IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

v. Case No. 15-CV-421-bbc

GERALD NICHOL, et al.,

Defendants.

DEFENDANTS' RESPONSE BRIEF ON STANDING

The plaintiffs' supplemental brief on standing makes clear that they do not meet the "irreducible constitutional minimum of standing" as outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiffs are asserting an injury that is common to all Democrats, irrespective of which Assembly District they live in. This is not a "particularized and concrete" injury. In addition, the plaintiffs' own description of their theory shows that it depends on untenable amounts of speculation about what third parties may or may not do. The three standing requirements—injury-in-fact, causation, redressability—are not present here.

Further, the plaintiffs cannot establish the core components of standing by analogizing to the one-person, one-vote cases. In those cases, the plaintiffs' injury-in-fact is the dilution of their votes. In contrast, the plaintiffs in this case do not allege any injury tied to their individual right to vote.

I. The plaintiffs' allegations regarding their injuries do not satisfy the three elements of standing in *Lujan*.

The plaintiffs' descriptions of their claims show they are far afield from the minimum standing requirements. For example, they state: "Plaintiffs here do not complain about the treatment of particular voters in a specific district or region." (Dkt. 40:2.) This description is telling. By attempting to divorce their claim from specific voters and specific districts, the plaintiffs are attempting to pursue a claim that is not, by its nature, concrete and particularized. Such a claim is simply not justiciable.

A. The plaintiffs have not alleged a "concrete and particularized" injury-in-fact

The plaintiffs have not alleged the "invasion of a legally protected interest which is [] concrete and particularized." *Lujan*, 504 U.S. at 560. The plaintiffs assert injuries that are common to all Democrats. They "do not complain about the treatment of particular voters in a specific district or region. Rather, they seek to redress the intentional dilution of their voting strength *statewide* based on their political beliefs and affiliations." (Dkt. 40:2 (emphasis in original).) The plaintiffs allege that, regardless of the district they live in, they all "have suffered a common, concrete injury." (Dkt. 40:2.) Even Democrats who were able to successfully elect Democratic candidates have allegedly suffered this injury because there will be "fewer Democratic

officeholders in the Assembly to join with that voter's representative to advocate and vote for the policies the voter favors." (Dkt. 40:12.)

An injury that applies to all members of a political party is not a particularized, concrete interest that can be addressed in the courts. While members of the Democratic Party may be interested in the performance of candidates running as Democrats in legislative elections, in *Lujan*, the Court made clear that a plaintiff must "be 'directly' affected *apart from* their 'special interest' in th[e] subject." *Lujan*, 504 U.S. at 563 (emphasis added; quoting *Sierra Club v. Morton,* 405 U.S. 727, 735, 739 (1972)). The Court is clear that the "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club*, 405 U.S. at 734-735.

The plaintiffs' theory turns that requirement on its head. Accepting the plaintiffs' contention that an individual suffers a concrete and particularized injury-in-fact when there are not enough of a party's legislators "to join with that voter's representative to advocate and vote for the policies the voter favors" would eliminate the "particularized" part of the injury-in-fact test. (Dkt. 40:12.) Under this reasoning, a member of a political party in Wisconsin could challenge the congressional districting in every other state. Regardless of whether the Wisconsin resident could successfully elect his chosen candidate to Congress, he still could go to court based on the idea that

gerrymandering in other states might prevent his congressperson from joining with other members to advocate for and enact policies that the Wisconsin resident desires.

That the plaintiffs' logic here produces this result shows that it is not based on a personal, particularized injury. As with other states' congressional elections, at most, the plaintiffs are indirectly affected by elections in other Wisconsin districts. That does not "directly" affect the plaintiffs "in a personal and individual way," as is required. *Lujan*, 504 U.S. at 560 n. 1. The plaintiffs are akin to plaintiffs with a special concern about the environment, *id.* at 562-67; *Sierra Club*, 405 U.S. at 734-35, or the supporters of a state constitutional amendment who would like to defend that amendment in court. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662-62 (2013).

