UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SENATOR JONATHAN LINDSEY, SENATOR JAMES RUNESTAD, REPRESENTATIVE JAMES DESANA, REPRESENTATIVE RACHELLE SMIT, REPRESENTATIVE STEVE CARRA, REPRESENTATIVE JOSEPH FOX, REPRESENTATIVE MATT MADDOCK, REPRESENTATIVE ANGELA RIGAS, REPRESENTATIVE JOSH SCHRIVER, REPRESENTATIVE NEIL FRISKE, and REPRESENTATIVE BRAD PAQUETTE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor of Michigan, or her successor, JOCELYN BENSON, in her official capacity as Michigan Secretary of State, or her successor, and JONATHAN BRATER, in his official capacity as Director of Elections, or his successor

Defendants.

No. 1:23-cv-01025

HON. JANE M. BECKERING

MAG. PHILLIP J. GREEN

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

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Dated: February 16, 2024

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs lack standing in their capacities as individual legislators?

2. Whether Plaintiffs have failed to state a valid claim where the U.S. Supreme Court has previously held that the Election Clause of the U.S. Constitution permits a state's voters to regulate congressional elections through an initiative process?

ARGUMENT

I. Plaintiffs lack standing to sue as members of the Michigan Legislature.

In this case, two state senators and nine state representatives present a single claim: that the use of Michigan's proposal process to enact federal-election regulations "usurp[s] their legislative power under the Elections Clause." (ECF No. 1, PageID.3.) But the "rule against legislative standing" set forth in controlling case law could not be clearer: individual state legislators, like Plaintiffs here, lack Article III standing to claim a violation of legislative authority except when they (1) have been authorized by the Legislature to assert the claim on its behalf, or (2) constitute a controlling faction of the legislature. *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 453-54 (6th Cir. 2017); *Tenn. ex rel. Tenn. Gen. Assembly v. United States Dep't of State*, 931 F.3d 499, 514 (6th Cir. 2019). The confusing mix of conflicting positions and inapt citations found in Plaintiffs' opposition to Defendants' motion to dismiss does nothing to suggest that either of those exceptions apply here. As a result, they lack standing to pursue their Election Clause claim based on their status as legislators.

Plaintiffs try to skirt the rule against legislative standing by dressing up their injury in "individual" terms. They insist their injury is not that the Michigan proposal process usurps the authority of the *Legislature* when used to regulate federal elections, but instead that it violates their personal "right or privilege" as legislators to "cast a binding vote on state laws regulating federal elections." (ECF No. 19, PageID.235.) But those are opposite sides of the same exact coin: Any time

a legislature's authority is said to be usurped, every member of that legislature can claim they have been deprived of the ability to cast a binding vote. Accepting Plaintiffs' theory would create an exception that swallows the entire rule against legislative standing.

Despite all the energy Plaintiffs spend on framing their injury in "individual" terms, they entirely fail to contend with their theory's fatal flaw: Their asserted injury—the deprivation of the power to cast a binding vote—is neither concrete nor particularized because it is shared by every single member of the Michigan Legislature. (ECF No. 16, PageID.190-191.) For that reason, the Supreme Court and Sixth Circuit have directly rejected attempts by legislators to frame their injuries the way Plaintiffs do. In *Raines v. Byrd*, the Supreme Court held six members of Congress lacked standing to challenge the Line Item Veto Act, which permitted the President to cancel spending measures after signing them into law. 521 U.S. 811, 815 (1997). Just like Plaintiffs here, the *Raines* plaintiffs framed their injury in individual terms, claiming that the President's nullification of enacted laws that they had passed deprived them of an "effective" congressional vote. *Id.* at 825. The Court forcefully rejected this theory, holding that such an injury does not satisfy Article III because it is "abstract and widely dispersed" among every member of a legislative body. *Id.* at 829. There was no allegation, the Court explained, that plaintiffs had been "singled out for specially unfavorable treatment" compared to other members or that they had "been deprived of something to which they *personally* are entitled—such as their seats as Members of

Congress after their constituents had elected *them*." *Id.* Instead, the plaintiffs' standing theory was based simply "on a loss of *political* power" that existed "solely because they [we]re Members of Congress," which cannot produce a concrete or particularized injury. *Id.* (emphasis added).

