UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH, et al,

Plaintiffs,

Case No. 2:11-cv-15385

and

Hon. Bernard A. Friedman

MICHIGAN DEMOCRATIC PARTY,

Intervening Plaintiff,

v.

RICK SNYDER, in his Official Capacity as Governor of the State of Michigan, RUTH JOHNSON, in her Official Capacity as Secretary of State for the State of Michigan,

Defendants,

and

MICHIGAN REPUBLICAN PARTY, JASMINE FORD, ROBERT MIDGETT, LILLIAN SMITH, and MARY KATHERINE DECUIR,

Intervening Defendants.

_____/

Peter H. Ellsworth (P23657)
Jeffery V. Stuckey (P34648)
Ryan M. Shannon (P74535)
DICKINSON WRIGHT PLLC
Counsel for Intervening Defendants
215 S. Washington Square, Suite 200
Lansing, MI 48933
517.371.1730

Michael A. Carvin
JONES DAY
Co-Counsel for Intervening Defendants
51 Louisiana NW
Washington, DC 20001
202.879.7643

Eric E. Doster (P41782)
FOSTER SWIFT COLLINS & SMITH, P.C.
Co-Counsel for Intervening Defendants
313 South Washington Square
Lansing, MI 48933
517.371.8241

_____/

INTERVENING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Intervening Defendants request dismissal of Plaintiff's First Amended Complaint based on Fed. R. Civ. P. 12(c) for the reasons stated in the accompanying brief.

Pursuant to L.R. 7.1(a), counsel for Intervening Defendants contacted counsel for Plaintiffs and Intervening Plaintiff in this matter and explained the nature of this motion and its legal basis. Counsel for Plaintiffs and Intervening Plaintiff did not concur in the relief sought.

Respectfully submitted,

DICKINSON WRIGHT PLLC
Counsel for Intervening Defendants

By: s/Peter H. Ellsworth
Peter H. Ellsworth (P23657)
Jeffery V. Stuckey (P34648)
Ryan M. Shannon (P74535)
Business Address:
215 South Washington Square, #200
Lansing, MI 48933
pellsworth@dickinsonwright.com
jstuckey@dickinsonwright.com
rshannon@dickinsonwright.com
Telephone: 517.371.1730

JONES DAY
Co-Counsel for Intervening Defendants

Michael A. Carvin
Co-Counsel for Intervening Defendants
51 Louisiana NW
Washington, DC 20001
202.879.7643
macarvin@jonesday.com

FOSTER SWIFT COLLINS & SMITH, P.C.
Co-Counsel for Intervening Defendants

Eric E. Doster (P41782)
313 South Washington Square
Lansing, MI 48933
517.371.8241
edoster@fosterswift.com

Dated: February 23, 2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH, et al,

Plaintiffs,

and

MICHIGAN DEMOCRATIC PARTY,

Intervening Plaintiff,

v.

RICK SNYDER, in his Official Capacity as Governor of the State of Michigan, RUTH JOHNSON, in her Official Capacity as Secretary of State for the State of Michigan,

Defendants,

and

MICHIGAN REPUBLICAN PARTY, JASMINE FORD, ROBERT MIDGETT, LILLIAN SMITH, and MARY KATHERINE DECUIR,

Intervening Defendants.

Case No. 2:11-cv-15385

Hon. Bernard A. Friedman

_____/

Peter H. Ellsworth (P23657)
Jeffery V. Stuckey (P34648)
Ryan M. Shannon (P74535)
DICKINSON WRIGHT PLLC
Counsel for Intervening Defendants
215 S. Washington Square, Suite 200
Lansing, MI 48933
517.371.1730

Michael A. Carvin
JONES DAY
Co-Counsel for Intervening Defendants
51 Louisiana NW
Washington, DC 20001
202.879.7643

Eric E. Doster (P41782)
FOSTER SWIFT COLLINS & SMITH, P.C.
Co-Counsel for Intervening Defendants
313 South Washington Square
Lansing, MI 48933
517.371.8241

_____/

BRIEF IN SUPPORT OF INTERVENING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Standard of Review

Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)

Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995)

Plaintiffs' § 2 Latino American "Cracking" Claim

Bartlett v. Strickland, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009)

Johnson v. De Grandy, 512 U.S. 997, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994)

Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)

Plaintiffs' Equal Protection Claims (Both)

Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995)

Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982)

Personnel Admin. of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)

Plaintiffs' § 2 African American Incumbent Pairing Claim

Prosser v. Elections Bd., 793 F. Supp. 859 (W.D. Wis. 1992)

Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)

Plaintiff's "One Person, One Vote" Claim

Brown v. Thompson, 462 U.S. 835, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983)

Gaffney v. Cummings, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973)

Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022 (D. Md. 1994)

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES PRESENTED

On August 9, 2011, Governor Snyder signed legislative redistricting plans into law for the Michigan House and Senate as Public Act 129 of 2011. Plaintiffs, including various organizations and individual voters, seek to challenge the House districts in the City of Detroit in the adopted plan under the § 2 of the 1965 Voting Rights Act as well as on constitutional grounds.

I. Have Plaintiffs failed to state a claim that Public Act 129 of 2011 violates § 2 of the Voting Rights Act by splitting the Latino American Community in Southwest Detroit where Plaintiffs do not allege the possibility of creating a Latino American majority-minority district?

II. Have Plaintiffs failed to state a claim that Public Act 129 of 2011 violates the Fourteenth Amendment's Equal Protection Clause by splitting the Latino American community in Southwest Detroit where Plaintiffs do not allege that the splitting resulted from racial animus and do not allege the possibility of creating a Latino American majority-minority district?

III. Have Plaintiffs failed to state a claim that Public Act 129 of 2011 violates § 2 of the Voting Rights Act by pairing African American incumbents in the same districts in the City of Detroit where plaintiffs do not allege dilutive effect or a diminishment of voter choice in the districts as drawn, but instead premise their claim on voter's ability to vote for a particular incumbent?

IV. Have Plaintiffs failed to state a claim that Public Act 129 of 2011 violates the Fourteenth Amendment's Equal Protection Clause by pairing African American incumbents in the same districts in the City of Detroit where Plaintiffs do not allege that the pairings resulted from racial animus, and where Plaintiffs do not identify a dilutive effect or a diminishment of voter choice?

V. Have Plaintiffs failed to state a claim that Public Act 129 of 2011 violates the Fourteenth Amendment's "One Person, One Vote" standard where Plaintiffs do not allege that the minor deviations in Detroit's House districts resulted from anything other than consideration of Michigan's traditional redistricting criteria?

I. INTRODUCTION

Plaintiffs—various organizations, the chair of the Michigan Legislative Black Caucus, and individual voters—filed a Complaint[1] setting forth two causes of action against Governor Rick Snyder and Secretary of State Ruth Johnson (collectively "State Defendants"), in their official capacities as state election officers. Plaintiffs' claims all challenge the validity of Michigan's new electoral district boundaries for the Michigan House in the City of Detroit.

Plaintiffs' first cause of action is based on the Legislature's failure to create a Latino influence district in Southwest Detroit, under which Plaintiffs allege violations of (1) § 2 of the Voting Rights Act and (2) the Equal Protection Clause of the Fourteenth Amendment. (Compl., ¶ 20.) In particular, Plaintiffs allege that the State "willingly and knowingly" "cracked" the Latino community in Southwest Detroit by splitting its population into two districts. (*Id.*) Plaintiffs also allege that the State rejected Plaintiffs' proposed map which kept the Latino community whole in a district with a 42.74% Latino voting-age population. (*Id.*) Plaintiffs' Latino "cracking" claim must fail as Plaintiffs do not plead the existence of well-established preconditions for vote dilution claims. Among other deficiencies, Plaintiffs do not allege it is possible to create a district with at least 50% Latino voting-age population. This failure is fatal under Supreme Court precedent. Plaintiffs' Equal Protection claim fails as well, because Plaintiffs have not sufficiently alleged intentional discrimination or the existence of any remediable harm.

