No. 24-1413

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants,

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; JONATHAN BRATER, In His Official Capacity as Director of Elections, or His Successor,

Defendants-Appellees.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Jane M. Beckering

BRIEF FOR DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants have requested oral argument. Defendants-Appellees Michigan Governor Gretchen Whitmer, Michigan Secretary of State Jocelyn Benson, and Michigan Director of Elections Jonathan Brater believe that oral argument is unnecessary for the Court to decide the issues presented in this appeal of the District Court's well-reasoned opinion because the issues raised in this appeal are resolved by established law.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this appeal from a final decision of a district court under 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED

1. The U.S. Supreme Court and this Court have held that individual legislators lack standing to challenge alleged restraints imposed on the legislature as a body. Here, without authorization from either chamber of the Michigan Legislature, two state senators and nine state representatives challenged voter-initiated amendments to the Michigan Constitution as violating the Elections Clause of the U.S. Constitution. Did the District Court correctly conclude that the individual state legislators lack standing?

INTRODUCTION

This case—brought by two state senators and nine state representatives, and without the authority or consent of either of their respective chambers—seeks to establish in American jurisprudence a new doctrine, under which citizens would be prohibited from proposing and enacting constitutional amendments that bear on the time, place, or manner of elections. Rather than deriving their legislative power from the constitutions adopted by the people and with the consent of the people, these state legislators lay claim to a power over the people and beyond them—only *they* should get to decide how elections will be held, and the people should have no power to decide such matters for themselves.

While the conceit implicit in these claims and arguments is noteworthy, this Court cannot reach the merits. Controlling case law instructs that individual state legislators, like Plaintiffs here, lack Article III standing to assert an Elections Clause claim without the authorization of the legislature itself or at least enough members to constitute a controlling faction. Plaintiffs do not assert that either of those exceptions to the rule against legislator standing apply here.

Accordingly, the District Court correctly dismissed Plaintiffs' Elections Clause claim for lack of standing.

But that's only one of the jurisdictional defects in this suit. Plaintiffs' challenge to Michigan voters' past use of the proposal process to amend their constitution in a manner that regulates federal elections is not redressable because the Michigan Legislature has independently enacted statutes codifying those same regulations into the Michigan Election Law. Thus, Plaintiffs' request for relief against past use of the proposal process is not redressable. Meanwhile, Plaintiffs' request for relief against *future* use of the proposal process to enact similar regulations is hopelessly speculative.

The Court should affirm.

STATEMENT OF THE CASE

Michigan's Proposal Process and Its Use in 2018 and 2022

Article XII, § 2 of the Michigan Constitution provides that "Amendments may be proposed to this constitution by petition of the registered electors of this state." Mich. Const. 1963, Art. XII, § 2. Such petitions are required to be signed by registered electors of the state equal to at least 10 percent of the total vote cast for all candidates for

governor in the last preceding election. *Id.* A petition that is determined to have a sufficient number of signatures is submitted to the electors at the next general election. *Id.* If the proposed amendment is approved by a majority of the electors voting on the question, it becomes part of the state constitution. *Id.* Michiganders are quite familiar with this process. Since ratification of the 1963 Constitution, they have proposed 35 constitutional amendments.[1] They also take a discerning approach to this responsibility: during that period, the voters rejected more than a quarter of the proposals submitted to them.[2]

Pursuant to this process, voters amended article II of the Michigan Constitution through passage of Proposal 3 of 2018 and Proposal 2 of 2022 (the "2018 and 2022 Amendments"). The vast majority of these amendments consisted of significant additions to

[1] See Initiatives and Referendums under the Constitution of the State of Michigan of 1963, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/Initia_Ref_Under_Consti_1208.pdf?rev=4d40debac96d42feb2f6ee9a0b2580be (accessed August 27, 2024).

[2] *Id.*

article II, § 4 that clarified various voting-related rights.[3] The 2018 Amendment provide rights to a secret ballot, ballot access for military and overseas voters, straight-ticket voting, automatic registration, registration by mail before the 14th day before an election, in-person registration with appropriate identification, absent voting without cause, and an election audit. (R. 4, PageID.24-2.)[4] The 2022 Amendment clarified the scope of the Michigan Constitution's "fundamental right to vote" and provided additional voting-related rights, including having one's absent-voter ballot counted so long as it is postmarked by election day and received within 6 days of election day, as well as the rights to prove one's identity through various means, to pre-paid ballot return envelopes, and to secure absent-ballot drop-boxes.

