deviations. They
3 cannot reverse course and survive a motion for judgment on the pleadings by arguing
4 that they have left open the possibility of different theories when those theories conflict
5 inherently.

6 Second, Plaintiffs incorrectly argue that they would only have to allege that "race
7 was the predominant factor" in order to invoke strict scrutiny if this were a racial
8 gerrymander claim. (Doc. 105 at 6.) The Supreme Court has applied strict scrutiny to
9 racial gerrymander claims, not one-person, one-vote claims. The Court's focus has been
10 to ensure that strict scrutiny is narrowly applied only when race is the predominant
11 factor because the Court is striking a balance between judicial deference to the local
12 control of districting and the unique harms that such racial classifications risk. *See, e.g.,*
13 *Bush*, 517 U.S. at 964-65; *Shaw v. Reno*, 509 U.S. 630, 647-48 (1993) (discussing
14 potential harms from racial classification). Plaintiffs cannot import the strict scrutiny
15 standard from the racial gerrymandering context without satisfying the threshold legal
16 requirement that they allege and establish that race was the predominant factor.

17 The focus on the particular harm underscores that Plaintiffs lack standing to assert
18 a race-based claim. Although Plaintiffs contend that they have standing in general to
19 assert a one-person, one-vote claim, they fail to address the Motion's argument
20 regarding standing for a race-based claim. (*See* Motion, Doc. 95 at 6-7.) To assert a
21 claim subject to strict scrutiny, Plaintiffs would have to allege that they suffered an
22 "injury in fact" caused by race-based under-population, in this case a "special
23 representational harms" that "racial classifications can cause in the voting context."
24 *United States v. Hays*, 515 U.S. 737, 745-46 (1995). As argued in the motion (at 7),
25 Plaintiffs have not done so.

26 Simply put, Plaintiffs have not alleged—and do not have the standing to allege—
27 a claim subject to strict scrutiny, one that alleges that "race for its own sake, and not
28

1 other districting principles, was [the Commission’s] dominant and controlling rationale
2 in drawing its district lines”. *Bush*, 517 U.S. at 958 (quoting *Miller*, 515 U.S. at 913).

3
4 **B. Plaintiffs’ Theory That An Effort To Comply With the VRA “Invites” Strict
Scrutiny Is Wrong.**

5 Plaintiffs also argue that strict scrutiny will apply if one of the bases for minor
6 population deviations is the Commission’s effort to ensure compliance with the VRA.
7 (Doc. 105 at 6-7.) In addition, although their argument is not clear, Plaintiffs’ position
8 seems to be that if Section Two of the VRA does not mandate a majority-minority
9 district, then that district *per se* fails strict scrutiny. (Doc. 105 at 6-7 (arguing that even
10 assuming compliance with VRA was a “compelling state interest,” districts that are not
11 required “majority-minority” districts under VRA do not justify minor population
12 deviations).) In other words, Plaintiffs argue that if compliance with the VRA is the
13 asserted reason for a deviation, the burden shifts from Plaintiffs (who would have to
14 show that the Commission’s reason was irrational and was the “actual” reason for a
15 deviation) to Defendants (who would have to satisfy strict scrutiny), and Defendants also
16 must show that any ability-to-elect districts were necessary under the VRA. Plaintiffs’
17 reasoning is flawed.

18 The Supreme Court has already held that efforts to create permissible—that is,
19 not necessarily mandated by the VRA—ability-to-elect districts are not only allowed,
20 but are not automatically subject to strict scrutiny. As Justice O’Connor explained when
21 summarizing the law in her *Bush v. Vera* concurrence, “States may intentionally create
22 majority-minority districts, and may otherwise take race into consideration, without
23 coming under strict scrutiny.” 517 U.S. at 993 (O’Connor, J., concurring). “[I]n the
24 context of redistricting, where race is considered only in applying traditional
25 redistricting principles along with the requirements of the Voting Rights Act, . . . strict
26 scrutiny is not required.” *DeWitt v. Wilson*, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994)
27 (cited approvingly in *Bush v. Vera*, 517 U.S. at 958).

28

1 Indeed, in *Bartlett v. Strickland*, the principal case Plaintiffs discuss in arguing
2 that certain districts go beyond the VRA, the Supreme Court stated, “[o]ur holding that §
3 2 does not require crossover districts,” a type of ability-to-elect district, “does not
4 consider the permissibility of such districts as a matter of legislative choice or
5 discretion.” 556 U.S. 1, 23 (2009). *Bartlett*’s holding was that Section 2 does not
6 **mandate** creation of cross-over districts, not, as Plaintiffs suggest, that the existence of a
7 non-mandatory ability-to-elect districts somehow violates the law. (*See* Doc. 105 at 9-
8 10.) Nothing in *Bartlett* waters down the Supreme Court’s well established rule that
9 strict scrutiny applies only if race was the predominant factor in a districting decision.