Indeed, in this case, the plaintiffs have disavowed that they have suffered injuries to their individual rights as "particular voters." (Dkt. 40:2.) That is not proper under *Lujan*. The plaintiffs cite cases that they assert support them, but those cases instead show that their claims go beyond any recognized application of standing. (Dkt. 40:16 n.3.) For example, in one case cited by the plaintiffs, only three Senate Districts were challenged. *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *1 (N.D. Ga. May 16, 2006). The plaintiffs had standing because they were residents of an under-populated district who had then been moved to an overpopulated

district, thus allegedly directly affecting their right to vote. *Id.* at *5. Similarly, another court found that the plaintiff alleged a "personalized injury" because he was alleging that "*his* vote for *his* preferred candidate in *his* district has been diluted as a result of the redistricting plan." *Perez v. Texas*, No. CIV.A. 11-CA-360-OLG, 2011 WL 9160142, at *9 (W.D. Tex. Sept. 2, 2011) (emphasis in original).[1]

The 1972 Seventh Circuit case relied upon by the plaintiffs has been superseded by more recent decisions. (Dkt. 40:12 (citing *Cousins v. City Council of City of Chi.*, 466 F.2d 830 (7th Cir. 1972)). Notably, the court dismissed a political gerrymandering claim as nonjusticiable. *Cousins*, 466 F.2d at 844-45. The plaintiffs claim *Cousins* supports their standing theory because it held a plaintiff had standing to bring a city-wide racial gerrymandering claim against aldermanic wards "even though the particular plaintiff is in a ward where his group is the majority." (Dkt. 40:12,

[1] The other cases cited by plaintiffs as examples of standing do not support the plaintiffs' statewide theory here. (*See* Dkt. 40:16 n. 3.) The *Radogno* case merely gave "Plaintiffs the benefit of the doubt under notice pleading" that they had met the standard for the standing of legislators to sue in their official capacity—notably not the theory the plaintiffs are pursuing in this case. *Radogno v. Ill. State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5025251, at *4 (N.D. Ill. Oct. 21, 2011). In another case, the court dismissed the partisan gerrymandering claim under *Vieth* while rejecting their Fourteenth Amendment claims for lack of standing. *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1296 (M.D. Ala.). The final case held that a group had standing to assert a novel claim that the First Amendment rights of its members had been violated (different from the claim in

citing *Cousins*, 466 F.2d at 845.) *Cousins*, decided in 1972, pre-dates *Lujan* and *Hays*. *Lujan*'s irreducible minimums apply to the present case, regardless of *Cousins*. *See Lujan*, 504 U.S. at 560-61 (stating the constitutional minimums). *Cousins* also predates *Hays*, which held that a racial gerrymandering plaintiff must live in the district being challenged because "[t]he rule against generalized grievances applies with as much force in the equal protection context as in any other." *U. S. v. Hays*, 515 U.S. 737, 743 (1995) (addressing racial gerrymandering). Thus, Cousins is no longer good law for its holding on standing for racial gerrymandering.

B. The plaintiffs' theory of causation and redress depends on layer upon layer of speculation about acts by others.

As discussed in the defendants' first brief on standing, the plaintiffs' also face problems on the causation and redressabilty elements of standing. Legally sufficient causation is not present when a theory of injury depends on an "independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-561 (citation omitted). And legally sufficient redressability must turn on redress to an injury that is "'likely,' as opposed to merely 'speculative.'" *Id.* at 561 (citation omitted). The plaintiffs' theory depends on speculation about what a series of theoretical people may do in the future. It supports neither causation nor redressability.

---

this case), but then dismissed the claim on the merits. *League of Women Voters v.*

By way of injury, the plaintiffs point to "the proportion of Democratic legislators in the Assembly relative to the number that would have been elected under a balanced map." (Dkt. 40:3.) They say that their proposed remedy will redress the alleged harm because a new map will not "dilute plaintiffs' electoral influence." (Dkt. 40:4.) They assert as their ending point that, under a different map, there will be more "Democratic officerholders in the Assembly to join with that voter's representative to advocate and vote for the policies the voter favors." (Dkt. 40:12.)