[3] Compare the version of Article II, § 4 as adopted by the people in 1963, see michiganconstitution1963asratified.pdf, with its amended version, see mcl-Article-II-4.pdf (mi.gov) (accessed January 8, 2024).

[4] The ballot language was approved by the Board of State Canvassers, September 7, 2018, meeting minutes, Board of State Canvassers, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Meeting-Minutes/Sep-07-2018-BSC-Meeting-Minutes.pdf?rev=0297354945fa48da8a3c52c9301e8509&hash=361CA4A274F04E27DB2BCCD4BDAF780A (accessed August 27, 2024).

(R. 4, PageID.26-29.)[5] The voting-related rights identified and clarified by the 2018 and 2022 Amendments at issue in this case are "self-executing," Mich. Const. 1963, Art. II, § 4(1), meaning no implementing legislation was needed for their enforcement.

Relevant Legislation Enacted by the Legislature

Separate and independent of the 2018 and 2022 Amendments, in the past six years the Michigan Legislature has passed more than 20 statutes codifying (and expanding upon) the very same rights set forth in those constitutional amendments. (*See* R. 16-2, PageID.208-210, List of Enacted laws.) For example, 2018 PA 603 eliminated statutory language requiring an absent voter to provide a reason for their request to vote absentee, in line with the 2018 constitutional amendment providing for no-reason absentee voting. Also, 2023 PA 82 requires clerks to provide pre-paid postage with ballot return envelopes, consistent with the right created through the 2022 constitutional

[5] The ballot language was approved by the Board of State Canvassers, August 31, 202, meeting minutes, Board of State Canvassers, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Meeting-Minutes/Aug-31-2022-BSC-Meeting-Minutes.pdf?rev=46ac4a4b95854ddebab717ffb6a39304&hash=EEFBCE56AF66A2A9E7D4F4D6564C1234 (accessed August 27, 2024).

amendment. Those statutes were enacted in accordance with the normal legislative process and are currently in effect. *Id.*; Mich. Const. 1963, Art. IV, § 27.

Procedural History

Plaintiffs-Appellants Michigan Senators Jonathan Lindsey and James Runestad, and Michigan Representatives James DeSana, Rachelle Smit, Steve Carra, Joseph Fox, Matt Maddock, Angela Rigas, Josh Schriver, Neil Friske,[6] and Brad Paquette are all Michigan state legislators. (R. 1, Compl., PageID.4, ¶14.) Plaintiffs have never claimed in this litigation that the Michigan Legislature has authorized them to bring this suit.

On September 28, 2023, Plaintiffs filed this lawsuit against Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and Director of Elections Jonathan Brater (State Defendants), seeking a declaration that the U.S. Constitution's Elections Clause invalidates any use of Michigan's voter-initiated ballot proposal process to regulate the time, place, or manner of any federal election, including voting-

[6] Representative Friske did not win the August 6, 2024 primary; his status as a state legislator will end at 11:59 p.m. on December 31, 2024.

related proposals enacted by voters in the 2018 and 2022 general elections. (R. 1, PageID.15, ¶¶ 1, 3.) Plaintiffs contended that the use of voter-initiated constitutional amendments to govern the conduct of elections violated their rights as state legislators under the Elections Clause. (R. 1, PageID.2-3, ¶4.)[7] They also sought an injunction barring these state officials from "funding, supporting, or facilitating" the implementation of those constitutional amendments approved by the voters in 2018 and 2022 to the extent they regulate federal elections, as well as any future use of the voter-initiated ballot-proposal process to the extent it might result in regulation of the time, place, or manner of any federal election. (R. 1, PageID.15.)

