

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT**

THE HONORABLE REVEREND	:	CASE NO. 4:22-cv-612
KENNETH L. SIMON, ET AL	:	
	:	
PLAINTIFFS	:	RELATED CASE NOS. 2:21-CV-2267
	:	AND 4:88-CV-1104
	:	
VS.	:	JUDGE JOHN ADAMS
	:	
GOVERNOR MIKE DEWINE, ET AL.	:	“THREE-JUDGE PANEL
	:	REQUESTED”
DEFENDANTS.	:	
	:	“CLASS-ACTION ALLEGATIONS”
	:	
	:	“CLAIM OF
	:	UNCONSTITUTIONALITY”

**PLAINTIFFS’ AMENDED OBJECTIONS TO SEPTEMBER 12, 2023 REPORT
AND RECOMMENDATION, ECF DOCKET #27**

In accordance with the provisions of 28 U.S.C. 636 (b)(1)(C), Plaintiffs in this action respectfully object to the following portions of the September 12, 2023 Report and Recommendation dismissing this action, (ECF Docket #27):

1. The conclusion that the District Court complied with the requirement in 28 U.S.C. §2284(a) to cause a district court of three judges to be convened to determine Plaintiffs’ challenges here the Constitutionality of congressional districts.
2. The Report and Recommendation ignores the provisions of 6 Cir. R. 32.1(b) which states published opinions are binding on later panels. A published opinion is overruled only by the court en banc. The Report and Recommendation erroneously treats *Armour v. Ohio*, 775 F. Supp 1044 (N.D. Ohio 1991) as though it was overruled by *Cousin v. Sundquist*, 145 F.3d 818 (1998) and therefore fails to properly state the elements for a Section 2 violation of the Voting Rights Act;
3. The Report and Recommendation erroneously treats Plaintiffs’ §2 Voting Rights Act claim as an inability to “elect ” claim instead of an inability to “nominate” claim.
4. The Report and Recommendation erroneously applies the *Thornberg v. Gingles*, 478 U.S. 30 (1986) preconditions as a bright line test to any §2

claim, when *Gingles* was specifically by its terms limited to a multimember districting challenge in a jurisdiction with both a majority vote and run off requirement.

5. The Report and Recommendation erroneously states unless a §2 claim is brought by a minority group with a voting-aged population of at least a single member majority in number, there is no duty to undertake a searching practical analysis of past and present political reality in the challenged jurisdiction or invoke the totality of circumstances test as required by *Gingles*.
6. The Report and Recommendation erroneously ignores the fact that no authority has ever determined that the *Gingles* preconditions apply to a redistricting claim in a non majority vote jurisdiction where, as here, the claim is inability to "nominate" a candidate of choice versus inability to "elect".
7. The Report and Recommendation's §2 analysis fails to acknowledge that Ohio does not have a majority vote requirement or a limit on the number of candidates who may compete for a nomination;
8. The Report and Recommendation erroneously states that Plaintiffs failed to state a 14th Amendment claim. Contrary to the Report, the Complaint alleges. "[T]he Equal Protection Clause [of the Fourteenth Amendment] forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Abbott*, 138 S. Ct. at 2314 (citing *Shaw v. Reno*, 509 U.S. 630, 641 (1993) ("*Shaw I*)). The Fourteenth Amendment limits "the deliberate segregation of voters into separate district on the basis of race." *Shaw*, 509 U.S. at 641. The Complaint alleges the maps here "sort voters on the basis of race ' and are therefore odious, citing ." *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022). (quoting *Shaw*, 509 U.S. at 643). Here, Plaintiffs' Complaint properly alleges that voters had been intentionally sorted by race.

Plaintiffs here alleged the State "[had]no basis in evidence in support of the (race-based) choices it has made." *Id.* at 801. That test is a demanding one, as redistricting plans that assign voters based on race are subject to the "strictest scrutiny." *Miller*, 515 U.S. at 915.

9. The Report and Recommendation erroneously states the 15th Amendment does not recognize a districting claim. The Report is also contrary to *Armour* in this regard. *Armour* recognized a 15th Amendment districting claim.
10. The failure of the Report and Recommendation to properly apply *Gingles* renders the entire Report invalid. Accordingly, Plaintiffs hereby incorporate by reference in support of these objections. Plaintiffs'

Memorandum in Opposition to Defendants' motion to Dismiss, ECF Docket #20.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by operation of the United States District Court, Northern District of Ohio electronic filing system, on September 27, 2023

/s/ Percy Squire
Attorney for Plaintiff (0022010)