UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH, FRED DURHAL, JR., in his official capacity as MICHIGAN LEGISLATIVE BLACK CAUCUS CHAIR, THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LATINO-AMERICANS FOR SOCIAL AND ECONOMIC DEVELOPMENT (LA SED), ANTHONY BENEVIDES, RAQUEL CASTANEDA LOPEZ, ANGELITA ESPINO, SHERRY G. DAGNOGO, KENNETH WHITTAKER, CHRISTOPHER WILLIAMS,

Plaintiffs,

MICHIGAN DEMOCRATIC PARTY,
Intervenor 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,

MICHIGAN REPUBLICAN PARTY,
Intervenor Defendant.

Case No. 2:11-cv-15385

HON. ERIC L. CLAY

HON. BERNARD M. FRIEDMAN

HON. PAUL L. MALONEY

DEFENDANTS GOVERNOR RICK SNYDER AND SECRETARY OF STATE RUTH JOHNSON'S CORRECTED MOTION TO DISMISS

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DEFENDANTS GOVERNOR RICK SNYDER AND SECRETARY OF STATE RUTH JOHNSON'S CORRECTED MOTION TO DISMISS

Defendants, Governor Rick Snyder and Secretary of State Ruth Johnson, respectfully move the Court to dismiss Plaintiffs' First Amended Complaint under Fed. R. Civ. P. 12(b)(6) for the reasons stated in the accompanying brief.

Pursuant to L.R. 7.1(a), there was a conference between counsel for Defendants and counsel for Plaintiffs in which Defendants explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought (dismissal).

Respectfully submitted,

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Dated: March 2, 2012

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EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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CONCISE STATEMENT OF ISSUES PRESENTED

1. The Voting Rights Act and the Equal Protection Clause guarantee a redistricting plan that does not diminish minority voting power. Plaintiffs in this action do not allege diminished voting power, but instead complain that Michigan's redistricting plan forces nine Detroit-area Democratic incumbents in four districts to run against each other. Should this Court be the first in the country to extend Voting Rights Act protection to political incumbents?

2. The Voting Rights Act and the Equal Protection Clause also arguably guarantee the creation of a majority-minority district when a minority population exceeds 50%. Plaintiffs in this action allege that Michigan's redistricting plan is unconstitutional because it "splits" a geographically dispersed Latino community that comprises less than 43% of the voting-age population. Should this Court be the first in the country to extend Voting Rights Act protection to a minority community that comprises less than 50% of the voting-age population?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Bartlett v. Strickland, 129 S. Ct. 1231, 1246 (2009)

Prosser v. Elections Board, 793 F. Supp. 859, 870 (W.D. Wis. 1992)

Brown v. Thomson, 462 U.S. 835, 842 (1983)

INTRODUCTION

Like clockwork, disgruntled incumbents and their political parties sue every 10 years, seeking to invalidate Michigan's legislative redistricting. The present suit raises two objections to the Michigan Legislature's 2011 redistricting of the Michigan House of Representatives. First, Plaintiffs claim that African-American "incumbent pairings" (districts pitting incumbents against each other) in the Detroit area violate § 2 of the 1965 Voting Rights Act and the Fourteenth Amendment. (First Amend. Compl. ¶¶ 37–38.) Second, Plaintiffs claim that the same laws are violated by the plan's failure to draw a Detroit-area district with a Hispanic Voting Age Population of 42.7%. (*Id.* ¶¶ 27, 39–40.) Neither claim is cognizable.

The Voting Rights Act seeks to enhance the electoral power of minority voters, not to maximize the prospects of minority incumbents. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 870 (W.D. Wis. 1992). That is why there is not a single case, in any court, that has ever held that incumbent pairings violate the Voting Rights Act or any other law. Plaintiffs' principal cited authority, *Cox v. Larios*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd* 542 U.S. 947 (2004), says no such thing.

Plaintiffs' claim based on a proposed Latino-American district is equally infirm. Under *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009), a party asserting a § 2 claim must allege that the minority population in a potential district exceeds 50%, and that a white voting bloc will defeat the minority's preferred candidate. Plaintiffs have created a theoretical district with, at most, a 42.7% Latino-American population, and at the cost of reducing the number of African-American-majority

districts from 10 to 9. Defendants respectfully request that the Court dismiss the Complaint in its entirety.