10 Plaintiffs reliance on *Miller v. Johnson* is likewise misplaced. Plaintiffs cite
11 *Miller* to support their argument that only majority-minority districts mandated by
12 Section 2 of the VRA could possibly justify a population deviation. (*See* Response,
13 Doc. 105 at 9-10 (arguing that LDs 8, 24, and 26 could not justify deviation unless
14 Commission was “right on the law” that Section 2 required the deviations).) In *Miller*,
15 a racial gerrymander case, the Court applied strict scrutiny to a Georgia district because
16 the evidence was “overwhelming, and practically stipulated . . . that race was the
17 predominant, overriding factor in drawing the” district. 515 U.S. at 910. In that context,
18 Georgia could not justify its race-predominant districting decisions merely because it
19 mistakenly believed the district was required under Section 5 of the VRA. *Id.* at 921-
20 926 (explaining Georgia’s position that DOJ told state district required for Section 5
21 preclearance and holding that VRA did not mandate district).

22 *Miller* therefore presents the precise situation that Plaintiffs have **not** alleged: that
23 there was overwhelming evidence that race was the predominant factor motivating
24 districting decisions. Nothing in *Miller* upsets Justice O’Connor’s statements in *Bush v.*
25 *Vera* or the Court’s discussion in *Bartlett* establishing that states may create non-
26 mandatory ability-to-elect or majority-minority districts without invoking strict scrutiny,
27 so long as race was not the sole or predominant factor motivating the creation of a
28 district.

1 Far from supporting Plaintiffs' efforts, *Miller* underscores the importance of
2 clarifying now that strict scrutiny does not apply to Plaintiffs' claims. The Court in
3 *Miller* went to great effort to explain that federal courts must "exercise extraordinary
4 caution in adjudicating claims that a State has drawn district lines on the basis of race."
5 *Id.* at 916; *see also id.* at 915-16 (noting that redistricting "is a most difficult subject . . .
6 and so the States must have discretion to exercise the political judgment necessary to
7 balance competing interests"). Accordingly, a plaintiff must prove "that the legislature
8 subordinated traditional race-neutral districting principles . . . to racial considerations."
9 *Id.*

10 Plaintiffs have not and cannot allege a claim that would satisfy this demanding
11 burden of proof. They have alleged an entirely different claim premised on a
12 partisanship theory, and they must live with the standard of judicial review that their
13 claim merits. Plaintiffs cannot avoid the deferential standard that applies to population
14 deviations within ten percent by attempting to transform their claim based on partisan
15 bias into a claim about race.

16 **C. Plaintiffs' Other Arguments Regarding Districts 8, 24, and 26 and Professor**
17 **Cain's Report Are Irrelevant, Premature, and Wrong.**

18 The Response is devoted primarily to pre-trying facts about Districts 8, 24, and
19 26. (*See* Doc. 105 at 7-10.) The purpose of Defendants' motion was to narrow the
20 scope of issues for trial and to prevent Plaintiffs from improperly shifting the burden of
21 proof to Defendants. Discussion of the facts surrounding specific districts is irrelevant
22 to this motion.

23 Plaintiffs also happen to be wrong. First, one of the three districts they address in
24 their response is not even underpopulated. LD 26 is 591 people over the ideal
25 population (+0.3% deviation from the ideal). (*See* Second Am. Compl. Ex. 13, Doc. 56
26 at 101 .) The other two, LDs 24 and 8 deviate from the ideal population by -3% and
27 -2.2% respectively. (*Id.*) Plaintiffs never link their critique of these districts to their
28 one-person, one-vote claim. The fact that LDs 24 and 8 may be marginally under-

1 populated says nothing about whether Plaintiffs had *their* voting power
2 unconstitutionally diluted.

