IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

KENNETH L. SIMON, et al.,	:	
	:	
Plaintiffs,	:	Case No. 4:22-cv-612
	:	
v.	:	**JUDGE JOHN ADAMS**
	:	
GOVERNOR MIKE DEWINE, et al.,	:	
	:	
Defendants.	:	

DEFENDANTS' RESPONSE TO PLAINTIFFS' AMENDED OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

Respectfully submitted,

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I. INTRODUCTION

Plaintiffs' Objections (ECF No. 31) to the Magistrate Judge's Report and Recommendation (ECF No. 27) are meritless and should be overruled. The Magistrate Judge properly found that (1) the precondition requirement set forth in *Thornburg v. Gingles* applies in this case; (2) Plaintiffs fail to meet those prerequisites to state a valid claim under Section 2 of the Voting Rights Act ("VRA"); and (3) Plaintiffs fail to state cognizable constitutional claims under the First, Fourteenth, and Fifteenth Amendments. Accordingly, this Court should adopt the Magistrate's Report and Recommendation and dismiss Plaintiffs' claims against the Defendants.

II. BACKGROUND

The Defendants are all members of the Ohio Redistricting Commission that passed a new Congressional redistricting plan on March 2, 2022. Alleging that the March 2 plan did not consider racial demographics, Plaintiffs brought claims against Defendants for violations of the Voting Rights Act of 1965, Section 2 of the Fourteenth Amendment, the First Amendment, and the Fifteenth Amendment to the United States Constitution. (ECF No. 1).

Defendants moved to dismiss Plaintiffs' claims for failure to state a valid claim. (ECF No. 15 and 18). As to Plaintiffs' Section 2 Voting Rights Act claim, Defendants argued that Plaintiffs cannot establish the preconditions necessary to prevail on such a claim. As to Plaintiff's constitutional claims, Defendants asserted that Plaintiffs failed to allege any set of facts that would establish those claims and that the claims are foreclosed by precedent.

The Magistrate agreed and recommended that the Court dismiss all of Plaintiffs' claims. (ECF No. 27). First, the Magistrate correctly recommended that a three-judge panel is unnecessary because Plaintiffs' constitutional claims are "wholly insubstantial and frivolous." R & R, ECF No. 27 at PageID 1161. The Magistrate also correctly held that *Gingles* applies to Plaintiffs' Section 2 Voting Rights Act claim, and that Plaintiffs fail to satisfy the required preconditions. Lastly, the

Magistrate correctly found that Plaintiffs fail to provide any authority to support a cognizable claim under the First, Fourteenth, and Fifteenth Amendments. And the Magistrate correctly concluded that, even if their constitutional claims were cognizable, Plaintiffs still fail to state a claim because they fail to allege any intentional discrimination by Defendants.

Plaintiffs now object to the Magistrate's Report and Recommendation for ten reasons. (ECF. 31). As to their first objection, Plaintiffs claim that the Magistrate erred in concluding that the District Court complied with the requirement in 28 U.S.C. § 2284(a) to refer the matter to a three-judge panel. Amended Obj., ECF No. 31 at PageID 1193. As to their second through seventh objections, Plaintiffs essentially claim that the Magistrate erroneously applied the precondition requirement set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Id.* at 1193-1194. As to their eighth and ninth objections, Plaintiffs claim that the Magistrate erroneously found their claim not cognizable under the Fourteenth and Fifteenth Amendments. *Id.* at 1194. Lastly, Plaintiffs claim that improper application of *Gingles* renders the Report and Recommendation invalid.

Plaintiffs' objections do nothing more than rehash their prior failed arguments. The Magistrate's conclusions are correct and should be adopted in full.

