IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DISTRICT

MICHAEL GONIDAKIS, ET AL.	:	CASE NO. 2:22-CV-773
PLAINTIFFS	:	CHIEF JUDGE ALGENON L. MARBLEY
VS.	:	CIRCUIT JUDGE AMUL R. THAPAR
FRANK LAROSE,	:	
DEFENDANTS.	:	JUDGE BENJAMIN J. BEATON

CORRECTED SIMON PARTIES MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND AMENDED MOTION FOR A PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

A. INTRODUCTION

Intervenor Plaintiffs, the Honorable Kenneth L. Simon, the Honorable Lewis Macklin and Helen Youngblood, (hereinafter "the Simon Parties"), respectfully oppose Plaintiff's Second Motion for Preliminary Injunction and Declaratory Relief, ECF Docket #96. The requested injunction should not be granted for many reasons discussed fully below. The overriding reason that compels denial of Plaintiff's motion however is the following: "Granting the motion would place this Honorable Court's imprimatur on a Redistricting Plan developed in stunning violation of the express duty under the Voting Rights Act of 1965 to consider racial demographics and whether a proposed Redistricting Plan will result in the dilution of Black voting strength". The Third Plan causes dilution to the Simon Parties' voting strength.

The Third Plan and current ongoing redistricting process in Ohio are both fatally grounded on the erroneous theory that the State of Ohio has no duty to comply with the Voting Rights Act in connection with legislative redistricting.

Defendants began the Redistricting process with an express declaration from lead map drawer Mr. Ray DiRossi, that Ohio's legislative leadership instructed map drawers to not consider race. This unlawful policy has been followed by Defendants throughout the map drawing process and infects the Third Plan. See, Exhibit A, DiRossi, Deposition, pp. 789-790.

As recently as March 23, 2022, the Defendant Ohio Redistricting Commission reiterated its intention to craft new legislative districts without considering race and issued unlawful instructions to newly engaged experts to that effect. See, Item 9, Exhibit B, Rules issued to map drawers for 4th Round. Ironically, Defendants contend that federal law prohibits consideration of race. See, Exhibit C, Testimony of Mr. Huffman starting at 01:19:25." Federal law prohibits considerations of race …" Also see Testimony of Speaker Cupp, Exhibit C, 01:19:25. "No information like that has been submitted to the Commission." Contrary to these statements the Simon Parties submitted "information like that" to the Commission on multiple occasions, including on its initial day of hearings on August 23, 2021. Exhibit D. Simon Parties initial input.

The Third Plan is defective and should not been maintained or otherwise utilized because it dilutes the voting power of the Simon Parties in violation of federal law.

B. BACKGROUND

The Simon Parties have filed an intervenor complaint that alleges five members of the Ohio Redistricting Commission and the Redistricting Commission intentionally violated Section 2 of the Voting Rights Act 52 U.S.C. §10301, et seq in connection with the proposed configuration of the 33rd Ohio Senate District and 59th Ohio House District. Plaintiffs allege that the 33rd Senate District as approved unlawfully dilutes Plaintiffs' voting strength through districting by separating the cities of Youngstown, and Warren,

Ohio. The 59th House District as approved unlawful dilutes the voting strength of the Simon Parties' votes by including portions of Columbiana County and excluding the cities of Struthers and Campbell. Although, it is not the subject of this motion, the Simon Parties' complaint also alleges that the use of at large elections in Mahoning County, Ohio violates federal statutory and Constitutional standards due to extremely racially polarized voting as evidenced by the failure of a Black to have ever been elected to county office in Mahoning or Trumbull County, Ohio. At large elections are not the subject of this Opposition however and are cited to focus on the gravity of race in electoral choices in Mahoning and Trumbull Counties, which should be considered by map drawers,

Plaintiffs' motion should be denied as a threshold matter for the reason Defendants have stated publicly that the Third Plan was configured without any regard whatsoever to whether the proposed districts impair Black voters ability to participate equally in the electoral process and elect representatives of choice. Defendants, despite the clear language of the VRA that no voting…standard practice or procedure shall be imposed in a manner that dilutes Black voting strength and the historical findings set forth by this Court in Armour v. Ohio, 775 F. Supp. 1044 (6th Cir. 1991) concerning the role of race in elections in Mahoning County, Ohio, adopted a wholesale policy of ignoring racial demographics in in connection with development of the Third Plan[1]. An injunction shouldn't be issued for the reason Defendants conduct here violated the clear instruction of the United States Supreme Court concerning the procedure that should be followed to comply with §2 of the

[1] [R]edistricting legislatures will almost always be aware of racial demographics, but that sort of race consciousness does not lead inevitably to impermissible race discrimination. See, Shaw v. Reno, 509 U.S. 630, 646. Here defendants configured districts without any consideration of racial demographics and therefore drew districts that failed to take into account historical and previous judicial findings of racial block voting..