Plaintiffs' second cause of action is based on the pairing of African American incumbent representatives in the City of Detroit, under which Plaintiffs allege violations of (1) § 2 of the Voting Rights Act, (2) the Equal Protection Clause of the Fourteenth Amendment, and (3) the

[1] Unless stated otherwise, references to the "Complaint" refer to the amended complaint filed January 3, 2012.

"One Person, One Vote" principle of the Fourteenth Amendment (or "equipopulation" principle). (*Id.*, ¶ 19.) Plaintiffs claim that, by pairing minority incumbents in Detroit's house districts, the State "stripped minority voters of their right to select candidates of their choosing …." (*Id.*, ¶¶ 19, 23.) Plaintiffs fail to state a claim upon which relief can be granted as to all three of their incumbent pairing claims. First, Plaintiffs fail to set forth any theory of voter harm. The Voting Rights Act protects voters—not incumbents. It protects voters' ability to select the candidate of their choice—not voters' ability to vote for a particular person. Plaintiffs do not allege that voter choice has been diminished, and thus fail to state a § 2 claim. Second, Plaintiffs fail to allege, as required for Equal Protection claims, that the incumbent pairings resulted from purposeful discrimination or that the pairings have caused any remediable harm. Third, Plaintiffs' "One Person, One Vote" claim fails because they have not alleged—as they must—that the slight under-population of the Detroit districts results from anything other than the Legislature's observance of Michigan's established and traditional redistricting criteria. In fact, aside from including the phrase "One Person, One Vote" in their Complaint, Plaintiffs have not made *any* allegations relevant to a "One Person, One Vote" claim.

Significantly, the Plaintiffs' claims ignore the demographic changes to the City of Detroit's population over the last 10 years. According to the 2012 Census and the Plaintiffs themselves,[2] Michigan is the only state to have lost population, declining from 9,938,444 persons in 2000 to 9,883,640 persons in 2010. Among the areas suffering the most from this population

[2] See Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction and Appointment of Special Master filed with this Court on or about December 8, 2011, p. 5. These data are also available at http://2010.census.gov/2010census/data/. This Court may consider documents filed with the Complaint without converting a Rule 12 Motion into a Motion for Summary Judgment. *See, e.g.*, *Industrial Constructor's Corp v United States Bureau of Reclamation*, 15 F.3d 963, 964 (10th Cir. 1994).

decline is the City of Detroit, declining from 951,270 persons in 2000 to 713,777 persons in 2010. Since the ideal State House population size is 89,851 persons per district, this means that the City of Detroit should lose three State House Districts, which means that some incumbents must be paired together in the same district if Michigan's traditional redistricting criteria are followed.[3]

The Legislature's redistricting efforts are to be afforded both substantial deference and a presumption of good faith by this Court. For this reason and the reasons set forth below, dismissal of Plaintiffs' Complaint, in its entirety, is both warranted and required.

II. FACTUAL AND STATUTORY BACKGROUND

A. Background Of Statutory Provisions Governing Redistricting In Michigan.

Following the 2010 national census, and consistent with its constitutional and state law obligations, the Michigan Legislature drew new electoral district boundaries. In Michigan, statutory criteria—which are based on redistricting principles in the Michigan Constitution—govern the redistricting process. M.C.L. § 4.261. These criteria were recognized by the Michigan Supreme Court in 1982, and are known as the "Apol Criteria," after the former director of elections, Bernard J. Apol, who drew maps for the Michigan Supreme Court that year. *See In re Apportionment of State Legislature—1982,* 413 Mich. 96, 141-42, 321 N.W.2d 565 (1982);

---

[3] The historical and statistical facts set forth in this Brief are provided for purposes of background and context, and they are not necessary for the Court's resolution of the motion for judgment on the pleadings. In any case, these facts are part of the "public record" and thus this Court is "not precluded in [its] review of the complaint from taking notice of" these facts. *Papasan v. Allain*, 478 U.S. 265, 269 n. 1, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); see also, *Hall v. Virginia*, 385 F.3d 421, 424 n. 3 (4th Cir. 2004) (taking traditional notice of population statistics in a redistricting case). "A Court may consider public records without converting a Rule 12(b)(6)) motion into a Rule 56 motion." *Jones v. City of Cincinnati,* 521 F.3d 555, 561 (6th Cir. 2008).

see also In re Apportionment of State Legislature —1992, 439 Mich. 715, 720-22, 486 N.W.2d 639 (1992). The Michigan Legislature codified the Apol Criteria in 1996. 1996 P.A. 463.

The Apol Criteria require single member districts for both the Michigan House and Senate, and require districts to be areas of convenient territory contiguous by land. M.C.L. § 4.261(a)-(c). The statute also specifies that senate and house districts shall have a population not exceeding 105% and no less than 95% of the ideal district size. M.C.L. § 4.261(d). That range (10%) has been recognized to be within the range of flexibility afforded to state legislatures by federal courts, and redistricting plans within that range are afforded a presumption of validity. *See Brown v. Thompson,* 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983). Michigan's redistricting laws specify a smaller range, however, "[w]ithin a city or township to which there is apportioned more than 1 senate district or house of representatives district" (such as Detroit), and in such circumstances "district lines shall be drawn to achieve the maximum compactness possible within a population range of 98% to 102% of absolute equality *between* districts within that city or township." M.C.L. § 4.261(i) (emphasis added).[4]

The Apol Criteria establish a hierarchy for the application of Michigan's redistricting principles. M.C.L. § 4.261(e)-(h). First, "district lines shall preserve county lines with the least cost to the principle of equality of population … ." M.C.L. § 4.261(e). Second, the Legislature should avoid breaking municipal boundaries to the extent possible. M.C.L. § 4.261(f)-(g). Only when necessary to stay within the range of allowable divergence may the Legislature break municipal lines. M.C.L. § 4.261(h).

[4] The 98-102% criterion thus defines the population deviation range between Detroit districts and not the deviation range from the ideal district.

B. Factual And Procedural History Of The Present Action.

The Michigan Legislature proposed redistricting plans for the Michigan Senate and Michigan House in Senate Bill 498. As stated in Plaintiffs' Complaint, the Michigan Black Caucus was "from the start, heavily engaged in the 2011 Legislative Redistricting Process," and its Chair "provided testimony to the House and Senate Redistricting Committees …." (Compl., ¶ 6.) Additionally, as stated by Plaintiffs, "[t]he Black Caucus, [its] counsel and [its] mapping expert met formally and informally with the Legislative Redistricting leadership throughout the [r]edistricting [p]rocess." (*Id.*) The plan for the Michigan House, as passed by the Michigan Legislature, provides for a total of twelve African American-majority districts (each with an African American voting-age population or "VAP" exceeding 50%). Ten of these African American-majority districts are located in the City of Detroit (each with an African American VAP exceeding 55%). Plaintiffs do not here challenge the number or sufficiency of these districts.

On August 9, 2011,[5] Governor Snyder signed the state legislative redistricting plans into law as Public Act 129 of 2011. Fully four months later, on December 8, 2011, Plaintiffs filed their initial complaint with this Court. (Dkt. # 1.) On January 3, 2011, Plaintiffs filed an amended complaint which is substantially the same as the original complaint. (Dkt. # 12.) Plaintiffs did not, however, serve their initial or amended complaint on the State Defendants until January 10, 2012—five months after Senate Bill 498 had been signed into law.

---

[5] Michigan law required that the Legislature adopt a redistricting plan for the state senate and state house no later than November 1, 2011. M.C.L. § 4.261.

III. ARGUMENT

A. Standard Of Review

A motion for judgment on the pleadings brought pursuant to Fed. R. Civ. P. 12(c) is determined using the same standard that applies to a review of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Poplar Creek Development v. Chesapeake Appalachia,* 636 F.3d 235, 240 (6th Cir. 2011); *JP Morgan Chase Bank, N.A. v. Winget,* 510 F.3d 577, 581 (6th Cir. 2007); *see* Fed. R. Civ. P. 12(h)(2)(B) ("Failure to state a claim upon which relief can be granted … may be raised … (B) by a motion under Rule 12(c) ….").

