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United States v. Hays: A Winnowing of Standing to Sue in Racial Gerrymandering Claims

In *United States v. Hays*,[1] the United States Supreme Court addressed the issue of whether individuals who reside outside racially gerrymandered districts have standing to sue on racial gerrymandering claims. In May 1992, Louisiana passed Act 42 of its Regular Session, which redrew its district boundaries to form two majority-minority districts[2]—Districts 4 and 2.[3] District 4 was a "Z-shaped creature"[4] that zigzagged through twenty-eight parishes and five major cities, yet the Act was precleared by the United States Attorney General. The plaintiffs, Hays et al., were residents of Lincoln Parish, which was located in the newly formed District 4, and brought suit to challenge Act 42 under state and federal constitutions as well as under the Voting Rights Act of 1965.[5] The State removed the case to the United States District Court for the Western District of Louisiana.[6] While the case was pending in the district court, the United States Supreme Court decided *Shaw v. Reno*,[7] and the district court, following the *Shaw* rule, held Act 42 unconstitutional and enjoined its enforcement.[8] Louisiana and the United States—intervening as a defendant—subsequently appealed to the United States Supreme Court. While the appeal was pending, the Louisiana Legislature repealed Act 42 and instituted Act 1 of the 1994 Second Extraordinary Session, which redrew District 4 to

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1. 115 S. Ct. 2431 (1995).
2. A majority-minority district is one "in which a majority of the population is a member of a specific minority group." Voinovich v. Quilter, 113 S. Ct. 1149, 1151 (1993).
3. *Hays*, 115 S. Ct. at 2434.
4. *Id.*
5. Voting Rights Act of 1965, 42 U.S.C. § 1973a(a) (1985).
6. *Hays*, 115 S. Ct. at 2434.
7. 113 S. Ct. 2816 (1993). The Court held that a reapportionment plan which "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race" is an unconstitutional gerrymander, and the entire state suffers an injury in fact. *Id.* at 2828-30.
8. *Hays*, 115 S. Ct. at 2434.

exclude Lincoln Parish.[9] The Supreme Court vacated the district court's decision and remanded the case for further consideration in light of the new Act 1.[10] The district court allowed the plaintiffs to amend their complaint to challenge Act 1 and held the Act unconstitutional for largely the same reasons as its decision regarding Act 42.[11] The district court further enjoined Louisiana from conducting elections, substituted its own redistricting plan, and denied Louisiana's request for a stay of judgment pending appeal.[12] Louisiana and the United States again appealed to the Supreme Court, which stayed the judgment of the district court pending appeal.[13] The Supreme Court held that the plaintiffs had no standing to sue, because

> where a plaintiff does not live in [a racially gerrymandered] district, he or she does not suffer [the representational harms of racial classifications in the voting context], and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference.[14]

In order to fully understand the significance of the Supreme Court's holding in *Hays*, the reader must have a working knowledge of the "standing to sue" doctrine generally and as it applies to civil rights and the Equal Protection Clause of the Fourteenth Amendment. In 1975, the Supreme Court decided *Warth v. Seldin*[15] and provided a comprehensive analysis of the standing doctrine and its purposes. The Court determined that the primary question of standing was "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[16] There are two dimensions to this question—"constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise"[17]—both of which are founded in a concern about the proper role and proper limitation of courts in a democratic society.[18] The constitutional dimension demands that a plaintiff make out a "case or controversy" within the meaning of Article III of the Constitution in order for the courts to entertain a suit.[19]

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9. *Id.*
10. *Id.*
11. *Id.* at 2434-35.
12. *Id.* at 2435.
13. *Id.*
14. *Id.* at 2436.
15. 422 U.S. 490 (1975).
16. *Id.* at 498.
17. *Id.*
18. *Id.*
19. *Id.* A crucial aspect of the justiciability of a case is the plaintiff's stake in the outcome of the controversy. *Id.* at 498-99.