BACKGROUND

The need for redistricting

The Census provides states decennially with revised population data, triggering the states' obligation to redraw their legislative districts. 2010 Census data was delivered to Michigan on March 22, 2011, and the news was harsh for the City of Detroit, which lost a staggering 25% of its population,[1] some 237,500 residents. Given the fact that there are roughly 90,000 residents in each state house district, the exodus of residents required significant changes in Detroit-area districts.

Michigan's redistricting plans and preclearance

In response to the Census figures, the Michigan Senate and House formed redistricting committees which met and held public hearings throughout the spring and summer of 2011. "From the start," the Michigan Black Caucus was "heavily engaged" in the redistricting process, meeting "formally and informally with the Legislative Redistricting leadership." (First Amend. Compl. ¶ 6.) This work culminated in HB 4780 (new congressional districts) and SB 498 (new state legislative districts). The Governor signed both bills into law on August 9, 2011. The Michigan House plan creates 12 African-American-majority districts—each with an

[1] http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn106.html

African-American voting-age population that exceeds 50%. Plaintiffs do not challenge the number or sufficiency of these districts.

Michigan filed a federal action in Washington, D.C., seeking preclearance under § 5 of the Voting Rights Act. On January 3, 2012, the United States filed its Notice of Consent, noting the United States' determination that "Michigan can meet its burden of proof under Section 5 of the Voting Rights Act" and can show, with respect to all areas covered by Section 5 of the Voting Rights Act, "that the proposed 2011 redistricting plans for the Michigan House and Senate and for Michigan's congressional districts 'neither ha[ve] the purpose nor will have effect of denying or abridging the right to vote on account of race or color.'"[2] On February 22, 2012, the Department of Justice and the State filed a Joint Motion requesting that the Court enter its Order finding that the State's plan satisfies § 5.

The Complaint

Although the redistricting plan has been in place since August 9, 2011, Plaintiffs waited until December 8, 2011, to file their Complaint; amended their complaint on January 3, 2012; and finally served their pleadings on Defendants on January 10, 2012, *five months* after the plan became law.[3] The Complaint makes two claims, the first focused on Detroit-area incumbent pairings, the second on a

[2] http://redistricting.lls.edu/files/MI%20preclear%2020120112%20consent.pdf

[3] The pleadings were not served until counsel for the Defendants asked to be served and indicated that the Defendants would authorize a waiver of service.

theoretical district that allegedly could contain as much as a 42.7% Hispanic Voting Age Population. As explained below, neither states a claim for relief.[4]

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, 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) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570; 127 S. Ct. 1955, 1974; 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557).

In cases alleging unconstitutional racial gerrymandering, at both the pleading and summary-judgment stage, a court should take into account the plaintiff's heavy burden of proof, the presumption of good faith that attaches to

[4] In support of their claim, Plaintiffs allege that the Black Caucus presented the Michigan Legislature with a proposed redistricting map that would have avoided the incumbent pairing *and* preserved the Detroit-area Latino community. (First Amend. Compl. ¶¶ 24, 28.) Plaintiffs failed to produce that map until February 22, 2012, and the map appears to contain fewer African-American-majority districts than the one the Legislature adopted. Defendants reserve the right to file a supplemental responsive pleading addressing the map.

legislative actions, and the intrusive nature of a judicial inquiry into the legislative arena. *Miller v. Johnson*, 515 U.S. 900, 916–17 (1995).

ARGUMENT

I. Plaintiffs fail to state a claim based on incumbent pairing.

In Plaintiffs' "First Cause of Action," they allege that the redistricting plan for the Michigan House of Representatives violates Voting Rights Act § 2 (which prohibits minority vote dilution), as well as the Equal Protection Clause and the one-person-one-vote standard of the Fourteenth Amendment. (First Amend. Compl. ¶¶ 37–38.) The basis for Plaintiffs' claim is the plan's creation of five Detroit-area districts that match African-American incumbents. (*Id.* ¶ 19; accord Pls' Mem. in Support of Mot. for TRO at 11.) But a claim based on incumbent matching fails to state a *prima facie* case for vote dilution under § 2 or any other legal theory.

A. Voting Rights Act § 2 protects the power of a majority-minority community to elect a minority candidate. It does not protect incumbents. Plaintiffs fail to state a claim of vote dilution.

