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.	:	

REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS

Respectfully submitted,

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INTRODUCTION

Defendants moved to dismiss the Plaintiffs' Complaint because it fails to state a claim under Rule 12(b)(6). In response, Plaintiffs make no meaningful attempt to articulate a claim upon which this Court can grant relief. They reiterate their allegation that Defendants' intentionally disregarded race in drawing Ohio's congressional district map. But that fact alone does not establish a violation of Section 2 of the Voting Rights Act. Plaintiffs are still not sufficiently large and geographically compact to constitute a majority in a single-member district. And, by their own allegations and proposed congressional district, Plaintiffs constitute only an influential vote.

Plaintiffs' allegations also do not establish a claim under Section 2 of the Fourteenth Amendment, and Plaintiffs do not refute Defendants' arguments that the First and Fifteenth Amendment claims are foreclosed by precedent. Finally, because Plaintiffs cannot establish a violation of the Fourteenth or Fifteenth Amendments, they are not entitled to any relief under Section 3 of the Voting Rights Act.

For these reasons and those set forth in Defendants' Joint Motion to Dismiss (ECF No. 15), Plaintiffs' opposition provides no basis to sustain their claims against the Defendants. Therefore, their Complaint should be dismissed.

ARGUMENT

I. Plaintiffs Fail to State a Claim Against the Defendants Under Section 2 of the Voting Rights Act.

Plaintiffs have failed to meet their burden to establish a claim under Section 2 of the Voting Rights Act. They cannot meet either step of the two-step process to prove a Section 2 "vote dilution" claim. Specifically, they cannot show the preconditions articulated in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986), and they cannot satisfy the totality-of-the-

circumstances test. Ultimately, Plaintiffs have presented an influence-dilution claim, which as a matter of law is not recognized as a viable claim under the Voting Rights Act.

In their Response, Plaintiffs suggest they can establish their Voting Rights Act claim without meeting the *Gingles* prerequisites. *See Pls.' Mem. in Opp'n* at 6-7, ECF No. 20 at PageID 1113-14. To the contrary, Plaintiffs must demonstrate the existence of all three *Gingles* preconditions, or 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.").

Plaintiffs argue that they can now avoid *Gingles* because their claim is a "nomination claim" rather than an "election claim." *See Pls.' Mem. in Opp'n* at 6, ECF No. 20 at PageID 1113 ("[S]eparating Youngstown from Warren in connection with the 6th District results in an unlawful encroachment on their right to *nominate* a candidate of choice." (emphasis added)). This is a pivot from their Complaint, wherein Plaintiffs allege harm from the inability to *elect* representatives of their choice. *See Complaint* at ¶¶ 14, 39, 43, 47, 52, 53, 54, 56, ECF No. 1. However, the idea that a "nomination claim" is not required to meet the same preconditions as an "election claim" to establish a violation of Section 2 of the Voting Rights Act—or that there is even such a distinction between claims—is wholly unfounded.

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986), the first time the Supreme Court construed Section 2 of the Voting Rights Act of 1965, as amended, the Court established the

three "necessary preconditions" for proving that an electoral structure "operate[s] to impair minority voters' ability to elect representatives of their choice." *Gingles* at 50. Nowhere in the Court's analysis is there a distinction made between the ability to nominate a representative and the ability to elect a representative. Rather, *Gingles* and every case since *Gingles* that has analyzed a Section 2-Voting Rights Act claim—including *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991), looked at the challenged legislative redistricting plan and whether a discriminatory effect resulted from the enactment of such a plan.[1] Since the overarching concern of Section 2 of the Voting Rights Act is to avoid a discriminatory effect, *see, e.g., Gingles* at 35, it would not make sense to apply different frameworks for a "nomination claim" and an "election claim." Thus, only one framework is applied and it is the framework devised in *Gingles*. Plaintiffs cannot avoid the requirements established by the Supreme Court by labeling their claims something else in their response to a motion to dismiss.

Finally, Plaintiffs again rely heavily on *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991), but again *Armour* was practically overruled by the Supreme Court in *Growe v. Emison*, 507 U.S. 25, 113 S. Ct. 1075 (1993), which found that the *Gingles* preconditions *do* apply to single member districts (*Armour* said they did not). Additionally, *Armour's* analysis of the race relations in Mahoning County, and the factual bases for that analysis, cannot form the basis for the Plaintiffs' claims in this case.

Plaintiffs' claim that the Ohio Redistricting Commission's March 2 Congressional Redistricting Plan violates the Voting Rights Act fails as a matter of law and should be dismissed.

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[1] The Southern District of Ohio pointed out a similar deficiency in the Plaintiffs' argument in *Gonidakis v. Ohio Redistricting Commission, et al*., Case No. 2:22-cv-773, ECF No. 201 at PageID 6318, finding that the "choice to not consider race goes to the choice of method, not results." The Court went on to say that "not taking race into account does not necessarily result in vote dilution" and that "the Supreme Court presumptively favors maps drawn without race in mind," which is consistent with Section 2's "results test." *Id.*

II. Plaintiffs Fail to State A Claim Against the Defendants Under Section 2 Of the Fourteenth Amendment, The Fifteenth Amendment, or the First Amendment.

