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

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INTRODUCTION

Plaintiffs' response brief raises only two, narrow legal theories challenging the 2011 Michigan House redistricting plan: (1) whether the pairing of nine incumbent African-American, Detroit-area, Michigan House members violates *Romer v. Evans*, 517 U.S. 620 (1996), and (2) whether § 2 of the Voting Rights Act required the Michigan Legislature to create a "combined" district with a voting-age population of 42.7% Latinos and 29.5% African Americans.

As discussed below, there are multiple legal deficiencies in both theories. But there is also a fundamental, overriding defect: Plaintiffs' preferred alternative reduces by one (from 10 to nine) the number of African-American-majority House districts in Detroit. In other words, Plaintiffs contend that Defendants intentionally discriminated by *maximizing* the number of African-American-majority Detroit House districts. Defendants respectfully request dismissal of Plaintiffs' Complaint.

CLARIFICATION OF FACTS

The cornerstone of Plaintiffs' case is that the State "ignored" a map that the Michigan Legislative Black Caucus (MLBC) submitted which had no incumbent pairings and purportedly scored higher than the State's map on various redistricting criteria.[1] (*E.g.*, First Am. Compl. ¶¶ 1, 24, 28.) To begin, if this litigation moves

[1] Plaintiffs failed to attach their proposed map to the original or First Amended Complaint, but they shared the map with Defendants in late February. It is attached as Exhibit A [hereinafter "MLBC's State House Districts"]. The Court may consider an exhibit attached to a motion to dismiss when the plaintiff's complaint explicitly referenced it. *Johnson v. Hayden*, 67 Fed. Appx. 319, *4 n. 4 (6th Cir. 2003) (citing *Nieman v. NLO, Inc.*, 1078 F.3d 1546, 1554 (6th Cir. 1997), and *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997)).

past the motion-to-dismiss stage, expert testimony will show that Plaintiffs' proposed alternative has more district deviation and more boundary breaks than the State's, and the alternative is not within the required 98-102% population range.

More important, if the State had adopted Plaintiffs' proposed map, opponents would have claimed a *prima facie* violation of § 2 of the Voting Rights Act. Under both the State's 2001 and 2011 redistricting plans, there are 10 African-American-majority House districts in Detroit. (Pls' Mem. in Support of TRO at 12.) But under Plaintiffs' plan, there are only nine such districts. (MLBC's State House Districts at 2.) The 10th district is replaced by a new district (no. 6) that has a voting-age population of 42.62% Hispanic and only 29.42% African American. (*Id.*) In sum, Plaintiffs' entire case rests on the contention that the State intentionally discriminated and violated equal protection and § 2 of the Voting Rights Act by *maintaining*, instead of decreasing, the number of African-American-majority districts.

It is strange enough to say that the State discriminated by drawing a map with *more* African-American-majority districts. But Plaintiffs then argue that one of the State's 10 African-American-majority districts in Detroit should be replaced by a coalition district (no. 6). Even in circuits that recognize coalition districts—and the Sixth Circuit does not—Plaintiffs must show that African Americans and Hispanics vote "cohesively." (Pls' Response at 3-4 (citations omitted).) But if Plaintiffs are correct, i.e., that Hispanics and African Americans vote for the same candidates, then it makes absolutely no difference whether district no. 6 has an African-American majority or a "coalition" majority; either way, the same minority candidate will be elected, mooting any claim of discriminatory redistricting.

ARGUMENT

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

Plaintiffs support their incumbent-pairing claim with only three paragraphs of analysis, an argument that consumes roughly one page of text. (Pls' Resp. at 1-2.) Nowhere in that one page do Plaintiffs come to terms with the arguments and numerous legal authorities Defendants cited in their motion to dismiss.

Plaintiffs first argue that their incumbent-pairing claim is controlled by *Romer v. Evans*, 517 U.S. 620 (1996). (Pls' Resp. at 1.) But no court anywhere has ever applied the *Romer* case to invalidate a redistricting plan, much less done so based on an incumbent-pairing theory. The *Romer* case involved a Colorado law that stripped gays and lesbians of all their legal rights, including the right to be free from discrimination. *Romer* said nothing that would dispel the fact that incumbent pairing is not a ground for challenging a redistricting plan. (State Br. in Support of Mot. to Dismiss at 5-14 (numerous citations omitted).) Moreover, it makes no sense for Plaintiffs to claim that Detroit-area incumbents are "similarly situated" to non-Detroit-area incumbents (Pls' Response at 1), when Detroit has suffered a population loss of more than 250,000 residents, necessitating district consolidation.