Pursuant to Fed. R. Civ. P. 12(b)(6), a court should dismiss a complaint if the alleged facts, even if true, do not entitle a plaintiff to relief on the theories asserted. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal quotation marks and citations omitted). Instead, to "survive a motion to dismiss, a complaint must contain sufficient factual matter,[6] accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quotation marks and citation omitted).

---

[6] Significantly, the Sixth Circuit has rejected the argument that a claim should survive a motion to dismiss on the basis that necessary information is exclusively within the defendant's control, even in the context of the less rigorous pleading requirements of Fed. R. Civ. P. 8. *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050–51 (6th Cir. 2011) ("[P]laintiff must allege specific facts ... even if those facts are only within the head or hands of the defendants. The plaintiff may not use the discovery process to obtain these facts after filing suit."). *See generally, Chesbrough v. VPA, P.C.*, 655 F.3d 461, 472 (6th Cir. 2011).

A complaint will not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly,* 550 U.S. at 557). In other words, the pleadings must contain "factual content[7] that allows the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Id.*; *see also Ass'n of Cleveland Fire Fighters v. City of Cleveland,* 502 F.3d 545, 548 (6th Cir. 2007) ("[E]ven though a complaint need not contain 'detailed' factual allegations, its '[f]actual allegations must be enough to raise a right to relief above the speculative level ….'") (citing *Twombly,* 550 U.S. at 555). In making this determination, a court "need not accept as true legal conclusions or unwarranted factual inferences." *Perry v. Am. Tobacco,* 324 F.3d 845, 848 (6th Cir. 2003) (quotation marks and citation omitted).

Under Fed. R. Civ. P. 8(a)'s pleading standard, a plaintiff must provide "a short and plain statement of the claim showing that the pleader is entitled to relief …." Regarding culpability, the complaint must allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged"; this entails showing "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S. Ct. at 1949 (citation omitted). If a complaint pleads facts "that are merely consistent with a defendant's liability," it falls short of this requirement. *Id.* (quotation marks and citation omitted).

In a redistricting case, courts must presume the legislature's good faith and "exercise extraordinary caution" when reviewing adopted plans. *Miller v. Johnson,* 515 U.S. 900, 915-16,

---

[7] In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint also may be taken into account. This Circuit has further held that documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to its claim. *Amini v. Oberlin College,* 259 F.3d 493, 502 (6th Cir. 2001).

115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995). As redistricting is "primarily the duty and responsibility of the State," judicial review of state redistricting legislation "represents a serious intrusion on the most vital of local functions." *Id.* at 915 (quotation marks and citation omitted). "[C]ourts must … recognize … the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed." *Id.* at 916-17.

B. Plaintiffs' Latino "Cracking" Claims Under § 2 Of The Voting Rights Act And The Equal Protection Clause Should Be Dismissed Because Plaintiffs' Allegations Fail To Meet The Threshold Requirements For Such Claims.

1. Plaintiffs' Claims.

In their Complaint, Plaintiffs claim that the State has violated § 2 of the Voting Rights Act as well as the Fourteenth Amendment's Equal Protection Clause by "willfully and knowingly creating House of Representative districts in the community that split the Latino community [of Southwest Detroit] in half …." (Compl. ¶ 20.) In particular, Plaintiffs allege that "[t]he State rejected a map which keeps the Latino community whole with a 42.74% Hispanic Voting Age Population base and instead 'cracked' the community, by placing" the Latino community into two districts in which they comprised 24.5% and 17.3% of the voting-age population, respectively. (*Id.*)

Plaintiffs allege further that "Latino-Americans in Southwest Detroit are politically cohesive," "have organized themselves collectively for political activity," "have common and distinct history, culture, and language," and have "[h]istorically … been subject to private as well as official discrimination on the basis of race, including discrimination in attempting to exercise their right of franchise and to participate equally with other residents in the political

process." (*Id.*, ¶¶ 29-32.) Finally, Plaintiffs allege that "[v]oting in Michigan is racially polarized." (*Id.*, ¶ 33.)

As set forth below, Plaintiffs' claims fail to meet well-established threshold pleading requirements. As such, dismissal is warranted.

2. Plaintiffs' Vote Dilution Claims Under § 2 Of The Voting Rights Act Should Be Dismissed Because Plaintiffs Fail To Plead The Existence Of The *Gingles* Preconditions.

a. The Legal Framework For Vote Dilution Claims Under § 2 Of The Voting Rights Act.

Section 2(a) of the Voting Rights Act prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen … to vote on account of race or color …." 42 U.S.C. § 1973(a). This prohibition extends to claims of "vote dilution." *See Thornburg v. Gingles,* 478 U.S. 30, 48-51, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). As a threshold matter, plaintiffs in § 2 vote dilution cases must plead the existence of three preconditions (the "*Gingles* preconditions"):

> (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district";
>
> (2) that the minority group is "politically cohesive"; and
>
> (3) that the "white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate."

Id. The failure to allege and prove *any one* of the three *Gingles* preconditions is fatal to a § 2 claim. *See Johnson v. De Grandy,* 512 U.S. 997, 1010-13, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994); *Growe v. Emison,* 507 U.S. 25, 40-41, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993). "Unless these points are established, there neither has been a wrong nor can [there] be a remedy." *Growe,* 507 U.S. at 40-41; *see also Hall v. Virginia,* 385 F.3d 421, 427-31 (4th Cir.

2004) (dismissing § 2 complaint where plaintiffs failed to plead existence of the *Gingles* preconditions).

A § 2 plaintiff's satisfaction of the *Gingles* preconditions is not, however, dispositive of a § 2 claim. *See De Grandy,* 512 U.S. at 1011. A violation of § 2 only occurs where, "based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a" protected class of citizens "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). Thus, if a § 2 plaintiff establishes the existence of the three *Gingles* preconditions, the court then "proceed[s] to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland,* 556 U.S. 1, 129 S. Ct. 1231, 1241, 173 L. Ed. 2d 173 (2009) (citations omitted).

b. Plaintiffs' Claim Based On Failure To Create An "Influence" District Is Squarely Foreclosed By Supreme Court Precedent.

The first *Gingles* precondition requires that the minority group's population be "sufficiently large and geographically compact to constitute a *majority* in a single-member district." 478 U.S. at 50 (emphasis added). The Supreme Court has held that this requires a § 2 plaintiff to demonstrate the possibility of creating a compact district where the minority group's population is at least 50% of the district's voting-age population. *Bartlett,* 129 S. Ct. at 1245-46.

Plaintiffs here seek an influence district—a district in which a minority group's population is less than a majority in a single member district. But the Supreme Court has stated that "§ 2 does not require the creation of influence districts." *Id.* at 1242 (citing *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 445, 126 S. Ct. 2594, 165 L. Ed. 2d 609

(2006) (*LULAC*)). Plaintiffs allege that their alternative map provides for a district in which Latinos only comprise 42.74% of the voting-age population. (Compl., ¶ 20.) This allegation is fatally flawed.

i. *Bartlett* Foreclosed All § 2 Claims Premised On A State's Failure To Create Sub-50% Districts.

In *Bartlett,* state officials who had violated a state redistricting law sought to defend on the basis that § 2 mandated the creation of an African American "crossover"[8] district. 129 S. Ct. at 1239, 1242-43. The state officials could not draw a compact majority-African American district. They nonetheless argued that the district's 39% African American voting-age population could succeed with help of members of the majority who "cross over to support the minority's preferred candidate," and that § 2 mandated the creation of such a district. *Id*. at 1242-43. The *Bartlett* Court[9] rejected this argument. *Id.* at 1243.