The courts are not warranted in exercising their remedial powers on the plaintiffs' behalf in the absence of such a claim, because the Article III powers are designed only to redress individual harms to the complaining party, even though the judgment may benefit others collaterally.[20] The Court, in *United States v. Richardson*,[21] further explained that a "'fundamental aspect of standing' is that it focuses primarily on the party seeking to get his complaint before the federal court rather than 'on the issues he wishes to have adjudicated.'"[22] In its 1992 decision in *Lujan v. Defenders of Wildlife*,[23] the United States Supreme Court outlined the requirements for standing as well as its pleading requirements at the different levels of litigation and encompassed all prior case law at the time.[24] The Court reduced the elements of standing to a minimum of three:

> First, the 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 . . . ." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court . . . ." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[25]

The Court further analyzed the "injury in fact" requirement in *Schlesinger v. Reservists Committee to Stop the War*[26] by holding that a plaintiff did not have standing to sue for generalized damages that all citizens share as a result of governmental action.[27] The Court said that without the requirement that the plaintiff suffer a concrete and particularized injury, the Court would not be able to formulate a reasonable rule based on a factual context within which the parties argue.[28] The Court in *Lujan* stated that the plaintiff must meet different pleading require-

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20. *Id.* at 499.
21. 418 U.S. 166 (1974).
22. *Id.* at 173.
23. 504 U.S. 555 (1992).
24. *Id.* at 560-61.
25. *Id.*
26. 418 U.S. 208 (1974).
27. *Id.* at 220.
28. *Id.* at 221. However, in *Warth v. Seldin*, the Court stated that those persons to which Congress has particularly granted rights of action may have standing "to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim." *Warth*, 422 U.S. at 501.

ments at the different stages of litigation.[29] General factual allegations of injury which result from the defendant's conduct will suffice at the pleading stage.[30] In response to a summary judgment motion, the plaintiff must set forth specific facts which are supported by affidavit or other evidence.[31] Finally, if the plaintiff's facts are controverted at the last stage, the evidence adduced at trial must support those facts.[32] The Court, in *FW/PBS v. Dallas*,[33] stated further that, even if the parties did not raise the issue of standing and the lower courts had not addressed it, the Court must address the issue and the parties cannot waive it.[34] As all areas of the law differ, so does the standing doctrine differ in its development in different areas of law. The Voting Rights Act of 1965 added specificity to the "injury in fact" requirement of standing by requiring a plaintiff to be an "aggrieved person" instituting a proceeding under the voting guarantees of the Fourteenth or Fifteenth Amendments.[35] One of the first cases in the civil rights/equal protection arena to address a standing issue was *Baker v. Carr*.[36] The plaintiffs were voters who lived within a county affected by a state apportionment statute, and they brought an action against the state claiming that their voting rights had been impaired.[37] The Court held that the plaintiffs had standing to sue because they were directly affected by the statute.[38] In 1972, the United States District Court for the District of Maryland faced a claim that a redistricting plan violated the rights of a candidate for Congress.[39] The candidate claimed that the plan created a racial imbalance in his district and that his campaign

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29. *Lujan*, 504 U.S. at 561.

30. *Id.* This requirement follows the requirements set by Rule 8(a) of the FEDERAL RULES OF CIVIL PROCEDURE that "[a] pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . ."

31. *Lujan*, 504 U.S. at 561. The trial and reviewing courts must accept these facts as true and must construe the complaint in favor of the complaining party. The trial court may also allow or require the plaintiff to supply further particularized facts deemed supportive of the plaintiff's standing. If all materials of record do not adequately reflect plaintiff's standing after this opportunity, the complaint must be dismissed. *Warth*, 422 U.S. at 501-02.

32. *Lujan*, 504 U.S. at 561.

33. 493 U.S. 215 (1990).

34. *Id.* at 230-31.

35. 42 U.S.C. § 1973a(a) (1988).

36. 369 U.S. 186 (1962).

37. *Id.* at 207-08.

