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. Eric L. Clay
Hon. Bernard A. Friedman
Hon. Paul L. Maloney

_____/

Peter H. Ellsworth (P23657)
Jeffery V. Stuckey (P34648)
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' REPLY TO PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs claim that the State's enacted map for House districts in the City of Detroit[1] impermissibly pairs a disproportionate number of minority incumbents and "cracks" the Latino community in Southwest Detroit. Intervening Defendants have moved for judgment on the pleadings, and in their brief in support, detailed a number of fatal deficiencies in Plaintiffs' Complaint, including Plaintiffs' failure to allege racial animus or voter harm, and failure to meet well-established preconditions under the Voting Rights Act. While Plaintiffs[2] made no response[3] to Intervening Defendants' Motion, Plaintiffs submitted a six-page brief in response to arguments advanced by the State Defendants. Plaintiffs' Response does not address the multiple and manifest deficiencies in the Complaint, and dismissal of the Complaint in its entirety remains warranted.

II. ARGUMENT

A. Plaintiffs Fail To Allege Intentional Discrimination.

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1 On February 28, 2012, the United States District Court for the District of Columbia pre-cleared the enacted plan for use under § 5 of the Voting Rights Act such that there is no impediment to the plan's implementation in the upcoming election. *See Michigan v. Holder,* No. 1:11-cv-01938 (D.D.C.) (Dkt. # 14) (three-judge court).

2 Intervening Plaintiffs are listed as signatories to the Plaintiffs' Response.

3 Under paragraph 1 of this Court's Expedited Scheduling Order, if a motion is opposed, a response brief is required, and "[e]xcept for good cause shown, if briefs opposing the motions are not timely filed, the motions will be considered unopposed." (Dkt. #38.) Intervening Defendants' Motion for Judgment on the Pleadings is thus considered unopposed, and Intervening Defendants are entitled to judgment. This Reply is filed in the event that Plaintiffs' response to the State Defendants' Motion to Dismiss is in some way deemed a response to Intervening Defendants' Motion as well.

The crux of Plaintiffs' Response is that, because Plaintiffs used the words "willfully and knowingly" in describing the manner in which the State paired minority incumbents[4] or "cracked" the Latino community, this Court should disregard all other defects in the Complaint—including a ubiquitous failure to allege *any* theory of voter harm.

Even if the Court were to disregard the lack of allegations regarding voter harm, Plaintiffs fail to direct the Court to any allegations that would suffice to state an intentional discrimination claim or disturb the presumption of the Legislature's good faith in enacting its plan. *See Miller v. Johnson,* 515 U.S. 900, 915, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995). Plaintiffs do not allege the existence, for example, of direct evidence of intent. *See, e.g., Bush v. Vera,* 517 US 952, 960-63, 70-71, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (finding intentional discrimination where the district boundaries were inexplicable except on the basis of race). In other words, Plaintiffs fail to allege that the "pairing" or the "cracking" could not have resulted from some legitimate state purpose. *See, e.g., Hunt v. Cromartie,* 526 U.S. 541, 551, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999) (holding that even where race and political affiliation overlap, redistricting on the basis of political affiliation will not equate to discriminatory purpose). Nor do Plaintiffs identify allegations regarding circumstantial evidence of intent. That is, Plaintiffs have not made allegations that there were departures from the normal procedure, substantive departures from the normal factors considered, nor that "contemporary statements by members of the decisionmaking body" tend to show intentional discrimination. *See Village of Arlington*

[4] In both their Response as well as their Complaint, Plaintiffs claim that their alternative map for Detroit House districts contains "no incumbent pairings." *See* Resp. at p. 2; Compl. ¶ 19. As a matter of logic, any redistricting map drawn for Detroit must contain at least *some* paired incumbents. Prior to the 2010 census, Detroit was apportioned twelve House Districts; it is now apportioned ten. Only one incumbent in Detroit, Representative Shanelle Jackson (District 9), is term limited, leaving ten districts for eleven incumbents.

Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 266-68, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

Instead, the toehold which Plaintiffs seek in their Response—that is, allegations of disparate impact and the State's awareness of consequences—has been repeatedly held insufficient to establish claims of intentional discrimination. *See Personnel Administrator of Mass. v. Feeney,* 442 US 256, 279 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979); *Arlington Heights,* 429 U.S. at 268. The focus on *purposeful* discrimination, rather than mere disparate impact, means that a law will not violate the Equal Protection clause "simply because it may affect a greater proportion of one race than another." *Rogers v. Lodge,* 458 U.S. 613, 618, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982) (citations omitted). Plaintiffs' allegations are thus insufficient as a matter of law.

