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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CITIZENS FOR FAIR
REPRESENTATION, et al.,

Plaintiffs,

v.

SECRETARY OF STATE ALEX
PADILLA,

Defendant.

No. 2: 17-cv-00973-KJM-DMC

ORDER

A voting rights organization, several local government entities, independent political parties and various individual California voters jointly sue California's Secretary of State, Alex Padilla, arguing the cap on state legislators encumbers certain citizens' right to self-governance. Plaintiffs' initial complaint alleged that the California legislature is too small to adequately represent California's nearly 40 million residents. The court dismissed that complaint as nonjusticiable. Plaintiffs amended the complaint, and defendant again moves to dismiss the complaint as nonjusticiable. Mot., ECF No. 42. Plaintiffs oppose. Opp'n, ECF No. 46. The court heard the motion on June 14, 2018. H'rg Mins., ECF No. 52. As explained below, the court GRANTS defendant's motion to dismiss, but this time without leave to amend.

1 I. BACKGROUND

2 In its prior dismissal order, the court reviewed the relevant historical and political
3 backdrop, which remains the same. *See* Prior Order, ECF No. 32, at 2-4 (Feb. 1, 2018). The
4 background information provided below focuses primarily on plaintiffs’ amended allegations as
5 relevant to the motion to dismiss.

6 A. Plaintiffs

7 The following entities and individuals and the plaintiffs who claim an interest in
8 expanding their access to and representation within state and local government:

- 9 ■ Citizens for Fair Representation, a nonprofit whose members are California
10 voters and government officials, alleges an interest in competitive elections
11 and democratic representation. *See* Second Am. Compl., ECF No. 39
12 (“SAC”), ¶¶ 1.0-1.2.
- 13 ■ The California Libertarian Party and the California American Independent
14 Party, minority political parties with an alleged interest in enhancing the voting
15 power of non-white Californians. *Id.* ¶ 1.7.
- 16 ■ Win Carpenter, Kyle Carpenter and Chief Roy Hall, Jr., members of the Shasta
17 Tribe of Indians with an alleged interest in promoting the tribe’s self-
18 governance through greater government access and the avoidance of the state’s
19 “intentional attempted genocide of their race” and the “decimation of the
20 Native American population.” *Id.* ¶ 1.2.
- 21 ■ David Garcia, a Latino American with an alleged interest in empowering the
22 votes of all Hispanics and repairing their “grave economic, social, and
23 stigmatic injuries.” *Id.* ¶ 1.3.
- 24 ■ Raymond Wong and Leslie Lim, Asian Americans with an alleged interest in
25 addressing the “intentional killing, forced expulsion, internment, and other
26 intentional discrimination based on their race from the 1850s through at least
27 the 1950s,” of which the legislative cap “is an integral part.” *Id.* ¶ 1.4.

- 1 ■ Cindy Brown, an African American with an alleged interest in rectifying the
2 “intentional[], systematic[], and invidious[] discriminat[ion]” against “brown
3 and other blacks . . . that have been formally admitted by the state, including
4 being denied the right to vote . . . [being] subjected to ‘Jim Crow’ race laws . . .
5 [being] subjected to voter disenfranchisement for felony convictions” and
6 being denied adequate “black political power” to for example, “oversee the
7 corruption of California’s judges and courts that incarcerate and impose felony
8 sentences (which impacts the right to vote) of non-whites.” *Id.* ¶ 1.5.
- 9 ■ Plaintiffs Mark Baird, Win and Kyle Carpenter, John D’Agostini, Mike
10 Poindexter, Michael Thomas and Larry Wahl, all individuals in various
11 districts who allege “this dilution of political power has [caused them] grave
12 economic, social, and stigmatic injury.” *Id.* ¶ 1.6.
- 13 ■ The cities of Colusa and Williams, rural municipalities that allege the state
14 legislative cap “was born out of the invidious discrimination against non-
15 whites described herein, [and] now causes them injury.” *Id.*

16 B. Allegations in the Complaint

17 Alleging that a refusal to increase the total number of elected representatives is an
18 arbitrary violation of several federal constitutional guarantees, plaintiffs sue California Secretary
19 of State Alex Padilla in his official capacity. *Id.* ¶ 1.9.¹ Specifically, plaintiffs challenge the
20 current legislative cap of 40 Senators and 80 Assemblymembers, which has been fixed by the
21 California Constitution since the late 1800s despite considerable population growth since then.
22 *Id.* ¶¶ 3.14, 3.26; *see also* Prior Order at 3. Plaintiffs allege this legislative cap has created an
23 unresponsive legislative oligarchy “to promote the white man’s interests by the exclusion of non-
24 white people from participating in California’s political process.” SAC ¶ 3.14. Plaintiffs further
25 allege California has a long history of discriminating against minority groups and that although

26 ¹ Although the complaint also names the State of California and the State’s Redistricting
27 Commission as defendants, *see* SAC ¶¶ 1.9-1.10, at hearing plaintiffs’ counsel clarified that
28 plaintiffs intend to sue only Secretary of State Padilla.