The State Defendants moved to dismiss the complaint, arguing that individual legislators lacked standing and that controlling precedent rejects the merits of their claims. (R. 15, PageID.173-175; R. 16, PageID.176-210.) The District Court dismissed the complaint, explaining that "the Supreme Court and the Sixth Circuit have directly

[7] The legislators also claimed injury as voters and taxpayers, but they have not raised those claims in this appeal.

rejected this type of 'legislator standing.'"[8] (R. 25, PageID.307-309.) Because the court concluded that Plaintiffs lacked standing, the court did not consider the merits of Plaintiffs' claim.

STANDARD OF REVIEW

This Court reviews a district court's order dismissing an action for lack of subject matter jurisdiction *de novo*. *Gerber v. Herskovitz,* 14 F.4th 500, 512 (6th Cir. 2021). In reviewing a determination of standing, this Court considers "the complaint and the materials submitted in connection with the issue of standing." *Id.* (quoting *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 729 (6th Cir. 2009)).

Whether a party has Article III standing is properly an issue of a court's subject matter jurisdiction under Rule 12(b)(1). *See Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017). Unlike a motion to dismiss for failure to state a claim under Rule 12(b)(6), "where subject matter jurisdiction is challenged under Rule 12(b)(1)[,] . . . the plaintiff has the

[8] The District Court's opinion held that the legislators lacked standing as legislators, as voters, and as taxpayers. In this appeal, the legislators address only their standing as legislators.

burden of proving jurisdiction in order to survive the motion." *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (quoting *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir. 1986)) (emphasis omitted).

SUMMARY OF ARGUMENT

The District Court correctly concluded that Plaintiffs lack Article III standing to bring this suit via their capacity as individual legislators. Plaintiffs' sole claim is that the use of Michigan's proposal process to enact federal-election regulations "usurp[s] their legislative power under the Elections Clause." (R. 1, PageID.3.) But the "rule against legislative standing" set forth in controlling case law could not be clearer: individual state legislators, like those 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). Because Plaintiffs allege nothing

suggesting that either of those exceptions applies in this case, they lack Article III standing.

As decisions of the Supreme Court and this Court make clear, violations of the Elections Clause impose neither concrete nor particularized injuries upon individual legislators. Such violations are "abstract and widely dispersed" among the legislative body, preventing any individual legislator from "claim[ing] a 'personal stake' in [such a] suit" and rendering their alleged injury "'[in]sufficiently concrete' to establish Article III standing." *Tennessee*, 931 F.3d at 514 (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)).

Recognizing that their suit runs headlong into controlling precedent compelling the conclusion that they lack standing to sue under the Elections Clause, Plaintiffs attempt to dress up their injury as the violation of some sort of "individual" right to cast a legislative vote. Plaintiffs argue that, despite Article III's default prohibition against individual legislators suing under the Elections Clause, 42 U.S.C. § 1983 confers Plaintiffs with the ability to do so. This argument badly misunderstands the *constitutional* limit that Article III imposes on federal courts' subject-matter jurisdiction. "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.

Even setting aside Plaintiffs' inability to identify a concrete and particularized injury, their claims also suffered from two other fatal Article III flaws. First, their request for invalidation of the 2018 and 2022 Amendments are not redressable because the Michigan Legislature has independently codified nearly all of those policies into state election statutes. Even if Plaintiffs prevailed in this suit, the policies they challenge will remain. As a result, their challenge to the 2018 and 2022 Amendments sought what would amount to only an advisory opinion. Second, Plaintiffs' attempt to challenge *any* future use of the proposal process to regulate federal elections—without identifying a single effort to do so—was far too speculative to satisfy Article III's imminence requirement.

Finally, the Court must disregard Plaintiffs' attempt to squeeze in merits-related arguments into this appeal. Because the District Court dismissed Plaintiffs' suit based on standing, it did not consider the merits of their claim. If that standing conclusion was erroneous (it was

not), the proper procedure would be for this Court to remand to the District Court for consideration of Defendants' Rule 12(b)(6) arguments in the first instance. In any event, Plaintiffs' claim is squarely foreclosed by Supreme Court precedent.

ARGUMENT

I. Plaintiffs' asserted injury is neither concrete nor particularized.

Plaintiffs' attempt multiple creative ways to avoid their Article III standing obligations. But the law is clear: individual legislators like Plaintiffs do not have standing to assert the claims of a legislature. This Court should affirm.

