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QUESTIONS PRESENTED

Plaintiffs claim that the California constitutional provision limiting the number of Assembly members to 80 and the number of Senators to 40 violates their Equal Protection and other federal rights.

1. Is this a generalized grievance, so that plaintiffs or anyone else lacks standing to present it in federal court?

2. Is this a non-justiciable political question?

JURISDICTION

The District Court entered a final judgment of dismissal on November 29, 2018. **E.R. 7**. Appellants filed a timely notice of appeal on December 27, 2018. **E.R. 1**. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Plaintiffs are an organization, two municipalities, two political parties and several individuals who believe that California's scheme for apportioning legislative districts is constitutionally infirm because it dilutes the effectiveness of their votes relative to those of others, and perpetuates invidious discrimination by means of state constitutional provisions that cap the number of state legislators at 120, consisting of 80 members of the Assembly and 40 senators.

Limits on the size of the state legislature were first adopted by the 1849 California Constitution, and entrenched by the 1879 Constitution, for the purpose of securing and promoting supremacy of the white race over other races—Indians, Hispanics, Asians and Blacks.[1] They also magnify the power of the wealthy and privileged at the expense of the poor and underprivileged. The legislative caps have not changed in more than a century and a half, even though the state's population has grown from fewer than 100,000[2] to 40 million today. The number of constituents represented by each member of the Assembly has grown from fewer than 1,300 in 1854, Second Amended Complaint (SAC) ¶ 3.1, **E.R. 25**, to approximately 500,000 today.[3]

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[1] California's 1849 Constitution is online at http://tinyurl.com/ycbqqbf2. The 1879 Constitution is at http://tinyurl.com/y3ywawob. The current state Constitution is at http://tinyurl.com/yywhz8t8.

[2] The 1850 federal census set California's population at 92,597, although there are some doubts about its accuracy. California States Census, 1852, https://www.ancestry.com/search/collections/1852californiastatecensus/

[3] It is impossible to make a similar comparison as to state senate districts because, prior to this Court's ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964), California followed what was known as the Little Federal Model, which meant that no Senate district would include more than three counties and none would include less than one complete county. This changed in 1967 when Senate districts were redrawn to comply with *Reynolds*. As a consequence, each California state senator now represents a population roughly equivalent to that of Delaware.

This 80/40 legislative cap, plaintiffs contend, perpetuates the well-documented racism that has animated California's history. As a direct consequence, California's legislature today is sharply out of balance with the state's population, with votes of some races (predominantly whites) favored and voters of other races - Indians, Hispanics, Asians and Pacific Islanders, and Blacks disfavored.[4]

Plaintiffs brought this lawsuit in order to challenge this apportionment scheme as unconstitutional. Because resolution of such a claim requires a three-judge district court, they filed a notice requesting that such a court be convened pursuant to 28 U.S.C. § 2284. **E.R. 88.** The district court issued such an order. **E.R. 87.** However, the court subsequently withdrew that order, **E.R. 86,** and eventually granted defendant's motion to dismiss, concluding that plaintiffs lack of standing and present non-justiciable political questions. **E.R. 18.**

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[4] For example, as the complaint points out, Indians, who once dominated the population, have never been able to elect a single legislator in either the State Senate or Assembly. Whites, on the other hand, comprise only 38% of the population but make up approximately 78% of the Senate. Hispanics, which make up only a percent less of California's current population (37%) are able to elect only 12% of state senators. The same is also true, albeit to a lesser degree, for Asians and Blacks. This racial disparity is not as severe in the Assembly. SAC ¶¶ 3.28-3.31. **E.R. 33-34.** Consistent with plaintiffs' theory, the smaller disparity in the Assembly is a direct result of the fact that each Assembly member represents half the number of constituents than each senator.

Plaintiffs filed a Second Amended Complaint and renewed request for a three-judge court. **E.R. 19.** Defendant, once again, moved to dismiss, and the district court eventually granted the motion, concluding that plaintiffs lack standing because they present a generalized grievance, and that their claims raise non-justiciable political questions. **E.R. 18.** It is from this order that plaintiffs appeal.

SUMMARY OF THE ARGUMENT

1. The district court erred in concluding that plaintiffs lack standing because they have presented a generalized grievance. Plaintiffs claim that the system for apportioning state Senate and Assembly districts, frozen in place more than a century and a half ago, discriminates among voters on the basis of their race by favoring whites at the expense of other races. This is no more a generalized grievance than that in *Shaw v. Reno*, 509 U.S. 630, 643 (1993), *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998), and countless other cases. Further, they have standing to present their non-race-based claims under *Akins*, because the harm they have suffered is concrete, rather than "abstract and indefinite."

