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,

Plaintiffs,

v.

Case No. 2:11-cv-15385
Hon. Bernard A. Friedman,
Hon. Eric L. Clay,
Hon. Paul L. Maloney

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.
_____/

PLAINTIFFS BRIEF IN RESPONSE TO DEFENDANTS MOTION TO DISMISS

Discussion

Defendants Motion rests on two arguments, both of which ignore the nature of Plaintiffs claims, ignore the plain meaning of the Fourteenth Amendment and the Voting Rights Act, and therefore fails as a matter of law.

Defendants begin with a misstated framing, to wit:

> "The Voting Rights Act and the Equal Protection Clause guarantee a redistricting plan that does not diminish minority voting power, but instead complain that Michigan's redistricting plan forces five pairs of Detroit-area Democratic incumbents to run against each other. Should this Court be the first in the country to extend Voting Rights Act protection to political incumbents?"

(Defendants Motion to Dismiss at v).

First, Defendants ignore the premise of this lawsuit and of the plain meaning of the Fourteenth Amendment's Equal Protection Clause which stands primarily for the principle of "equal treatment." The Equal Protection Clause requires that in the context of state action, persons similarly-situated must be treated similarly. *Romer v Evans*, 517 U.S. 620 (1996). Defendants choose to ignore the obvious: African-Americans and Latinos are treated differently under the state's redistricting plan, than are whites. In the state's 96 majority-white districts there are only 2.083% incumbent pairings. In the African-American and Latino districts the number is 35%. The differential cannot be explained away by population loss, or by the number of districts. The Michigan Legislative Black Caucus produced a map with the same number of districts (10), but no incumbent pairings and which scored higher on the "Apol" objective scoring for compactness, adjacency, and contiguity. Defendants engaged in willful disparate treatment.

Second, the minority voters are treated differently and therefore harmed, by the disparate treatment and through the loss of the representation of their choosing. This is particularly impactful in the era of term limits, where the forcing out of minority lawmakers who have gained positions of trust, influence, and institutional knowledge in the political process are essential to effectively fight for the political priorities of minority voters. These are the candidates of choice of the minority electorate, and a disproportionate number of them are being forced out under the state plan.

Third, *Cox v. Larios,* 542 U.S. 947 (2004) held that "avoiding incumbent pairings," particularly in the context of disproportionately-impacted minority districts, is a "legitimate state interest." *Id.* at 1337-1338. The Court ordered the special master to "un-pair the incumbents," which it did.

Defendants' second contention must fail as being equally untenable as it states:

> "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?"
>
> (Defendants Motion to Dismiss at v).

Yet again, Defendants miss the point the facts and the law. In *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009), the Court held that acts of *intentional* discrimination are problematic, and violate the Fourteenth Amendment and the Voting Rights Act, regardless of whether the baseline minority population exceeds 50%. See, Bartlett at 1246: "Our holding [minority voters must comprise 50 plus 1% of the district voters] does not apply to cases in which there is intentional discrimination against a racial minority." And Justice Kennedy explained further that "If there

were a showing that a state intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments," *Id.* at 1246.

It should also be noted that in the alternative map proposed by the Michigan Legislative Black Caucus, the minority population does exceed 50%. The Latino population (HVAP) is 42.7%. The African-American population is 29.5% (BVAP). The combined minority population being 72.2%, exceeds the 50% threshold. And in fact a majority of federal courts extend Voting Rights Act protection to such "coalition" districts when the state map fails to provide for such a district combined into a coalition for Section 2 purposes. See *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (rehearing en banc), cert. denied,114 S Ct 878 (1994)("[i]f blacks and Hispanics vote cohesively, they are legally a single minority group"); *Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir.1992)("minorities must be able to show that they have in the past voted cohesively");*Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906F.2d 524 (11th Cir. 1990); *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir.1989); *Brewer v Ham*, 876 F.2d 448, 453 (5th Cir 1989)("minority groups may be aggregated for purposes of asserting a Section 2 violation"); *Campos v. City of Baytown*, 840 F.2d 1240, 1244-45 (5th Cir. 1988) ("a minority group [in this case a coalition] is politically cohesive if it votes together"), reh'g denied, 849 F.2d 943, cert denied, 492 U.S. 905 (1989); *LULAC Council No. 4386 v. Midland ISD*, 812 F.2d 1494, 1501-2 (5th Cir. 1987), vacated on other grounds, 829 F.2d 546 (5th Cir. 1987) (en banc); *Arbor Hill Concerned Citizens Neighborhood Ass'n. v.County of Albany*, 2003 WL 21524820, *5 (N.D.N.Y. July 7, 2003)("blacks and Hispanics may be considered as a single minority group under the Voting Rights Act if the coalition meets the three *Gingles* preconditions"); *France v. Pataki*, 71

F.Supp. 2d 317, 327 (S.D.N.Y .1999); *Skorepa v. City of Chula Vista*, 723 F.Supp. 1384, 1390 (S.D.Cal. 1989)("the Court does recognize that the minority group for a Section 2 case may consist of members of two or more different minority groups"); *Romero v. City of Pomona*, 665 F.Supp. 853, 858 (C.D.Cal.1987), aff'd, 883 F.2d 1418 (9th Cir. 1989), abrogated by *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990); *Latino Political Action Committee v. City of Boston*, 609 F.Supp. 739, 746 (D.C.Mass.1985) aff'd, 784 F.2d 409 (1st Cir.1986); *Wilson v. Eu*, 1 Cal. 4th 707, 715, 728 (1992) (noting with approval the appointed Special Masters' consideration of minority coalition districts in drawing California state legislative lines.) See, Research Brief, The Chief Justice Earl Warren Institute on Law and Social Policy (May 2011).

The holding in *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc), which holds to the contrary, is distinguished from the foregoing as it rests on an "effects" test, which VRA Section 2 does not require. This instant lawsuit is for "intentional" discrimination.

The Latino community in Southwest Detroit is "cracked" under the state plan. That is undisputed. There were alternative maps which kept the Latino community in Southwest Detroit whole. That is undisputed. This is the third time in the last three redistricting cycles that Republicans in the Legislature have attempted to crack the Latino community in Southwest Detroit. That is undisputed.

The Latino population in this area presently functions in a politically cohesive way to elect candidates of its choosing, and the state's plan intentionally dismantles this to the harm of the Latino community. This violates *LULAC v. Perry*, 548 U.S. 399 (2006).

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court dismiss Defendants Motion to Dismiss.

Respectfully submitted,

Dated: March 8, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification to the interested parties.

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