A. Elections Clause violations impose neither concrete nor particularized injuries upon individual legislators.

Controlling case law quickly disposes of Plaintiffs' assertion that they "have individual legislator standing to challenge usurpation of state legislative powers." (R. 1, PageID.12, ¶ 65.) The Supreme Court has stated exactly the opposite: "individual members *lack* standing to assert the interests of a legislature." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019) (emphasis added). So has this Court:

"[a]n individual legislator, or group of legislators, do not have Article III standing based on an allegation of an institutional injury, or a complaint about a dilution of legislative power[.]" *Tennessee*, 931 F.3d at 514.

For a federal court to entertain Plaintiffs' claim, Article III requires Plaintiffs to have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To plead an injury in fact, Plaintiffs had to establish an "invasion of a legally protected interest" that is both "concrete and particularized." *Id.* at 560. To be concrete and particularized, an injury must "affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

Absent narrow circumstances that no one claims are satisfied here, individual state legislators cannot satisfy Article III's standing requirements when they sue over a violation of the Elections Clause. "The general rule that individual legislators lack standing to sue in their official capacity as [members of a legislature] follows from the requirement that an injury must be concrete and particularized."

Crawford v. U.S. Dep't of Treasury, 868 F.3d 438, 453 (6th Cir. 2017). Plaintiffs' claim here—that Michigan's proposal process improperly limits their authority to regulate the time, place, or manner of federal elections—presents "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of [the legislature] and both Houses [ ] equally." *Tennessee*, 931 F.3d at 514 (quoting *Raines*, 521 U.S. at 821). Because the "nature of that injury" is "abstract and widely dispersed" among the legislative body, individual legislators cannot "claim a 'personal stake' in [such a] suit," rendering their alleged injury "'[in]sufficiently concrete' to establish Article III standing." *Id.* (quoting *Raines*, 521 U.S. at 830); *see also Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016) ("[A]n individual legislator cannot 'tenably claim a personal stake' in a suit based on such an institutional injury.") (quoting *Arizona State Legislature*, 576 U.S. at 802). The same holds true of the Plaintiffs here: they hold no personal stake in the Michigan Legislature's authority to regulate the state's elections.[9]

[9] The mere fact that Plaintiffs are a (small) group of legislators, as opposed to just one legislator, does not change this calculus. *Tennessee*,

Aside from deriving from foundational Article III principles, the rule against legislator standing stands as an important protection against federal courts becoming the venue for members of a state legislature to wage a political battle against their colleagues. As an institution, a legislature gets to decide whether to challenge what it believes is an Elections Clause claim, and it will have Article III standing to do so as long as it has passed "authorizing votes in both of its chambers." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802-04 (2015). But if individual legislators can also bring the same suit on their own, they can do so even when the majority of their colleagues do not wish to do so. The rule against legislator standing ensures that when individual legislators "fail[] to prevail in their own Houses, [they can]not repair to the Judiciary to complain." *Id.* at 802.

In this way, the rule against legislator standing also ensures federal courts are not called upon to adjudicate hypothetical disputes.

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931 F.3d at 514 (rejecting the standing of a "group of legislators" to assert such a claim). Plaintiffs constitute just two of Michigan's 38 state senators, and 9 of Michigan's 110 state representatives—a tiny fraction of their respective chambers.

See Lujan, 504 U.S. at 560. The decision of a legislature, as a whole, to bring an Elections Clause claim indicates a clear intention to legislate in a manner contrary to the provision the legislature challenges. *See Arizona State Legis.*, 576 U.S. at 800-01 (holding that Arizona Legislature's injury was sufficiently imminent, even though it had not yet enacted legislation violating the challenged provision). But when individual legislators assert an Elections Clause claim without the backing of their legislature, there is good reason to believe the legislature does *not* intend to legislate contrary to the challenged provision. In that latter scenario, the court is asked to adjudicate a constitutional claim based on the prospect of potential legislative action that very well may never occur. That is precisely what Plaintiffs asked the District Court to do.