2. The district court also erred in concluding that plaintiffs have presented non-justiciable political questions. Plaintiffs' claim that they are the victims of a racially discriminatory apportionment scheme no more presents a political question than did *Gomillion v. Lightfoot*, 364 US 339 (1960), *Baker v. Carr*, 369 U.S. 186

(1962), and scores of other cases challenging districting schemes where the political question doctrine is seldom even raised anymore.

STANDARD OF REVIEW

This court reviews a district court's grant of a motion to dismiss for lack of subject matter jurisdiction de novo. *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015) (en banc).

ARGUMENT

California is a state born in sin. Established on territory forcibly taken from Mexico and the Indians, the new state was dominated politically and economically by bigots. The pre-statehood constitutional convention, held in 1849, "elimina[ted] the existing suffrage rights of all Native Americans, blacks, and non-white persons of Mexican descent, because they feared loss of control of California to non-whites. Art. II, § 1, expressly limited suffrage to ***only*** white males, including white male Mexicans who declared U.S. Citizenship." SAC ¶ 3.3, **E.R. 25-26**. "At its very first session, the California Legislature enacted an ironically named 'Act for the Government and Protection of Indians.' This statute was utilized to make Native Americans slaves . . . and to deprive them of basic human rights they had enjoyed prior to California's statehood." *Id.* ¶ 3.4, **E.R. 26.**

In 1851, the year after statehood, "California Gov. Peter Burnett declared that 'a war of extermination will continue to be waged . . . until the Indian race becomes extinct.' In 1852, U.S. Sen. John Weller—who became California's governor in 1858—told the U.S. Senate that California Indians 'will be exterminated before the onward march of the white man,' and argued that '*the interest of the white man demands their extinction*.' *Id.* ¶ 3.5, **E.R. 26.** "The State of California in the nineteenth century paid bounties for the scalps and severed heads of Native Americans." *Id.* ¶ 3.6, **E.R. 26.**

Non-white Mexicans, Asians and Blacks fared little better. Though not hunted down like animals, they were the targets of concerted efforts to drive them out of the body politic and, where possible, the state itself. "As a group, non-white Mexicans were denied citizenship and serious efforts were made to remove them from the state and the United States." *Id*. ¶ 3.8, **E.R. 27.** In its first session, the California legislature adopted An Act Concerning Crime and Punishment which contained the following provision: "No black or mulatto person, or Indian, shall be allowed to give evidence in favor of, or against any white person. Every person who shall have one eighth or more of Negro blood shall be deemed a mulatto, and every person who shall have one half of Indian blood shall be deemed an Indian." Statutes of California, Ch. 99, §14 (1850), p. 230. http://tinyurl.com/yyeum6bt.

In *People v. Hall*, 4 Cal. 399 (1854), the California Supreme Court ruled in favor of "a free white citizen of this State, [who] was convicted of murder upon the testimony of Chinese witnesses." *Id.* at 399. In letting Hall get away with murder, Chief Justice Hugh Murray disclosed much about California attitudes towards non-whites and their participation in democratic governance:

> It will be observed, by reference to the first section of the second Article of the Constitution of this State, that **none but white males can become electors**, except in the case of Indians, who may be admitted by special Act of the Legislature. On examination of the Constitutional debates, it will be found that not a little difficulty existed in selecting these precise words, which were finally agreed upon as the most comprehensive that could be suggested to exclude all inferior races.
>
> . . . .
>
> The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; **whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point**, as their history has shown**;** differing in language, opinions, color, and physical conformation; **between whom and ourselves nature has placed an impassable difference**, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, **but the further privilege of participating with us in administering the affairs of our Government.**
>
> **These facts** were before the Legislature that framed this Act, and **have been known as matters of public history to every subsequent Legislature.**

4 Cal. at 404-05 (emphasis added).

In the period between the 1849 and 1879 constitutional conventions, anti-Chinese animus was particularly virulent. The Workingmen's Party, one of the state's three major parties, issued its Manifesto just two years before the 1879 convention, declaring that "the Chinaman must leave our shores" and "[t]o an American, death is preferable to life on par with the Chinaman." SAC ¶ 3.11, **E.R. 27-28** (quoting Winfield J. Davis, *History of Political Conventions in California 1849-1892,* 368-69 (1893) (ch. XXVII, 1877--Workingmen's Party and the Kearney Excitement)). One in three delegates to the 1879 constitutional convention was a Workingmen's Party member. *Id.* ¶3.12, **E.R. 28.**

