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' SUPPLEMENTAL BRIEF ON STANDING

The plaintiffs' legal theory is based on an alleged injury to the rights of all Democrats such that plaintiffs cannot demonstrate an "injury in fact" that is sufficiently "concrete and particularized" to confer Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Likewise, they cannot meet the requirements that their alleged injury be "fairly . . . trace[able]" to the challenged actions or that any injury is likely to be redressed by a favorable decision. *Id.* at 560-61.

Because the plaintiffs have not yet articulated the nature of their injury-in-fact, the defendants can only base this brief on the plaintiffs' articulation of their legal theory. Given that the plaintiffs bring their claims based on the alleged constitutional right of "both major parties [to] be able to translate their popular support into legislative representation with approximately equal ease," (Dkt. 31:18), the plaintiffs appear to be asserting

a generalized grievance equally shared by all Democrats irrespective of Assembly District. This type of injury is not sufficiently "concrete and particularized," nor does it otherwise satisfy the requirements of Article III standing.

I. Plaintiffs do not satisfy the irreducible minimums of Article III standing.

Plaintiffs cannot satisfy the elements constituting the "irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. The Plaintiffs, as the parties invoking federal jurisdiction, "bear[] the burden of establishing these elements." *Id.* at 561. They must show a "concrete and particularized" injury in fact; that there is "a causal connection between the injury and the conduct complained of"; and that redress is likely from a favorable decision. *Id.* at 560-61. The plaintiffs cannot meet these requirements. Taking their allegations at face value, they allege generalized concerns or grievances related to the fact that they would like more state representatives identifying as Democrats to be elected, regardless whether those candidates are running for office in the district in which the plaintiffs vote. That theory can meet none of the standing requirements.

For example, to meet the first injury requirement, a plaintiff must "be 'directly' affected apart from their "'special interest' in th[e] subject." *Lujan*, 504 U.S. at 563. At best, the latter is what the Plaintiffs assert in

their complaint. The Plaintiffs are individuals who live in particular districts in which particular people run for office. It bends the word "directly" beyond recognition to say they are "directly affected" for voting purposes by the election of representatives that do not represent them and for whom they cannot vote for or against. The Plaintiffs are not voting for a statewide office or party that might correspond to their statewide legal theory. Their asserted "interest" falls far short of "a legally protected interest" that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations omitted).

For similar reasons, the other irreducible standing requirements are not present. There is no reliable causal connection between re-doing statewide districts and what the Plaintiffs themselves are involved in, namely, localized elections. At best, the Plaintiffs may have in mind results from an "independent action of some third party not before the court," which does not meet the causation requirement. *Id.* at 560-561 (citation omitted). Their theory necessarily includes choices by other voters and the acts of theoretical representatives for whom those other voters may or may not vote.

Likewise, any redress here does not correspond to the Plaintiffs. Theoretically, a different districting map might make some of the Democratic candidates that the Plaintiffs assert they would vote for more easily elected, less easily elected, or might have no effect. And it is pure speculation that the

theory they pursue—regarding the general makeup of statewide representatives, most of whom the plaintiffs do not and cannot vote for or against—could make a concrete difference *to them* if somehow there were an avenue to redress. In fact, some of them could be adversely affected in their individual ability to elect their candidate of choice—those who are allegedly packed in a district might be shifted to a new district that is more likely to vote for a Republican candidate.

Thus, under the established and irreducible standing requirements, this case should be dismissed for lack of standing.