VRA. See, Thornburg v. Gingles, 478 U.S. 30 (1986).The Third Plan was crafted pursuant to a State policy that supposes the Voting Rights Act can be ignored with impunity.

In Thornburg, the United States Supreme Court stated both amended §2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, courts, and implicitly legislative bodies configuring legislature districts, must consider the "totality of the circumstances" and determine, based "upon a searching practical evaluation of the past and present reality,' S. Rep. at 30 (footnote omitted), whether the proposed structure results in the political process being equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,'" Rogers, supra, at 621, quoting Nevett v. Sides, 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S. at 458 U. S. 622. Plaintiffs' motion can not be granted because Defendants violated §2 and Armour by totally disregarding race when they configured the Third Plan.

C. DEFENDANTS' POLICY CONCERNING ROLE OF RACE CONTRARY TO LAW

In order to comply with the VRA the redistricting process must take into consideration whether a white "majority votes sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate." Thornburg v. Gingles, 478 U.S. 30, 51 (1986). Here, the Simon Parties repeatedly provided evidence to Defendants demonstrating that consideration of race was necessary to comply with the findings in Armour to prevent "retrogression in respect to Plaintiffs' ability…to elect their preferred candidates of choice.'" See, Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1263 (2015) (quoting 52 U.S.C. § 10304(b)). Defendants here stated explicitly that they made a policy

level decision to completely disregard race and whether the proposed districts impair the rights of Black Mahoning County voters or takes into account their findings in Armour historical.

The Voting Rights Act violations complained of herein were not innocent mistakes. Defendants were fully aware of their duties under the VRA, but conspired to intentionally violate the previous ruling of this Court in Armour and the clear language of Section 2 in favor of partisan political advantage. Defendants intentionally discriminated by ignoring Armour's 15th Amendment findings and failed to follow federal VRA methodology, which specifically harmed Plaintiffs' class in Mahoning County, but also generally diluted Black voting power across Ohio.

The specific intentional conduct of Defendants complained of herein should operate to condemn the Third Plan because, despite having been advised of the findings of this Court in Armour concerning historical racial discrimination and the duty under the VRA to engage in an intensely local appraisal of indigenous political reality in Ohio and Mahoning County and the totality of circumstances test set forth in the Senate Report enacting Section 2, Defendants gave specific instructions to their staff responsible for the drawing of district maps to disregard race, racial bloc voting or any other racial consideration in connection with district configuration.. (See, Exhibit D for input provided by the Simon Parties to Defendants during redistricting.)

Further, support for this assertion is found in the following exchange that occurred during hearings before the Ohio Redistricting Commission on September 9, 2021.

> Ray DiRossi: Urn, [00:03:30] I am Ray DiRossi and as was mentioned, I'm from the caucus staff for the Senate Majority Caucus and my colleague Blake Springhetti, caucus staff for the Ohio House Majority Caucus. Urn, co-chairs and distinguished members of the Redistricting Commission, it's great to be with you today.

Sykes: Uh, thank you to the co-chairs and to Mr. Springhetti and Mr. DiRossi. Thank you, uh, for the work that you put together, uh, put, so you could present to us to get, today. Excuse me. Uh, my question is specific to, urn, how this current map complies with, uh, any provisions of the Voting Rights Act and what provisions of the Voting Rights Act [00:22:30] d- did you consider in constructing this map that you presented, or these maps that you presented today?

Ray DiRossi: Co-chairs, Leader Sykes, thank you for the question. We did not use demographic data or racial data in the production of our maps.
Sykes: Any follow up.

Vernon Sykes: Yes, please.

Sykes: Thank you for answering the question. Uh, so are there any provisions of the Voting Rights Act in which you considered while you drew the, or while you drew these maps [00:23:00] before us today?

Ray DiRossi: I guess I would ... Co-chairs I guess I would say it on my previous statement, we did not use racial data or demographic data for the map, but we feel that the map complies with all the provisions of the Ohio Constitution.

Sykes: Thank you. Uh, I appreciate your answer, and I, I certainly appreciate the brevity of it. Uh, can you explain why you didn't consider any parts of the Voting Rights Act in your consideration of these maps [00:23:30] before us today?

Ray DiRossi: Well, I said we didn't consider racial data or demographic data in our maps, but we were directed not to use that data by the legislative leaders, and so we did not use it.

Audience: (laughs)

Vernon Sykes: Yeah. [inaudible 00:23:46].

Sykes: So I, I would count myself as a legislative leader and I don't think that I shared that information with you and I, this is not an ambush, this is simply a question. The Voting Rights Act is certainly, uh, a part of our, uh, [00:24:00] election and electoral fabric. Uh, and so really just trying to get a better idea of how we are, or not in compliance with that, with these maps. So, urn, hopefully we can have some deeper conversations about that, but, but again, thank you for your responses.

Ray DiRossi: Thank you.

See, Exhibit A, DiRossi Deposition Transcript pp. 789-790.