38. *Id.* at 208. The Court reasoned that by residing in a racially gerrymandered district, the plaintiffs were in a position of "unconstitutionally unjustifiable inequality" and therefore had a "legally cognizable injury." *Id.*

39. Shapiro v. Maryland, 336 F. Supp. 1205 (D. Md. 1972).

would be adversely affected.[40] The court found that the candidate had no standing because he was not harmed by being forced out of a racially balanced district into a racially imbalanced district, particularly because he was not a resident of the district which was affected by the plan.[41] The court stated that the candidate would have conceivably had standing to challenge the whole redistricting plan, but such was not the claim before it.[42] By this time, the courts were moving toward a concession that parties might have standing by challenging an entire redistricting plan rather than proving that they were residing in a particular district adversely affected by the plan. This concession became fully realized in *Heckler v. Matthews*,[43] a case involving an equal protection challenge to a pension offset provision. A retiree brought a class action suit challenging a pension offset exception that allowed for certain monies to flow to women rather than men and claimed that the provision subjected men to unequal treatment solely on the basis of sex.[44] The Court stated that the retiree had standing because his alleged injury in fact was a stigmatic injury which the Court has "long recognized as judicially cognizable."[45] The Court explained that the underlying reason for allowing standing in a claim where the harm is a stigmatic injury is that

> [D]iscrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.[46]

The Court further refined the analysis of a stigmatic injury claim in *Allen v. Wright*.[47] The plaintiffs brought suit against the IRS claiming that the IRS was violating the law by allowing tax exemptions to discriminatory private schools.[48] The Court held that the plaintiffs had

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40. *Id.* at 1208.

41. *Id.* *See also* Chavis v. Whitcomb, 305 F. Supp. 1364, 1390 (S.D. Ind. 1969) (plaintiffs were not harmed and had no standing because they did not live in the district affected).

42. *Shapiro*, 336 F. Supp. at 1209.

43. 465 U.S. 728 (1984).

44. *Id.* at 738.

45. *Id.*

46. *Id.* at 739.

47. 468 U.S. 737 (1984).

48. *Id.* at 740-43. The plaintiffs were parents of black children who were attending schools undergoing the process of integration. The IRS was supposed to grant tax exemptions to schools that either had successfully integrated or were in the process of

no standing because they did not allege a stigmatic injury of the kind involved in *Heckler*.[49] The Court reasoned that an abstract stigmatic injury, if allowed as sufficient to permit standing, would extend to all persons of the group affected by the government's alleged wrongful conduct and could undermine the requirement of a personal injury.[50] The Court, therefore, narrowed the eligibility of the stigmatic injury to support standing by stating that "[t]he stigmatic injury thus requires identification of some concrete interest with respect to which [plaintiffs] are personally subject to discriminatory treatment."[51] In *Shaw v. Reno*,[52] the Court broadened the availability of the stigmatic injury as an injury in fact to uphold standing. In that case, the plaintiffs—five white voters—challenged a redistricting plan which created a majority-minority district whose boundaries followed an interstate highway. The plaintiffs claimed that the plan created an unconstitutional racial gerrymander and violated their rights to a "color-blind" election.[53] The Court found that the reapportionment plan "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race . . . ."[54] The stigmatic injury in racial gerrymandering cases is concrete enough to satisfy the *Allen v. Wright* test of showing a concrete injury directly resulting from the harmful action, because such action "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[55] The Court also stated that standing would not be denied the plaintiffs simply because they were white and did not live within the district affected by the plan, because such a reinforcement of racial stereotypes harms the whole state which adopts such a plan.[56]

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integration and deny such exemptions to schools that were racially discriminatory. *Id.*

49. *Allen*, 468 U.S. at 755. The Court stated that the plaintiffs had not shown that the stigmatic injury they suffered had a causal connection to, and flowed as a direct result of, having been denied equal treatment. *Id.* Rather, the plaintiffs relied on their rights to have the government act in accordance with the law, and such a claim is not judicially cognizable. *Id.* at 754-55. *See also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974).

50. *Allen*, 468 U.S. at 755-56.

51. *Id.* at 757.

52. 113 S. Ct. 2816 (1993).

53. *Id.* at 2820, 2824.

54. *Id.* at 2828.

