

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

John B. Curley, as Chairman of the Lake County,
Indiana, Republican Central Committee, and as a
registered voter, and Jim B. Brown as member of
the Lake County Board of Elections and
Registration and as a registered voter,

Plaintiffs,

v.

Case No. 2:08 cv-00287-JVB

Lake County Board of Elections and Registration,
and the Honorable Thomas Philpot, not
individually but as Lake County Clerk,

Defendants.

Linda Peterson, Roosevelt Phillips, Mary Aaron,
Service Employees International Union, and
Indiana State Conference of National Association
for the Advancement of Colored People Branches,

Intervenor-Defendants.

**INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO REMAND**

INTRODUCTION

This case is in federal court because Defendant Board of Elections filed a Notice of Removal. Intervenor-Defendants demonstrate below that despite the removal, this Court lacks jurisdiction and therefore the case should be remanded to state court. There are two reasons a remand is required. First, it is well-established that federal courts lack jurisdiction if the plaintiff lacks Article III standing. Whether or not Plaintiffs here can demonstrate standing to sue in *state*

court, they certainly cannot show injury within the meaning of Article III. Second, the removal was improper under 28 U.S.C. §1443(2) because Plaintiffs sued Defendant Board for acting *affirmatively* to provide early voting sites, not “for refusing to do any act,” as required under the removal statute. For these reasons, the Court lacks jurisdiction.

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING

Federal courts lack subject matter jurisdiction over a removed case – even if the removal is proper – if the plaintiff lacks Article III standing. That the action started in state court, that the plaintiff’s claim is one of state law, or that the plaintiff might have standing to sue in state court is irrelevant to the question of this Court’s Article III jurisdiction: “Standing to sue in any Article III court is, of course, a federal question which does not depend on the party’s prior standing in state court.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *see also Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) (“[A] plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury.”); *Coyne v. Am. Tobacco*, 183 F.3d 488, 495 (6th Cir. 1999) (plaintiffs in removed case lacked Article III standing even if they would have standing to sue in state court).¹

¹ Although the Supreme Court has left open the narrow question of whether Article III standing must be established for state-law claims in cases removed under §1442(a)(1), this removal provision is not at issue here. *See Primate Protection League v. Administrators of Tulane*, 500 U.S. 72, 77 n.4 (1991).

To establish Article III standing, a plaintiff ““must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.”” *MainStreet Organization of Realtors v. Calumet City*, 505 F.3d 742, 751 (7th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife, Inc.*, 504 U.S. 555, 560 (1992) (alteration in original)). Plaintiffs cannot establish such a “concrete and particularized” injury here.

The central injury to Plaintiffs that they allege in the Complaint is that voting at the allegedly improperly authorized early voting sites “risks illegal dilution of otherwise valid votes in the November, 2008, General Election, including without limitation, the voting rights of each of the Plaintiffs as registered voters.” Complaint, ¶21. “Vote dilution” can mean many things; stated alone it is insufficient to establish standing. *See Duncan v. Coffee County, Tenn.*, 69 F.3d 88, 94 (6th Cir. 1995) (“[V]ote dilution is a term of art.”); *Curry v. Baker*, 802 F.2d 1302, 1312 n.6 (11th Cir. 1986) (“Inserting the term ‘vote dilution’ in an election contest case is not a talisman.”); *Daughtrey v. Carter*, 584 F.2d 1050, 1056 (D.C. Cir. 1978) (“[N]ot . . . every alleged dilution of voting rights [is] a sufficient injury to confer standing.”).

Some injury must flow from the dilution. For example, if the votes of a minority group are diluted, the minority group will have less political power and thus be injured. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“[A minority group] vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, an action disadvantaging voters of a particular race.”) (citation and internal quotation marks omitted). Vote dilution can also constitute an injury if the plaintiff’s vote will be diluted because his state will have less representation in

Congress than other states. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) (Indiana resident established injury because proposed Census methods would likely result in the loss of a Congressional representative for the state and “[w]ith one fewer Representative, Indiana residents’ votes will be diluted”).