III. ARGUMENT

A. Standard of Review

The district court is required to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b). On review, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). "'Objections, however, must be specific, not general' and should direct the Court's attention to a particular dispute." *Bey v. McCandless*, N.D.Ohio No. 1:22-cv-00554, 2023 U.S. Dist. LEXIS 55598, at *14 (Mar. 30, 2023) citing *Howard v. Secretary of Health & Hum.*

Servs., 932 F.2d 505, 509 (6th Cir. 1991). "'[O]bjections disput[ing] the correctness of the magistrate's recommendation but fail[ing] to specify the findings . . . believed [to be] in error' are too general." *Spencer v. Bouchard*, 449 F.3d 721, 725 (6th Cir. 2006) (quoting *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995)). Thus, if a party fails to file *specific* objections, the failure to do so constitutes a waiver of those objections. *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004).

B. Plaintiffs' first objection should be overruled because the Magistrate properly found that all of Plaintiffs' constitutional claims are wholly insubstantial and frivolous.

Plaintiffs first claim that 28 U.S.C. § 2284(a) requires this Court to convene a three-judge panel because of the constitutional challenge to congressional districts. Amended Obj., ECF No. 31 at PageID 1193. This fails because the Magistrate correctly concluded that all of Plaintiffs' constitutional claims are wholly insubstantial and frivolous. While a district court of three judges must be convened when an action challenges the constitutionality of the apportionment of congressional district, claims that are wholly insubstantial and frivolous may be dismissed by a single judge. *Loeber v. Spargo*, 391 F.App'x 55, 57 (2d Cir.2010); 28 U.S.C. § 2284(a). A claim is insubstantial when "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby v. Osser*, 409 U.S. 512, 518, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973).

The Magistrate correctly found that Plaintiffs' claims are foreclosed as a matter of settled law and they fail to state a cognizable claim under the Fourteenth and Fifteenth Amendments. As to Plaintiffs' Fourteenth Amendment claim, the Magistrate correctly held that the Supreme Court only recognized vote dilution claims under the Fourteenth Amendment for *multimember* districts. Plaintiffs failed to show that such claims extend to single member districts. R & R, ECF No. 27 at PageID 1179-1180. In rebuttal, Plaintiffs merely claim that their Complaint properly alleges that

votes had been intentionally sorted by race. Amended Obj., ECF No. 31 at PageID 1194. But Plaintiffs specifically allege that Defendants reported they "did not use demographic data or racial data" in the production of their maps. Compl., ECF No. 1 at p. 7, ¶ 17, PageID 8. Thus, the Magistrate correctly held that the Complaint fails to plausibly demonstrate that a discriminatory purpose was a "motivating factor" in Defendants' actions or decisions. R & R, ECF No. 27 at PageID 1180. As Plaintiffs fail to raise a colorable constitutional claim, their claims are insufficient to warrant the appointment of a three judge panel as set forth in 28 U.S.C. § 2284(a).

The Magistrate also correctly held that the Supreme Court has not "held any legislative apportionment inconsistent with the Fifteenth Amendment," and has not "held that vote dilution violates the Fifteenth Amendment." R & R, ECF No. 27 at PageID 1181-1182, citing *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) and *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334, n. 3 (2000). In rebuttal, Plaintiffs assert that a vote dilution claim was found to be cognizable under the Fifteenth Amendment in *Armour v. Ohio*, 775 F. Supp 1044 (N.D. Ohio 1991). Amended Obj., ECF No. 31 at PageID 1194. However, the *Armour* court only addressed the Fifteenth Amendment claim because it was indistinguishable from the claim under the Voting Rights Act. *Armour* at 1060. This alone is insufficient to establish that a vote dilution claim is a cognizable claim under the Fifteenth Amendment.

As to Plaintiffs' First Amendment claim, the Magistrate correctly found that "Plaintiffs have failed to provide any authority to support the existence of any applicable First Amendment claim for relief." R & R, ECF No. 27 at PageID 1184. To the extent Plaintiffs are making a partisan gerrymandering claim under the First Amendment, this claim is foreclosed by *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). In *Rucho*, the Supreme Court held that partisan gerrymandering claims are nonjusticiable political questions and federal courts lack jurisdiction to

entertain them. The Magistrate correctly held that *Rucho* "emphasizes the lack of authority for any finding that a racial gerrymandering or vote dilution claim may be asserted under the First Amendment." R & R, ECF No. 27 at PageID 1184.