A redistricting plan violates § 2's prohibition against vote dilution when minority plaintiffs prove they have been denied an equal opportunity to participate in the political process and to select candidates of their choice in a particular district. 42 U.S.C. § 1973. To state a § 2 claim, a minority group must show that:

1. the group is sufficiently large and geographically compact to constitute a majority in a single-member district,

2. the group is politically cohesive, i.e., usually votes for the same candidates, and

3. in the absence of special circumstances, bloc voting by a white majority usually defeats the group's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 48–51 (1986). The failure to prove any precondition is fatal. *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994). Conversely, satisfying all three preconditions is not sufficient to establish a § 2 claim. *Id.* at 1011; *Gonzalez v. City of Aurora*, 535 F.3d 594, 597–98 (7th Cir. 2008). The court must still decide, based on the totality of the circumstances, whether a § 2 violation has occurred. *Gingles*, 478 U.S. at 44–45; *Johnson*, 512 U.S. at 1011; *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 429–430 (2006).

As the *Gingles* factors suggest, the essence of a § 2 claim is that an electoral law "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Often, § 2's ambit results in a claim that legislative redistricting should have created additional majority-minority districts. But there is no dispute here that the Michigan Legislature created the maximum possible number of African-American-majority districts. (Plaintiffs also do not allege that it was possible to create a Latino-majority district.) In other words, Plaintiffs do *not* contend that minority voters' ability to elect minority candidates has been diluted.

What Plaintiffs *do* seek to vindicate in their first cause of action is the ability of particular incumbents to increase their odds of reelection. But that is not a cognizable § 2 claim, because it has nothing to do with combatting vote dilution or vindicating a minority group's ability to elect a minority representative. As one three-judge panel (including the Seventh Circuit's Judge Posner) has observed,

"[t]he pairing of incumbents has no relation that we can see to the purpose of the Voting Rights Act." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 870 (W.D. Wis. 1992). "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." *Id.*

The *Gingles* preconditions prove the same point. Assuming, *arguendo*, that the first two *Gingles* factors are satisfied, Plaintiffs have failed to allege that the proposed districts with paired incumbents are likely to result in bloc voting by a white *majority* that defeats the minority voters' preferred candidate. *Gingles*, 478 U.S. at 56. As Plaintiffs' Amended Complaint suggests (and evidence would establish), the districts pairing incumbent African-American legislators have African-American majorities, not white majorities. It is therefore impossible for a "white *majority*" to disenfranchise African-American voters, as would be the case in districts where African-Americans were in the minority. Given Plaintiffs' failure to plead any allegations in their first cause of action supporting a § 2 claim, this Court should dismiss it. *Iqbal*, 129 S. Ct. at 1249.

In Plaintiffs' memorandum supporting their motion for a TRO, they cite two cases that purportedly "stand[] for the proposition that a state's redistricting maps cannot have a disproportionate number of incumbency pairings for minority legislators." (Mem. in Support of Mot. for TRO at 21.) Neither case actually says that.

In *Cox v. Larios*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd* 542 U.S. 947 (2004), a three-judge panel invalidated a stage legislative redistricting plan *not* because of

excessive incumbent pairing, but because the plan violated the one-person-one-vote principle by deviating from population equality by nearly 10%. 300 F. Supp. 2d at 1327–28. The plan's transparent purpose was to maximize the retention of Democrat-majority legislators in urban and rural districts, at the expense of suburban Atlanta districts. *Id.* Specifically, the panel held that the plan's purpose was "to protect Democratic incumbents," which was not a legitimate purpose for denying one-person-one-vote protection. *Id.* at 1338.

In so holding, the panel observed that deviations from exact population equality may be permissible to further legitimate state interests, including the avoidance of incumbent pairings. *Id.* at 1337–38. But the panel never endorsed the notion that incumbent pairing could be the basis of a claim under § 2 of the Voting Rights Act. Unsurprisingly, the Supreme Court opinion that affirmed the panel's holding said nothing about the issue of incumbent pairing under the Voting Rights Act. *See generally* 542 U.S. 947.