1 the current populous legislative districts harm all voters, the most injury falls on “members of
2 minority groups” including racial and ethnic minorities, political minorities, less wealthy citizens
3 and people that live in less populated areas. *Id.* ¶ 3.27. Plaintiffs further allege the dilution of
4 power resulting from the legislative cap impedes their access to state services and assistance,
5 thwarts their efforts to elect minority legislators or to run for office, and gravely injures them
6 socially, economically and “stigmatic[ally].”² *Id.* ¶¶ 1.3, 1.4, 1.6, 3.0, 3.22, 3.32, 3.33, 7.2, 9.4,
7 9.8.

8 Plaintiffs assert six claims. They claim the legislative cap violates all plaintiffs’
9 right to equal protection (Claim 1), but particularly non-white plaintiffs (Claim 2) and plaintiffs
10 with less political power, “from rural areas, minority political parties and lower socio-economic
11 brackets” (Claim 3). *Id.* ¶¶ 4.0-6.5. They allege the State’s legislative cap impedes each
12 plaintiff’s access to government benefits and services in violation of each plaintiff’s due process
13 guarantees (Claim 4); that this cap “was enacted and is maintained to suppress and retaliate
14 against residents who advocate viewpoints contrary to the political elites” in violation of First
15 Amendment free speech guarantees (Claim 5); and that this cap “assure[s] that the great majority
16 of residents have no effective influence on their legislators” in violation of the guarantee to a
17 republican form of government (Claim 6). *Id.* ¶¶ 7.0-9.9.³

18 Plaintiffs seek a declaration that the current sizes of the State Assembly and Senate
19 are unconstitutional and they seek an injunction requiring that the number of state legislators “be
20 increased to a number, as determined at trial, which will assure . . . voters who have been
21 discriminated against . . . have a meaningful opportunity to elect their preferred candidates” and
22 “voters in sparsely populated rural areas have a meaningful opportunity to elect their preferred
23 candidates.” *Id.* ¶ 10. Plaintiffs also ask that the court “grant” the state up to two years “to cure

24 ² Plaintiffs do not provide further allegations to clarify what they mean by their use of
25 “stigmatic,” although in context it appears they are suggesting underrepresentation perpetuates
26 minority distrust in the democratic process.

27 ³ Five of the six claims are brought by “all plaintiffs” without differentiation. Claim 2,
28 however, is brought only by “non-white plaintiffs,” without identifying those plaintiffs by name
in this part of the complaint. *See* SAC ¶¶ 5.0-5.4.

1 these constitutional violations” but then “retain jurisdiction” over the dispute to ensure the state
2 does so. *Id.*

3
4 C. Procedural History

5 Plaintiffs first filed this lawsuit in May 2017 and requested that it be heard by a
6 three-judge court. ECF No. 1; 28 U.S.C. § 2284(a) (providing three-judge court should hear
7 lawsuits “challenging the constitutionality of the apportionment of congressional districts or the
8 apportionment of any statewide legislative body”). Because jurisdiction is still in question, this
9 court has not requested the convening of a three-judge court. *See* Aug. 24, 2017 Min. Order, ECF
10 No. 22 (“the court has determined it is premature to request the convening of [a three-judge] court
11 prior to this court’s threshold determination of jurisdiction and justiciability”) (citing *Shapiro v.*
12 *McManus*, 136 S. Ct. 450, 455 (2015)); *see also* Aug. 1, 2018 Order, ECF No. 63 (“Until the
13 court resolves defendant’s motion and unless or until it determines a federal court has jurisdiction
14 over plaintiffs’ amended complaint, the court continues to find that convening a three-judge court
15 would be premature.”).

16 On February 1, 2018, the court dismissed plaintiffs’ First Amended Complaint
17 with leave to amend for lack of subject matter jurisdiction. *See* Prior Order. The court explained
18 plaintiffs lacked standing and the requested relief would require the court to adjudicate
19 nonjusticiable political questions. *Id.* at 4-10. Defendant now moves to dismiss the Second
20 Amended Complaint on the same jurisdictional grounds. *See* Mot. at 11-16 (arguing plaintiffs
21 still lack standing and the complaint still raises nonjusticiable political questions). Plaintiffs
22 oppose, Opp’n, and defendant has filed a reply, ECF No. 50.