B. Even If Plaintiffs Had Alleged Intentional Discrimination, They Fail To Allege Cognizable Harm.

Because § 2 protects voters, not incumbents, no court has ever recognized a § 2 claim for pairing minority incumbents. *See Prosser v. Elections Bd.,* 793 F. Supp. 859, 870 (W.D. Wis. 1992) (three-judge panel) ("The pairing of incumbents has no relation … to the purposes of the Voting Rights Act."). Plaintiffs cite no contrary authority in their Response. But perhaps more striking is the complete failure of Plaintiffs to identify any theory of voter harm. Plaintiffs argue that "minority voters are treated differently and therefore harmed, by the disparate treatment and through the loss of representation of their choosing." Resp. at p. 3.[5] But Plaintiffs do not allege that *any* voter in *any* district will be not be able to vote for a candidate of their choosing from their district on equal footing with other voters in the State.

[5] Plaintiffs did not include page numbers in their Response. Citations are thus to the page numbers added by the electronic filing process.

Though not supported by any allegation in the Complaint, Plaintiffs' new argument is that harm to minority voters from incumbent pairings stems from "the forcing out of minority lawmakers who have gained positions of trust, influence, and institutional knowledge in the political process …." *Id.* Even if Plaintiffs' new argument is correct and incumbents[6] had been forced out, Plaintiffs do not claim in their Complaint that the specific incumbents paired here had "positions of trust" and "influence," or possessed "institutional knowledge" such that their departure would actually harm minority voters. Regardless, Plaintiffs have not answered Intervening Defendants' argument that the districts do not "force out" anybody: incumbents wishing to run again may do so as presently situated, may run in another district, or may run in a later election at a time when another incumbent has been term limited.

Finally, there is no right—under § 2, the Equal Protection Clause, or otherwise—to vote for a particular incumbent. If there were, any time the Legislature moved a district line such that some voters could no longer vote for the incumbent in their old district, a potential § 2 claim would follow.

C. *Larios* is Inapposite And Plaintiffs Misrepresent Its Holding.

Plaintiffs cite to the Supreme Court's summary affirmance in *Cox v. Larios,* 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004), for the proposition that "avoiding incumbent pairings, particularly in disproportionately-impacted minority districts, is a legitimate state

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[6] Plaintiffs appear to claim in their Response that they do not premise their Complaint on harm to paired incumbents. Resp. at p. 3. Not only would such a claim fail because § 2 does not protect individual incumbents, but it would also fail as Plaintiffs lack standing to complain of such an injury. Intervening Defendants preserved the issue of standing in their Affirmative Defenses. *See* Affirmative Defenses, ¶ 2 (Dkt. # 29). The only incumbent legislator currently listed as a Plaintiff in this matter is Representative Durhal, who is not paired in the enacted map.

interest." Resp. at p. 3. Plaintiffs state further that "the Court [in *Larios*] ordered the special master[7] to 'un-pair the incumbents,' which it did." *Id.*

Plaintiffs' misrepresentation of *Larios* is glaring. First, the Supreme Court said no such thing; the pin cite which Plaintiffs offer is to the district court opinion. 300 F. Supp. 2d 1320, 1337-38 (N.D. Ga. 2004). Second, *Larios* dealt *solely* with the "One Person, One Vote"[8] principle—i.e., there was no analysis whatsoever regarding the Equal Protection Clause or § 2, and certainly no holding whatsoever regarding protection of minority incumbents. Plaintiffs thus seek to premise a § 2 and Fourteenth Amendment violation on the holding of a case which spent no ink on either. *Larios* did not hold that avoiding incumbent pairings was required, but merely that partisan incumbent protection could not justify population deviations between districts. *Id.* at 1327.

D. *Bartlett* Forecloses Plaintiffs' Ability To Allege Harm.

As Intervening Defendants have fully briefed, Plaintiffs' Latino "cracking" claim fails as a matter of law because Plaintiffs do not allege the existence of the first *Gingles* precondition—i.e., that it is possible to draw a Latino-majority district in Southwest Detroit. *See Thornburg v. Gingles,* 478 U.S. 30, 50 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986); *Bartlett v. Strickland,* 556 U.S. 1, 129 S. Ct. 1231, 1245-46, 173 L. Ed. 2d 173 (2009).