This testimony is clear evidence that the legislative leadership in Ohio intentionally disregarded whether the proposed districts diluted Black voting strength or the existence among other things, of racial block voting.

According to Mr. DiRossi, the lead representative for defendants in the redistricting process, the Defendants intentionally decided to ignore race, and the Voting Rights Act, but also previous judicial findings of official racial discrimination in legislative districting in Ohio. The approach to redistricting followed the Defendants, results in vote dilution, because it ignores preexisting judicial findings in Armour of racial block voting and the Senate Report factors discussed in Armour. Defendants have unlawfully instructed map drawers considering new maps to disregard race. See, Exhibit C, Item 9.

D. VOTING RIGHTS ACT

Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301, prohibits voting practices and procedures that discriminate on the basis of race, color, or membership in a language minority group. "The essence of a § 2 claim is that a certain electoral laws, practices, or structures interact with social and historical conditions to cause an inequality in the opportunities enjoyed by protected voters to elect their preferred representatives." Gingles, 478 U.S. at 47. Defendants failed to determine whether the proposed districts caused inequality despite a permanent injunction from Armour and the duty to consider the totality of circumstances. This threshold failure by Defendants warrants denial of Plaintiffs' motion.

E. PRELIMINARY INJUNCTION

The Supreme Court has "long held that federal courts may in some circumstances grant injunctive relief against" state and federal officials "who are violating, or planning to

violate, federal law." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326-27 (2015) (citing Osborn v. Bank of United States, 9 Wheat. 738, 838-39 (1824); Ex parte Young, 209 U.S. 123, 150-51 (1908); Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902)). This power to enjoin unlawful "actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." Id. At 327. While Congress may prohibit courts from awarding such equitable relief, id. at 327-28, Congress need not confer the power to award such relief in order for courts to exercise that power: the power is an inherent aspect of the courts' equitable authority, see, e.g., Am. School of Magnetic Healing, 187 U.S. at 110; see also Barry v. Lyon, No. 13-cv-13185, 2015 U.S. Dist. LEXIS 174347, at *5 (E.D. Mich. June 5, 2015); In re Trump, 928 F.3d 360, 373 (4th Cir. 2019); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 287 (4th Cir. 2018) (en banc) (Gregory, J., concurring); Sierra Club v. Trump, 929 F.3d 670, 694 (9th Cir. 2019); CNSP, Inc. v. City of Santa Fe, 755 F. App'x 845, 849 (10th Cir. 2019).

Courts must balance "four factors ... when considering a motion for a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." City of Pontiac Retired Emples. Ass'n v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014) (internal quotation marks omitted). The standard for a permanent injunction is identical, except that the movant must show "actual success on the merits" instead of a likelihood of success on the merits. Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987).

The purpose of a preliminary injunction is "to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." United States v. Alabama, 791 F.2d 1450, 1459 (11th Cir. 1986) (affirming preliminary injunction). An injury is considered to be irreparable "if it cannot be undone through monetary remedies." Scott v. Roberts, 612 F.3d 1279, 1295 (11th Cir. 2010); Cunningham v. Adams, 808 F.2d 815, 821 (11th Cir. 1987); see also Charles H. Wesley Educ. Found., Inc. v. Cox, 32*, Supp. 2d 1358, 1368 (N.D. Ga. 2004) (Cox I), aff'd, 408 F.3d 1349 (11th Cir. 2005) (Cox II) ("no monetary award can remedy the fact that [plaintiff] will not be permitted to vote in the precinct of her new residence."); see also United States v. Georgia, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) (entering a preliminary injunction where "the potential deprivation of the ability to vote, the most basic of American citizens' rights, outweigh[ed] the cost and inconvenience" that the state might suffer, which were comparatively minor).

As explained below, injunctive relief is not warranted, because none of the four elements weigh in Plaintiffs' favor. Plaintiffs are not likely to succeed on the merits. Because the Plan they support is unlawful and has already been invalidated, they will not suffer irreparable harm if the May 2022 elections are delayed unlawful plan is crafted. The balance of hardships do not in favor Plaintiffs. Ohioan's fundamental right to vote would be infringed by voting in unlawful districts, outweighing any burden that Plaintiffs might suffer by a delay. The requested injunction would not serve the public interest because the public would be voting under an invalid racially discriminatory plan.

F. CONCLUSION

For the above reasons, Plaintiffs' motion should be denied.

/s/ Percy Squire
Percy Squire (0022010)
Percy Squire Co., LLC
341 S. Third Street, Suite 10
Columbus, Ohio 43215
(614) 224-6528, Telephone
(614) 224-6529, Facsimile
psquire@sp-lawfirm.com
Attorney for Intervenors-Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by operation of the United States District Court, Southern District of Ohio electronic filing system, on March 24, 2022.

s/Percy Squire, Esq.
Percy Squire (0022010)
Attorney for Intervenors-Plaintiffs