Restated, their chain of causation and redressability assumes the following: a new map will mean that some voters in some districts will have a greater chance of electing someone who runs as a Democrat; that voter will indeed vote for the Democrat, regardless of the candidate's other attributes or specific policy ideas; the Democrat then wins the election that he or she would not have won but for the new map; that new Representative votes together with other Democrats, regardless of those Democrats' other attributes and policy ideas; all of those Democrats voting together constitute a majority and pass a hypothetical bill that is different than a hypothetical bill that would have otherwise passed; the governor signs that bill into law; the new law is

---

Quinn, No. 1:11-CV-5569, 2011 WL 5143044, at *1-5 (N.D. Ill. Oct. 28, 2011).

something that one of the plaintiffs in this case would favor over whatever other hypothetical bill would have passed and been signed.

Laid bare, the dots that must be connected to the plaintiffs' "vote for the policies" they favor require an unprecedented amount of speculation. Not only that, but the speculative acts must be taken by nonparties and theoretical politicians. (Dkt. 40:12.) Recognizing standing in this case would run headlong into the basic *Lujan* standing principles of causation—which may not depend on "independent action of some third party"—and redressability—which is not satisfied by mere speculation.[2]

C. The plaintiffs' failings when it comes to standing make sense as a proper application of Article III.

The plaintiffs' failure to articulate a theory that satisfies the three core components of Article III standing reinforces the conclusion that the plaintiffs are attempting to bring a case that is not properly left for the courts under Article III. *Lujan* recognized that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." 504 U.S. at 560. The "case" or "controversy" language in Article

[2] The plaintiffs cite a 1996 district court memorandum opinion in *Barnett v. City of Chicago*, No. 92C1683, 1996 WL 34432 (N.D. Ill. Jan. 29, 1996). (Dkt. 40:4.) *Barnett*, however, involved a claim of racial vote dilution under § 2 of the Voting Rights Act. In such a claim, there would be a causal connection between the enactment of the districting plan and any racial vote dilution that occurred. There is no such direct connection between a statewide plan and the number of legislators that will be elected from each party.

III does "not include every sort of dispute, but only those 'historically viewed as capable of resolution through the judicial process.'" *Hollingsworth*, 133 S. Ct. at 2659 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). The standing requirements ensure that courts "act as *judges*, and do not engage in policymaking properly left to elected representatives." *Id.* (emphasis in original). The Supreme Court, even when it entertained claims of partisan gerrymandering, expressed caution against "embroil[ing] the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls." *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality op.).

In this case, the plaintiffs are asking the court to decide a dispute that the plaintiffs purport to bring on behalf of every member of the Democratic Party. Essentially, the plaintiffs want this Court to issue a ruling about the relative balance of power between the Democratic and Republican parties in the State of Wisconsin. The courts, however, are not the appropriate place for a dispute about the general rights of all members of the Democratic Party to translate their statewide support into legislative seats. This is far from Justice Kennedy's hope that judicial intervention might be permissible "if some limited and precise rationale were found to correct an established

violation of the Constitution in some redistricting cases." *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment).

II. The one-person, one-vote cases do not help the plaintiffs.

The plaintiffs' analogy to one-person, one-vote misses the mark. Those cases do not support the plaintiffs' proposition that someone who asserts they are a Democrat has statewide standing to challenge districting that allegedly impairs the Democratic Party's ability to translate its statewide vote share into legislative seats. Rather, plaintiffs in one-person, one-vote claims must meet the three core elements of standing by showing (1) suffered a concrete injury in the dilution of their vote; (2) which was directly related to the apportionment plan; and (3) which could be remedied by a re-apportioning of districts to equal populations. One-person, one-vote plaintiffs do not have standing to challenge a statewide plan in the abstract. Rather, *after* a plaintiff demonstrates standing because of a particularized vote-dilution injury, a *remedy* in those cases may include readjusting other districts to make them equal population. This does not resemble what the plaintiffs propose here; rather, they skip the first step of standing (individualized injury due to vote dilution) and seek to go straight to the remedy.