Of course, an individual legislator (or group of legislators) may sue as an *authorized representative* of a legislative body if they have been expressly chosen by the body to do so. *Tennessee*, 931 F.3d at 514; *Ariz. State Legislature*, 576 U.S. at 801-02 (distinguishing a suit brought by individual legislators with one brought by the legislature itself or an authorized member). But Plaintiffs do not claim that the Michigan

Legislature has authorized them to serve as its representative in this litigation. Perhaps that is unsurprising, given that the legislature has independently codified into statute the election regulations approved by the 2018 and 2022 Amendments that the individual legislators now seek to invalidate. *See* Section II., p 30-32. Plaintiffs have either been unable to convince their colleagues to authorize this suit, or they have not tried. Either way, they "cannot alone [pursue] the litigation against the will of [their] partners in the legislative process." *Bethune-Hill*, 139 S. Ct. at 1956.

In sum, controlling case law makes clear that Plaintiffs lack standing to pursue their Elections Clause claim as members of the legislature.

B. Plaintiffs' concocted "individual" right to legislate cannot avoid the rule against legislator standing.

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 power as legislators to "cast a binding vote" on

state laws regulating federal elections. (Appellants' Br., p 8.) 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.

But 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. For that reason, the Supreme Court and this Circuit have directly rejected attempts by legislators to frame their injuries the way Plaintiffs seek to do here.

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.* (emphasis in original). 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*, this Court 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 circuits 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 that a fracking ban rendered their "lawmaking authority nullified"); *Kerr*, 824 F.3d at 1211-12 (state legislators claimed that a state constitutional amendment rendered their votes "advisory"); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999) (members of Congress claimed that an 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' 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*, 407 U.S. 433; 59 S. Ct. 972; 83 L. Ed. 1385 (1939) is not only misplaced—it confirms the absence of standing. (Appellants' Br., pp 32-34.) *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; *see Baird v. Norton*, 266 F.3d 408, 402 (6th Cir. 2001) (rejecting Michigan legislators' standing because they lacked "votes sufficient" to defeat or approve legislative action).

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. *Arizona State Legislature*, 576

U.S. at 801-02. And if *Arizona State Legislature* were not clear enough, the Court reiterated that "individual members lack standing to assert the institutional interests of a legislature" four years later in *Bethune-Hill*, 587 U.S. at 667.

Plaintiffs' attempt to narrow *Raines* to situations where legislator-plaintiffs' quarrel is "with their colleagues" thus fails. (*See* Appellants' Br, pp 35-36). Particularly post-*Arizona State Legislature*, courts have readily recognized that Supreme Court legislative-standing precedent forbids individual legislators from asserting injuries to the legislature's authority—even when the cause of that injury is a wholly external constraint on the legislature's authority. *Kerr*, for example, considered the exact same kind limitation that the Plaintiffs allege here: a state constitutional amendment that limited the legislature's authority to enact laws. 824 F.3d at 1211. At least in the absence of a "group of legislators large enough to prevail on a vote," limitation on the legislature's lawmaking authority was an "institutional injury" under *Arizona State Legislature* that individual legislators lacked standing to assert. *Id.* at 1215-16. Other circuits have similarly rejected legislator standing in cases involving institutional injuries emanating from

outside the legislature. *Yaw v. Del. River Basin Comm'n*, 49 F.4th 302, 311 (3d Cir. 2022) (members of the Pennsylvania Senate lacked standing to challenge a fracking ban imposed by the Delaware River Basin Commission that allegedly "deprived [the Senators] of their lawmaking authority relative to millions of Pennsylvanians"); *Blumenthal v. Trump*, 949 F.3d 14, 20 (D.C. Cir. 2020) (215 Members of Congress lacked standing to sue former President Trump's decision to accept alleged emoluments without first permitting Congress to vote on their acceptance deprived them of their "entitlement to vote" on them).

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. As far as the State 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 confers rights upon, individual state legislators. U.S. Const. art. I, § 4 (emphasis added). Plaintiffs identify no authority (and the State 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." *Arizona State Legislature*, 576 U.S. at 802.

Plaintiffs' effort to invent standing based on state court decisions fares no better, and the Michigan Supreme Court's decision in *Dodak v. State Admin. Bd.,* 495 N.W.2d 539 (Mich. 1993), cannot bear the weight the Individual State Legislators' place on it. As the Third Circuit

recently explained while rejecting the same legislator-standing theory Plaintiffs' 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.*, 792 N.W.2d 686, 702 (Mich. 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.