Plaintiffs' other cited authority is no better. It is true that the court in *Balderas v. State*, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001), sought to avoid incumbent pairing when redrawing a districting plan, but the court never said that avoidance of minority incumbency pairings was necessary to satisfy the Voting Rights Act. And the Department of Justice's objection in that same case (*see* Mem. in Support of Mot. for TRO at 21) involved a Latino incumbent paired with a white incumbent who had maintained a higher proportion of her constituents. *Id.* at *3.

In sum, Plaintiffs are attempting to state a claim that no U.S. court has ever recognized by stringing together inapposite language from opinions in cases that do not involve challenges to minority incumbency pairings. What Plaintiffs fail to address is that the Voting Rights Act is not an incumbent-protection plan; it ensures minority voters of a voice. Under SB 498 with its many majority-minority districts, those voters clearly do. Plaintiffs have failed to state a § 2 claim.

B. Plaintiffs have failed to state an equal-protection claim based on racial gerrymandering.

Plaintiffs' reliance on the Fourteenth Amendment's Equal Protection Clause is equally ill fated. A plaintiff can prove an Equal Protection Clause violation in redistricting only by demonstrating that race was the legislature's predominant motive in drawing district lines, such that the legislature subordinated race-neutral districting principles to racial considerations. *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). When such racial gerrymandering occurs, strict scrutiny applies. *Shaw II*, 517 U.S. at 920.

"Strict scrutiny applies [only] where redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles, . . . or where race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (internal quotations and citation omitted). In other words, for strict scrutiny to apply, traditional districting criteria, such as compactness, contiguity, and respect for political subdivisions or

communities defined by actual shared interests, must have been subordinated to race. *Bush*, 517 U.S. at 959, 963.

Courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U. S. at 916. "[C]aution is especially appropriate . . . where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 242 (2001). In *Cromartie II*, the Supreme Court clarified the burden that parties challenging redistricting must meet in cases where race correlates with political affiliation:

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional redistricting principles. The party must also show that those districting alternatives would have brought about significantly greater racial balance.

Cromartie II, 532 U.S. at 258. See also *Bush*, 517 U.S. at 968 ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify.").

The allegations in Plaintiffs' First Amended Complaint are limited to the following: (1) the redistricting plan pairs African-American incumbents (First Amend. Compl. ¶ 23); (2) redistricting leadership ignored a map that could have avoided those pairings (*id.* ¶¶ 1(A), 23); (3) historically, African-Americans in Detroit have been subjected to racial discrimination, both generally and with

respect to voting (*id.* ¶ 25); and (4) the policy underlying the redistricting plan is "illogical and illegal" (*id.* ¶ 34).

The problem is that nowhere in the Complaint do Plaintiffs actually allege that race was the Michigan Legislature's predominant motive in drawing the House Districts. Nor have Plaintiffs sufficiently alleged facts supporting a reasonable inference that the lines were not simply the result of race-neutral districting principles and a significantly smaller Detroit population. *Iqbal*, 129 S. Ct. at 1949.

In addition, in the four incumbent-paired districts, it is very likely that race correlates with a monumental decrease in Detroit's population, and the fact that a single party's candidates have typically represented the districts that must be consolidated based on the population decrease. Where politics, not race, was the predominant factor in crafting a challenged district, there is no claim for racial gerrymandering. *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 6318960 (N.D. Ill. 2011).

C. Plaintiffs fail to state a claim under the one-person-one-vote principle of the Equal Protection Clause.

Finally, Plaintiffs (the African-American group) claim that the new House Districts violate the one-person-one-vote principle of the Equal Protection Clause. (First Amend. Compl. ¶ 38). This claim fails because Plaintiffs have not alleged facts demonstrating unconstitutional population deviations.

The U.S. Constitution requires that congressional and state legislative seats be apportioned equally to ensure that the right to vote is not denied by debasement

or dilution of the weight of a citizen's vote. *Reynolds v. Sims*, 377 U.S. 533, 555, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). While the Supreme Court allows some flexibility in state legislative reapportionment, the central objective is "equal representation for equal numbers of people." *Wesberry*, 376 U.S. at 18. Each state, therefore, must "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577.

In reviewing one-person-one-vote challenges, the Supreme Court adopted the "ten percent rule" for allocating the burden of proof. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). A plan with a higher maximum deviation "creates a prima facie case of discrimination and therefore must be justified by the State." *Brown*, 462 U.S. at 842–43. In assessing legitimate justifications, courts must consider "[t]he consistency of application and the neutrality of effect of the nonpopulation criteria" in order to determine whether a state legislative reapportionment plan violates the Fourteenth Amendment. *Id.* at 845–846.