In the decades between the 1849 and 1879 constitutional conventions, the white oligarchy that ran the state adopted laws entrenching its own political power and minimizing or eliminating any political power that existed or could be developed by racial minorities. Some laws, like the one considered by the Supreme Court in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), were "fair on [their] face and impartial in appearance, yet . . . applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . ." *Id.* at 373-74. Other laws, like the ones struck down by the California Supreme Court in *Lin Sing v. Washburn*, 20 Cal. 534 (1862), were overtly animated by "hostility to the Chinese and an intention to banish them from the country." *Id.* at 538-39.

There can be no doubt that California's earliest history is permeated with legal and extra-legal efforts to entrench the political and economic power of the white race, to the exclusion of all others.

The 1849 California Constitution first initiated the legislative cap as part of its limitation on suffrage to white males. 1849 California Constitution, Art. IV, § 29. This was a sharp break with the past, where minorities were allowed to vote and hold public office, including governor and mayor of Los Angeles. SAC ¶ 3.24, **E.R. 32.** The cap was then re-adopted in the 1879 Constitution, 1879 California Constitution, Art. 4, § 5, and remains, largely unchanged, in the state's current constitution. California Constitution, Art. 4, § 2.

California's Founders had good reason to believe that this simple formula would accomplish their nefarious purpose: As population shifted over time, a minority group might become a majority group within particular districts, and thereby gain voices in the legislature. But gaining a majority in the district becomes more difficult as the district becomes more populous. Small geographic units such as villages, towns or neighborhoods, might become minority dominated in a few years, but accomplishing a demographic conversion of a large district could take many decades; the more populous the district, the longer it would take. Automatically increasing the population size of a district makes it increasingly

more difficult for minorities to gain political control. The evil genius of the 80/40 formula is that it keeps increasing the size of each district over time, consistent with population growth, concomitantly increasing the difficulty of minorities in gaining a voice in the legislature.

There is nothing unusual or ground-breaking in presenting a discrimination claim based on events that occurred long ago. The Supreme Court has recognized that legal measures designed to entrench racist attitudes will continue to serve their invidious purpose long after the state's political establishment ceases to be overtly racist. This is because legal measures continue to have force even after the animus that spawned them may have dissipated. The Supreme Court considered such a measure in *Hunter v. Underwood*, 471 U.S. 222 (1985). The measure there in question, adopted as part of the 1901 Alabama Constitution, "disenfranchise[ed] persons convicted of, among other offenses, 'any crime . . . involving moral turpitude.'" *Id*. at 223. "The District Court found that disenfranchisement of blacks was a major purpose for the convention at which the Alabama Constitution of 1901 was adopted, but that there had not been a showing that 'the provisions disenfranchising those convicted of crimes [were] based upon the racism present at the constitutional convention.'" *Id.* at 224-25. The Eleventh Circuit reversed, finding that the crimes included in the disenfranchisement provision "were believed by the delegates to be more frequently committed by blacks." *Id.* at 227.

The Supreme Court affirmed: "Presented with a neutral state law that produces disproportionate effects along racial lines, the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 227. Justice Rehnquist's unanimous opinion recognized that "[p]roving the motivation behind official action is often a problematic undertaking." *Id.* at 228. Nevertheless, "evidence of legislative intent available to the courts below consisted of the proceedings of the convention, several historical studies, and the testimony of two expert historians." *Id.* at 229. This evidence "showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* "Having reviewed this evidence," the Supreme Court concluded, "we are persuaded that the Court of Appeals was correct in its assessment." *Id.*

Like the plaintiffs in *Hunter*, plaintiffs here allege that the 80/40 apportionment scheme was adopted by the people controlling California's two constitutional conventions with the express purpose of maintaining the political power of the dominant elite, consisting of wealthy whites, and effectively disenfranchising Hispanics, Blacks, Asians and Indians. At the time, California's population was less than 100,000 people—about the size of today's Boulder, Colorado. While the state's population has grown 400-fold, wealthy whites

continue to control the state's politics. Plaintiffs have so alleged in their complaint and stand ready to prove it at trial. They merely ask for an opportunity to do so.