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7 Plaintiffs' reference to "special masters" can only be intended as a reference to the district court's decision issued on remand *after* the Supreme Court's summary affirmance. *Larios v. Cox,* 314 F. Supp. 2d 1357 (N.D. Ga. 2004). There, in a footnote, the court noted that special masters revised their original map following complaints from African American legislators that "the plans retrogressed [under § 5 of the VRA] because black incumbents in the Special Master's Original Plans were paired more frequently than white incumbents." *Id.* at 1366, n 16. The court, which was speaking at the remedial stage, did not find that a § 2 violation had occurred, nor did the court order special masters to unpair minority incumbents.

8 As Plaintiffs made no attempt whatsoever in their Response to defend their "One Person, One Vote" claim, it appears Plaintiffs have abandoned and waived that claim.

As with *Larios* in the context of Plaintiffs' "pairings" claim, Plaintiffs egregiously misrepresent the Court's holding in *Bartlett*, stating that "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%." Resp. at p. 3. The *Bartlett* Court held no such thing. Instead, in the same paragraph Plaintiffs cite in their Response, the Court expressly stated that that it refused to "consider whether intentional discrimination affects the *Gingles* analysis" as that issue was not before it. 129 S. Ct. at 1246.

As set forth above, Plaintiffs have failed to allege discriminatory intent. Even if they had, however, and assuming that the first *Gingles* precondition could be relaxed, Plaintiffs would still be required to demonstrate remediable harm.[9] The Court in *Bartlett did* hold that minority voters in a sub-50% district cannot elect "representatives of their choice" without assistance from others, and that "[r]ecognizing a § 2 claim in [such] circumstance[s] would grant minority voters a right to preserve their strength for the purposes of forging an advantageous political alliance." *Id.* at 1243 (quotations and citations omitted) (stating further that "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions."). Because a sub-50% Latino population cannot, acting alone, elect "representatives of their choice," Plaintiffs cannot demonstrate cognizable harm when a sub-50% district is split. Indeed, "§ 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2;

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[9] For this reason, the dissent in *Bartlett* argued that the plurality's statement that its holding "does not apply to cases in which there is intentional discrimination," was inaccurate, since "if the elimination of a crossover district can never deprive minority voters in the district of the opportunity 'to elect representatives of their choice,' minorities in an invidiously eliminated district simply cannot show an injury under § 2." 129 S. Ct. at 1259, n. 5 (opinion of Souter, J.)

where such an effect has not been demonstrated, § 2 simply does not speak to the matter." *Voinovich v. Quilter,* 507 U.S. 146, 155, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993).

E. Plaintiffs' New "Coalition" District Theory Is Foreclosed By Controlling Precedent.

Plaintiffs' Complaint makes no reference whatsoever to African American voting age population in any district, much less in a "coalition district." In their Response, Plaintiffs introduce for the first time an argument that the African-American voting-age population in their Latino-influence district is 29.5%, and that when combined with Latino voters, the total minority population is "72.2%, exceed[ing] the 50% threshold" required by *Bartlett.* Resp. at p. 4. Plaintiffs then cite a list of cases from other circuits holding that § 2 protections extend to coalition districts. *Id.* at 4-5.

Plaintiffs' newly offered "coalition" theory fails for no less than three reasons.

First, controlling precedent in the Sixth Circuit forecloses Plaintiffs' theory. *Nixon v. Kent County,* 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc); *see also See also Perry v. Perez,* Nos. 11-713, 11-714, and 11-715, slip. op. at 10 (U.S. Sup. Ct. Jan. 20, 2012) (per curiam) ("If the District Court set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so.") (citing *Bartlett*). In *Nixon*, the Sixth Circuit Court of Appeals, sitting en banc, expressly precluded § 2 claims based on aggregating populations of minority voters to reach the 50% threshold. *Id.* The *Nixon* Court noted that Congress has never made a specific determination that groups consisting of a "mixture" of minorities have been subject to historical discrimination. *Id.* at 1391. The Court also noted that a "coalition theory" was a threat to the goals of § 2, since it "could just as easily be advanced as a defense in Voting Rights Act cases," and would also provide a tool to those hoping to avoid creating true § 2 majority-minority districts. *Id.*

Plaintiffs attempt to distinguish *Nixon* on the basis that it did not involve a claim of intentional discrimination. Resp. at p. 5. Plaintiffs' argument must fail as accepting it would place the State in a Catch-22. That is, if the State had created the coalition district now sought by *Plaintiffs* (in which neither African Americans nor Latinos comprise a majority) the State would be subject to challenge under *Nixon* on the basis that the State should have instead created a true African American-majority district, as in the enacted plan. For this reason, *Nixon* also forecloses Plaintiffs' claims of intentional discrimination; the State's decision to "crack" the Latino District can be explained as an effort to remain in accord with *Nixon*.