Plaintiffs make no attempt to address the deficiencies of their Second, Third, and Fourth Claims for Relief. They do not argue the merits of these issues. Nor do they offer support for any theory of relief to contradict Defendants' Motion to Dismiss. Instead, Plaintiffs reiterate their allegation that Defendants' intentionally disregarded race in drawing Ohio's congressional district map and imply that this allegation alone establishes their causes of action. Simply put, Plaintiffs are wrong as a matter of law and therefore fail to state a claim under Section 2 of the Fourteenth Amendment, the Fifteenth Amendment, or the First Amendment.

Plaintiffs still offer no legal authority that Section 2 of the Fourteenth Amendment is relevant to their vote dilution claim. And even if Plaintiffs could establish that their Fourteenth Amendment claim is a viable legal claim, Plaintiffs simply fail to allege facts sufficient to establish intentional racial discrimination. Again, Plaintiffs can offer no legal support for the notion that the *lack* of racial consideration amounts to *intentional* discrimination. Accordingly, Plaintiffs' claim under Section 2 of the Fourteenth Amendment fails as a matter of law.

Plaintiffs' Fifteenth Amendment vote-dilution claim is foreclosed by precedent and Plaintiffs do not argue otherwise. In *Bossier Parish Sch. Bd.*, 528 U.S at 334 n. 3, the Supreme Court indicated that vote dilution claim is not a viable under the Fifteenth Amendment. *See Tigrett v. Cooper*, 855 F. Supp. 2d 733, 748 (W.D. Tenn. 2012). Indeed, the Supreme Court has "never [] held any legislative apportionment inconsistent with the Fifteenth Amendment." *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993). Plaintiffs' claim is no different than those rejected by the Supreme Court and should be dismissed.

Finally, Plaintiffs' First Amendment claim also fails. Plaintiffs cite no authority for the proposition that the First Amendment applies to redistricting generally. And, to the extent

Plaintiffs mean to make a partisan gerrymandering claim under the First Amendment, that claim is foreclosed by precedent. *Rucho v. Common Cause* held that partisan gerrymandering claims are nonjusticiable political questions and federal courts lack jurisdiction to entertain them. 139 S. Ct. 2484, 2508 (2019). That is, *Rucho* explicitly rejected the claim that the First Amendment is an avenue for federal-court review of partisan gerrymandering claims. Therefore, Plaintiffs' claim under the First Amendment fails and should be dismissed.

III. Plaintiffs Are Not Entitled to Relief Under Section 3 of the Voting Rights Act.

In light of the foregoing, Plaintiffs' Section 3 claim also fails. Section 3 of the Voting Rights Act is a *future* looking remedy, where a court may retain jurisdiction and may require preclearance only *after* the court has found violations of the Fourteenth or Fifteenth Amendments. *See* 52 U.S.C.S. 10302(c). Here, Plaintiffs have failed to provide any cases showing that the State of Ohio is subject to preclearance under Section 3, nor have they provided any cases showing an Ohio Court has retained jurisdiction such that it could subject the State to Section 3 preclearance.

Instead, Plaintiffs rely on several cases that merely explain how Section 3 operates, not why Section 3 applies here. For example, Plaintiffs cite to *League of Women Voters v. Lee*, N.D. FL, Case No. 4:21-cv-186 (March 31, 2022). There, the court enjoined Florida's voting laws in part as violative of the Voting Rights Act, and thus the court explicitly held (1) Florida would be subject to preclearance under Section 3 and (2) that the court would retain jurisdiction for ten years concerning certain election activities. *Id.* at *349. Two things to note about *Lee*. First, the Eleventh District recently stayed that decision, including the preclearance requirement, pending appeal, so the merits of its analysis may be in question. *See League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, Nos. 22-11133, 22-11143, 22-11144, 22-11145, 2022 U.S. App. LEXIS 12293 (11th Cir. May 6, 2022). Second, *Lee* supports Defendants' argument that when a Court

orders Section 3 relief, the Court must explicitly order preclearance and explicitly state it is retaining jurisdiction. *Lee* at *349.

Plaintiffs also cite to *Jeffers v. Clinton*, 740 F.Supp. 585 (E.D.Ark.1990), which states a court must determine "(1) whether violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred within the State or any of its political subdivisions; and (2) whether, if so, the remedy of preclearance should be imposed." *Id.* at 587. Plaintiffs assert the first *Jeffers* factor has been met, but they do not provide any analysis or proof of any cases where subjecting the State of Ohio to preclearance. Rather, they make an entirely unrelated assertion that for 20 years, the State of *Florida* "has repeatedly target Black voters because of their affiliation with the Democratic Party." *See Pls.' Mem. in Opp'n*, ECF No. 20 at Page ID 1122.

Plaintiffs also point out that *Jeffers* gives courts a series of non-exhaustive factors to guide discretion on whether to award Section 3 relief. *Id*. at Page ID 1122-23. And Plaintiffs believe that given these factors, Defendants had a duty to consider the Simon parties' racial data. *Id*. at Page ID 1123. But again, the Court's discretion to consider any factors on whether to afford Section 3 relief comes only after a finding of a Fourteenth or Fifteenth Amendment violation has occurred. This Court has not found a Fourteenth or Fifteenth Amendment violation, nor can Plaintiffs point to a case where a Court has explicitly (1) retained jurisdiction over this sort of matter in Ohio and (2) ordered Ohio to be subject to preclearance under Section 3. Therefore, Plaintiffs are not entitled to Section 3 relief.

CONCLUSION

For these reasons, the Defendants respectfully move this Court to dismiss Plaintiffs' Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2022, 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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