Next, Plaintiffs assert that the number of paired African-American incumbents "cannot be explained away by [Detroit-area] population loss, or by the number of districts." (Pls' Resp. at 1.) Not true. The redistricting map the Legislature adopted was a reasonable way to satisfy the "Apol" criteria *and* preserve the 10 existing African-American-majority districts in Detroit under the 2001 redistricting plan. Plaintiffs' purported "proof" of discriminatory intent is the fact that Plaintiffs

produced a map with no incumbent pairings. (*Id.*) But, as noted above, had the State adopted the alternative plan, opponents would have asserted a *prima facie* claim under § 2 of the Voting Rights Act, because Plaintiffs' alternative reduces by one the number of African-American-majority districts in Detroit.

Plaintiffs then state, without citation, that loss of minority incumbents harms minority voters. (*Id.* at 2.) But Plaintiffs fail to explain how this translates into a violation of equal protection or § 2 of the Voting Rights Act. Plaintiffs fail to respond to the argument that they cannot prove the necessary predicate to a § 2 claim (the *Gingles* factors) or an equal-protection claim (evidence that race was the Legislature's predominant motive in drawing district lines). (Defs' Br. in Support of Mot. to dismiss at 5-11 (numerous citations omitted).)

Finally, Plaintiffs rely on *Cox v. Larios*, 542 U.S. 947 (2004), as holding that avoidance of incumbent pairings is a "legitimate state interest." (Pls' Resp. at 2.) But as explained in Defendants' motion, the three-judge panel in *Larios* made that statement in the context of *upholding* a redistricting plan. The panel never said that incumbent pairing could be the basis for *overturning* a plan. (Defs' Br. in Support of Mot. at 7-9.) In fact, no court anywhere has ever made that link.

Underlying all of Plaintiffs' arguments, of course, is their alternative proposed map, which would actually reduce the number of African-American-majority House districts in Detroit. Plaintiffs' proposal undermines their allegations that Governor Snyder and the Legislature acted with discriminatory intent. And it destroys any possible claim of vote dilution, which requires a plaintiff to show "the possibility of creating more than the existing number of reasonably

compact" majority-minority districts than exist in the challenged plan. *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). Lacking a "reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice," *Reno v. Bossier Parish School Board*, 520 U.S. 471, 480 (1997), Plaintiffs fail to state a claim.

In sum, Plaintiffs' one-page analysis does not respond in a meaningful way to any of the State's arguments and cited authorities explaining why Plaintiffs have no claim based on incumbent pairings. Such failure is tantamount to waiver, and it speaks volumes about the merits of Plaintiffs' incumbent-pairing claim. Plaintiffs' Count I should be dismissed in its entirety.

II. Plaintiffs fail to state a claim based on the alleged "cracking" of the Southwest Detroit Latino population.

Plaintiffs treat their "cracking" claim more seriously, devoting roughly three pages of argument to the issue and citing numerous authorities. (Pls' Resp. at 2-5.) But here, too, Plaintiffs raise insufficient facts and law to sustain their claim.

First, Plaintiffs do not disagree that in the absence of intentional discrimination, *Bartlett v. Strickland*, 556 U.S. 1 (2009), requires a party asserting a § 2 violation to show by a preponderance of evidence that the minority population in the potential district is "greater than 50 percent." Plaintiffs admit that their potential Latino district does not meet this threshold requirement, as it will only have a 42.7% Hispanic Voting Age population. Thus, Plaintiffs cannot satisfy the first *Gingles* condition.

Moreover, Plaintiffs' response, like the First Amended Complaint, fails to plead any facts in support of their purported intentional discrimination claim.

