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' MOTION TO ALTER OR AMEND JULY 1, 2024 ORDER

I. INTRODUCTION

The Panel's decision to dismiss Plaintiffs' complaint was not "baseless," "manufactured from whole cloth," "groundless," or "cavalier." *See* Pl. Mot. to Alter, Doc. 56 at PageID #1851. To the contrary, the Panel properly applied binding precedent and correctly concluded Plaintiffs' claim under § 2 of the Voting Rights Act fails as a matter of law. Unsatisfied with that outcome, Plaintiffs now move the Panel to reconsider its order under Fed. R. Civ. P. 59(e). Pl. Mot. to Alter, Doc. 56 at PageID #1855. Plaintiffs' sole argument is that the Panel failed to correctly interpret "the law concerning the construction of § 2 of the Voting Rights Act." Pl. Mot. to Alter, Doc. 56 at PageID #1850. But their rehashed argument has been twice rejected already, and nothing in their latest motion changes the calculus. Their motion should be denied.

II. LAW AND ARGUMENT

Plaintiffs cannot demonstrate that their proposed district would result in a Black majority voting bloc, but *Gingles v. Thornburg* requires them to do so to state a valid § 2 claim. 478 U.S. 30, 50 (1986). Instead, Plaintiffs have repeatedly styled their § 2 claim as a "nomination" claim to

avoid the well-established *Gingles* preconditions and avail themselves of *Armour v. Ohio*, 775 F. Supp 1044 (N.D. Ohio 1991). *E.g.,* Pl. Memo. in Opp., Doc. 20 at PageID #1112. This Panel has already rejected that argument. Op., Doc. 54 at PageID # 1838 ("Critically, plaintiffs point us to nothing in *Armour* or any other case that suggests the ability to nominate a candidate alone is of any § 2 significance."). Plaintiffs' most recent motion simply recapitulates it.[1]

Plaintiffs cannot use Rule 59(e) to try again. Rule 59(e) provides relief where a movant establishes "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (quoting *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006)). These are "narrow grounds," *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.*, 616 F.3d 612, 616 (6th Cir. 2010), and a motion under Rule 59(e) is "extraordinary" and "seldom granted." *Gascho v. Glob. Fitness Holdings, LLC*, 918 F. Supp. 2d 708, 714 (S.D. Ohio 2013).

Rule 59(e) is not a vehicle to "relitigate old matters, or to raise arguments . . . that could have been raised prior to the entry of judgment," *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5, 128 S. Ct. 2605 (2008), or "to re-argue a case." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). But that is precisely how Plaintiffs use it here. They articulate no clear error of law, no new evidence or precedent, or no manifest injustice. They simply re-argue their theory that a "nomination" claim under § 2 need not meet the *Gingles* preconditions.

Plaintiffs fail to show how the Panel's decision rejecting their § 2 "nomination" claim entitles them to relief under Rule 59(e). Their first problem: the *Armour* plaintiffs did not survive

[1] Plaintiffs make no Rule 59(e) argument with respect to the dismissal of their constitutional claims.

dismissal because Black voters in a redrawn district, despite not being a majority, could *nominate* their preferred candidate; instead, the court found that they could *elect* their preferred candidate—with the help of non-minority voters. *Armour*, F. Supp at 1060 ("Since black voters consistently vote eighty to ninety per cent Democratic and white voters vote consistently almost fifty per cent Democratic, we find that plaintiffs could *elect* a candidate of their choice . . . in a reconfigured district.") (emphasis added).

That introduces Plaintiffs' bigger problem: the Supreme Court subsequently foreclosed the viability of such a claim, dubbed a "crossover" claim, under § 2. *Bartlett v. Strickland*, 556 U.S. 1, 14, 129 S. Ct. 1231, 1243 (2009). In the redrawn district in *Bartlett*, Black voters would "have the opportunity to join other voters--including other racial minorities, or whites, or both--to reach a majority and elect their preferred candidate." *Id.* But they could not "elect that candidate based on their own votes and without assistance from others." *Id.* The Court declined to disturb the bright line rule set forth in *Gingles* for crossover claims: it "remains the rule" that "a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Id.* As this Court aptly analyzed, the binding precedent drawn from *Bartlett*'s lead opinion and its two-Justice concurrence is that the *Gingles* preconditions—including the majority-minority precondition—apply to crossover claims like Plaintiffs'. Op., Doc. 54 at PageID #1837-38; *Backus v. South Carolina*, 857 F. Supp. 2d 553, 566 n.2 (D.S.C. 2012), *aff'd*, 568 U.S. 801 (2012). Plaintiffs cannot meet this threshold requirement, and "relabeling" their claim as a "nomination" claim "does not help." Op., Doc. 54 at PageID #1838. No matter how Plaintiffs style their § 2 claim, controlling precedent requires its dismissal.

III. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 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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