The *Bartlett* Court first reviewed redistricting terminology. In "majority-minority districts," the Court stated, "a minority group composes a numerical, working majority of the voting-age population." *Id.* at 1242. Majority-minority districts can be required by § 2. *Id.* "At the other end of the spectrum," the Court continued, "are influence districts"—the type of district here sought by Plaintiffs—"in which a minority group can influence the outcome of an election

---

[8] A "crossover" district is one where members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to elect representatives of their choice with support from a limited but reliable white crossover vote. *See Rodriguez v. Pataki,* 308 F. Supp. 2d 346, 376 (S.D.N.Y. 2004) (three-judge panel) aff'd, 543 U.S. 997, 125 S. Ct. 627, 160 L. Ed. 2d 454 (2004) .

[9] The opinion in *Bartlett* was authored by Justice Kennedy and joined by Justices Roberts and Alito. As the two concurring Justices, Thomas and Scalia, would have held that vote dilution claims are *never* viable under § 2, a majority of the Court in *Bartlett* held that vote dilution claims based on crossover districts are not viable. *See Bartlett,* 129 S. Ct. at 1250 (Thomas, J., concurring in the judgment).

even if its preferred candidate cannot be elected." *Id.* Citing its prior decision in *LULAC,* the *Bartlett* Court stated that "§ 2 does not require the creation of influence districts." *Id.*

The Court next addressed whether § 2 mandated the creation of a sub-50% "cross-over" district, which it called "an intermediate type of district" falling between "majority-minority" and "influence" districts. *Id.* at 1242. Because recognizing crossover districts would confer a special political advantage on minority groups, the Court held that § 2 does not require legislatures to create such districts:

> [B]ecause [petitioners] form only 39 percent of the voting-age population in District 18, African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength. … They cannot … elect [a] candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters a right to preserve their strength for the purposes of forging an advantageous political alliance. Nothing in § 2 grants special protection to a minority group's right to form political coalitions. Minority voters are not immune from the obligation to pull, haul, and trade to find common political ground.

Id. at 1243 (internal quotation marks and citations omitted); *see also Gingles,* 478 U.S. at 83 ("[Protecting alliances is] interest-group politics rather than a rule hedging against racial discrimination.") (White, J., concurring).

Rather than "place courts in the untenable position of predicting many political variables and tying them to race-based assumptions," the requirement that a § 2 plaintiff demonstrate the possibility of a "majority-minority" district "draws clear lines for courts and legislatures alike." *Bartlett,* 129 S. Ct. at 1244. While legislatures are *permitted*[10] to create crossover and influence

[10] For example, the Michigan Supreme Court's special masters, who crafted a remedial map in the 1990 cycle of state legislative redistricting, permissibly considered the integrity of Southwest Detroit's Latino population in drafting senatorial districts, though such a consideration was not required. *See NAACP, Inc. v. Austin,* 857 F. Supp. 560, 574-75 (E.D. Mich. 1994) .

districts "as a matter of legislative choice or discretion," the State's failure to do so is not answerable under § 2. *See id.* at 1248.

In sum, Plaintiffs cannot premise a § 2 claim on the state's failure to create an "influence" district. Because Plaintiffs fail to allege that it is possible to create a majority-Latino district in Southwest Detroit, they fail to state a claim under § 2.

c. Plaintiffs Do Not Allege The Possibility Of An Alternative Plan With A Greater Number Of Majority-Minority Districts.

Consistent with the first *Gingles* precondition, a § 2 vote dilution plaintiff must demonstrate "the possibility of creating *more* than the existing number of reasonably compact" majority-minority districts than exist in the challenged plan. *De Grandy,* 512 U.S. at 1008 (emphasis added); *see also LULAC,* 548 U.S. at 430. This is because "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured …." *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 480, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997) (*Bossier I*) (citation omitted). A plaintiff cannot survive by merely presenting a hypothetical reconfiguration where the number of majority-minority districts is the same as in the challenged plan. *See LULAC,* 548 U.S. at 429-30 (opinion of Kennedy, J.) ("If the inclusion of the plaintiffs [in a majority-minority district] would necessitate the exclusion of others, then the State cannot be faulted for its choice.").

Plaintiffs have not demonstrated the existence of a hypothetical alternative containing a Latino-influence district which would *maintain*, much less *increase,* the number of majority-minority districts in Detroit. This failure is fatal. This Court can take notice that, historically, it has not been possible to keep the Latino population whole in Southwest Detroit without eliminating at least one of the City's African American-majority districts. *See NAACP v. Austin,*

857 F. Supp. 560, 574-75 (E.D. Mich. 1994) (Martin, J., Cohn, J., and Friedman, J.).[11] Plaintiffs would thus have this court destroy a majority-minority district to create an influence district. Such a remedy is contrary to the purposes of § 2 of the Voting Rights Act.

d. Plaintiffs Fail To Plead The Existence Of Majority Bloc Voting Resulting In The Defeat Of Latinos' Preferred Candidate.

The third *Gingles* precondition requires that Plaintiffs both plead and establish that the "majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." 478 U.S. at 51.

Plaintiffs do not make any allegation with respect to the third *Gingles* precondition. Aside from perhaps a generalized allegation that "[v]oting in Michigan is racially polarized," (*see* Compl. ¶ 33), Plaintiffs at no point plead the existence of any facts regarding bloc voting in Southwest Detroit. Nor do Plaintiffs allege or plead facts showing that majority bloc voting usually defeats Latinos' preferred candidates. Vote dilution is a district-specific, not statewide, inquiry. *See Gingles,* 478 U.S. at 59, n. 28 (third prong must be established as to each district challenged, each district being a "separate vote dilution claim[]").

As with Plaintiffs' failure to plead the existence of the first *Gingles* precondition, Plaintiffs' failure even to attempt to plead the existence of the third *Gingles* precondition also and independently warrants dismissal. *See Hall,* 385 F.3d at 427-31.

[11] In *Austin*, this Court noted that—in contrast to Plaintiffs' position here—the NAACP advocated splitting the Latino population in Southwest Detroit, apparently to enable the creation of an additional African American-majority district. 857 F. Supp. at 575, n. 14.

e. Even With The *Gingles* Preconditions, The Complaint Still Fails To State A Vote Dilution Claim.

Plaintiffs have not alleged facts sufficient to establish that a violation has occurred "based on the totality of circumstances." 42 U.S.C. § 1973(b). For that reason, even assuming, *arguendo*, that Plaintiffs had sufficiently pled the three *Gingles* preconditions, Plaintiffs' § 2 claim would still fail. *See Bartlett,* 129 S. Ct. at 1241. The Supreme Court has identified the following factors as relevant to a totality-of-the-circumstances analysis:

> (1) The history of voting-related discrimination in the State or political subdivision;
>
> (2) the extent to which voting in the elections of the State or political subdivision is racially polarized;
>
> (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group …;
>
> (4) the exclusion of members of the minority group from candidate slating processes;
>
> (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
>
> (6) the use of overt or subtle racial appeals in political campaigns; and
>
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 44-45 (citing S. Rep. No. 97-417 (1982)) (numbers added). Also relevant is "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *See LULAC,* 548 U.S. at 426 (citation omitted). Finally, "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying

the State's … use of the contested practice or structure is tenuous may have probative value." *Gingles,* 478 U.S. at 45.

Plaintiffs offer a formulaic recitation of the existence of only the first and second factors, alleging that Latino-Americans have historically been subject to "private as well as official discrimination on the basis of race," and that "[v]oting in Michigan is racially polarized." (Compl. ¶¶ 32, 33.) Vote dilution is necessarily a district-specific inquiry, *Gingles,* 478 U.S. at 59 n. 28, and yet Plaintiffs do not make any district-specific allegations. Plaintiffs do not allege, for example, that there have been overt racial appeals in political campaigns in the area of Southwest Detroit where a Latino district would be located. Nor do Plaintiffs allege that elected officials in Southwest Detroit are not responsive to the particularized needs of the Latino community. In short, even if Plaintiffs' failure to adequately plead the *Gingles* preconditions were not dispositive, Plaintiffs' failure to allege specific facts relevant to the totality-of-the-circumstances test would be.