Lastly, it warrants brief notice that the District Court's opinion in this case is not an outlier, and it is consistent with the conclusions of other federal courts. The District Court for the Middle District of Pennsylvania recently rejected a similar "state legislator standing" argument. *Keefer v. Biden*, No. 1:24-CV-00147, 2024 U.S. Dist. LEXIS 55796 (M.D. Penn., Mar. 26, 2024). In that opinion, the Court—after reviewing the *Raines*, *Coleman*, *Arizona State Legislature, Virginia House of Delegates,* and *Yaw* cases discussed above—rejected Plaintiffs' claim to standing, and aptly concluded:

> Just as in the binding precedent described above, Plaintiffs here do not allege that they specifically, as individuals, are suffering a harm because of the executive actions at issue. Rather, the harm is to the authority of the Pennsylvania General Assembly to establish the times, places, and manner of elections as provided by the Constitution. Moreover, Plaintiffs claim that they, as "real persons who are part of an exclusive entity, the state legislature of Pennsylvania [, . . . have] a right to protect [their] individual [] constitutional rights and privileges to participate in making laws regarding the manner of elections []." Just as the Third Circuit concluded in *Yaw*, this claim sweeps too broadly. If every state legislator has an individual right to vindicate their right to "participate in making laws," then the standing requirement of a particularized injury would be rendered

> meaningless because *every* legislator would suffer an injury in the same way.

Keefer, 2024 U.S. Dist. LEXIS 55796 at *25-26.

Plaintiffs' attempt to cast their standing through the lens of their wish to vote on matters of federal election regulation is flatly inconsistent with controlling case law. Their asserted injury in this case is neither concrete nor particularized. As a result, the District Court correctly dismissed this suit.

C. Section 1983 cannot confer Plaintiffs with Article III standing they otherwise lack.

Puzzlingly, Plaintiffs spend a substantial portion of their brief arguing that 42 U.S.C. § 1983 authorizes this suit. (Appellants' Br., pp 12-18.) That issue is entirely irrelevant to this appeal. The contours of § 1983 have no bearing on whether Plaintiffs' pleadings satisfied Article III's constitutional standing requirements. Section 1983 confers a *statutory* private right of action against state actors who violate federal law. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). It does not impact whether a federal-court plaintiff has Article III standing. Indeed, it cannot: "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; *see TransUnion LLC v. v. Ramirez*, 594 U.S. 413, 426 (2021) ("Article III standing requires a concrete injury even in the context of a statutory violation.").

Plaintiffs lack Article III standing. Section 1983 does not, and cannot, suggest otherwise.

II. Plaintiffs' challenge to the 2018 and 2022 Amendments is not redressable.

Even if Plaintiffs could identify a concrete and particularized injury—they would *still* lack standing to challenge the vast majority of the 2018 and 2022 Amendments because the Michigan Legislature has since codified those policies into statute. To have standing, a plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. As described above, after voters approved the 2018 and 2022 Amendments, the legislature separately enacted nearly all of the same policies into statutory law. Thus, even if the Court were to issue a judgment in Plaintiffs favor as to the 2018 and 2022 Amendments, the policies approved by those proposals would almost entirely remain in place. As a result, as to the vast majority of Plaintiffs' challenge to the

2018 and 2022 Amendments, this Court can "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)).

To be sure, a judgment in Plaintiffs' favor would remove a current barrier *theoretically* preventing the legislature from enacting an election regulation that contravenes the 2018 or 2022 Amendments, should it choose to do so.[10] But Plaintiffs allege no facts suggesting that the Michigan Legislature has any intention of doing so; and the small minority of legislators willing to join this lawsuit strongly suggests that it does not. In any event, the mere possibility that the legislature *may*, at some point in the future, wish to enact a statute going beyond what the 2018 or 2022 Amendments permit comes nowhere close to crossing the line between "speculative" redress, which

[10] Plaintiffs contend that this assertion, which Defendants also made below, is somehow a "critical admission." (Appellants' Br., p 39.) It is difficult to see how that could be. It is of course possible that the Legislature might in the future seek to repeal the various election laws it has enacted in the last six years. Anything is possible. But Article III draws a clear line between "*possible* future injur[ies]," which "are not sufficient" for standing, and "*certainly impending*" ones, which are. *Memphis A. Philip Randolph Inst.*, 978 F.3d at 386.

cannot satisfy Article III, and "likely" redress, which can. *Lujan*, 504 U.S. at 561. As a result, the court lacked subject-matter jurisdiction to entertain Plaintiffs' challenge to the 2018 and 2022 Amendments.