I. The District Court Erred in Concluding that Plaintiffs Present a Generalized Grievance

The district court dismissed plaintiffs' complaint under the mistaken impression that it presents a "generalized grievance" that affects all California citizens equally, so that plaintiffs' "injury is not distinct from that suffered in general by other taxpayers or citizens." District Court's Order Dismissing Second Amendment Complaint ("Dismissal Order") at 6, **E.R. 13**, (quoting *Hein v. Freedom From Religion Found., Inc*., 551 U.S. 587, 598 (2007) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989))). The district court is mistaken. *Hein* and *ASARCO*, from which this language was plucked, are inapposite because they both involved harms growing from the alleged misuse of government resources. *Hein* was a taxpayer standing case where the issue was whether the "narrow exception" for taxpayer standing recognized in *Flast v. Cohen*¸392 U. S. 83 (1968), should be broadened to include a challenge to executive action (rather than, as in *Cohen*, use of congressional appropriations). The harm alleged by the *Hein* plaintiffs consisted of misuse of taxpayer dollars for what they claimed were unconstitutional activities, rather than the activities themselves. Such harm is, by hypothesis, undifferentiated from that suffered by other taxpayers. *ASARCO* is cut

from the same cloth. The case (insofar as relevant here) involved a state-court challenge to a state statute governing mineral leases which, plaintiffs claimed, violated federal law and "result[ed] in unnecessarily higher taxes." 490 U.S. at 614. The Supreme Court concluded that the plaintiffs would not have had standing to bring the case in federal court.[5]

The other two cases on which the district court relied, *Lance v. Coffman*, 549 U.S. 437 (2007) and *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) also involved taxpayer and/or citizen standing. The claim in both cases was, not that the activity in question harmed plaintiffs but, rather, that they were harmed by the government's use of public resources to engage in allegedly unconstitutional activities.

Cases where the harm alleged consists of misuse of government resources present intractable redressability problems (detailed by the Court in *ASARCO*, 490 U.S. at 614-17) and must therefore be dismissed for lack of standing, unless they fall under the "narrow exception" of *Flast. But see Hein,* 551 U.S. at 637 (Scalia, J., dissenting) ("*Flast* should be overruled.") Plaintiffs' is not such a case. The injuries they claim flow directly from the challenged apportionment scheme, not

[5] In a second part of its standing analysis, the Supreme Court concluded that petitioners *did* have standing to petition the Court itself because the adverse judgment below had caused them a concrete injury. 490 U.S. at 617-24.

because California is expending resources on those activities. Specifically, plaintiffs here claim that this ostensibly neutral apportionment scheme actually discriminates against minorities, including racial minorities, much as in *Hunter v. Underwood*. *See supra* pp. 10-11.

The Supreme Court has reached the merits of many cases where plaintiffs' injuries were shared by the public at large, or at least by all eligible voters. Consider these examples:

Poll taxes: In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court overturned Virginia's poll tax, which was imposed on *all* voters. The Court held that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.* at 668. Even though the law "'was born of a desire to disenfranchise'" black people, *id*. at 666 (quoting *Harman v. Forssenius*, 380 U.S. 528, 543 (1965)), every voter in the state was subject to the tax and could assert a claim. The Supreme Court adjudicated the dispute on the merits; neither majority, nor concurring, nor dissenting opinions raised lack of standing as an obstacle. The district court does not explain why the plaintiffs in *Harper* had standing to object to the universally-applicable poll tax, but the plaintiffs here lack standing, even though the court recognized that the

claimed "injury may be felt differently by certain minority populations." District Court Order at 8, **E.R. 15.**

Challenges to census results that affect legislative apportionments: In *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), voters from several states had standing to challenge the planned use of statistical sampling for the upcoming census. Voters in Indiana would suffer cognizable injuries because the sampling technique was "virtual[ly] certain" to cost the state a seat in the House of Representatives. *Id.* at 330. The Court concluded that these voters had standing because they were "asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Id.* at 331–32 (quoting *Baker v. Carr*, 369 U.S. at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939))).

The district court tried to distinguish *Department of Commerce* by pointing out that, although the same sampling technique would be used nationwide, its *effect* would be to "dilute[e] every Indiana resident's vote relative to voters in other states." Dismissal Order at 8, **E.R. 15.** But this is not a distinction; it's a parallel. In our case, as in *Department of Commerce*, plaintiffs are claiming that a methodology applied equally to all voters dilutes the value of their votes vis-à-vis those of other voters. In *Department of Commerce* it was Indiana voters vis-à-vis

voters in the rest of the country; in our case it is Indian and other minority voters vis-à-vis white voters.