Here, while Plaintiffs repeatedly mention the one-person-one-vote principle in their First Amended Complaint (e.g., ¶¶ 1, 19, 38), nowhere do they allege that the population deviations of the new House Districts exceed 10%, or even come close to that figure. In fact, Plaintiffs do not bother to identify the challenged districts or the attendant population deviations in their First Amended Complaint. Where the deviation does not exceed 10%, Plaintiffs bear the burden of producing further

evidence to show that the apportionment process "had a taint of arbitrariness or discrimination." *Larios v. Cox*, 300 F. Supp. 2d 1320, 1340 (N.D. Ga. 2004) (quoting *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996)). And the challenged plan is entitled to a rebuttable presumption of constitutionality. *Id.* at 1341. In other words, Plaintiffs must show that the lines drawn, and the population deviations within, were not driven by any traditional redistricting criteria such as compactness, contiguity, or preserving political subdivisions, but rather resulted from an arbitrary or discriminatory process. *Id.* at 1341–42.

Plaintiffs allege that the redistricting process for the House Districts was arbitrary and discriminatory to the extent it resulted in an allegedly disproportionate number of African-American incumbent pairings, as opposed to white incumbent pairings. (First Amend. Compl. ¶¶ 19, 23.) They allege that the Black Caucus submitted a map that would have avoided incumbency pairings (presumably the African-American pairings), and scored higher on traditional redistricting principles. (First Amend. Compl. ¶ 1(A)). But Plaintiffs do not allege how these "facts" relate to the population deviations in the challenged districts. Again, a one-person-one-vote claim challenges the population deviations of a particular map or plan. So, Plaintiffs must allege and show that there is an unconstitutional deviation from the required population equality. Plaintiffs' First Amended Complaint fails to include any factual allegations along those lines, and thus fails to state a plausible claim for relief. *Iqbal*, 129 S. Ct. at 1249.

At bottom, Plaintiffs' Count I has nothing to do with racial discrimination; the clear fact is that the victors in the contested districts will almost certainly be African-Americans. Count I instead has everything to do with the Michigan Democratic Party "protecting its incumbent members' seats," as the Party admits in its intervention motion. (Michigan Democratic Party Mot. to Intervene ¶ 7.) Defendants respectfully request that Count I be dismissed in its entirety.

II. Plaintiffs fail to state a claim based on a geographically dispersed, Southwest Detroit Latino population that, as alleged, would not even constitute 43% of a newly drawn voting district.

A. Plaintiffs' Voting Rights Act claims are fatally flawed because they fail to allege that Detroit-area Latinos could constitute more than 50% of a compact voting district or that a white voting bloc is depriving Latinos from electing candidates of their choice.

In Count II, Plaintiffs allege that the new Michigan House district violates § 2 of the Voting Rights Act because it "cracks" the Latino community in Southwest Detroit into two districts—House District 5 with a 24.5% Hispanic voting age population, and House District 6 with a 17.3% Hispanic voting age population—thereby diluting the votes of the Latino community. (First Amend. Compl. ¶¶ 20, 27, 40.)[5] When kept whole, according to Plaintiffs, the Southwest Detroit Latino community has a 42.7% Hispanic voting age population base. (*Id.* ¶¶ 20, 27.) These allegations fail the first *Gingles* factor and therefore fail to state a claim.

[5] In *Vieth v. Jubelirer*, 541 U.S. 267, 287 n.7 (2004), the Supreme Court noted that "'[p]acking'" refers to the practice of filling a district with a supermajority of a given group or party. 'Cracking' involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts."

To reiterate, the very first requirement of a § 2 claim is that a minority group is large enough and geographically compact enough to be a *majority* in a single-member district. *Gingles*, 478 U.S. at 48–51. But Plaintiffs allege that, when kept whole, the Latino community has a 42.7% Hispanic voting age population. (First Amend. Compl. ¶¶ 20, 27.) Accordingly, Plaintiffs fail to state a *prima facie* § 2 claim. *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (a "party asserting a [section] 2 liability must show by a preponderance of the evidence that the minority population in the potential election district *is greater than 50 percent*.") (emphasis added). This problem is fatal without the need for any further factual development; there is simply no way that Plaintiffs can conjure up a 50 percent district which they acknowledge does not exist.