III. Plaintiffs' challenge against future, unidentified use of the proposal process is speculative.

Finally, Plaintiffs say they will be injured in the future because the proposal process "*can*"—not will—"be used again to amend the State's Constitution to regulate" federal elections. (Appellants' Br. 3.) That, of course, comes nowhere close to satisfying Article III's imminence requirement for forward-looking relief.

Standing to seek prospective declaratory and injunctive relief, requires a plaintiff to demonstrate 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)). Plaintiffs' complaint alleged no facts suggesting that any future proposal touching on the time, place, or manner of federal elections is in process or even being currently contemplated in Michigan. And the mere fact that prior

such proposals have been approved cannot satisfy Article III's imminence requirement. *See Citizens in Charge v. Husted*, Nos. C2-08-1014, C2-10-095, 2011 WL 3652701, at *4 (S.D. Ohio Aug. 9, 2011) (finding plaintiffs lacked standing to challenge future use of allegedly unlawful petition process when all they alleged was "that they have signed referenda petitions in the past"); *see also Lujan*, 504 U.S. at 564 n.2. Without any factual allegations suggesting that there is a certainly impending proposal to amend the Michigan Constitution in a way that regulates federal elections, the individual legislators lack standing to seek relief against future uses of that process.

IV. Plaintiffs' description of Election Clause case law is wrong.

Having properly concluded Plaintiffs lacked standing, the District Court did not reach the merits of Plaintiffs' constitutional arguments. In this appeal, however, Plaintiffs appear to ask the Court not only to conclude they have standing, but also to endorse the merits of their claim—that is, that Michiganders' use of the proposal process to amend their constitutional violates the Elections Clause. (Appellants' Br., pp 19-31.) Plaintiffs make no effort to explain how or why these questions should be decided for the first time on appeal; instead they merely

frame the inclusion of the merits as the "context" for their standing. (Appellants' Br., p 19.)

Because the District Court did not reach the merits, this Court should not consider the merits on appeal. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Indeed, because the Plaintiffs lack standing, the court lacks the authority to reach the merits. *Davis v. Detroit Pub. Sch. Cmty. Dist.*, 899 F.3d 437, 445 (6th Cir. 2018). And even if the Court were to reverse the district court's ruling on jurisdiction, the appropriate course would be to remand for the district court to consider the merits in the first instance. *See Kareem v. Cuyahoga Cty. Bd. of Elections*, 95 F.4th 1019, 1021, 1027 (6th Cir. 2024) (remanding after reversing district court's ruling that plaintiff lacked standing to consider merits arguments the district court had not addressed).

In any event, Plaintiffs' theory is foreclosed by controlling precedent. Indeed, just a few years ago, the U.S. Supreme Court not only rejected the exact theory on which Plaintiffs' claim wholly relies,

but in doing so described the very claim that Plaintiffs now bring as an example of why that theory must be wrong.

Plaintiffs' sole claim asserts that the use of the Michigan Constitution's proposal process to regulate federal elections violates the U.S. Constitution's Elections Clause because it "usurp[s]" the Michigan Legislature's authority to write those election rules. (R. 1, PageID.9, ¶ 50). The Elections Clause provides that "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., Art 1, § 4, Cl. 1. The Supreme Court has concluded that the Framers inserted the Elections Clause into the federal constitution to prevent "a State [from] refus[ing] to provide for the election of representatives to the Federal Congress"—a "very real concern" at the time, given "the widespread, vociferous opposition to the proposed Constitution." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). To serve as an "insurance" against this possibility, the Elections Clause performs "two functions": "[u]pon the States it imposes the duty ('*shall* be prescribed') to prescribe

the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Id.*

The crux of Plaintiffs' claim is an assertion that the Elections Clause's use of the term "Legislature" prohibits the Michigan Constitution from giving independent authority to regulate federal elections to both the legislature (via statute) *and* the people (via proposal). But in 2015, the U.S. Supreme Court squarely held that the Elections Clause poses no such bar. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Arizona State Legislature—not a subset of its membership—challenged a congressional plan enacted by the state's independent redistricting commission, which was created by voters through an initiative process identical in all meaningful respects to Michigan's proposal process. 576 U.S. at 796-97. The legislature asserted that the constitutional amendment creating the redistricting commission violated the Elections Clause because it authorized regulation of Arizona's congressional elections without the legislature's input. *Id.* at 792-93.