3. Plaintiffs' Equal Protection Claim As To The Latino Influence District Should Be Dismissed Because The Complaint Fails To Make Cognizable Allegations Of Racially Discriminatory Purpose.

a. Plaintiffs Do Not Allege Or Plead Facts Consistent With Racial Animus.

It is a fundamental principle of the equal protection doctrine that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 194, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003) (quotation marks omitted) (citing, *inter alia*, *Washington v. Davis,* 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)); *see also Rogers v. Lodge,* 458 U.S. 613, 617, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982). In the Equal Protection context, "discriminatory purpose"

means more than making a choice with "awareness of consequences." *Personnel Admin. of Massachusetts v. Feeney,* 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) (citation omitted). Indeed, the Plaintiff here must allege that the Legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects" on the Latino population of Southwest Detroit. *Id.*

The Supreme Court has stated that federal courts should exercise "extraordinary caution" in reviewing claims challenging redistricting plans under the Fourteenth Amendment, especially in light of both the "presumption of good faith" accorded legislative enactments and the evidentiary difficulties in making a "distinction between being aware of racial considerations and being motivated by them …." *Miller*, 515 U.S. at 915-16 (citations omitted). Courts, moreover, "must … recognize these principles" in deciding a motion to dismiss. *Id.* at 916-17. And the importance of applying these standards at the pleading stage is reinforced by the Court's more recent decision in *Iqbal*, which (as here) involved allegations of discrimination by government officials. *See* 129 S. Ct. at 1949, 1951. The application of these principles here requires dismissal of Plaintiffs' claims.

In redistricting cases, there are two forms of Equal Protection claims. Both types require a showing of purposeful race discrimination, but they involve one of two different forms of injury: (1) dilution of minority voting strength, *White v. Regester*, 412 U.S. 755, 765-66, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973), or (2) separation of voters on racial lines that "stigmatize[s] individuals by reason their membership in a racial group, …" *Shaw v. Reno*, 509 U.S. 630, 643, 133 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) (*Shaw I*). Here, Plaintiffs have attempted to allege the former type of injury, but they have failed to state a claim under that theory because their allegations of purposeful vote dilution are invalid as a matter of law.

Plaintiffs allege only that "[t]he State … *willfully* and *knowingly* creat[ed] … districts … that split the Latino community in half," and that the State "*intentionally* divided the rapidly-growing Latino community in Southwest Detroit … ." (Compl. ¶ 20 (emphasis added).). These statements offer mere labels and conclusions with respect to the Legislature's purpose and conspicuously fail to connect that purpose to a racial animus. Instead, Plaintiffs implicitly base their allegations of purposeful discrimination on the State Defendants' mere awareness of the location of the Latino community. Alleging awareness of racial demographics, awareness of consequences, and disparate impact, without more, repeats allegations that the Supreme Court has repeatedly rejected as insufficient to establish purposeful discrimination. *See Feeney,* 442 U.S. at 279; *Village of Arlington Heights v. Metro Hous. Dev. Corp.,* 429 U.S. 252, 268, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

Plaintiffs' failure to plead discriminatory intent must moreover be viewed in light of the presumption of good faith which courts give to a state legislature when reviewing redistricting legislation. *Miller,* 515 U.S. at 915-16. As the Supreme Court has noted, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines … ." *Shaw I,* 509 U.S. at 646 (emphasis in original). Therefore, an Equal Protection plaintiff must allege that the challenged redistricting was "conceived or operated as [a] purposeful devic[e] to further racial discrimination by minimizing, cancelling out or diluting the strength of racial elements in the voting population." *Rogers,* 458 U.S. at 617 (quotation marks and citations omitted). As set forth above, Plaintiffs have not alleged anything more than that the Legislature acted with awareness of racial demographics when it split the Latino community in Southwest Detroit.

b. Plaintiffs' Equal Protection Claims Must Fail As Plaintiffs Make Insufficient Allegations Relevant To The Totality Of The Circumstances Analysis.

Finally, in evaluating claims of vote dilution under the Fourteenth Amendment, courts have applied a totality of the circumstances analysis first set out in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973). *See Rogers,* 458 U.S. at 619-22. These factors are parallel to the totality of the circumstances factors set forth in Gingles—because *Gingles* similarly based its analysis on *Zimmer*. *See Gingles*, 478 U.S. at 36, n. 4. As such, just as Plaintiffs' failure to plead the existence of facts relevant to the totality of the circumstances was fatal to Plaintiffs' § 2 claims, so too is it fatal to Plaintiffs' claims under the Equal Protection Clause of Fourteenth Amendment.

c. Plaintiffs Fail To Demonstrate The Existence Of Dilutive Effect Or The Possibility Of A Remedial Plan.

Plaintiffs' inability to make out a vote dilution claim under § 2 necessarily forecloses their Fourteenth Amendment claim. Plaintiffs cannot argue *purposeful* vote dilution, after all, unless they first show the *existence* of vote dilution. *See Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) ("[P]laintiffs must show that they have been injured as a result" of the allegedly "intentional discrimination."). Under both the Constitution and § 2, vote dilution exists where "the political processes leading to nomination and election [a]re not equally open to participation by the group in question –[i.e.,] its members ha[ve] less opportunity than d[o] other residents in the district to participate in the political processes and to elect legislators of their choice." *White*, 412 U.S. at 766. Indeed, this standard was articulated by the Supreme Court in the context of a constitutional challenge and later adopted by Congress when it amended § 2 of the Voting Rights Act. *See Gingles*, 478 U.S. at 35. The only difference between the two claims

is that under § 2 "a violation c[an] be proved by showing discriminatory effect alone," *id.*, while, under the Constitution, "discriminatory intent or purpose" must be shown as well. *Village of Arlington Heights,* 429 U.S. at 265.

Plaintiffs' failure to allege a cognizable dilutive *effect* also means that they cannot carry the "inordinately difficult" burden of proving discriminatory *purpose*. *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, at 36 (1982)). The Complaint fails, as required, to "postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Bossier I*, 520 U.S. at 480 (citation omitted). More important, and as set forth above, Plaintiffs do not allege that the Legislature failed to create the maximum possible number of majority-minority districts. Therefore, Plaintiffs obviously do not, and cannot, contend that the Legislature *purposefully* failed to create additional majority-minority districts. And, since the only way minority voting strength can even *potentially* be diluted is through failure to create additional majority-minority districts, which Plaintiffs do not allege, they simply cannot argue that the Legislature had the discriminatory purpose of *diluting* minority voting strength.

The remedy sought by Plaintiffs here (unlike plaintiffs in typical Equal Protection redistricting cases) is not for a race-blind plan, but for a race-conscious plan. Plaintiffs seek to create an "influence" district for the avowed racial purpose of better enhancing one racial group's relative voting strength. *Cf. Bartlett,* 129 S. Ct. at 1247 (recognizing that intentional creation of crossover and influence districts requires race-conscious line-drawing). A state may draw influence districts, provided racial considerations do not predominate, but it is not required to do so. *See id.* at 1248-49. Plaintiffs have thus failed to state a claim under the Fourteenth Amendment's Equal Protection Clause, and moreover have failed to identify any remediable harm. As such, dismissal is warranted.

C. Plaintiffs' Incumbent Pairing Claims Under § 2 Of The Voting Rights Act, The Equal Protection Clause, And The "One Man, One Vote" Principle Should Be Dismissed Because Each Fails To Plead The Existence Of Cognizable Harm Or Meet Threshold Requirements For Such Claims.

