

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

<b>KENNETH L. SIMON, et al.,</b>	:
	:
<i>Plaintiffs,</i>	: Case No. 4:22-cv-612
	:
v.	: <b>CIRCUIT JUDGE JOAN L. LARSEN</b>
	: <b>JUDGE SOLOMON OLIVER</b>
<b>GOVERNOR MIKE DeWINE, et al.,</b>	: <b>JUDGE JOHN R. ADAMS</b>
	:
<i>Defendants.</i>	:

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**DEFENDANTS’ MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION TO  
ALTER OR AMEND AUGUST 2, 2024 ORDER**

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**I. INTRODUCTION**

The same day that this Panel issued its order denying Plaintiffs’ motion to alter or amend its July 1, 2024 judgment, Plaintiffs moved the Panel to alter or amend *that* order. This most recent motion is *déjà vu*: once again, Plaintiffs seek relief under Fed. R. Civ. P. 59(e) and, once again, they offer the same “nomination/election” argument that this Panel has already rejected. The Panel should reject it again. Plaintiffs still fail to offer authority supporting their argument, and they cannot compel a different outcome by sheer force of will. Their motion should be denied.

**II. LAW AND ARGUMENT**

Plaintiffs continue to style their claim as a “nomination” claim to avoid *Gingles* and avail themselves of *Armour v. Ohio*, 775 F. Supp 1044 (N.D. Ohio 1991). *E.g.*, Pl. Mot., Doc. 60 at PageID #1870; Pl. Mot., Doc. 56 at PageID #1850; Pl. Memo. in Opp., Doc. 20 at PageID #1112. This Panel has continually 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.”); Order, Doc. 59 at PageID # 1868 (“No court has ever

found that a so-called nomination claim falls outside the *Gingles* framework, and this panel finds no basis to do so under the facts pled herein.”).

Plaintiffs cannot use Rule 59(e) to try and try again into perpetuity. 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).

Plaintiffs’ motion is their latest attempt to resurrect their “nomination” argument from the dead. But Plaintiffs have a threshold procedural problem: they cannot use Rule 59(e) to alter or amend the August 2, 2024 order because Rule 59(e) applies to judgments. *See Fed. R. Civ. P. 59 Advisory Committee’s Note* (“The subdivision deals only with alteration or amendment of the original judgment in a case . . . .”). The original judgment in this case was the July 1, 2024 order dismissing Plaintiffs’ complaint in its entirety. The August 2, 2024 order denying Plaintiffs’ motion to alter or amend is therefore not a judgment within the scope of Rule 59(e).

Regardless, Plaintiffs’ most recent motion also fails substantively. They primarily object to the Panel’s reading of *France v. Pataki*, 71 F. Supp. 2d 317 (S.D.N.Y. 1999). They are incorrect—*France* is on point and Plaintiffs fail to distinguish it. The *France* plaintiffs abandoned

a claim challenging an actual election process in favor of a challenge to the nomination process alone so they could argue their “claim is removed from the controlling authority of *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986).” *France*, 71 F. Supp. at 319, fn. 1. The *France* court properly applied *Gingles* nonetheless. *Id.* at 323. Plaintiffs advance the same argument and, like the *France* court, this Panel correctly concluded that *Gingles* applies and forecloses their claims.

Instead of providing legal authority to support their theory of a “nomination” claim that is not subject to *Gingles*, Plaintiffs try to flip the tables: there is no Supreme Court or Sixth Circuit authority, they argue, that says a nomination claim *doesn't* exist. But Plaintiffs’ double negative does not alleviate their burden to state a plausible claim for relief. Under Fed. R. Civ. P. 8, Plaintiffs bear the burden of alleging facts “respecting all material elements necessary for recovery under a viable legal theory.” *Kreipke v. Wayne State. Univ.*, 807 F.3d 768, 774 (6th Cir. 2015); *see also D'Ambrosio v. Marino*, 747 F.3d 378, 383 (6th Cir. 2014). Plaintiffs have failed to do so—they allege no facts suggesting they satisfy the *Gingles* preconditions, and offer no authority suggesting their “nomination” claim can survive without first satisfying *Gingles*. As a result, their complaint was properly dismissed, and their prior motion to alter or amend was properly denied.

### III. CONCLUSION

Plaintiffs’ latest motion should be denied, too. Plaintiffs articulate no clear error of law, new evidence or precedent, or manifest injustice. Instead, they navel gaze, quibble with the Panel, and rehash failed arguments. That is not enough for relief under Rule 59(e). Their motion should be denied.

Respectfully submitted,

DAVE YOST  
Ohio Attorney General

*/s/ Julie M. Pfeiffer*

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Senate President Matt Huffman*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 16, 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.

*/s/ Julie M. Pfeiffer*

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