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.	:	**CIRCUIT JUDGE JOAN L. LARSEN**
	:	**JUDGE SOLOMON OLIVER**
GOVERNOR MIKE DeWINE, et al.,	:	**JUDGE JOHN R. ADAMS**
	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE OF DAVID NIVEN, Ph. D's ANALYSIS OF OHIO'S SIXTH CONGRESSIONAL DISTRICT

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiffs' request for judicial notice should be denied because (1) the report fails to meet the requirements under Fed. R. Evid. 201(b) and (2) the report is irrelevant to the instant case. Plaintiffs seek judicial notice of an undated opinion piece ("the Report") drafted by Dr. David Niven for the League of Woman Voters of Ohio, a political advocacy organization and a party to the state court redistricting litigation, where he concludes that the Sixth Congressional District was purposefully gerrymandered. The Report's title—"Strangers in District 6"—is a reference to the popular Netflix series *Stranger Things* where a group of bicycle-riding middle schoolers battle monsters from a strange and upside-down alternate dimension. The premise of the Report—keeping with the *Stranger Things* theme—is a listing of differences around the District which, according to the author, makes members of the District "strangers" and thus, allegedly, victims of gerrymandering. Examples of the alleged offending differences are that members may be fans of different baseball teams, go to different schools, live in different weather service locations, and are divided in a town best known for an apple butter festival. The author claims that "research demonstrates" his points, yet he only cites to various websites without a scintilla of analysis.

The problems with the Plaintiffs' request for judicial notice of the Report are obvious and many. The most overarching is that the Report is plainly and simply an opinion piece written for laypeople, to whom it might appear superficially compelling. A closer look by a trained eye, however, reveals that nothing in the Report bears any legal relevance to this case. Moreover, judicial notice would be improper because its factual assertions, analyses, and conclusions are neither generally known within the court's territorial jurisdiction, nor can they be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. To the contrary,

it's the very conclusion and unsubstantiated bases of the Report that are in considerable dispute. Importantly, the Report is irrelevant to the ultimate issues in this case: whether a private right of action exists under Section 2 of the Voting Rights Act, and whether Plaintiffs can satisfy the first of the preconditions set forth in *Thornburg v. Gingles,* 478 U.S. 30, 50, 106 S. Ct. 2752 (1986). *See generally* Defs.' Renewed Comb. Mot., Doc. No. 48. Accordingly, this Court should deny Plaintiffs' request.

II. ARGUMENT

A. Plaintiffs' request for judicial notice should be denied because Fed. R. Evid. 201(b) does not contemplate judicial notice of the disputed contents of the Report.

Plaintiffs ask this Court to take judicial notice "of the analysis" within the Report to support their "claim that the 6th District is unlawfully gerrymandered." Pltfs.' Mot., Doc No. 51 at PageID #1806. Plaintiffs face a threshold problem under Fed. R. Evid. 201(b)—disputed facts, analyses, and conclusions like those contained in the Report are not subject to judicial notice.

Under the Federal Rules of Evidence, "judicial notice is available only for facts that are not subject to 'reasonable dispute.'" *Changizi v. HHS*, 82 F.4th 492, 498 n.7 (6th Cir. 2023) (quoting Fed.R. Evid. 201(b)). For parties seeking judicial notice, this is a steep burden—as the Advisory Committee Notes to Rule 201 puts it, the "essential prerequisite" to judicial notice is a "high degree of indisputability." Fed. R. Evid. 201, Advisory Committee Notes. Accordingly, the Sixth Circuit has "repeatedly denied motions styled as requests for judicial notice that sought to introduce additional evidence concerning a disputed issue of fact." *Abu-Joudeh v. Schneider*, 954 F.3d 842, 849 (6th Cir. 2020) (collecting cases).