II. The case law supports that there is no standing here.

The case law shows that the plaintiffs do not have standing. The Supreme Court has made clear that "[t]he rule against generalized grievances applies with as much force in the equal protection context as in any other." *United States v. Hays*, 515 U.S. 737, 743 (1995). *Hays* addressed a racial gerrymandering claim, but the Court's statement—which concerns an irreducible Article III requirement—was not limited to cases related to race. *See Lujan*, 504 U.S. at 560-61 (stating the constitutional minimums). In *Hays*, the Court recognized that when challenging a race-based classification, a plaintiff must have been "'personally denied equal treatment' by the challenged discriminatory conduct." *Id.* at 744 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). For this reason, the Court limited standing

in racial gerrymandering claims to those who "reside[] in a racially gerrymandered district" because they have "been denied equal treatment because of the legislature's reliance on racial criteria." *Id.* at 745. Those that lived outside of the district "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." *Id.*

The same must hold true here. In this case, the plaintiffs are asserting an injury that is not personal to any one of them, but instead is common to anyone who supports the Democratic Party. The "[p]laintiffs are qualified, registered voters in the State of Wisconsin" who "are all supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates." (Dkt. 1 ¶ 15.) They allege that "[r]egardless of where they reside in Wisconsin and whether they themselves reside in a district that has been packed or cracked, all of the plaintiffs have been harmed by the manipulation of district boundaries in the Current Plan to dilute Democratic voting strength." (Dkt. 1 ¶ 16.) The essence of the claim is not that the plaintiffs' individual vote is diluted—in fact, the plaintiffs complain that some Democrats are "packed" in districts so that they too easily elect the representative of their choice.

Instead, the plaintiffs claim they are injured because Democrats cannot translate their total statewide votes into legislative seats as easily as Republicans can. This alleged injury is common to all Democrats irrespective

of their Assembly District because the plaintiffs' legal theory is only concerned with the overall statewide results. Some plaintiffs might actually have to be switched from a Democratic-leaning district (in which they select their representative of choice) into a Republican-leaning district or a swing district (in which they might not be able to select their representative of choice) in order to bring the statewide totals into a more favorable balance for the Democratic Party as a whole. The important issue in plaintiffs' claim is the overall statewide results, not the results in the plaintiffs' individual districts.

The plaintiffs have therefore not shown any particularized injury to themselves. This type of theory cannot confer standing on individuals, however, because "[o]nly those citizens able to allege injury 'as a direct result of having *personally* been denied equal treatment,' may bring such a challenge." *Hays*, 515 U.S. at 746 (quoting *Allen*, 468 U.S. at 755) (emphasis added in *Hays*). There is a mismatch between what the Plaintiffs do—vote for localized representatives—and what this lawsuit purports to be about—the way in which all votes cast throughout the state translate into legislative seats. Justice Stevens in his *Vieth* dissent recognized a difference between the alleged representative harm in statewide claims, which was of a general nature, and the representative harm as to specific districts, which was

specific to district residents. *Vieth v. Jubelirer*, 541 U.S. 267, 327-32 (2004) (Stevens, J., dissenting).

III. The *Vieth* Supreme Court decision shows there is no standing here.

A majority of Justices in *Vieth* properly recognized that a statewide challenge to a redistricting plan was not justiciable. That should resolve the standing question here. The *Vieth* plurality correctly observed that, even leaving Justice Kennedy's concurrence aside, a majority of the Court agreed that a statewide claim could not proceed because of standing and justiciability barriers. The plurality explained:

> Justice Stevens concurs in the judgment that we should not address plaintiffs' statewide political gerrymandering challenges. Though he 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.

Id. at 292; *see also id.* at 328 ("plaintiffs-appellants lack standing to challenge the districting plan on a statewide basis") (Stevens, J., dissenting).

A majority of the Court held that statewide claims were not justiciable and there has been no change of that position since *Vieth*. It is well-established that, "[i]n its constitutional dimension, standing imports justiciability." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Thus, to conclude that a statewide claim is nonjusticiable or to conclude that a plaintiff does not

have standing to bring a statewide claim, leads to the same place because standing is a subset of justiciability.

IV. The standing analysis from the *Vieth* district court decision does not apply because it was based on the rejected legal standard from *Davis v. Bandemer*.

In its order for supplemental briefing, this Court asked whether the district court's approach to standing in *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Pa. 2002), should apply in this case. It should not because the *Vieth* district court's view was not adopted by the Supreme Court.