Accordingly, as all of Plaintiffs' constitutional claims are wholly insubstantial and frivolous, the Magistrate correctly concluded that the three-judge panel was unnecessary.

C. Plaintiffs' objections two through seven, and ten should be overruled because the Magistrate properly applied the *Gingles* precondition analysis.

Collectively, Plaintiffs' second through seventh objections, and their tenth objection, dispute the Magistrate's application of the precondition requirement set forth in *Gingles*. Amended Obj., ECF No. 31 at Page ID 1193-1195. To support their claim that *Gingles* does not apply, Plaintiffs rely on a single case: *Armour v. Ohio*. These objections fail. The Magistrate analyzed the extensive development of cases since *Armour*, and correctly concluded that Plaintiffs must meet the *Gingles* precondition requirement to state a valid claim under Section 2 of the Voting Rights Act.

Since *Armour*, the Supreme Court has twice held that Section 2 and *Gingles* apply to claims challenging single-member districts. *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); *Allen v. Milligan*, ___U.S.___, 143 S.Ct. 1487, 1515, 216 L.Ed.2d 60 (2023). In contrast, *Armour* held that *Gingles* does not apply to single-member districts. *Armour* at 1051. In light of the post-*Armour* authority, the Magistrate correctly found that "it is now well-established that the *Gingles* framework applies [to single-member redistricting challenges]." R & R, ECF No. 27 at PageID 1174.

Similarly, the Magistrate was right to consider post-*Armour* authority in rejecting Plaintiffs' argument that a Section 2 claim for dilution of minority influence might be cognizable. In *Cousin v. Sundquist*, the Sixth District expressly held that it would "reverse any decision to

allow such a claim to proceed since [the court did] not feel that an "influence" claim is permitted under the Voting Rights Act." 145 F.3d 818, 828 (6th Cir.1998). Other district courts followed, holding that influence claims are not cognizable under Section 2 of the Voting Rights Act in the Sixth Circuit. *See, e.g.*, *O'Lear v. Miller*, 222 F.Supp.2d 850, 861 (E.D.Mich.2002); *Parker v. Ohio*, 263 F.Supp.2d 1100, 1105 (S.D.Ohio 2003), aff'd, 540 U.S. 1013, 157 L. Ed. 2d 426, 124 S. Ct. 574 (2003). Recognizing that the *Parker* decision was summarily affirmed by the Supreme Court, the Magistrate correctly noted that summary affirmance effectively forecloses any recognition of influence dilution claims under Section 2 of the Voting Rights Act. *Hicks v. Miranda*, 422 U.S. 332, 344-345, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (holding that lower courts are bound by summary decision by the Supreme Court until such time as the Court informs them that they are not).

The Magistrate also correctly found that Plaintiffs had no authority to support their theory that a "nominate" claim is exempt from the *Gingles* preconditions in all Section 2 vote dilution cases. Plaintiffs note that *Gingles* and other cases cited by Defendants involved claims arising from inability to elect rather than to nominate a candidate, but Plaintiffs fail to show how this difference is material. *See* Mem. In. Opp., ECF No. 20 at PageID 1112. Without more, Plaintiffs' objections should be overruled.

Finally, the Magistrate was not required to proceed to a totality of circumstances test or other analysis upon finding that *Gingles* preconditions were not met. To successfully bring a claim under Section 2 of the Voting Rights Act, a plaintiff must satisfy three preconditions. *Allen v. Millligan*, 143 S.Ct. 1487, 1502-1503 (2023) (quoting *Gingles*, 478 U.S. at 47). If a plaintiff fails to demonstrate all three *Gingles* preconditions, their case automatically fails. *See Growe v. Emison*, 507 U.S. 25, 41, 113 S. Ct. 1075 (1993) ("Unless the [*Gingles* preconditions] are established, there

neither has been a wrong nor can be a remedy."); *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) ("Satisfaction of these three preconditions is necessary, but not sufficient.") (internal citations and quotations omitted); *Concerned Citizens for Equality v. McDonald*, 863 F. Supp. 393, 401 (E.D. Tex. 1994) ("It is now well established that failure to establish any one of the *Gingles* factors precludes a Section 2 violation."). "[O]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 11–12 (2009) (plurality).