Second, under the second *Gingles* precondition, a § 2 vote dilution plaintiff must allege that a minority group is politically cohesive. 478 U.S. at 50. The decisions from other circuits which Plaintiffs cite in arguing that coalition districts are valid under § 2, *see* Resp. at p. 4-5, recognize the requirement that a § 2 "coalition" plaintiff still must show the coalition satisfies the second *Gingles* precondition. *See, e.g., Badillo v. City of Stockton,* 956 F.2d 884, 891 (9th Cir. 1992) ("Plaintiffs must be able to show that they have in the past voted cohesively …."); *France v. Pataki,* 71 F. Supp. 2d 317, 327 (S.D.N.Y. 1999) ("The second Gingles factor requires the plaintiffs to show that the minority groups in question [Latinos and African Americans] are politically cohesive."). Plaintiffs have alleged only that "Latino-Americans in Southwest Detroit are politically cohesive," Compl., ¶ 29, and not, as required by case law cited by Plaintiffs, that Latinos vote cohesively with African Americans to form a "coalition."

Third, accepting, *arguendo,* that African Americans and Latinos vote cohesively *and* that coalition districts are protected by § 2 (neither of which is true), the State created *two* such districts when it split the Latino population into districts 5 and 6, as both of those districts presently contain in excess of 50% African American voting age population. *See* Compl., ¶ 27.

In other words, Plaintiffs cannot both claim that the enacted plan dilutes Latino voting power *and* that Latinos vote cohesively with African Americans, since the "split" Latino population now finds itself in two African American-majority districts.

F. Plaintiffs Admit They Create Fewer Majority-Minority Districts.

The enacted plan creates ten African American-majority districts in the City of Detroit;[10] Plaintiffs do not challenge the number or sufficiency of these districts in their Complaint. In their Response, Plaintiffs admit that their alternative map contains a district (District 5), with only a 29.5% African American Voting Age Population. Resp. at p. 4. Because § 2 protections for "coalition" districts are not recognized in the Sixth Circuit, Plaintiffs' admission also means that Plaintiffs' alternative map contains *fewer* majority-minority districts than the enacted map.

Plaintiffs' admission is fatal to their claims not only because it vitiates any allegations with respect to discriminatory intent on the part of the State, but also because vote dilution plaintiffs must show "the possibility of creating *more*" majority-minority districts than exist in the challenged map. *See Johnson v. De Grandy,* 512 U.S. 997, 1008, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994). Stated differently, Plaintiffs are required to demonstrate "a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 480, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997).

Even assuming, *arguendo,* that Plaintiffs' coalition district was on par with an African-American majority-minority district, at most, Plaintiffs have alleged only the possibility of trading one racial group's § 2 protections for those of another racial group. Such an allegation does not establish a § 2 violation when the State chooses between two such alternatives. *LULAC v. Perry,* 548 U.S. 399, 429-30, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006). ("If the inclusion of

[10] The enacted plan also creates African American-majority districts in Southfield and Flint for a total of twelve statewide.

the plaintiffs [in a majority-minority district] would necessitate the exclusion of others, then the State cannot be faulted for its choice.")

III. CONCLUSION

For the reasons stated herein, Intervening Defendants respectfully request that this Court dismiss the entirety of Plaintiffs' Complaint with prejudice.

Respectfully submitted,

DICKINSON WRIGHT PLLC
Counsel for Intervening Defendants

Dated: March 12, 2012

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 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 J. Hollowell, Jr., Lawrence T. Garcia, Michael A. Carvin, Eric E. Doster, Gary P. Gordon, Mary Catherine Wilcox, John J. Bursch, Heather Meingast, and James A. Britton.

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 E. Fifth Street
Cincinnati, OH 45202

The Honorable Bernard A. Friedman
United States District Court for the Eastern District of Michigan
Theodore Levin U.S. Courthouse
231 W. 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 Building, 410 W. Michigan Avenue
Kalamazoo, MI 49007

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