1. Plaintiffs' Claims.

In their Complaint, Plaintiffs claim that, by pairing several African American incumbents in the City of Detroit, the State has violated (1) § 2 of the Voting Rights Act and (2) the Equal Protection Clause of the Fourteenth Amendment. (Compl. ¶ 19.) Plaintiffs also claim the incumbent pairings violate the "One Person, One Vote Standard" of the Fourteenth Amendment, but there is a conspicuous lack[12] of any allegations which are even tangentially relevant to such a claim. (*Id.*)

Plaintiffs do not identify the specific pairings at issue, and claim that minority representatives will be "force[d]-out." (*Id.*) There is no explanation given for the meaning of this phrase or further factual pleading which would indicate that incumbents have actually been "force[d]-out." Plaintiffs also claim that pairing minority incumbents somehow "strip[s]" minority voters of their "right to select candidates of their choosing," though Plaintiffs do not allege any theory by which pairing incumbents can cause harm to voters. (*Id.*) Plaintiffs allege that the pairings were accomplished through "racial[] gerrymander[ing]" but do not make any allegations regarding district shape. (*Id.*, ¶ 23) Plaintiffs also allege that "Redistricting Leadership" "ignored" a map in which "House Districts for the City of Detroit [were] drawn to avoid incumbent pairings." (*Id.,* ¶ 24.)

---

[12] Plaintiffs combine their incumbent pairings allegations in a single lengthy paragraph. (Compl., ¶ 19.) The conspicuous lack of *any* allegations with respect to facts supporting Plaintiff's "One Person, One Vote" claim may show that, despite the phrase's legal significance, Plaintiffs did not intend to state a separate claim by its use. Nonetheless, the insufficiency of Plaintiff's Complaint with respect to a "One Person, One Vote" claim is addressed below.

As set forth below, due to numerous pleading deficiencies, dismissal of each of Plaintiffs' incumbent pairing claims is warranted.

2. Plaintiffs Fail To Plead The Existence Of Cognizable § 2 Harm With Respect To Their Incumbent Pairing Claim.

a. No Court Has Ever Held That § 2 Prohibits Pairing Minority Incumbents.

No court has ever recognized a § 2 violation due to the pairing of incumbents. This is because "[t]he pairing of incumbents has no relation … to the purposes of the Voting Rights Act." *Prosser v. Elections Bd.,* 793 F. Supp. 859, 870 (W.D. Wis. 1992) (three-judge panel); *see also Lowe v. Kansas City Bd. of Election Comm'rs,* 752 F. Supp. 897, 899-900 (W.D. Mo. 1990) (finding local term limits provision which had the practical effect of preventing a disproportionate number of minority incumbents from running for reelection did not violate § 2).

The relevant text of § 2 of the 1965 Voting Rights Act provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results in a denial or abridgement of the right of any citizen of the United States to vote* on account of race or color [or membership in a language minority group], as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that 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 by subsection (a) in that its *members* have less opportunity than other *members of the electorate to participate in the political process and to elect representatives of their choice*. …

42 U.S.C. § 1973 (emphasis added).

As the above text demonstrates, the Voting Rights Act protects the rights of "*members of the electorate* to participate in the political process and to elect representatives of their choice"—not the rights of incumbents nor the rights of members of the electorate to vote for a particular

incumbent.[13] Plaintiffs must premise their § 2 claim on voter harm, and yet they have alleged none. This is likely because Plaintiffs here are not ultimately concerned with the expression of the will of minority voters. Instead, Plaintiffs' probable concern is with protecting incumbents. Minority incumbents, however, are not protected by the Voting Rights Act. "The goal of the Voting Rights Act is to enhance the electoral power of minority voters, rather than to maximize the electoral prospects of minority incumbents." *Prosser,* 793 F. Supp. at 870. The Plaintiffs seek a remedy which will allow the paired incumbents to harvest the political benefits of incumbency—not to assure that the political processes are "equally open to participation" by minority voters. *See* 42 U.S.C. § 1973(b). Plaintiffs' claim that the pairing of incumbents is answerable under § 2 is not a viable legal theory, and dismissal of this claim is therefore appropriate. *Terry v. Tyson Farms, Inc.,* 604 F.3d 272, 275-76 (6th Cir. 2010).

b. Plaintiffs Have Not Alleged The Existence Of Dilutive Effect.

Section 2 applies to "voting qualification[s]," "prerequisite[s] to voting," or voting "standard[s], practice[s], or procedure[s]." 42 U.S.C. § 1973(a). The vast majority of cases applying § 2 have addressed claims of vote dilution—i.e. a reduction in the weight of minority group voting strength—based on the drawing of district lines in a manner which either submerges minority voters in majority districts ("cracking") or concentrates minority voters thus preventing their influence in nearby districts ("packing"). *See generally Hall,* 385 F.3d at 429 n. 12. Of the few remaining § 2 cases in which vote dilution is not alleged, Plaintiffs must allege the existence of a denial or abridgement of ballot access. These cases include claims premised

[13] This is not to say that minimizing the number of pairings of minority incumbents is impermissible. When drafting plans, legislatures and courts have at times avoided pairing minority incumbents. *See, e.g., Larios v. Cox,* 314 F. Supp. 2d 1357, 1366 n. 16. (N.D. Ga. 2004) (noting that special masters unpaired minority incumbents who had been paired in the masters' original plan). This discretionary avoidance is manifestly different, however, from what Plaintiffs seek to compel in this suit.

on the state's use of defective voting equipment or imposition of felon voting prohibitions, which are not here alleged. *See, e.g., Common Cause v. Jones,* 213 F. Supp. 2d 1106 (C.D. Cal. 2001) (finding § 2 applied to claims of racial disparity in the use of defective punch-card voting equipment); *Farrakhan v. Washington,* 338 F.3d 1009, 1016 (9th Cir. 2003) (finding § 2 applies to felon disenfranchisement laws).

Plaintiffs' claim instead hinges on the alleged deprivation of voter choice resulting from the pairing of incumbents. Not only is this claim not cognizable under § 2, but it is not fairly characterized as a harm. *See Garza,* 918 F.2d at 771 (9th Cir. 1990) ("[S]ome showing of injury must be made to assure that the district court can impose a meaningful remedy.") (emphasis omitted).

Section 2 does not protect the right to vote for a particular candidate. Instead, it protects the right to vote for a "representative[] of choice," on equal terms with other "members of the electorate." *See* 42 U.S.C. § 1973(b). This point is obvious when one considers that any time a district line moves, some number of voters are placed in a district other than the one in which they were previously located. The pool of candidates residing in that new district presents a different choice to those voters. A different choice is not, as Plaintiffs allege, a diminished one giving minority voters "less opportunity … to elect representatives of their choice." *See id.* Otherwise, any time a district line moves such that some minority voters are placed in a different district with a different incumbent or slate of candidates, a § 2 violation would follow.

i. Plaintiffs Fail To Offer Any Legal Theory Or Factual Support For Their Claim That Incumbents Have Been "Force[d] Out."

The adopted plan does not restrict who can run or where they can run. No incumbent has been "force[d]-out." (Compl. ¶ 19.) Paired incumbents can choose to run and submit to voter

choice now, elect to wait until another incumbent has been rendered ineligible due to term limits and then run in the same district, or move to another district where there is no incumbent. Under Michigan election laws, a candidate need only be a registered and qualified elector of the district he or she seeks to represent by the filing deadline. M.C.L. § 168.161(1).

ii. Plaintiffs Fail To Plead Established Preconditions Required For A Vote Dilution Claim.

Though Plaintiffs have not adequately identified any cognizable theory of voter harm, Plaintiffs seek to present their pairings claim as one for § 2 vote dilution. But even if the pairing of incumbents were somehow cognizable under § 2 as vote dilution, Plaintiffs do not plead the existence of any of the required preconditions for such a claim. As set forth above in the context of Plaintiffs' Latino "cracking" claim, plaintiffs seeking to premise a § 2 claim on vote dilution must plead the existence of each of the three *Gingles* preconditions. *See* 478 U.S. at 50-51. Plaintiffs have not attempted to allege the existence of the *Gingles* preconditions at even the most basic level: Plaintiffs offer no allegations regarding compactness, cohesiveness, or majority bloc voting in any paired district.

c. Plaintiffs' § 2 Claim Fails Regardless As Plaintiffs Have Not Pled Any Facts Relevant To The Totality Of The Circumstances Analysis.