Department of Commerce holds that voters who claim that a universally-applicable mechanism used in apportionment actually discriminates against them, have standing to challenge that mechanism. Ours is an a fortiori case. In *Department of Commerce* the challenged mechanism was the method of counting constituents, which indirectly affected the apportionment process. In our case, it is the archaic 80/40 apportionment formula itself which perpetuates the white supremacist regime that disgraced the early decades of California politics.

Racial gerrymandering: Racial gerrymanders violate the Equal Protection Clause whether they are "explicit," *Shaw v. Reno*, 509 U.S. 630, 643 (1993), or covert. Such gerrymanders "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id*. at 643. *Any voter* in such districts has standing to sue, including whites, because the stigmatization and racial discord resulting from race-based redistricting affects everyone. *See Miller v. Johnson*, 515 U.S. 900, 909 (1995) (white voters could sue to invalidate congressional districts designed to increase black representation); *United States v. Hays*, 515 U.S. 737, 744-45 (1995) (any resident of a district drawn by "racial criteria . . . has standing to challenge the legislature's action").

The district court dismissed the relevance of racial gerrymandering, poll-tax and whites-only primary cases on the ground that, in those cases, the government "arbitrarily den[ied] racial minorities their right to vote compared to other citizens." District Court Order at 8, **E.R. 15.** But plaintiffs here are making the same claim: They are arbitrarily denied their right to a vote of equal weight to that of other citizens. The only difference is that California has come up with a subtler mechanism for achieving this unconstitutional result. Whether plaintiffs are able to prove that the 80/40 apportionment plan discriminates against minorities is a matter to be decided at trial. For purposes of standing, it suffices that they *claim* to be victims of discrimination and have articulated a non-frivolous theory as to why this is so.

Facial challenges under First Amendment overbreadth doctrine: The purpose behind the overbreadth doctrine is to avoid chilling the public's free expression. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003). If a law limiting speech is substantially overbroad, it "may not be enforced against anyone . . . ." *Brockett v. Spokane Arcades*, 472 U.S. 491, 503 (1985). In asserting that a law is "'incapable of any valid application,'" *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)), the challenger stands for every person in the jurisdiction. Nevertheless lack of standing is not an obstacle.

Suits seeking information for the public benefit: Government agencies often are required to release information on request. *Any* member of the public has standing to seek such disclosure. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) (denial of public records request "constitutes a sufficiently distinct injury to provide standing to sue.").

Laws requiring private parties to disclose information present similar standing issues. In *FEC v. Akins*, voters claimed that the American Israel Public Affairs Committee was required to disclose the names of its donors. The Supreme Court considered whether these plaintiffs had standing to vindicate an "informational injury," 524 U.S. at 24, even though their grievance was "shared in substantially equal measure by all or a large class of citizens." *Id*. at 23 (quoting Brief for Petitioner 28 (quoting *Warth v. Seldin*, 422 U. S. 490, 499 (1975))).

The district court below dismissed *Akins* on spurious grounds: "*Akins* dealt with standing that was specifically provided by the Federal Election Campaign Act . . . . Here, because there is no statutorily-prescribed right to sue, *Akins* does not support finding plaintiffs have standing to pursue this case." Dismissal Order at 7-8, **E.R. 14-15**. But whether there is congressional authorization to sue has no bearing on whether an injury is generalized or particular. Congress may confer

rights but it cannot, by waving a legislative wand, turn a generalized grievance into a particularized grievance for constitutional purposes.

Indeed, the Supreme Court in *Akins* said nothing about the fact that the right in question was granted by Congress when addressing the FEC's "generalized grievance" argument. *See Akins*, 524 U.S. at 23-25. The Court, rather, focused on whether the claimed harm is abstract and indefinite (in which case there would not be standing) or concrete (in which case there would be standing, even though the harm is widespread). The Court's cogent discussion of this distinction merits quoting in full:

> Whether styled as a Constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance. *Warth, supra,* at 500 . . . .
>
> The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature--for example, harm to the "common concern for obedience to law." *L. Singer & Sons* v. *Union Pacific R. Co*., 311 U. S. 295, 303 (1940) . . . . Cf. *Lujan, supra*, at 572-578 (injury to interest in seeing that certain procedures are followed not normally sufficient by itself to confer standing); *Frothingham, supra*, at 488 (party may not merely assert that "he suffers in some indefinite way in common with people generally"); *Perkins* v. *Lukens Steel Co*., 310 U. S. 113, 125 (1940) (plaintiffs lack standing because they have failed to show injury to "a particular right of their own, as distinguished from the public's interest in the administration of the law"). The abstract nature of the harm--for example, injury to the interest in seeing that the law is obeyed--deprives the case of the concrete specificity that

> characterized those controversies which were "the traditional concern of the courts at Westminster," *Coleman*, 307 U. S., at 460 (Frankfurter, J., dissenting); and which today prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion. . . .
>
> Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found "injury in fact." See *Public Citizen*, 491 U. S., at 449-450 ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure ... does not lessen [their] asserted injury"). Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an "injury in fact." This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), **or where large numbers of voters suffer interference with voting rights conferred by law**. . . . We conclude that, similarly, the informational injury at issue here, directly related to **voting**, **the most basic of political rights,** is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of Constitutional power to authorize its vindication in the federal courts.

Akins, 524 U.S. at 23-25 (emphasis added; some citations omitted).

This disquisition, overlooked by the district judge, could have been written with our case in mind. First, the Court explains that "generalized grievance" has less to do with how widespread the harm is, and more with whether the harm is abstract or concrete. Plaintiffs' alleged harm—the dilution of their voting power vis-à-vis other citizens—is certainly concrete; it is not a "common concern for

obedience to law" or "the public's interest in the administration of the law." Plaintiffs claim, in sum, is that their individual rights to cast a meaningful vote has been undermined by California's constitutional contrivance which, for 170 years, has been squeezing ever more voters into a tiny number of legislative districts.

Second, *Akins* explains that the availability of a political forum which "may be more readily available" to correct the grievance—in our case the theoretical possibility that the state Constitution might be amended to increase the number of legislative districts—"does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'" 524 U.S. at 24.

Third, and perhaps most telling, the Court singled out an "interest related to voting" as "the most basic of political rights," and noted, among the types of cases where standing will not be lacking, those "where large numbers of voters suffer interference with voting rights conferred by law . . . ." *Id.* at 35.

Elsewhere in its order, the district court faults plaintiffs for "defin[ing] 'minority groups' so broadly that the . . . grievance identified is shared by virtually all Californians. Specifically, the impacted minorities include voters of Asian descent, of Hispanic descent, and of African descent; voters that live in 'more sparsely populated areas of the state'; voters with certain 'minority' political

views; and voters who are 'not wealthy.'" Dismissal Order at 6, **E.R. 13**. It is true that plaintiffs present a number of legal theories pursuant to which various minority groups are suffering discrimination because of the 80/40 apportionment scheme. But, even if all those groups are aggregated—and we disagree strongly that they can be[6]—they certainly include nowhere near every Californian. Millions of white, well-to-do Californians—those who are the beneficiaries of the current apportionment system and therefore hold a disproportionate share of political power—are excluded from the plaintiff class. Standing must be determined on a claim-by-claim basis because it is the claim that ultimately determines the potential scope of relief and thus whether the grievance is concrete or generalized. None of plaintiffs' claims encompasses more than a fragment of California voters.

Finally, even if the district court were right and some of plaintiffs' claims could be raised by virtually every California voter, it wouldn't matter. Under the modern theory of generalized grievance articulated by the Supreme Court in *Aikin*, the question is not how many are aggrieved but whether the controversy is abstract or concrete. Plaintiffs are not seeking "what would, in effect, amount to an advisory opinion." *Aikin*, 524 U.S. at 24.

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[6] For example, Count Two of the complaint is brought only on behalf of all non-white plaintiffs, thus excluding the entire white population of California—some 15 million people. **E.R. 37.**

This, then, is the crux of our disagreement with the district court: Plaintiffs believe that standing is not an impediment to challenging a law of general applicability that is facially neutral but in practice disadvantages certain groups of voters. This is the teaching of cases going back at least to *Baker v. Carr*, 369 U.S. at 211, which also involved a law of general applicability written in neutral terms that, with the passage of time, had disparate effects on different groups of voters. Our case is a fortiori because the scheme first adopted by California in 1849 was not neutral to begin with; it was meant to discriminate from the start. The passage of time has perpetuated the discriminatory effect and perhaps exacerbated it. The grievance is not hypothetical, nor is it an abstract interest in the proper functioning of the law. Plaintiffs are seeking, at long last, an apportionment scheme that will give them their full share of political participation. The district court erred grievously by concluding they lack standing.