In the one-person, one-vote cases, the Supreme Court held that citizens have the "right to a vote free of arbitrary impairment by state action."

Baker v. Carr, 369 U.S. 186, 208 (1962). The plaintiffs in the case were "asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Id.* (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). As explained in authority cited by the plaintiffs, a "plaintiff living in an underrepresented district suffers a discrete representational harm from the disproportionate weakness of his vote as compared to the vote possessed by a resident of an overrepresented district." *Larios v. Perdue*, 306 F. Supp. 2d 1190, 1211 (N.D. Ga. 2003). The injury-in-fact is an injury to the plaintiff's individual right to vote. For this reason, a plaintiff living in an under-populated district does not have standing to sue because he has no injury. (*See* Dkt. 40:10.)

In this case, the plaintiffs are not asserting a "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Baker*, 369 U.S. at 208. Instead, the plaintiffs contend that the actual effectiveness of an individual's vote in electing a particular candidate is irrelevant to their right to bring an action: "Plaintiffs here do not complain about the treatment of particular voters in a specific district or region. Rather, they seek to redress the intentional dilution of their voting strength *statewide* based on their political beliefs and affiliations." (Dkt. 40:2 (emphasis in original).) Even a voter who resides in a favorable district for Democrats under the plaintiffs' standard, *i.e.*, a narrowly Democratic district with few Democratic

wasted votes, suffers an injury under their theory. The plaintiffs allege that this voter would be injured because there are "fewer Democratic officeholders in the Assembly to join with that voter's representative to advocate and vote for the policies the voter favors." (Dkt. 40:12.) The plaintiffs are not asserting a right that is based on the individual's vote; instead it is a generalized right that the entire state political system provide the group with sufficiently proportional representation to its statewide support.

The *Vieth* Court recognized that one-person, one-vote cases "have no bearing upon [partisan gerrymandering claims], neither in principle nor in practicality." 541 U.S. at 290 (plurality opinion). The principle that "that each individual must have an equal say in the selection of representatives," that underlies the one-person, one-vote cases does not mean "that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers." *Id.* The right to a vote in a district of equal population simply is not equivalent to the right of a party to translate its votes into legislative seats with equivalent ease, both for a plaintiff's injury-in-fact and for courts developing a judicially discernible legal standard.

III. The Plaintiffs' discussion of *Vieth* and *LULAC* does not solve their standing problems.

The remainder of the plaintiffs' arguments is an attempt to show that no Supreme Court case has definitively stated that plaintiffs cannot have standing to pursue a statewide partisan gerrymandering claim. The problem with that line of argument is twofold. First, it is the plaintiffs' burden to show they have standing *for their particular claim* under the irreducible constitutional minimums. Because they have not shown that they meet the minimums stated in *Lujan*, there is nothing more to consider. Second, *Vieth* and *LULAC v. Perry*, 548 U.S. 399 (2006), do not demonstrate that the plaintiffs have standing here.

For example, the plaintiffs rely on the district court decision in *Vieth* (Dkt. 40:9-10), but that reliance is misplaced as was discussed in the defendants' first standing brief. A majority of the Justices in *Vieth* affirmatively rejected *Davis v. Bandemer*, 478 U.S. 109 (1986), which underpinned the district court's standing analysis. (*See* Dkt. 39:8-11 (defendants' first brief, discussing this topic).)

Nor does Justice Stevens' dissent in *Vieth* support standing here, as suggested by the plaintiffs. (Dkt. 40:14.) First, a dissent would not provide support for the plaintiffs meeting their burden of showing the *Lujan* components of standing for their particular claim. Second, Justice Stevens did

not state that there should be statewide standing for the kind of claim pled here. As the *Vieth* plurality pointed out, he said just the opposite. *Vieth*, 541 U.S. at 292 ("Though [Justice Stevens] reaches that result via standing analysis, post, at 1805, 1806 (dissenting opinion), while we reach it through political-question analysis, our conclusions are the same: these statewide claims are nonjusticiable.").