As with Plaintiffs' Latino "cracking" claim, Plaintiffs fail to plead the existence of facts relevant to any of the totality of the circumstances factors. As set forth more fully above, factors relevant to the required totality of the circumstances analysis include, *inter alia,* "the extent to which members of the minority group have been elected to public office in the jurisdiction," and evidence that "elected officials are unresponsive to the particularized needs of the members of the minority group …." *Gingles,* 478 U.S. at 44-45. Proof of the totality of the circumstances

factors is necessary to establish a § 2 violation.[14] *See* 42 U.S.C. § 1973(b); *Bartlett* , 129 S. Ct. at 1241.

Plaintiffs make only a conclusory, non-district specific allegation that "[h]istorically, African-American residents of the City of Detroit and the State of Michigan have been subject to private as well as official discrimination on the basis of race …." (Compl. ¶ 25.) Similarly, Plaintiffs allege, without anything more than a formulaic recitation of the factor, that "[v]oting in Michigan is racially polarized." (Compl. ¶ 33.)

Plaintiffs make no district-specific allegations with respect to the totality of the circumstances and, indeed, Plaintiffs' Complaint lacks allegations even as to which pairings or districts are at issue. A review of the districts in which minority incumbents have been paired in Detroit in the current map reveals that Plaintiffs may be attacking the pairings in Michigan House Districts 2, 3, 6, and 10. These districts are "majority-minority" districts and have consistently elected African-Americans to public office. There is no allegation that the districts will not continue to do so. Nor do Plaintiffs allege that each of the districts is not an effective majority-minority district complying with § 2's proscriptions against vote dilution. Plaintiffs have not alleged that the elected officials in *any* of the Detroit house districts are unresponsive to

---

[14] In *In re Apportionment of the State Legislature—1992,* 439 Mich. 715, 737, 486 N.W.2d 639 (1992), the Michigan Supreme Court analyzed the totality of the circumstances with respect to Michigan generally, finding that "[t]he parties did not establish that Michigan has ever been a jurisdiction with *de jure* segregation. African-American persons have been elected to statewide office in the executive and judicial branches, and to the state's educational governing boards. Numerous black persons have served in the Legislature, and many hold office at the local level. The parties have shown no history of keeping black persons away from the polls through devices such as discriminatory poll taxes or literacy tests. Nor have they shown that Michigan has used unusually large election districts, majority vote requirements, or anti-single-shot provisions, or other practices that prevent black persons from achieving effective political representation."

the particularized needs of the districts' minority members, nor have Plaintiffs alleged the use of overt or subtle racial appeals in political campaigns. *Gingles,* 478 U.S. at 44-45.

In sum, Plaintiffs fail to identify any effect of the adopted plan which results in minority voters in the City of Detroit having "less opportunity than other members of the electorate … to elect representatives of their choice." 42 U.S.C. § 1973(b). Plaintiffs have not demonstrated a harm, nor a proposed remedy. As such, Plaintiffs fail to state a claim upon which relief can be granted.

3. Plaintiffs' Fourteenth Amendment Claim For Incumbent Pairing Should Be Dismissed Because The Complaint Fails To Make Cognizable Allegations Of Racially Discriminatory Purpose.

The same analysis as set forth above for Plaintiffs' Latino "cracking" Equal Protection claim is dispositive as to Plaintiffs' Equal Protection claim for incumbent pairing.

In short, and as earlier stated, "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *City of Cuyahoga Falls,* 538 U.S. at 194 (quotation marks and citations omitted). Because the Legislature "always is *aware* of race when it draws district lines," *Shaw,* 509 U.S. at 646, an Equal Protection Plaintiff must allege that the challenged plan was "conceived or operated as [a] purposeful devic[e] to further racial discrimination." *Rogers,* 458 U.S. at 617 (quotation marks and citations omitted). Yet Plaintiffs make only a single, unadorned reference to purpose, stating "[t]he *purpose* and effect of the State Redistricting Plan … is to prevent African-American voters in the City of Detroit from exercising their right to elect candidates of their choosing because of discriminatory incumbent pairings …." (Compl., ¶ 35.) (emphasis added). Plaintiffs do not allege that the Legislature's decisions were race-based, nor do Plaintiffs add any factual support for their claim which would put the State Defendants on notice of specific misconduct. *See Iqbal,* 129 S. Ct. at 1949.

Instead, Plaintiffs implicitly seek to premise an Equal Protection violation on allegations of awareness of race and disparate impact. The Supreme Court has repeatedly found allegations of this nature insufficient to make out an Equal Protection claim. *Feeney,* 442 U.S. at 279; *Village of Arlington Heights,* 429 U.S. at 268.

Plaintiffs not only fail to plead the existence of discriminatory purpose, but as with Plaintiffs' § 2 claim regarding incumbent pairings, Plaintiffs also fail to allege any cognizable harm or a workable remedy. Incumbency protection[15] is not part of Michigan's traditional (and now codified) redistricting criteria. *See* M.C.L. § 4.261. While some courts that have prepared remedial plans have attempted to avoid pairing of incumbents, others have not. In a prior redistricting cycle, for example, this Court stated, "the maintenance of the geographic and population cores of existing districts is a criterion designed primarily to protect incumbents. Criteria that are so laden with political considerations are inappropriate, in our judgment, in the formulation of a judicial districting plan." *Good v. Austin,* 800 F. Supp. 557, 564 (E. & W.D. Mich. 1992) (Ryan, J., Newblatt, J., and Bell, J.).

As set forth above, Michigan's Apol Criteria instead impose an obligation on the Legislature to maintain the integrity of county, and then municipal, boundary lines (including the boundary lines of the City of Detroit) and, in the City of Detroit, to "achieve the maximum compactness possible within a population range of 98% to 102% of absolute equality between districts within that city …." M.C.L. § 4.261(i). Given these constraints, along with Detroit's

---

[15] To the extent Plaintiffs seek to subordinate Michigan's traditional redistricting criteria to racial considerations by selectively protecting minority incumbents, such a plan would be subject strict scrutiny and would likely run afoul of the Fourteenth Amendment's Equal Protection Clause. *See, e.g., Bush v. Vera,* 517 U.S. 952, 958-59, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (finding a redistricting plan which subordinated traditional principles to race was not "narrowly tailored" to satisfy the claimed compelling interest of compliance with § 2).

massive 25% drop in population, the City of Detroit will have fewer state representatives than it has had in the past and some pairings are unavoidable.[16]

Absent allegations of discriminatory purpose, harm, or a remedy, Plaintiffs' Equal Protection claim cannot survive, and dismissal is warranted.

4. Plaintiffs' "One Person, One Vote" Claim Should Be Dismissed.

a. Plaintiffs Do Not Allege That The Minor Population Deviations In Detroit Are The Result Of Improper Considerations.

Plaintiffs' final claim with respect to incumbent pairings is that the "State's actions violate[d] … the Fourteenth Amendment's One Person, One Vote Standard." (Compl., ¶ 19.)

The "One Person, One Vote" principle (or "equipopulation principle") of "the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of the legislature, as nearly of equal population as practicable." *Reynolds v. Sims,* 377 U.S. 533, 577, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The Supreme Court has "repeatedly recognized that state reapportionment is the task of local legislatures …. Their work should not be invalidated under the *Equal Protection Clause* when only minor population variations among districts are proved." *Gaffney v. Cummings,* 412 U.S. 735, 751, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973). Indeed, population variations as high as 16.4% have been found constitutional where those deviations resulted from the "rational state policy" of adhering to political subdivision lines. *Mahan v. Howell,* 410 U.S. 315, 321-31, 93 S. Ct. 979, 35 L. Ed. 2d 320 (1973). As such, a redistricting plan with a maximum deviation below 10% is presumed constitutional and there is

---

[16] *See* U.S. Census Bureau, *State & County Quick Facts, Detroit (city), Michigan*, available at http://quickfacts.census.gov/qfd/states/26/2622000.html. A Court may consider public records without converting a motion for judgment on the pleadings into a Rule 56 motion. *See Jones,* 521 F.3d at 561.

no burden on the State to justify that deviation. *See Voinovich v. Quilter,* 507 U.S. 146, 161, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993); *Brown,* 462 U.S. at 842; *Marylanders for Fair Representation, Inc. v. Schaefer,* 849 F. Supp. 1022, 1031 (D. Md. 1994) (three-judge panel); *see also Gaffney,* 412 U.S. at 745.