II. The District Court Erred in Concluding that Plaintiffs Present a Political Question

The answer to whether plaintiffs present a nonjusticiable political question begins and largely ends with the Supreme Court's magisterial opinion in *Baker v. Carr*. As this Court doubtless will recall, *Baker* (like our case) involved a challenge to the apportionment scheme for a state legislature, there called the General Assembly. *Id.* at 187. Plaintiffs in *Baker* (like plaintiffs here) claimed

that they "and others similarly situated, [we]re denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes . . . ." *Id.* at 188. And (like the district court below), the *Baker* district court dismissed, inter alia, "because the matter [wa]s considered unsuited to judicial inquiry or adjustment," which the Supreme Court characterized as "a failure to state a justiciable cause of action." *Id.* at 196. *Baker* noted that the district court "went on to express doubts as to the feasibility of the various possible remedies sought by the plaintiffs," *id*. at 197—very much like the district court below. Dismissal Order at 10, **E.R. 17.**

After confirming that any claim based on the Guarantee Clause would, indeed, be nonjusticiable, 369 U.S. at 220-29,[7] the Court pointed to a number of its cases presenting "claims of Constitutional deprivation which are amenable to judicial correction," and noted that "this Court has acted upon its view of the merits of the claim." *Id.* at 229.

Prominent among those cases is *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), where the Court "applied the Fifteenth Amendment to strike down a redrafting of municipal boundaries which effected a discriminatory impairment of voting rights,

[7] Plaintiffs concede that their Guarantee Clause claim, Count 6, **E.R. 40**, is nonjusticiable and this Court should affirm its dismissal.

in the face of what a majority of the Court of Appeals thought to be a sweeping commitment to state legislatures of the power to draw and redraw such boundaries." *Baker*, 369 U.S. at 229. The plaintiff in *Gomillion* challenged a law passed by the Alabama legislature "which alter[ed] the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure," which had the effect of "remov[ing] from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident." *Gomillion*, 364 U.S. at 341. While recognizing that the legislature has plenary power in setting municipal boundaries, the Court held that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344-45. The Court also held that plaintiffs' claims that the legislature's action "deprives them of their votes and the consequent advantages that the ballot affords[,] . . . lift this controversy out of the so-called 'political' arena and into the conventional sphere of Constitutional litigation." *Id*. at 346-47 (quoted in *Baker*, 369 U.S. at 231).

This has been the law for over half a century since *Baker* and *Gomillion*; the argument that challenging an apportionment scheme presents a political question is seldom even raised anymore. *See, e.g. Shaw v. Reno*, 509 U.S. 630 (1993) (racial gerrymandering); *Rogers v. Lodge*, 458 U.S. 613 (1982) (vote dilution); *White v. Regester*, 412 U.S. 755 (1973)(same). With the notable exception of the political

gerrymandering cases, discussed below, *see infra* pp. 27-28, counsel is aware of only two Supreme Court districting cases since *Baker* where the political question doctrine was even raised, *Wesberry v. Sanders* and *Department of Commerce v. Montana*, both of which rejected the claim. *Wesberry*, 376 U.S. 1, 4 n.3 (1964); *Department of Commerce*, 503 U.S. at 456-59. Nor did the district court below cite any such cases. Rather, the cases on which it relied contradict its conclusion.

In *Miller v. Johnson*, 515 U.S. 900 (1995), which the district court quoted for the proposition that "districting decisions 'implicate a political calculus in which various interests compete for recognition,'" Dismissal Order at 10, **E.R. 17,** the Court nevertheless affirmed the district court's finding that the apportionment plan drawn by the legislature violated the Constitution because it relied on racial classifications. How a case that reaches the merits of the constitutional claim can support the proposition that such a claim is nonjusticiable, the district court does not explain.

The district court also cited to *Holder v. Hall*, 512 U.S. 874 (1994), but that case cuts the wrong way. *Holder* considered "whether the size of a governing authority is subject to a vote dilution challenge under § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973." *Id.* at 876. The Court resolved this statutory claim on the merits, something it could not have done, had the case presented a political

question. The Court then "remanded for consideration of respondents' constitutional claim." *Id*. at 885. Had the Court thought that the constitutional claim presented a political question, it would have dismissed it rather than remanding it for consideration.