23 II. SUBJECT MATTER JURISDICTION

24 Defendant moves to dismiss plaintiffs’ complaint for lack of subject matter
25 jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See* Mot. at 10-16. When, as here, a
26 motion to dismiss facially attacks the complaint’s reliance on subject matter jurisdiction, the court
27 presumes all allegations are true and analyzes whether the allegations plausibly establish
28 jurisdiction. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)

1 (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). As explained in the Prior Order, the
2 federal constitution’s central concept of separation-of-powers defines and limits what grievances
3 a federal court may hear. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992). As the parties
4 invoking the court’s subject matter jurisdiction, plaintiffs have the burden to establish it. *Id.* at
5 561.

6 A. Standing

7 Every plaintiff must have standing to litigate a grievance before a federal court.
8 *Id.* at 560. As in their first motion to dismiss, defendant argues plaintiffs lack standing to sue
9 because they assert only a generalized grievance common to all Californians. *See Mot.* at 11-13.

10 To establish standing to sue, plaintiffs must allege an injury particularized to each
11 plaintiff or each group of plaintiffs; the injury cannot be a general grievance “‘where [the
12 plaintiff’s] own injury is not distinct from that suffered in general by other taxpayers or citizens.’”
13 *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (quoting *ASARCO Inc. v.*
14 *Kadish*, 490 U.S. 605, 613 (1989)); *see also Lujan*, 504 U.S. at 560.

15 Here, after amendment, the operative complaint still identifies only generalized
16 grievances. Plaintiffs allege that “[a]lthough the adverse effects of representative government by
17 enormous legislative districts are felt by all California voters, the interests of members of
18 minority groups . . . are specifically and concretely affected.” SAC ¶ 3.27. But plaintiffs define
19 “minority groups” so broadly that the definition supports the court’s reaching the same conclusion
20 it did before in response to the first motion to dismiss: The grievance identified is shared by
21 virtually all Californians. Specifically, plaintiffs allege the impacted minorities include voters of
22 Asian descent, of Hispanic descent, and of African descent; voters that live in “more sparsely
23 populated areas of the state”; voters with certain “minority” political views; and voters who are
24 “not wealthy.” *See Opp’n* at 9-15; SAC ¶¶ 3.27, 6.2. Although they do not allege a generalized
25 grievance on behalf of every single Californian, plaintiffs claim a generalized grievance on behalf
26 of virtually every Californian, noting only two exceptions by name. *See Opp’n* at 13 (citing two
27 “wealthy Californians living in geographically-concentrated legislative districts,” Mark
28 Zuckerberg and Nancy Pelosi, each of whose voting power allegedly remains strong).

1 Even if the alleged interference with the right to self-governance affects each
2 Californian differently, nothing in the complaint makes out a claim that the plaintiffs'
3 individualized experiences transform the underlying grievance from the general to the particular.
4 Rather, the alleged injury underlying each individual's hardship is unequivocally generalized:
5 "As the state's population grows inexorably, the political influence of each voter will be
6 increasingly diluted." SAC ¶ 3.26.

7 The Supreme Court has "consistently held" that generalized grievances such as the
8 one plaintiffs plead here fall outside the court's Article III power. *See Lance v. Coffman*, 549
9 U.S. 437, 439 (2007) (listing cases; explaining plaintiff "claiming only harm to his and every
10 citizen's interest in proper application of the Constitution and laws, and seeking relief that no
11 more directly and tangibly benefits him than it does the public at large—does not state an Article
12 III case or controversy."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21
13 (1974) (interest held by all members of public is necessarily abstract and cannot establish
14 standing); *Hein*, 551 U.S. at 606-08 (taxpayers lacked standing to challenge President's "faith-
15 based initiatives" where their injury was not distinct from that suffered by other taxpayers). As in
16 these cases decided by the Court, plaintiffs' core allegation here is too generalized to support
17 standing.