The authority Plaintiffs cite in support of judicial notice in fact illustrates why judicial notice of the Report would be improper. As Plaintiffs acknowledge, in *Texas & Pacific Railway*

Company v. Pottorff, the Court took judicial notice of official public reports created by a governmental entity. 291 U.S. 245, 254 (1934). Likewise, in *Clemmons v. Bohannon*, the Tenth District took judicial notice of "federal statutes and regulations, state statutes, government reports, municipal ordinances, and the Surgeon General's reports referred to or incorporated into the Congressional Record." 918 F.2d 858, 865 n.5 (10th Cir. 1990). Similarly, *Blair v. City of Pomona* saw the 9th Circuit take judicial notice of an independent report commissioned by the mayor of Los Angeles. 223 F.3d 1074, 1081 (9th Cir. 2000); *see also Report of the Independent Commission on the Los Angeles Police Dep't.* at 273, App'x 1 ("The Commission will report to the Mayor, to the Police Commission and, most important of all, to the public. An initial report will be filed in 60 to 90 days.").[1]

The disputability of public documents of governmental origin is a far cry from that of a biased report created by an expert on behalf of a political advocacy organization, like the Report here. Courts within the Sixth Circuit have recognized this public-private distinction under Rule 201, drawing "a distinction between public and government documents, on the one hand, and information available only on private websites . . ." on the other. *Koenig v. USA Hockey, Inc.,* No. 2:09-cv-1097, 2010 U.S. Dist. LEXIS 122809, at *4 (S.D. Ohio June 14, 2010) (citing *United States ex rel. Dingle v. BioPort Corp*., 270 F.Supp. 2d 968, 973 (W.D. Mich. 2003)). Judicial notice of the latter is inappropriate because the Court cannot "'verify the information found on these websites for accuracy or authenticity. . . .'" *Id.* Thus, Plaintiffs' reliance on judicial notice case law pertaining to public and government documents is misplaced.

[1] Available at: https://web.archive.org/web/20110722124708/http://www.parc.info/client_files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf (last accessed June 21, 2024).

Plaintiffs' remaining authority fares no better. In *Ieradi v. Mylan Laboratories, Inc.*, the Court took judicial notice of a company's settlement with the Federal Trade Commission as noted in a newspaper article, but there is no indication that the fact of the settlement was disputed, and it was ultimately not pertinent to the Court's analysis. 230 F.3d 594, 597-600. And in *Heliotrope General, Inc. v. Ford Motor Company*, the 9th Circuit did *not* take notice of "information contained in news articles" itself, as Plaintiffs claim—instead, it took judicial notice "that *the market was aware*" of that information because market awareness defeated a shareholder action based on a fraud-on-the-market theory. 189 F.3d 971, 981 n.18 (9th Cir. 1999) (emphasis added). In other words, the Court did not take judicial notice of the truth of the matter asserted in the news articles, but of the fact that the news articles were available to the public. This is consistent with the Sixth Circuit's explanation that "a court may take notice of the documents and what they say, but it '[cannot] consider the statements contained in the document for the truth of the matter asserted.'" *Platt v. Bd. of Comm'rs on Grievs. & Discipline of Ohio Supreme Court*, 894 F.3d 235, 245 (6th Cir. 2018) (quoting *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 467 (6th Cir. 2014)).

That is not what Plaintiffs ask of this Court. Instead, they seek it to take judicial notice of the truth of the contents of the Report as "additional support for [their] claim that the 6th District is unlawfully gerrymandered." Pltfs'. Mot., Doc. No. 51 at PageID # 1806. But the Report is rife with factual assertions, analysis, and conclusions about the makeup of the 6th District and its representational adequacy that are in "considerable dispute." *See United States v. Bonds*, 12 F.3d 5 40, 533 (6th Cir. 1993). And neither the Court nor Defendants have had opportunity to examine the methodology of the research on which the Report relies. As such, taking judicial notice of the Report would unfairly preclude Defendants from probing its reliability and prevent them from conducting discovery pertinent to the report and "rebutting the report with expert testimony" if

necessary. *See id; see also Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 796 (8th Cir. 2009) (quoting *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 77 (2d Cir. 1998)) ("'Because the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under [Fed.R.Evid] Rule 201(b).'"); *United States v. De La Torre*, 940 F.3d 938, 952 (7th Cir. 2019) (judicial notice of expert declarations improper because "declarants were not subjected to *Daubert* challenges, cross-examined, or tested with competing expert testimony.").

The Report was written by a professor at the request of the League of Women Voters, a self-admitted political advocacy group, Ex. A, Doc. No. 51-1 at PageID # 1819, and a party to state court redistricting litigation. The Court is not simply asked to take judicial notice of the Report's existence—Plaintiffs want this Court to accept its disputed facts and conclusions as true, wholesale. This is the type of self-serving request for judicial notice that "should be viewed with a healthy dose of skepticism." *See Koenig*, 2010 U.S. Dist. LEXIS 122809, at *6. And if notice of *public* documents is proper only for the fact of the documents' existence and not the truth of the facts asserted therein, *Platt*, 894 F.3d at 245, the same is doubly true for private documents like the Report. *See, e.g.*, *Scanlan v. Texas A&M University*, 343 F.3d 533, 536 (5th Cir. 2003) (court should not take judicial notice of a "defendant-created report" appearing on the Internet); *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1124 (N.D. Cal. 2008) ("a [private] study from an internet site on identity theft" is "not remotely akin to the type of facts which may be appropriately judicially noticed.").