Moreover, looking carefully at Plaintiffs' First Amended Complaint, they allege only that the division of the Hispanic community will "frustrate" the "community's ability to speak with a politically cohesive voice in Lansing." (First Amend. Compl. ¶ 20.) They do not allege that they will be denied the opportunity to elect candidates of their choice. See 42 U.S.C. § 1973(b). But § 2 is not violated where a minority group is only large enough to influence election results, rather than elect candidates of its choice. *LULAC*, 548 U.S. at 445–446 (Kennedy, J.).[6] Thus, Plaintiffs' § 2 claim fails as a matter of law.

[6] It is not clear that Plaintiffs even have an "influence" district because the relevant inquiry is citizen voting-age population, and not simply voting age population. *LULAC*, 548 U.S. at 429. As a general rule, "because of both age and the percentage of noncitizens, Latinos must be 65 to 70 percent of the total population in order

Plaintiffs attempt to plead around their 50% problem by suggesting that the cracking of the Latino community was the result of intentional discrimination. (First Amend. Compl. ¶¶ 1(B), 20.) But that attempt also fails. As a threshold matter, the First Amended Complaint is virtually devoid of any facts supporting that claim. Plaintiffs merely assert:

> The State rejected a map which keeps the Latino community whole with a 42.7% Hispanic Voting Age Population base, and instead "cracked" the community, by placing 24.5% of Latino voters in one district and 17.3% of Latino voters in another, frustrating this community's ability to speak with a politically cohesive voice in Lansing. The State *intentionally* divided the rapidly-growing Latino community in Southwest Detroit in half, to diminish and weaken the political strength of Latino voters [sic] speak with a politically cohesive voice in Lansing.

(First Amend. Compl. ¶ 20 (emphasis added).)

But to survive a motion to dismiss, Plaintiffs' claim must be "plausible." *Iqbal*, 129 S. Ct. at 1949. To plead a plausible claim, a complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, it must contain enough facts to make it more than a "sheer possibility" that the defendant has acted unlawfully. *Id.* Even accepting as true Plaintiffs' allegation that the State rejected a map that would have kept the Latino community within a district, a "reasonable inference" cannot then be drawn that the State intentionally discriminated against Latinos in drawing the district lines. *Id.* Plaintiffs' conclusory statements and

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to be confident of electing a Latino." *Barnett v. City of Chicago*, 141 F.3d 699, 703 (7th Cir. 1998).

allegations are insufficient to set forth a plausible claim of intentional discrimination.

Plaintiffs' § 2 claim is also legally deficient in other respects. Even if the first *Gingles* factor is "relaxed" based on allegations of intentional discrimination, Plaintiffs still "have to show that the plan lessened the [minority voting bloc's] opportunity to elect a candidate of its choice." *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 5185567, at *4 (N.D. Ill. 2011). And to show such discriminatory effects, Plaintiffs have to prove the second and third *Gingles* factors. *Id.*

Plaintiffs' allegations with respect to the second and third *Gingles* factors are also legally deficient. The allegations regarding the second *Gingles* factor are that "Latino-Americans in Southwest Detroit are politically cohesive," that they "have organized themselves collectively for political activity," and that they "have common and distinct history, culture, and language." (First Amend. Compl. ¶¶ 29–31).[7] Such allegations do nothing more than re-state the second *Gingles* requirement as a legal conclusion and are insufficient to set forth a claim. Plaintiffs were required to support their conclusory allegations with voting data that shows that the identified Latino community has consistently rallied around the same candidate in primary and general elections.

As to the third *Gingles* factor, Plaintiffs merely allege that "[v]oting in Michigan is racially polarized." (First Amend. Compl. ¶ 33.) Plaintiffs do not allege

[7] Plaintiffs also attached affidavits that included similar allegations.

that the white majority votes as a bloc to defeat the minority's preferred candidates, as the third factor requires. *Gingles*, 478 U.S. at 48–51. Again, data can easily prove (or disprove) such allegations, and Plaintiffs failed to provide any.