The Court rejected that theory. It explained that the Elections Clause neither "diminish[es] a State's authority to determine its own lawmaking processes" nor "disarm[s] States from adopting modes of legislation that place the lead rein in the people's hands." *Id.* at 824. Indeed, the Court stated, "it would be perverse to interpret the term 'Legislature' in the Elections Clause so as to exclude lawmaking by the people." *Id.* at 820. Because Arizona's redistricting commission was created through an initiative process authorized by the state constitution, its authority to regulate Arizona's congressional elections without any involvement of the state legislature did not offend the Elections Clause. *Id.* at 824.

Arizona State Legislature is fatal to Plaintiffs' claim here. Their entire theory is that if a federal-election regulation is enacted through Michigan's proposal process, it "violate[s] the Elections Clause because the Michigan state legislature did not vote and approve it." (R. 1, PageID.11, ¶ 58.) But if the Elections Clause allows a state's electorate to confer, through an initiative process, full decision-making authority over an election regulation to a governmental body that is not the state legislature (as in *Arizona State Legislature*), it surely does not prohibit

the people from using such a process to decide election regulations for themselves. In fact, the *Arizona State Legislature* Court reasoned that the legislature's theory in that case must have been wrong because a ruling in the legislature's favor might suggest that election regulations enacted directly through popular initiative—precisely what Plaintiffs challenge here—also violate the Elections Clause. 576 U.S. at 822 (rejecting legislature's argument because it would "cast doubt on numerous other election laws adopted by the initiative method legislating" such as California's initiative-enacted permanent voter registration system, Ohio's initiative-enacted prohibition against straight-ticket voting, and Oregon's initiative-enacted 20-day registration deadline). In other words, the *Arizona State Legislature* Court rejected the legislature's theory in part out of fear that adopting it might *even suggest* that Plaintiffs' claim here has merit. The Court's rejection of the claim presented there compels the rejection of Plaintiffs' claim here.

Plaintiffs' attempts to distinguish *Arizona State Legislature* from the present case based on the Michigan Constitution's definition of "legislature" also fails. (Appellants' Br., p 29.) As in Arizona, the

people share in "lawmaking power" in Michigan. *Arizona State Legislature*, 576 U.S. at 795. "Under [the Michigan] Constitution, '[a]ll political power is inherent in the people.'" *League of Women Voters of Mich. v. Sec'y of State*, 506 Mich. 561, 571 (2020) (quoting Mich. Const. 1963 art. 1, §1). "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" under article 12, section 2 that Plaintiffs challenge here. *Id.* As when Arizonans initiate changes to their constitution, Michiganders act as the "power that makes laws," *Arizona State Legislature*, 576 U.S. at 813-14, when they initiate constitutional changes under the Michigan Constitution.

By providing for constitutional amendments to be adopted through ballot proposals, the people of Michigan have reserved for themselves a measure of legislative power to regulate elections that they alone may exercise under specified conditions. U.S. Supreme Court case law makes unmistakably clear that the Elections Clause poses no threat to that choice. Although the merits are not relevant to this appeal, Plaintiffs' arguments are contrary to binding precedent.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants-Appellees Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and Director of Elections Jonathan Brater respectfully request that this Honorable Court affirm the District Court's dismissal of the complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I certify that on August 28, 2024, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	09/28/2023	R. 1	1-19
Complaint Exhibits	09/28/2023	R. 4	24-30
Defendants' Motion to Dismiss	01/08/2024	R. 15	173-175
Brief in Support of Defendants' Motion to Dismiss	01/08/2024	R. 16	176-210
Opinion and Order	04/10/2024	R. 25	300-312