The *Vieth* district court held that the plaintiffs had standing based on a legal theory that was subsequently abrogated when the Supreme Court took up the case. The district court reasoned that a partisan gerrymandering claim "envisions harm to a particular class of voters that results in impermissibly denying them participation in the political process," specifically referencing *Davis v. Bandemer*, 478 U.S. 109 (1986). *Vieth*, 188 F. Supp. 2d at 540. In *Bandemer*, the Court held that a partisan gerrymandering claim was actionable "only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," which "must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."

478 U.S. at 133. The *Vieth* district court was applying this legal standard when it held that "[i]n equal protection claims based on partisan gerrymandering, the allegation is that an identifiable political group has had its political voice silenced through the drawing of elective district lines" such that "the injury is done to the entire identifiable political group." 188 F. Supp. 2d at 540.

However, the Supreme Court then abrogated the *Davis v. Bandemer* legal standard. *Vieth*, 541 U.S. at 305-06 (plurality); 541 U.S. at 308 (Kennedy, J.). In his concurrence, Justice Kennedy agreed that the plurality opinion "demonstrates the shortcomings of the other standards that have been considered to date," including that "the standards proposed in *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797, 92 L.Ed.2d 85 (1986), by the parties before us, and by our dissenting colleagues are either unmanageable or inconsistent with precedent, or both." *Vieth*, 541 U.S. at 308. As a result, the group-based injury discussed by the *Vieth* district court, in reliance on *Bandemer*, is not an actionable constitutional violation.

In any event, the standing analysis in the *Vieth* district court decision does not help the plaintiffs because the standing analysis in a *Bandemer* claim is intertwined with its substantive legal theory; *i.e.*, a claim under *Bandemer* uses the *Bandemer* standard to define the plaintiffs' "legally protected interest." In this case, the plaintiffs have not alleged the

"invasion of a legally protected interest" under the *Bandemer* standard. In fact, the *Bandemer* legal standard is flatly inconsistent with the plaintiffs' proposed standard. *Bandemer* held that the constitution did not "require[] proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.* at 130. It further recognized that "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." 478 U.S. at 131.

The *Bandemer* Court imposed these substantive limitations on its holding so as to avoid "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." 478 U.S. at 133. The Court rejected a theory "that *any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation" because it was inconsistent with its substantive legal standard and "such a low threshold for legal action would invite attack on all or almost all reapportionment statutes." 478 U.S. at 133 (emphasis in original).

The more generalized nature of the injury recognized in *Bandemer* went hand-in-hand with the high burden of proof the *Bandemer* standard demanded of plaintiffs. The plaintiffs cannot rely on the expansive definition of injury recognized by the *Vieth* district court (based on *Bandemer*) while ignoring the substantive limitations that *Bandemer* imposed on granting relief for that injury. To do otherwise would ignore the *Bandermer* Court's attempt to limit judicial involvement in the redistricting process.

For all of these reasons, the district court version of *Vieth* is of no consequence to the standing question here. If anything, the *Vieth* Supreme Court decision supports the lack of standing.

V. The plaintiffs have not alleged an injury-in-fact to their First Amendment rights.

The plaintiffs also have failed to establish the constitutional minimums—an injury-in-fact, causation, and redressability—on their First Amendment claims for the same reasons discussed above because their entire lawsuit depends on the same premise. The plaintiffs have not separately identified how they have suffered concrete and particularized injuries to their First Amendment rights. As with the unsuccessful claim in *Radogno*, the plaintiffs allege that their "ability to successfully elect their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights." *See Radogno v. Ill. State Bd. of*

Elections, No. 1:11-CV-04884, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011). The plaintiffs "are every bit as free under the new [redistricting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." *Id.* (quoting *Kidd v. Cox*, No. 1:06-CV-997-BBM, 2006 WL 1341302, at *17 (N.D. Ga. May 16, 2006)). There is simply no invasion of First Amendment rights at all, let alone an injury that is personal, concrete and particularized to the individual plaintiffs.

CONCLUSION

For the foregoing reasons, the Plaintiffs lack Article III standing.

Dated this 23rd day of November, 2015.

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