3 Second, Plaintiffs' voting rights discussion focuses exclusively on Section 2
4 (Response, Doc. 105 at 8-10) and ignores Section 5, the only part of the Voting Rights
5 Act that places the burden of proof on the State. And the State previously satisfied its
6 burden under Section 5 by receiving preclearance from the Department of Justice.
7 Third, the Commission's interrogatory response Plaintiffs cite did not assert that LD 8
8 was a district in which minority voters had the ability to elect candidates of their choice.
9 It merely listed LD 8 as one of the districts with a majority-minority population. (*See*
10 Response, Ex. 1, Doc. 105 at 15.) The interrogatory response also referenced the
11 Commission's preclearance submission, which explained that LD 8 was not an ability-
12 to-elect district. (*See* Motion to Dismiss, Ex. 1, Doc. 23-1 at 5 (table of contents for
13 preclearance submission, stating that LD 8 is not an "ability to elect" district).) LD 8 is,
14 according to the Commission's expert Bruce Cain, a competitive district that in the 2012
15 election favored Republican candidates. (Doc. 98-1 at 11-12 ¶ 18.) District 8 voters
16 supported Republican candidates for President and U.S. Senate and voted two
17 Republicans to the State House of Representatives. (*See id.* at 18 ¶30.) The sole
18 Democrat elected from District 8 was the State Senator. (*See* 2012 General Election
19 Canvas <http://www.azsos.gov/election/2012/General/Canvass2012GE.pdf>)).¹

20 Furthermore, Plaintiffs mischaracterize Professor Cain's expert report when they
21 contend that he "identifies race as the most significant if not only factor in the drafting
22 of the underpopulated districts." (Doc. 105 at 7.) It is not surprising that Plaintiffs fail
23 to cite where Professor Cain so identifies; he does not. Among other things, Professor
24 Cain opines that "the Commission's adjustments from draft to final were made for
25 legitimate purposes, including strengthening ability-to-elect districts." (*See* Doc. 98-1 at

26 ¹ Plaintiffs are similarly mistaken when they suggest that a supposed majority-
27 minority district is not VRA-compliant if, for instance, a Latino individual fails to
28 win an election. (*See* Doc. 105 at 10:9-15.) Of course, a non-minority candidate
can be (and often is) a candidate of choice.

1 15 ¶ 26.) In District 8, for instance, Professor Cain opines that the Commission adjusted
2 the district “both to improve its competitiveness and preserve opportunities for minority
3 voters in that area.” (*Id.*) With regard to District 26, Professor Cain notes that “the
4 Commission considered other ways to strengthen the ability to elect . . . but rejected
5 them due to concerns about splitting communities of interest.” (*Id.* at 16 ¶ 27.)

6 Plaintiffs’ misreading of Professor Cain’s report likely derives from assuming
7 that race is all that is considered when the Commission worked to ensure compliance
8 with the VRA (and preclearance from the DOJ) by creating ability-to-elect districts. In
9 addition to balancing demographics with numerous other factors, a much greater
10 analysis is involved than assuming that a minority population will vote as a unit. To
11 ensure compliance with the VRA and satisfy its burden of proof under Section 5, the
12 Commission analyzed election results, polarized voting data, turnout, and numerous
13 other demographic factors. Plaintiffs’ crude assumption that the creation of an ability-
14 to-elect district is solely or predominantly focused on race is just wrong. More
15 importantly, the fact that race was part of the calculation does not trigger strict scrutiny
16 in this context. *See Bush*, 517 U.S. at 958 (“Strict scrutiny does not apply merely
17 because redistricting is performed with consciousness of race” or “to all cases of
18 intentional creation of majority-minority districts”).

19 **D. Defendants’ Motion Is Timely and Necessary.**

20 Plaintiffs complain that this issue should have been raised at the case
21 management conference. But it had already been raised by Plaintiffs in their “disputed
22 legal issues” in the proposed case management plan (Doc. 61.) An order at this pre-trial
23 stage clarifying that strict scrutiny does not apply will save substantial judicial and party
24 resources. The Commission brought this motion because the scope of discovery and
25 preparation for trial will have to change if Plaintiffs are allowed to impose a strict
26 scrutiny burden on the Commission’s districting. Although the Commission has no
27 doubt its legislative districting plan is lawful, it is a legislative body that should not be
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1 subjected to strict scrutiny review unless a proper claim is alleged that qualifies for that
2 invasive, heightened level of judicial review.

3
4 RESPECTFULLY SUBMITTED this 11th day of February, 2013.

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20 **CERTIFICATE OF SERVICE**

21 I hereby certify that on February 11, 2013, the attached document was
22 electronically transmitted to the Clerk of the Court using the CM/ECF System which
23 will send notification of such filing and transmittal of a Notice of Electronic Filing to all
24 CM/ECF registrants.

25 s/ Sara C. Sanchez

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