The Magistrate followed and applied *Gingles* properly. The first *Gingles* precondition requires that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Reviewing the population in Plaintiffs' proposed district, the Magistrate correctly found that the black population would constitute only 46% of the total population of Plaintiffs' proposed district. R & R, ECF No. 27 at PageID 1176. Importantly, Plaintiffs provided "no legal authority for their contention that application of the first *Gingles* precondition requires *both* a division between minority and majority populations *and* a second division of those same populations based on political party affiliation." *Id.* at 1177. Plaintiffs fail to rebut the Magistrate's decision.

Accordingly, Plaintiffs' objections must be overruled.

D. The Magistrate correctly held that Plaintiffs fail to state a cognizable claim against the Defendants under the Fourteenth or Fifteenth Amendments.

As to their eighth and ninth objections, Plaintiffs claim that the Magistrate erroneously ruled that their claim was not cognizable under the Fourteenth and Fifteenth Amendments. But, as mentioned above, the Magistrate correctly held that Plaintiffs failed to show that a vote dilution claim regarding single member influence districts is cognizable under Section 2 of the Fourteenth

or Fifteenth Amendments. Even if their claims were cognizable, which they are not, Plaintiffs' claims are wholly insubstantial as they fail to allege *intentional* discrimination. And the Magistrate correctly held as much. R & R, ECF No. 27 at PageID 1180, 1182. Generally, cases involving racial discrimination are "subject to the standard of proof generally applicable to Equal Protection Clause cases." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (citations omitted). Under that standard, a violation "is established only where there is proof of a racially discriminatory intent or purpose." *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (citing *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252, 265 (1977)); *see also Parker v. Ohio*, 263 F.Supp.2d 1100, 1106 (S.D.Ohio 2003) (holding that while the Supreme Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims, to effectively make such a claim, plaintiffs need to show that the redistricting and reapportionment plan was intentionally discriminatory toward African-Americans); *Schroeder v. Maumee Bd. of Educ.*, 296 F.Supp.2d 869, 874 (N.D.Ohio 2003) (holding that a showing of intentional, purposeful discrimination is required to claim violations under the Fourteenth Amendment); *Willing v. Lake Orion Community Schools Bd. of Trustees*, 924 F.Supp. 815, 819 (E.D.Mich.1996) ("It is clear from the language and from the authorities interpreting the Fifteenth Amendment, that proof of a racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").

Plaintiffs have shown no racial discriminatory intent or purpose by Defendants. As mentioned above, the Magistrate correctly noted that Plaintiffs specifically alleged that Defendants did *not* consider racial or demographic data in preparing the relevant maps. R & R, ECF No. 27 at PageID 1180, 1182; Compl., ECF No. 1 at p. 8, ¶ 17, PageID 8. And Plaintiffs offer no legal support for the notion that the *lack* of racial consideration amounts to *intentional* discrimination.

Accordingly, the Magistrate correctly held that Plaintiffs' claims under the Fourteenth and

Fifteenth Amendments are not cognizable and even if they are, they fail as a matter of law.

IV. CONCLUSION

For these reasons, the Court should overrule Plaintiffs' objections and adopt the Magistrate's Report and Recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2023, the foregoing was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

/s/ Julie M. Pfeiffer
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CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Ohio Local Civil Rul. 7.1(f), I hereby certify that this memorandum adheres to the page limitations set forth in Rule 7.1(f).

/s/ Julie M. Pfeiffer
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