But here, Plaintiffs’ votes will not be “diluted.” To be sure, valid, registered voters will be able to vote early. But they will do so based on the *same requirements* they would face on election day: Early voters must provide proof of identification and must complete and sign an application for an absentee ballot, including their name and address. Ind. Code §§3-11-4-5.1, 3-11-10-26(b). Other than the *day* on which the ballot is cast, there is no meaningful difference between what a voter does if she votes early or if she votes on election day. *Compare* Ind. Code §3-11-8-25.1 (requiring election day voters to provide proof of identification). Plaintiffs’ political power will not be weakened in any way, nor will the one-person, one-vote principle be contravened. In short, Plaintiffs can claim no *injury* that they will suffer if registered voters who meet all requirements vote.²

Plaintiffs also allege that the Board failed to comply with the ten-day notice provision, Indiana Code §3-11-10-37. As an initial matter, although the Complaint alleges that John Curley received no such notice (Complaint, ¶15), it does not allege *any* injury caused by the lack of notice. For that reason alone, Plaintiffs fail to establish any injury caused by the alleged lack of notice. *See Disability Rights Wisc., Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796,

² Certainly, “an injury amounting only to the alleged violation of a right to have the Government act in accordance with law” is merely a generalized grievance and cannot be a sufficient injury for Article III purposes. *Lujan*, 504 U.S. at 575.

801 (7th Cir. 2008) (finding no Article III injury because allegations of injury did not appear in complaint).

Even if the complaint could be construed to allege an injury from this claim, Plaintiffs' basic allegation is easily refuted. Mr. Curley was notified more than 10 days before October 6, 2008, that in-person absentee voting would occur in Gary, Hammond, and East Chicago. As of the September 23, 2008 Board meeting, this fact was public knowledge. Indeed, the Board action was reported in *The Times of Northwest Indiana* on September 24, 2008, and Mr. Curley was quoted in the article as complaining about the Board's action. *See* http://nwitimes.com/articles/2008/09/24/news/lake_county/docf80e8a464152a5d4862574cd007e7e69.txt. Mr. Curley cannot seriously contend that he was not notified. Even if there is some hyper-technical argument that there was no notification – and Intervenor-Defendants do not believe there is – Mr. Curley knew of the Board's decision and so suffered no cognizable injury from any lack of notice.

Plaintiffs thus lack Article III standing, and this Court lacks jurisdiction over the matter. The proper course is to remand the case to state court. *See* 28 U.S.C. §1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”); *see also* *Coyne*, 183 F.3d at 496-97 (remanding case after determination that plaintiff lacked Article III standing).

II. REMOVAL WAS IMPROPER UNDER §1443(2) BECAUSE THE DEFENDANT WAS NOT SUED FOR “REFUSING TO . . . ACT”

28 U.S.C. §1443(2) provides:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district

and division embracing the place wherein it is pending: . . . For any act under color of authority derived from any law providing for equal rights, or *for refusing to do any act on the ground that it would be inconsistent with such law.*

(Emphasis added.) The first provision of §1443(2) – governing actions brought “[f]or any act under color of authority derived from any law providing for equal rights” – is not applicable here, as only federal officers or agents may remove under this provision. *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966).

Instead, the Board of Elections removed this case under the second provision, which applies to actions brought “for refusing to do any act on the ground that it would be inconsistent with [any equal rights] law.” 28 U.S.C. §1443(2). The Board claims that it directed early voting sites to open in Gary, Hammond, and East Chicago because to do otherwise would violate the Voting Rights Act. Intervenor-Defendants agree that the Voting Rights Act required the Board to open these early voting sites.

But this does not make the case removable under §1443(2), because Plaintiffs did not sue the Board because it “*refused*” to do anything. To the contrary, Plaintiffs’ sole complaint is that the Board acted *affirmatively* by directing the sites to open. And Plaintiffs’ complaint seeks injunctive relief to prevent the Board from taking this action. Thus, “the ‘refusal’ clause is unavailable in this case, where the defendants’ actions, rather than their inaction, are being challenged.” *Mass. Council of Constr. Employers, Inc. v. White*, 495 F. Supp. 220, 222 (D.Mass. 1980); *see also Detroit Police Lieutenants & Sergeants Ass’n v. City of Detroit*, 597 F.2d 566, 568 (6th Cir. 1979) (“We believe [the “refusing to do any act” provision] was designed to protect state officers from being penalized for failing to enforce discriminatory state laws or policies. . . . Such is not the case here . . . [because] no one has attempted, or even threatened, to punish

[defendants] for refusing to do any act inconsistent with any law providing equal rights.”); *City & County of San Francisco v. Civil Service Comm’n*, 2002 WL 1677711, at *4 (N.D.Cal. Jul 24, 2002) (“[T]he ‘refusal to act’ clause is unavailable where the removing party’s *action*, rather than its *inaction*, is the subject of the state-court suit.”) (emphases in original).

The Board has offered no alternative ground for removal. As removal was improper under §1443(2), this Court should remand the case to the state court.

CONCLUSION

For the foregoing reasons, the Court should grant Intervenor-Defendants’ motion to remand.

Dated: October 7, 2008

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2008, a copy of the foregoing Memorandum in Support of Motion To Remand was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to the following counsel of record. Parties may access this filing through the Court's system:

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