Plaintiffs do not—and cannot—allege that any of the districts at issue approach, much less exceed, the 10% variation threshold. In fact, Plaintiffs' Complaint is itself devoid of allegations with respect to specific deviation percentages in *any* district. Nonetheless, in Plaintiffs' Brief in Support of its Motion for Temporary Restraining Order, attached to its Complaint,[17] Plaintiffs set forth a chart which plainly shows that the maximum deviation from ideal for any of the Detroit districts is a mere 2.78%. (Dkt. # 1-1, p. 12). These are very minor deviations. The relevant figures from Plaintiffs' chart are set forth below:

HD	Population	Ideal Population	Deviation
1	87,768	89,851	-2.32%
2	87,595	89,851	-2.51%
3	87,906	89,851	-2.16%
4	88,168	89,851	-1.87%
5	87,356	89,851	-2.78%
6	89,085	89,851	-0.85%
7	88,586	89,851	-1.41%
8	87,850	89,851	-2.23%
9	89,598	89,851	-0.28%
10	87,869	89,851	-2.21%

[17] As stated above, this Court may consider documents filed with the Complaint without converting a Rule 12 motion into a Rule 56 motion. *See, e.g., Industrial Constructors Corp.,* 15 F.3d at 965; *see also* 5C Wright & Miller, Federal Practice & Procedure, Civil 3d § 1364, at 140-42 ("Memoranda and briefs presented by counsel also may be submitted to support or oppose a rule 12(b) motion.") Regardless, Intervening Defendants are prepared to prove, in the context of a motion for summary judgment, if necessary, that none of the house districts in Detroit approach or exceed the 10% variation threshold.

In *Larios,* the case relied on by Plaintiffs, the court stated "[d]eviations from exact population equality may be allowed in some instances in order to further legitimate state interests such as making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings." *Larios,* 300 F. Supp. 2d at 1337-38 (citations omitted). "Where population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny." *Id.*; *see Marylanders,* 849 F. Supp. at 1032; *see Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004) (three-judge panel), aff'd, 543 U.S. 997, 125 S. Ct. 627, 160 L. Ed. 2d 454 (2004); *see also Mahan,* 410 U.S. at 324-28. Plaintiffs here have not made any allegations that the deviations do not result from legitimate state interests. In light of the presumption of validity afforded districting plans with minor variations, *Brown,* 462 U.S. at 842, Plaintiffs' failure must result in dismissal of their claim.

b. *Larios* Is Inapposite To Plaintiffs' Claims As Plaintiffs Do Not Allege The Deviations At Issue Resulted From An Unconstitutional Or Irrational Policy.

In attempted support of Plaintiffs' allegation that the Redistricting Plan "has the purpose and result of denying or abridging the right of African-Americans to vote for candidates of their choosing, because of discriminatory incumbent pairings, …." Plaintiffs' Complaint cites *Cox v. Larios*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004). (Complaint ¶ 38; *see also* ¶ 19 & Prayer for Relief at ¶ 2.) The *Larios* case does not otherwise alter the warranted dismissal of the Complaint for failure to state a claim on which relief can be granted.

First, Plaintiffs do not explain this citation, and the *Larios* case cited by Plaintiffs is a one-sentence summary affirmance by the Supreme Court of the district court case.

Second, even assuming that Plaintiffs intended to reference, instead, the lower court proceedings, the facts and allegations there are markedly different than those present here. *Larios* did not involve race discrimination, nor did *Larios* hold or imply that incumbents could not be paired. Instead, the Supreme Court merely affirmed that plaintiffs could rebut the presumption of validity for plans with minor variations where (1) overall district variation approached very near to 10%, and (2) the plaintiffs submitted sufficient and direct evidence that such variations were the result of partisanship rather than traditional redistricting principles. *See id.* (citing *Cox v. Larios,* 300 F. Supp. 2d 1320, 1327 (N.D. Ga. 2004) (three-judge panel)). The claim in *Larios* was that the near-10% variations had resulted from Democrats' purposeful scheme of over-populating Georgia's Republican senate districts to dilute the value of Republican votes. This over-population was found to have deliberately resulted in pairing numerous Republican incumbents against one another while protecting Democrats in nearby districts. 300 F. Supp. at 1329. *Larios* provides that the protection of incumbents of one party at the expense of incumbents of another party cannot justify a population deviation. *Id.* at 1338. *Larios* never addressed the pairing of incumbents, as the Plaintiffs appear to claim. The *Larios* plaintiffs had demonstrated that the population deviations were not the result of applying legitimate state redistricting criteria. Plaintiffs here have not even attempted to make similar allegations.

Moreover, in *Larios,* the over-population of Republican districts increased their geographic size. This increase in size, together with "creative district shapes," gave Georgia's legislators the ability to include multiple incumbent residences in the same districts. *Id.* at 1330-31. Over-population was thus the *sine qua non* of the one-person, one-vote violation in *Larios,* In contrast here, all of the districts at issue are *under-populated*. (*See* chart at Dkt. # 1-1, p. 12

(the relevant figures are set forth above)). Under-population plainly leads not only to increased voter voice in these African American districts relative to the districts in the rest of the State, but also to *fewer* incumbent pairings since under-populated districts are geographically smaller. To achieve district populations which are closer to ideal than at present, voters would have to be *added* to the districts at issue, increasing their size and making incumbent pairings *more* likely. On the other hand, a greater deviation (i.e. subtracting voters from the districts at issue) would be in tension with the equipopulation principle—not satisfy it. Simply put, there can be no "One-Person, One-Vote" violation for incumbent pairings on the basis of under-population in a paired district.

In sum, *Larios* is inapposite and Plaintiffs have failed to plead the existence of facts which would support a determination that the house plan violates the equipopoulation principle. Plaintiffs' One-Person, One-Vote claim should be dismissed.

IV. CONCLUSION

WHEREFORE, Defendants respectfully request that this Court dismiss the entirety of Plaintiffs' Complaint with prejudice.

Respectfully submitted,

DICKINSON WRIGHT PLLC
Counsel for Intervening Defendants

By: s/Peter H. Ellsworth
Peter H. Ellsworth (P23657)
Jeffery V. Stuckey (P34648)
Ryan M. Shannon (P74535)
Business Address:
215 South Washington Square, #200
Lansing, MI 48933
pellsworth@dickinsonwright.com
jstuckey@dickinsonwright.com
rshannon@dickinsonwright.com
Telephone: 517.371.1730

JONES DAY
Co-Counsel for Intervening Defendants

Michael A. Carvin
Co-Counsel for Intervening Defendants
51 Louisiana NW
Washington, DC 20001
202.879.7643
macarvin@jonesday.com

FOSTER SWIFT COLLINS & SMITH, P.C.
Co-Counsel for Intervening Defendants

Eric E. Doster (P41782)
313 South Washington Square
Lansing, MI 48933
517.371.8241
edoster@fosterswift.com

Dated: February 23, 2012

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2012, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to Alan L. Canady, Harry Kalogerakos, James P. Allen, Kelly L. Cumberworth, Melvin Butch Hollowell, Lawrence T. Garcia, Michael A. Carvin, Eric E. Doster, Gary P. Gordon, Mary Catherine Wilcox, John J. Bursch, Heather S. Meingast, and James A. Britton.

s/Peter H. Ellsworth
DICKINSON WRIGHT PLLC
215 South Washington Square, Suite 200
Lansing, MI 48933-1816
(517) 371-1730
pellsworth@dickinsonwright.com