In a straightforward application of *Raines*, the Sixth Circuit recently held that an individual senator lacked standing to challenge a law that "denied [him] the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote." *Crawford*, 868 F.3d at 460. The court explained that, despite the senator's attempt to frame his injury in individual terms, such an "incursion upon [the] Senator['s] political power is not a concrete injury like the loss of a private right." *Id.* at 460. Other courts have applied *Raines* to reject similar attempts by legislators to frame their injury in individual terms as Plaintiffs do here. *Yaw v. Delaware River Basin Comm'n*, 49 F.4th 302, 311 (3d Cir. 2022) (state legislators claimed fracking ban rendered their "lawmaking authority nullified"); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1211-12 (10th Cir. 2016) (state legislators claimed state constitutional amendment rendered their votes "advisory"); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999) (members of Congress claimed executive order deprived them "of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation").

Raines and its progeny make quick work of Plaintiffs' legislative-standing theory here. As in *Raines*, Plaintiffs' asserted injury is based solely on their membership in the Michigan Legislature; they do not allege they have been singled

out for disfavored treatment compared to other colleagues, nor do they allege that they have lost the seat to which they are entitled. As a result, they "have alleged no injury to themselves as individuals." *Raines*, 521 U.S. at 829.

Plaintiffs' reliance on the Supreme Court's discussion of *Coleman v. Miller* in *Arizona State Legislature* is not only misplaced—it confirms the absence of standing. (ECF No. 19, PageID.239-40.) *Coleman* involved a challenge to a state's ratification of a proposed federal constitutional amendment brought by a large group of state senators that "would have been sufficient" to defeat ratification if their challenge to the legality of the Lieutenant Governor's tie-breaking vote had been upheld. 307 U.S. 433, 438 (1939). Just as in *Raines*, however, *Coleman* has no application here, where Plaintiffs "have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Raines*, 521 U.S. at 824. Nor does *Arizona State Legislature* offer Plaintiffs any help. There, in holding that the Arizona Legislature had standing as an institution to pursue an Election Clause claim, it reaffirmed that individual legislators lacked standing to do so absent express authorization by the legislature itself. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 801-02 (2015).

Plaintiffs' confused foray into the Supremacy Clause, Elections Clause, and the Michigan Legislature's voting rules does nothing to demonstrate a concrete or particularized injury under Article III. (ECF No. 19, PageID.228-234.) As far as Defendants can tell, that discussion is intended to suggest that Plaintiffs have

standing because they have some sort of federally protected right to cast votes on questions relating to regulation of Michigan's federal elections. But as just explained, controlling case law requires the conclusion that the injury resulting from any violation of this "right" would be identical for every member of the Michigan Legislature, rendering it insufficiently particularized to satisfy Article III. In any event, the "right" that Plaintiffs attempt to concoct does not exist. The Elections Clause gives authority to "the *Legislature*" of each state; it makes no mention of, let alone confer rights upon, individual state legislators. U.S. Const. art. I, § 4 (emphasis added). Plaintiffs identify no authority (and Defendants are aware of none) suggesting that, contrary to the plain text of that provision, the Elections Clause silently confers an enforceable right upon thousands of state legislators across the country. That is not surprising. Allowing individual legislators to pursue claims belonging to their legislature without the consent, or even contrary to the wishes, of that legislature would seriously threaten legislative autonomy. Legislators who "fail[] to prevail in their own Houses" cannot "repair to the Judiciary to complain." *Ariz. State Legis.*, 576 U.S. at 802.[1]

The Michigan Supreme Court's decision in *Dodak v. State Admin. Bd.,* 441 Mich. 547 (1993), cannot bear the weight Plaintiffs place on it. As the Third Circuit recently explained while rejecting the same legislative-standing theory Plaintiffs

[1] Plaintiffs' discussion of 42 U.S.C. § 1983 does not change the standing analysis. (ECF No. 19, PageID.236.) "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3.

present here, "Article III standing limits the power of *federal* courts and is a matter of federal law. It does not turn on state law, which obviously cannot alter the scope of the federal judicial power." *Yaw*, 49 F.4th at 311; *see also Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999) (rejecting plaintiffs' reliance on state-court standing decisions). That is particularly so here, given that standing to sue in Michigan courts is (and was at the time of *Dodak*) a "limited, prudential doctrine." *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.,* 487 Mich. 349, 378 (2010).