18 Plaintiffs' attempt to draw parallels to historical voters' rights cases is misplaced.
19 For instance, the justiciability concerns in this case differ from those in the case of *Federal*
20 *Election Comm'n v. Akins*, 524 U.S. 11 (1998), in which voters had standing to sue based on a
21 "widely shared" voter injury: The denial of access to certain public records relevant to a recent
22 election. *Id.* at 24. The Court explained that just because "an injury is widely shared . . . does
23 not, by itself, automatically disqualify an interest for Article III purposes." *Id.* But *Akins* dealt
24 with standing that was specifically provided by the Federal Election Campaign Act ("FECA"):
25 Any voter could sue under FECA if she was denied campaign information that must be publicly
26 available under the statute. *Id.* at 21; *cf. Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449
27 (1989) (holding denial of public records request "constitutes a sufficiently distinct injury to
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1 provide standing to sue.”). Here, because there is no statutorily-prescribed right to sue, *Akins*
2 does not support finding plaintiffs have standing to pursue this case.

3 This case also is distinguishable from cases involving gerrymandering, poll taxes
4 or all-white primaries. See *United States v. Hays*, 515 U.S. 737, 744–45 (1995) (racial
5 gerrymandering); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (same); *Harper v. Virginia Board of*
6 *Elections*, 383 U.S. 663 (1966) (poll tax); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (all-white
7 primaries). Race-based gerrymandering, poll taxes as a voting precondition and primaries for
8 only white voters arbitrarily deny racial minorities their right to vote compared to other citizens.
9 In contrast, in this case, the alleged underrepresentation and inaccessibility to government of
10 which plaintiffs complain is common to virtually all Californians: The legislative cap does not
11 apply differently to shape certain districts only, or impose voting requirements that affect voters
12 in some districts more than others; it applies equally across districts, inflicting the same alleged
13 injury throughout the state, even if that injury may be felt differently by certain minority
14 populations. See SAC ¶ 3.26 (“California’s population growth has required each of its 120
15 legislators to represent ever increasing numbers of people over time As the state’s population
16 grows inexorably, the political influence of each voter will be increasingly diluted.”).

17 This case also presents a different question than that posed in *Dep’t of Commerce*
18 *v. U.S. House of Representatives*, 525 U.S. 316 (1999). There, “every voter” in Indiana had
19 standing to challenge the planned use of statistical sampling for the upcoming national census
20 because the proposed method would have eliminated one of Indiana’s seats in the federal House
21 of Representatives, thus diluting every Indiana resident’s vote relative to voters in other states.
22 *Id.* at 332. In contrast here, plaintiffs do not allege that any single voter has less power than
23 another; rather, plaintiffs allege California voters are steadily losing power generally over time,
24 through population growth. See SAC ¶ 3.26.

25 As the court explained in the Prior Order, comparisons to *Baker v. Carr*, 369 U.S.
26 186, 211 (1962), are misplaced. In *Baker*, the challenged apportionment scheme progressively
27 diminished voting power in five specific districts, while voting power in other districts
28 progressively strengthened in the absence of any reapportionment after sixty years of steady

1 population growth. *Id.* at 207-08. But here, plaintiffs allege residents in every district in
2 California face the same alleged underrepresentation and inaccessibility to government as a result
3 of the legislative cap. They even plead that whatever new legislative cap they want the court to
4 choose should be applied in every district, further illustrating that the alleged injury here applies
5 to every voter across all districts. SAC ¶ 3.26 (“[U]nder the . . . Equal Protection Clause,
6 legislative districts must contain substantially the same number of persons.”) (citing *Reynolds v.*
7 *Sims*, 377 U.S. 533, 577 (1964)).

8 In sum, without an injury sufficiently particularized to their circumstances,
9 plaintiffs have not established standing.

10 B. Political Question Doctrine

11 Even if they had satisfied standing, plaintiffs’ claims are nonjusticiable because
12 the requested injunctive relief turns on the resolution of political questions better suited to
13 legislative resolution. Mot. at 13-16. The original complaint was dismissed in part for this very
14 reason. Prior Order at 9-10. As the court there explained, “Increasing the numbers of legislators
15 would appear to be susceptible to constitutional amendment . . . yet plaintiffs bring this grievance
16 to federal court, effectively asking the court to usurp the electorate and unilaterally alter the state
17 constitution . . . ; a task committed to the legislative branch.” *Id.* at 9 (citing *Baker*, 369 U.S. at
18 210).