Plaintiffs' proffered Report provides no indicia of the "high degree of indisputability" that is an "essential prerequisite" to judicial notice. *See* Fed. R. Evid. 201, Advisory Committee Notes.

Quite the opposite—the Report is the equivalent of a position statement by a party advocating for their desired outcome. It is an opinion commissioned by a political advocacy group, and neither the Court nor Defendants have had any opportunity to probe its accuracy or reliability. Accordingly, it is not appropriate for judicial notice, and Plaintiffs' motion must be denied.

B. Plaintiffs' request for judicial notice should be denied because the Report is irrelevant to this case.

While Fed. R. Evid. 201(c)(2) provides that judicial notice may be taken if a party requests it and the court is supplied with the necessary information, "the Court need not recognize irrelevant facts, even when a party has requested judicial notice." *Prows v. City of Oxford*, S.D.Ohio No. 1:22-cv-693, 2023 U.S. Dist. LEXIS 200723, at *10-11 (Nov. 8, 2023) (citing *Cece v. Wayne Cty.*, 758 F.App'x 418, 424 (6th Cir.2018)); *United States v. Houston*, 110 F.App'x 536, 545 (6th Cir.2004) ("For a court to take judicial notice of a fact, that fact must be relevant to the ultimate issue that the jury must decide."). Here, the entire Report—including its facts and conclusions—is wholly irrelevant to this action.

The crux of this action is whether a party can bring a private cause of action under Section 2 of the Voting Rights Act. That issue has been briefed by the parties, and the Report does not provide any relevant information in that regard. Even if this Court finds that a private cause of action exists under Section 2 of the Voting Rights Act, which it should not, the Report provides no support to Plaintiffs' claim that their proposed plan can satisfy the first prong of the *Gingles* pre-condition test. To state a claim of a violation under Section 2 of the Voting Rights Act, Plaintiffs must establish by a preponderance of the evidence (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) that [the minority group] is "politically cohesive;" and (3) that "the white majority vot[es] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Growe v. Emison*, 507

U.S. 25, 40, 113 S. Ct. 1075 (1993) (quoting *Gingles*, 478 U.S. at 50-51). Failure to prove any one of the preconditions is fatal on the merits. *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (quotations omitted).

Plaintiffs claim that their proposed plan can meet the *Gingles* pre-condition test by further dividing the population by political party. Plaintiffs' Renewed Mots., Doc. 39, PageID 1235, p. 12. But this novel idea is without any legal support, and the Report offers no support for such claim. Indeed, nowhere in the expert's report is there any indication of a racial minority group that is sufficiently large and geographically compact enough to constitute a majority in a single-member district that would satisfy the first prong of the *Gingles* test. *Id.* Moreover, Plaintiffs' claims involve areas around Trumbull County and Mahoning County called the Mahoning Valley metropolitan area. Compl., Doc. 1, PageID #18-19, ¶ 50. Instead, the Report focuses on other counties and only mentions Mahoning County on a non-racial, economic basis. Ex. A, Doc. 51-1, PageID #1815. At most, the Report attempts to show that the Sixth District is composed of diverse communities. That fact alone is irrelevant to whether Plaintiffs can satisfy the first *Gingles* precondition. *See Agee v. Benson*, W.D.Mich. No. 1:22-cv-272, 2023 U.S. Dist. LEXIS 236965, at *16 (Oct. 20, 2023), fn. 1 (clarifying that the court did not find that "communities of interest" and "partisan fairness" factors are "particularly relevant" or prerequisites to satisfying the first *Gingles* precondition). The Report provides no relevant information to the ultimate issue of whether Plaintiffs have a private cause of action under Section 2 of the VRA, or whether they can satisfy the first *Gingles* precondition. Because Plaintiffs' request this Court to take judicial notice of irrelevant information, their motion should be denied.

III. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' request for judicial notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2024, 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.

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