But even viewing *Dodak* merely as possible persuasive authority, it offers Plaintiffs no help. In concluding the state legislator in that case had standing under state law, the *Dodak* court relied heavily on the reasoning in D.C. Circuit case law that was rejected by the U.S. Supreme Court in *Raines* six years later. *See Chenoweth*, 181 F.3d at 115 (explaining *Raines*'s impact on prior D.C. Circuit decisions in this area); *Raines*, 521 U.S. at 820 n.4. Thus, whatever persuasive arguments *Dodak* could offer Plaintiffs in support of their standing theory have since been rejected by the U.S. Supreme Court, whose decisions bind this Court.

In summary, Plaintiffs have not presented any legal authority that grants standing to individual legislators for claims purporting to arise under the Elections Clause.

II. Plaintiffs lack standing to sue in any other capacity.

Despite continuing to assert their claims alternatively as "citizens, taxpayers, and voters," (ECF No. 19, PageID.245), Plaintiffs' opposition offers no response whatsoever to Defendants' citations to several Supreme Court decisions making

clear that Plaintiffs do not face, in any of those capacities, an injury that would satisfy Article III. (ECF No. 16, PageID.192-196.)

Instead of contending with the controlling case law squarely rejecting the alternative standing theories presented in their Complaint, Plaintiffs assert that they have standing here because Michigan law has authorized anyone to "represent the state in Elections Clause legislative usurpation cases." (ECF No. 19, PageID.245 (claiming Michigan law "authorizes any citizen" and "any private person" to bring this type of suit.) That is quite wrong.

To support their assertion that state law authorizes them to bring this suit, Plaintiffs rely on, and badly misread, two authorities. First, they cite Article II, § 4(1)(a) of the Michigan Constitution. (ECF No. 19, PageID.245.) That provision first establishes a "fundamental right to vote"—including the right to a secret ballot—and prohibits anyone from burdening that right. 1963 Mich. Const., art. II, § 4(1)(a). It then provides in pertinent part:

> Any Michigan citizen or citizens shall have standing to bring an action for declaratory, injunctive, and/or monetary relief to enforce the rights created by this part (a) of subsection (4)(1) on behalf of themselves. Those actions shall be brought in the circuit court for the county in which a plaintiff resides.

Id. Plaintiffs' suggestion that this language authorizes someone to sue in federal court "to represent the state in Elections Clause legislative usurpation cases" borders on frivolity. (ECF No. 19, PageID.245.) Subsection 4(1)(a) requires that the

lawsuits it authorizes "shall be brought" in state "*circuit court*," not federal court.[2] It permits plaintiffs bringing such a suit to sue only "on behalf of *themselves*," not on behalf of the State or Legislature. And it permits suits seeking to vindicate only the "*rights created by this part (a)*" which protect casting an electoral ballot, not the Legislature's authority to pass laws.[3] Subsection 4(1)(a) does nothing even remotely close to what Plaintiffs claim it does.

Second, Plaintiffs cite the Michigan Supreme Court's statement in *League of Women Voters of Michigan v. Secretary of State*, 506 Mich. 561, 587 (2020), that individuals "may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public." (ECF No. 19, PageID.245.) But that statement comes nowhere close to suggesting that Michigan law authorizes Plaintiffs to bring suit in federal court to vindicate the Legislature's Elections Clause authority. It is merely an assertion about standing requirements in state court, which, for the reasons already explained, has no impact on whether Plaintiffs can satisfy the far stricter requirements of Article III. *Supra* § I. In any event, this is not a state-court mandamus action seeking to enforce a "public right or duty relating to elections." Instead, this is a federal-court challenge

[2] Plaintiffs' opposition conspicuously omits from its quotation of subsection 4(1)(a) the sentence plainly requiring such suits to be filed in state circuit court. (ECF No. 19, PageID.245.)

[3] This also raises a separate jurisdictional problem with Plaintiffs' theory. The Eleventh Amendment prohibits federal courts from entertaining state-law claims against state officials. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Yet, subsection 4(1)(a) only authorizes claims vindicating "rights created by" the Michigan Constitution.

to the validity of amendments to the Michigan constitution. Plaintiffs are not trying to enforce Michigan law, they are seeking to overturn it.

Defendants' motion to dismiss explained that controlling case law rejects Plaintiffs' assertion that they have standing as citizens, voters, or taxpayers. (ECF No. 16, PageID.192-196.) Plaintiffs' opposition completely ignores those arguments. Instead, it offers an argument premised on plain misreadings of state authorities. Plaintiffs have failed to demonstrate that they have standing to assert their claim in any capacity.