Plaintiffs' larger problem is that the "inquiry into the existence of vote dilution . . . is district specific." *Gingles*, 478 U.S. at 59 n. 28. And Plaintiffs cannot allege that a white majority has historically defeated the Southwest Detroit Latino community's preferred candidates, because the majority population in House Districts 5 and 6, according to Plaintiffs' own chart, is African American—another minority group. (Pls' Mem. in Support of Mot. for TRO at 12.) Under these circumstances, Plaintiffs have not, and cannot, allege bloc-voting along racial lines in the challenged districts. *Iqbal*, 129 S. Ct. at 1949.

Finally, Plaintiffs fail to allege sufficient facts to support their claim of intent to dilute, or to allege factors relevant to the totality-of-the-circumstances analysis under section 2. The following factors are pertinent to this analysis:

> "[1] the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; [2] 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; [3] 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; [4] the use of overt or subtle racial appeals in political campaigns; and [5] the extent to which members of the minority group have been elected to public office in the jurisdiction. . . . [A]lso [ ] 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 or the political subdivision's use of the contested practice or structure is tenuous may have probative value."

LULAC, 548 U.S. at 425–426 (citations omitted). Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its population share in the relevant area. *Id.*

> As to these factors, the First Amended Complaint simply says:
>
> Historically, Latino-American residents of the City of Detroit and State of Michigan have 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.

(First Amend. Compl. ¶ 32.) And, as noted above, Plaintiffs allege that "[v]oting in Michigan is racially polarized," and "[t]he policy underlying the adopted Redistricting Plan is illogical and illegal." (*Id.* ¶¶ 33, 34). These conclusory statements are unsupported by any underlying factual allegations and do not demonstrate that Plaintiffs have a plausible vote-dilution claim.

B. Plaintiffs fail to state a claim under the Equal Protection Clause for vote dilution based on alleged "cracking" of the Latino community.

Plaintiffs also fail to state a claim for vote dilution under the Equal Protection Clause of the Fourteenth Amendment. To state such a claim, Plaintiffs must allege that the challenged redistricting plan was "conceived or operated as [a] purposeful devic[e] to further racial discrimination," *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (Stewart, J., plurality opinion), "by minimizing, canceling out or diluting the voting strength of racial elements of the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982). Courts use a totality-of-the-circumstances analysis to determine whether a challenged redistricting plan violates either the Fourteenth

Amendment or § 2 of the Voting Rights Act. *Gingles*, 478 U.S. at 36–37; *Rogers*, 458 U.S. at 620–622, n.8.

Plaintiffs make no concrete allegations in support of their equal-protection claim distinct from their § 2 claim. Instead, they again assert mere conclusions. (See Compl. ¶ 20 (accusing the State of "willfully," "knowingly," and "intentionally" dividing the Latino community).) Particularly in light of the good-faith presumption that applies to redistricting legislation, *Miller*, 515 U.S. at 915–16, such conclusory allegations are legally insufficient. Accordingly, Plaintiffs fail to state a claim for intentional vote dilution under the Equal Protection Clause.

CONCLUSION AND RELIEF REQUESTED

In proposing the elimination of incumbent pairings and the creation of a Latino district with less than a majority of Hispanic voters, Plaintiffs seek to vindicate political interests, not constitutional rights. As a result, no factual development could possibly save their Complaint. For all these reasons, Defendants respectfully request that the Court grant their motion to dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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Dated: March 2, 2012

CERTIFICATE OF SERVICE (e-file)

I hereby certify that on March 2, 2012, I electronically filed the foregoing document(s) with the Clerk of the Court using the ECF System, which will provide electronic notice and copies of such filing of the following to the parties: Defendants Governor Rick Snyder and Secretary of State Ruth Johnson's Corrected Motion to Dismiss and Corrected Brief in Support.

A courtesy copy of the aforementioned document was placed in the mail directed to:

The Honorable Eric L. Clay, United States Circuit Judge, Sixth Circuit Court of Appeals, 540 Potter Stewart U.S. Courthouse, 100 East Fifth Street Cincinnati, Ohio 45202.

The Honorable Bernard A. Friedman, United States District Court for the Eastern District of Michigan, Theodore Levin U.S. Courthouse, 231 West Lafayette Blvd., Room 101, Detroit, MI 48226.

The Honorable Paul L. Maloney, Chief Judge, United States District Court for the Western District of Michigan, 137 Federal Bldg, 410 W. Michigan Ave, Kalamazoo, MI 49007.

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