(Defs' Br. in Support of Mot. to Dismiss at 16.) Plaintiffs merely assert that "[t]his 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." (Pls' Response at 5.) No reasonable inference of intentional discrimination can be drawn from this single unsupported and conclusory statement. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Second, to the extent Plaintiffs assert that they can aggregate the Latino population and the African-American population in their potential district to create a "coalition district"[2] with a combined minority population of over 50%, that claim is foreclosed. *Bartlett's* "majority-minority" rule is plain and it precluded finding a § 2 violation in "crossover" district cases. *Bartlett*, 556 U.S. at 14; *id.* at 26 (Thomas, J. concurring in the judgment). The same rationale applies to "coalition" district cases. *See 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 addition, this Court is bound by *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc). There, the Sixth Circuit expressly foreclosed § 2 claims based on aggregating populations of minority voters to reach the 50% threshold. *Id.* at 1393. Plaintiffs' claim that *Nixon* is distinguishable because it rested on the

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[2] A "coalition" district is one in which "two minority groups form a coalition to elect the candidate of the coalition's choice." *Bartlett,* 556 U.S. at 12. A "crossover" district is one in which the minority group is not a majority but is able to elect candidates of the group's choice based on support by white crossover votes. *See Rodriguez v. Pataki*, 308 F. Supp 2d 346, 376 (S.D.N.Y. 2004).

"effects" test is unpersuasive because, even for a § 2 intentional-discrimination claim, courts have held that a plaintiff must demonstrate discriminatory effects by proving the second and third *Gingles* conditions. *See, e.g., Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, ___ F. Supp. 2d ___, 2011 WL 6318960, *15 (N.D. Ill. 2011) ("[W]ithout effect, discriminatory intent will not carry the day.") (citing *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990); *Johnson v. DeSoto County Bd. of Commissioners*, 72 F.3d 1556, 1561-63 (11th Cir. 1996)).

Third, even assuming that the State acted with discriminatory intent and that minority groups may be aggregated, Plaintiffs must demonstrate that the Latino and African-American populations in the potential district are politically cohesive. (*See* Plaintiffs' cited authorities at pages 3-4 of their response brief.) But neither the First Amended Complaint nor Plaintiffs' response expressly pleads or provides any evidence of cohesion between the two minority groups. The First Amended Complaint only vaguely alleges the political cohesiveness of the Latino community itself. (*See* State Defs' Br. in Support of Mot. to Dismiss at 17.) Plaintiffs' response similarly states only that the "Latino population in this area presently functions in a politically cohesive way to elect candidates of its choosing." (Pls' Response at 6.) As a result, Plaintiffs fail to satisfy the second *Gingles* factor.

Fourth, assuming discriminatory intent and that the minority groups vote cohesively, Plaintiffs' claim fails because it proves too much. Under the State's plan, African Americans and Latinos comprise a majority in districts 5 and 6, and, since they vote cohesively (according to Plaintiffs), they will elect the Latino community's favored candidate. As a result, Plaintiffs cannot satisfy the third

Gingles condition because Hispanics will (according to Plaintiffs' own reasoning) elect candidates of their choice. In fact, applying Plaintiffs' argument to the State's plan, the Latino community will be able to elect *two* candidates of their choosing, because they will influence two districts, rather than one. No § 2 violation exists under these circumstances.

Finally, if the State had adopted Plaintiffs' proposed plan, opponents would have argued that the State violated § 2 of the Voting Rights Act by reducing the number of African-American-majority districts by one. In fact, there can be little doubt that litigation would have ensued based on the creation of Plaintiffs' "coalition" district. That is a particularly ironic outcome, one the law does not require. *Bartlett*, 556 U.S. at 14, 26 (§ 2 does not require creation of "crossover" districts); *League of Latin American Citizens v. Perry*, 548 U.S. 399, 445 (2006) (§ 2 does not require creation of "influence" districts). Where a plaintiff has alleged only the alternative of trading one minority group's § 2 rights for those of another, there is no § 2 violation. *LULAC v. Perry*, 548 U.S. 399, 429-30 (2006) ("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' Count II must also be dismissed.

CONCLUSION AND RELIEF REQUESTED

The five-page response to the State's motion to dismiss demonstrates that Plaintiffs' lawsuit is not serious. Plaintiffs failed to respond to numerous legal authorities demonstrating the First Amended Complaint's lack of any viable claim. Instead, Plaintiffs stake their case on an alternative redistricting proposal that harms African-American voters by proposing one fewer African-American-majority districts than appeared in the plan the State actually adopted. That alternative—which opponents would have argued violates equal-protection principles and § 2 of the Voting Rights Act had the State adopted it—fails to demonstrate that Governor Snyder and the Michigan Legislature acted with discriminatory intent to deprive minority voters of their ability to elect minority candidates, the necessary predicate to Plaintiffs' claims.

Accordingly, the State of Michigan respectfully requests that the Court dismiss Plaintiffs' First Amendment Complaint in its entirety.

Respectfully submitted,

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Dated: March 12, 2012

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on March 12, 2012, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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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