III. Plaintiffs lack standing because their asserted injuries are non-redressable and speculative.

Defendants' motion to dismiss argued that Plaintiffs' challenge to the 2018 and 2022 constitutional amendments are not redressable because, after they were adopted, the Michigan Legislature enacted essentially all of those policies into statutory law, and Plaintiffs allege no fact suggesting the Legislature wishes to repeal those statutory enactments. (ECF No. 16, PageID.197-98.) Plaintiffs thus fail to allege that an order enjoining implementation of the 2018 and 2022 constitutional amendments would change the status quo in any way. Plaintiffs' challenge to those constitutional provisions thus ask this Court to "do nothing more than issue a jurisdiction-less 'advisory opinion.'" *Mann Constr., Inc. v. United States*, 86 F.4th 1159, 1162 (6th Cir. 2023) (quoting *California v. Texas*, 141 S. Ct. 2104, 2116 (2021)).

Plaintiffs' opposition offer no response other than to state conclusively that "[t]his Court has the legal authority to issue an order declaring the 2018 and 2022 state constitutional amendments as violative of the Elections Clause," citing the Declaratory Judgment Act and Federal Rule of Civil Procedure 65. (ECF No. 19, PageID.248.) But the Court's authority to grant declaratory and injunctive relief is dependent upon Plaintiffs' satisfaction of Article III's requirements. *Heydon v. MediaOne of Se. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003) ("[B]efore invoking the [Declaratory Judgment] Act, the court must have jurisdiction already."). Because Plaintiffs make no effort to demonstrate their request for declaratory and injunctive relief against the 2018 and 2022 amendments would be more than a request for an advisory opinion, they have failed to demonstrate their standing to challenge those provisions.

Defendants' motion also argued that Plaintiffs' request for relief against unidentified future uses of the proposal process to regulate Michigan's federal elections was far too speculative to satisfy Article III. (ECF No. 16, PageID.198-99.) The Court's power to grant prospective declaratory and injunctive relief depends on Plaintiffs' demonstration of an "imminent injury" that is "*certainly impending*"; "allegations of *possible* future injury are not sufficient." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks omitted)). While Plaintiffs suggest that they hope to prevent any future petition drives to enact amendments that involve elections, their complaint identifies no such drive

presently in existence. Any concern over future petition efforts that might be initiated, and amendments that might pass as a result, are entirely speculative. It may be that no such effort is ever undertaken again, or that these Plaintiffs might no longer be state legislators by the time any such future effort began. But it is simply impossible to know at this time. Article III requires far more certainty.

Again, Plaintiffs make almost no effort to respond to this argument. (ECF No. 19, PageID.248-49.) They assert their claim is "targeted against the process of adopting these constitutional amendments without state legislative approval," but identify no current effort to use that process in the future. (ECF No. 19, Page.ID 248-49.)

Because Plaintiffs' requests for declaratory relief are either non-redressable or speculative, they cannot demonstrate Article III standing.

IV. Even if Plaintiffs had standing, their claims fail on the merits.

As Defendants' motion explains, the theory on which Plaintiffs' claim relies—that the Elections Clause prohibits a state constitution from establishing a process for regulating federal elections that does not involve the state legislature—was rejected by the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) ("*ASL*"). (ECF No. 16, PageID.200-201.) Just as Plaintiffs do here, the Arizona Legislature in *ASL* asserted that a voter-initiative-created redistricting commission violated the Elections Clause because it could enact congressional plans without any input by the state legislature. *Id.* at 792-93. The Court rejected that theory, holding that the

Elections Clause does not "single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process." *Id.* at 818.

Plaintiffs identify no meaningful difference between their claim and the Arizona Legislature's claim rejected in *ASL*. In insisting that their claim is different from that presented in *ASL*, they formulate "the crux" of their case as follows: "the Legislators' federal rights under the Elections Clause are being violated by the adoption of constitutional amendments regulating times, places and manner of federal elections without state legislative approval." (ECF No. 19, PageID.254.) But that was precisely the argument asserted in *ASL*: The Arizona Legislature complained that its Elections Clause authority had been usurped by an initiative-adopted constitutional amendment that regulated federal elections through a process that "operat[ed] independently of the state legislature." *ASL*, 576 U.S. at 813. The *ASL* Court's rejection of that claim requires rejection of this one.