While the plaintiffs contend that the plurality "mischaracterized Justice Stevens' stance," (Dkt. 40:15), Justice Stevens himself did not share that view. Although he disagreed with the plurality on other points, when it came to standing, he wrote that "the *Hays* standing rule requires dismissal of the statewide claim" and "plaintiffs-appellants lack standing to challenge the districting plan on a statewide basis." *Id.* at 327-28 (Stevens, J., dissenting). The plaintiffs rely on a footnote, where Justice Stevens said he might "in a future case feel free to reexamine the standing issue." *Id.* at 327 n. 16. (Dkt. 40:15.) But footnote saying that he *might* do something in the future is not a statement in support of standing here, especially when the main text says there is no standing.[3] Further, it was not just the plurality and Justice

[3] The plaintiffs also attempt to distance themselves from Justice Stevens' dissent by asserting that Justice Kennedy distinguished between racial gerrymandering and partisan gerrymandering claims, saying the latter was "quite a different matter." (Dkt. 40:16.) *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring.) This distinction by Justice Kennedy, however, does not benefit the plaintiffs. Justice Kennedy was

Stevens who had reservations. Justice Souter, too, stated in his dissent that he would first devise a workable scheme for "individual districts instead of statewide patterns." *Id.* at 346 (Souter, J., dissenting, joined by Ginsburg, J.).

The plaintiffs also suggest *LULAC* shows they have standing. (Dkt. 40:8-9.) But *LULAC* said nothing of the sort. Far from holding that there should be standing for the claim pled in the present case, the gerrymandering claim in that case failed outright, without the Court needing to address justiciability or standing.[4] *See Radogno* 2011 WL 5025251, at *5 (the "Court punted on the question of justiciability—finding that the issue was not before it—but held that plaintiffs' claims must nevertheless be dismissed because of 'the absence of any workable test for judging partisan gerrymanders.'").

When it came to the general topic of "partisan symmetry," three Justices, at best, noted problems with using partisan symmetry at all, while leaving open the possibility that it someday might be a relevant factor. *LULAC*, 548 U.S. at 420 (2006) (Kennedy, J.); *id.* at 483 (Souter, J. and

---

saying that political cases are different because they are *more* difficult for plaintiffs, and perhaps impossible for them.

[4] The only mention of standing in *LULAC* was by Justice Stevens (concurring in part, dissenting in part), where he essentially repeated his view from *Vieth* (about district-by-district challenges). *LULAC,* 548 U.S. at 475 (2006) ("to have standing to challenge a district as an unconstitutional partisan gerrymander, a plaintiff would have to prove that he is either a candidate or a voter who resided in a district that was changed by a new districting").

Ginsberg, J.). Justice Alito and the Chief Justice did not support using partisan symmetry. *Id.* at 492-93 (Roberts, C.J.). Justices Scalia and Thomas held the claim was nonjusticiable. *Id.* at 511-12 (Scalia, J., concurring in the judgment and dissenting in part). None of this is an analysis of, much less a majority holding about, standing. And, of course, it says nothing about whether plaintiffs can have standing when they assert that their lawsuit has nothing to do with "particular voters in a specific district or region." (Dkt. 40:2.) [5]

[5] At the end of their brief, the Plaintiffs assert that they should be permitted to amend their complaint. (Dkt. 40:18.) They have not formally moved to do so, and their request in the brief makes no effort to reconcile a proposed amendment with their other statements—regarding the fact that their lawsuit has nothing to do with "particular voters in a specific district" and that it is only based on a "statewide concept." (Dkt. 40:2, 9.) The Court should treat this request as inadequate or futile or both.

CONCLUSION

The plaintiffs have not met their burden to establish standing. Their legal theory is far outside the parameters from *Lujan*, as it includes no particularized injury-in-fact, and they cannot establish either causation or redressability. Because the Plaintiffs lack Article III standing, their claims should be dismissed.

Dated this 30th day of November, 2015.

BRAD D. SCHIMEL
Attorney General

s/ Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020 (*Keenan*)
(608) 267-2238 (*Russomanno*)
(608) 267-2223 (Fax)
keenanbp@doj.state.wi.us
russomannoad@doj.state.wi.us