Finally, the district court relied on *Vieth v. Jubelirer*, 541 U.S. 267 (2004)**Error! Bookmark not defined.**, a political gerrymandering case. *Vieth* is, of course, under reconsideration in *Virginia House of Delegates v. Bethune-Hill*, No. 18-281 (oral argument held March 18, 2019), thus it is probably unwise to waste much space discussing it.[8] Nevertheless, Justice Scalia's plurality in *Vieth* is pellucid: *political* gerrymandering cases are sui generis and thus teach little about the justiciability of ordinary types of districting cases, such as those involving *racial* gerrymandering. Districting to achieve political goals is "a lawful and common practice," whereas "the purpose of segregating voters on the basis of race is not a lawful one . . . ." 541 U.S. at 286. Moreover, determining whether there has been racial discrimination is relatively easy, as it involves consideration of "three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts; whereas requiring judges

[8] Depending on the outcome, appellants may seek leave to file a supplemental brief addressing *Bethune-Hill*.

to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon." *Id.* at 290.

None of these considerations implicate our case. We claim is that the facially-neutral 80/40 legislative caps, like the poll tax in *Harper*, the failure to re-district despite vast demographic shifts in *Baker* and the facially neutral (but transparently racist) redrawing of the city boundaries in *Gomillion,* violate substantive constitutional guarantees and are therefore unlawful. Nothing in *Veith* undermines plaintiffs' right to present such a claim to the federal courts, and it's hard to imagine that *Bethune-Hill* will say anything different. Plaintiffs are not claiming that the current system favors one political philosophy or party; indeed, plaintiffs have sharp *political* differences among themselves. What they do agree on is that the current apportionment system in California undermines the constitutional rights of multiple minorities to fair and equal representation in the state legislature.

Finally, the district court went astray by focusing on the *remedy* plaintiffs propose—increasing the number of legislative districts—rather than the rights they seek to have vindicated. The district court pointed out that determining the proper number of districts is a quintessentially legislative question that the federal courts

are ill equipped to answer. District Court Order at 10, **E.R. 17.** But in order to survive a justiciability challenge, plaintiffs need show only that they are asserting rights that are judicially cognizable. Or, as the Supreme Court put it in *Baker*, "[b]eyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, *it is improper* now to consider what remedy would be most appropriate if appellants prevail at the trial." 369 U.S. at 198 (emphasis added).

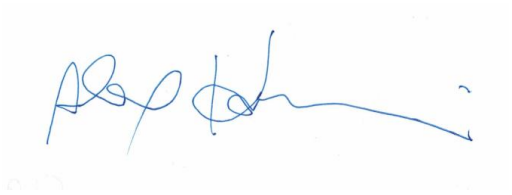
There is "no cause . . . to doubt" that the district court here can fashion a remedy. Plaintiffs, it will be recalled, are claiming that a particular provision in the California Constitution denies them their federal constitutional rights. Assuming they prevail on one or more of their claims, there is an easy remedy the district court could impose without the need to exercise political (or any) judgment, rely on the advice of experts or weigh the equities: declare that the legislative cap in Art. 4, § 2 of the California Constitution violates the U.S. Constitution. It would then be up to the state's public officials to come up with an apportionment scheme that meets constitutional standards. California officials proved equal to the task when it became clear that the existing scheme violated the one-person-one-vote principle. *See supra* n.3. There is no reason to doubt that they can do it again.

Plaintiffs have requested such a limited remedy. SAC ¶ 10.1, **E.R. 42.** Of course, plaintiffs would prefer a more elaborate remedy, one that invokes the district court's supervision and equity powers, but there is no need to explore that possibility at this time. Indeed, according to *Baker v. Car*, "it is improper" to do so. Having determined that *some* remedy for the alleged constitutional violation is possible without the exercise of political judgment, the inquiry as to remedies must be postponed to a later stage of the ligation, after a constitutional violation has been found.

CONCLUSION

This court must vacate the district court's order and remand with instructions that the district judge reinstate the Second Amended Complaint and issue an order pursuant to 28 U.S.C. § 2284 calling for the convocation of a three-judge court.

Respectfully submitted,



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STATEMENT OF RELATED CASES

Appellant is unaware of any related cases pending in the Ninth Circuit.

CERTIFICATE OF COMPLIANCE

I certify that his brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 7,082 words, excluding those portions of the brief required by FRAP 32(f). The brief's typeface and type styles comply with FRAP 32(a)(5) and (c).

ALEX KOZINSKI