Plaintiffs' only other attempt to distinguish *ASL* is their puzzling assertion that the Michigan Constitution "does not expressly revoke the Legislators' federally-guaranteed rights to regulate times, places, and manner of federal elections." (ECF No. 19, PageID.254.) But no "revocation" of the Legislature's authority is occurring here. As the Supreme Court explained in *ASL*, voter-initiative processes are *part* of the state's "lawmaking power" with authority under the Elections Clause to regulate federal elections. 576 U.S. at 793; *League of Women Voters of Mich.*, 506 Mich. at 571 (2020) ("Although the people have granted the Legislature lawmaking

authority, they have retained for themselves three paths to exercise that authority," including the "proposal of constitutional amendments."). There is nothing in the Michigan Constitution that limits or prevents the people from proposing and enacting amendments to the constitution addressing election related topics. It is entirely unclear what more explicit statement could be required of the people's intention than where they reserve rights for themselves, or what right Plaintiffs claim exists to legislate in contravention of the rights reserved by the people in their constitution.

Plaintiffs' other merits-related arguments are unavailing. They argue that under Rule 12(b)(6), their allegations must be accepted as true, and since they have alleged that they have rights as legislators to vote on anything involving elections, they have therefore stated a claim that is plausible on its face. (ECF No. 19, PageID.249-251). Plaintiffs' argument, however, relies on a single sentence in *Mosier v. Evans*, 90 F.4th 541 (6th Cir. 2024) citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). *Mosier* was a Fourth Amendment excessive force case, however, and its discussion of *Iqbal* and *Twombly* was limited to a recital that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* Plaintiffs appear to understand this to mean that this Court must accept their legal theories as true along with their factual allegations, but that is not so. The Supreme Court in *Iqbal* recognized that "the tenet that a court must accept as true all of the allegations contained in a complaint is

inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. And in *Twombly,* the Court held that grounds for relief require more than labels and conclusions. *Twombly,* 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation")). This Court, then, is not required to, and should not, accept Plaintiffs' legal theories and conclusions as true for purposes of Defendants' motion under Rule 12(b)(6).

Because Plaintiffs' claims rest entirely on a constitutional theory that has already been rejected by the Supreme Court, they have failed to state a claim that is plausible on its face. In fact, Plaintiffs concede in their Response that the Elections Clause *is* subject to state constitutional limitations. (ECF No. 19, PageID.250-251) ("The Legislators agree with *Moore* that their federal rights under the Electors Clause are limited by state constitutional limitations, federal and state judicial authority and Congressional enactments.") This concession alone ought to be fatal to the merits of Plaintiffs' claims, even notwithstanding the long line of Supreme Court precedent outlined in Defendants' principal brief rejecting Plaintiffs' theory and reasoning.

Plaintiffs also argue that the state legislature "still has a federally guaranteed legislative role in state law-making regulating the times, places and manner of federal elections." (ECF No. 19, PageID.251). This appears to be a straw-man argument, as Defendants have never suggested that the state legislature has *no* role in regulating elections. Instead, the issue posed in this case

is whether the people of Michigan retained for themselves some measure of legislative power through the amendment process provided in Article 12, section 2 of the state constitution, through which they might restrain the legislature's power to legislate on certain matters, such as the right of registered electors to vote by absentee ballot. Plaintiffs claim that the people have no power to do so, and that they – as state legislators – have rights under the Elections Clause that are superior to those of the very people they represent, and that the state constitution cannot prohibit them from voting on anything having to do with elections. As Defendants argued in their principal brief, Plaintiffs' claim is unsupported by law and is contrary both to Supreme Court precedent and the history and traditions of the republic. But the legislature may still pass legislation regarding the time, place, and manner of elections to the extent that it does not intrude on the powers reserved by the people in their constitution.[4]

Because Plaintiffs claims fail on the merits, their complaint must be dismissed, regardless of whether they can establish standing.

CONCLUSION AND RELIEF REQUESTED

For these reasons, and the reasons stated in their principal brief, Defendants Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and Director of

[4] In support of the merits of their claim, Plaintiffs again argue they have a cause of action under § 1983 to pursue their Elections Clause claim. (ECF No. 19, PageID.252-54.) But the question of whether Plaintiffs have a cause of action to pursue their claim is entirely separate from whether they can succeed on the *merits* of that claim. That latter question is answered squarely by *ASL*.

Elections Jonathan Brater respectfully request that this Court grant Defendants' motion to dismiss pursuant to Fed. R. Civ P. 12(b)(1) and (6).

Respectfully submitted,

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Dated: February 16, 2024

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2024, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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