19 The same conclusion applies here in light of the amended pleadings. Plaintiffs
20 again request “an injunction requiring that the number of [state legislators] be increased to a
21 number, as determined at trial, which will assure . . . voters who have been discriminated against .
22 . . have a meaningful opportunity to elect their preferred candidates; . . .[and] voters in sparsely
23 populated rural areas have a meaningful opportunity to elect their preferred candidates.” SAC
24 ¶ 10.2. Plaintiffs contend they have remedied any justiciability concern by asking the court to
25 first defer to the California Legislature by granting that body up to two years to fix the
26 constitutional inadequacies on its own. *Id.* ¶ 10.1. Plaintiffs argue that with this request, “[i]t is
27 entirely possible that this court will need do no more than declare the status quo unconstitutional”
28 and leave the rest to the legislative branch. Opp’n at 17. In the same breath, plaintiffs concede

1 “the unlikelihood of legislators acting to diminish their own local authority defaults,” *id.* at 16,
2 and ask the court to “retain jurisdiction over the case until the constitutional violations have been
3 cured.” SAC ¶ 10.1.

4 Practically speaking, plaintiffs’ request remains the same, even while building in a
5 two-year delay: If legislators do not gather the support necessary to enact a constitutional
6 amendment that dilutes their own power within two years, plaintiffs ask the court to step in to
7 ensure the change is made. *See* SAC ¶ 10.1; Opp’n at 16-17. In effect, plaintiffs ask the court to
8 serve a legislative function by, at a minimum, declaring the current legislative cap
9 unconstitutionally low. SAC ¶¶ 10.0, 10.1, 10.2; Opp’n at 17-19. Such a determination would
10 require the court to weigh competing policy interests; evaluate “opinions from political
11 scientists;” and select a new minimum number of legislators per district that would assure
12 “members of minority groups” have “reasonable opportunities to elect candidates of their choice,”
13 reasonable access to their representatives, and voting power that mirrors their majority
14 counterparts. Opp’n at 18. The court cannot engage in this sort of political evaluation by relying
15 on “judicially manageable standards,” which are steeped in a well-established body of case law
16 and constitutional dictates, *see Baker*, 369 U.S. at 210, 226 (“Judicial standards under the Equal
17 Protection Clause are well developed and familiar, and . . . [have] been open to courts since the
18 enactment of the Fourteenth Amendment”), as compared to legislative standards that consider the
19 ever-evolving interests of the citizens they serve, *see Miller v. Johnson*, 515 U.S. 900, 914 (1995)
20 (districting decisions “implicate a political calculus in which various interests compete for
21 recognition”). *See also Vieth v. Jubelirer*, 541 U.S. 267, 280-81, 285-86 (2004) (in
22 gerrymandering context, there are “no judicially discernible and manageable standards” for
23 redistricting determinations; “the Constitution clearly contemplates districting by political entities
24 . . . and unsurprisingly that turns out to be root-and-branch a matter of politics.”); *Gaffney v.*
25 *Cummings*, 412 U.S. 735, 753 (1973) (“The reality is that districting inevitably has and is
26 intended to have substantial political consequences”); *cf. Holder v. Hall*, 512 U.S. 874, 881, 885,
27 891 (1994) (five justices agreeing with proposition there is no discoverable benchmark for
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1 determining appropriate size of legislative districts) (Kennedy, J. and Rehnquist J. (opinion);
2 O'Connor, J. (partial concurrence); Thomas, J. and Scalia, J. (separate concurrence)).

3 Finally, the court is unpersuaded by the “*dissents* in the great reapportionment
4 cases” that plaintiffs argue the court should follow. Opp’n at 16 (original emphasis). It is not for
5 a trial court to rewrite from the bottom up the law established by the Supreme Court. As the
6 majority in *Vieth* aptly observed, the fact that the dissenters in that case “come up with [] different
7 standards” among themselves “goes a long way to establishing that there is no constitutionally
8 discernible standard” by which courts might properly engage in redistricting. *See* 541 U.S. at
9 292.

10 Plaintiffs’ requested relief turns on political questions that lie outside the bounds
11 of this court’s powers, which are proscribed.

12 III. CONCLUSION

13 Plaintiffs’ alleged grievance is too generalized to establish standing to sue in
14 federal court. Plaintiffs’ requested relief would also require the court to resolve non-justiciable
15 political questions. Accordingly, the court DISMISSES the complaint under Rule 12(b)(1) for
16 lack of subject matter jurisdiction.

17 Having carefully considered the question, and noting that plaintiffs already have
18 been granted an opportunity to cure the absence of standing, the court finds no further amendment
19 could salvage plaintiffs’ claims. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (courts consider
20 any potential futility before granting leave to amend). Accordingly, dismissal is without leave to
21 amend.

22 This resolves ECF No. 42. The Clerk of the Court is directed to CLOSE this case.

23 IT IS SO ORDERED.

24 DATED: November 28, 2018.

25 
26 UNITED STATES DISTRICT JUDGE
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28