55. *Id.*

56. *Id.* at 2830. On remand to the district court as Shaw v. Hunt, 861 F. Supp. 408 (E.D. N.C. 1994), that court held that

The decision in *United States v. Hays*[57] was primarily a reaction to the development of the stigmatic injury as a tool for upholding standing and particularly the injury in fact requirement, which culminated in *Shaw v. Reno*[58] and its result on remand in *Shaw v. Hunt*.[59] The Court began its opinion in *Hays* by reviewing the requirements of standing and immediately addressing the issue of generalized grievances.[60] The Court made clear that generalized grievances against alleged wrongful government conduct will not meet the standing requirement of injury in fact, and it pointed to *Allen v. Wright* for support.[61] The Court reviewed its reasoning in *Shaw* for allowing a stigmatic injury to suffice for the injury in fact requirement, but rejected the plaintiffs' argument that everyone in the state had a claim because each person must prove that they have actually been injured.[62] The Court realized the difficulty in demonstrating individualized harm and created a solution by separating claims between those who live inside districts affected by redistricting plans and those who live outside such districts.[63] The Court reasoned that, naturally, those who live within such districts are going to be directly affected by a plan which focuses on their district, while those outside such districts are only going to be indirectly affected.[64] The Court therefore decided that those within the affected districts will have standing, while those outside the affected districts must overcome, with specific evidence, a presumption that they are not harmed.[65] If plaintiffs who live outside the affected districts do not include specific evidence in the complaint, the Court explained, they will be asserting a generalized grievance which has already been shown, through *Schlesinger* and *Allen*, not to support standing.[66] The Court

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> [a]ny person who can show that a redistricting plan has assigned him to vote in a particular district at least in part because of his race has standing to challenge it, even if he cannot show that it has caused any concrete injury to his political interest. In this context, the "injury in fact" presumably is the state's decision to deal with the voter as a member of a particular racial class, rather than as an individual, in assigning him to a voting district, which is an affront to his "personal dignity."

Id. at 426.

57. 115 S. Ct. 2431 (1995).
58. 113 S. Ct. 2816 (1993).
59. 861 F. Supp. 408 (E.D. N.C. 1994).
60. 115 S. Ct. at 2435.
61. *Id.*
62. *Id.* at 2436.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

then focused on the case before it and addressed the plaintiffs' lack of specific evidence showing that they had been injured by the redistricing plan.[67] Although the plaintiffs had shown that the Louisiana Legislature was aware of the racial composition of the plaintiffs' new district, the Court stated that "proof of '[t]hat sort of race consciousness' in the redistricting process is inadequate to establish injury in fact," because the "legislature always is aware of race when it draws district lines."[68] The Court further explained that even if the plaintiffs had shown that the legislature had an improper motive in redrawing District 4, no inferences could be drawn from that motive and applied to District 5, where the plaintiffs resided.[69] With respect to the absence of specific evidence showing individualized harm, the Court concluded that it had "never held that the racial composition of a particular voting district, without more, can violate the Constitution."[70] Finally, the Court entertained the plaintiffs' analogy of their situation to that in *Powers v. Ohio*,[71] where the Court held that an individual has a right not to be excluded from a petit jury on account of race.[72] The Court distinguished *Powers* on the basis that the plaintiff in that case had suffered a concrete injury that was realized at the time of the harmful act—being excluded from the jury.[73] The plaintiffs in this case may have had a right not to be excluded from a certain district on account of their race, but the Court said that the plaintiffs had not shown that they suffered such treatment.[74]

The effects of the decision in *Hays* are significant. The Court did not overrule its decision in *Shaw v. Reno*,[75] but it restricted the application of that decision. The white voters in *Shaw* were not precluded from making a stigmatic injury claim, yet if the decision in *Hays* were retroactive those same voters would be denied standing. The voters were not residents of the gerrymandered district and had no specific evidence supporting their injury in the complaint, so standing would

67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 2437.
71. 499 U.S. 400 (1991).
72. *Hays*, 115 S. Ct. at 2437.
73. *Id.*
74. *Id.* Justice Stevens concurred in the opinion because the plaintiffs had not shown that they were harmed, but he did not agree with the majority's view that the plaintiffs would be better off if they resided in the gerrymandered district. *Id.* at 2440 (Stevens, J., concurring). Justice Stevens agreed with the majority that the plaintiffs' residency, by itself, does not give them standing, but he did not believe that the plaintiffs' residency, by itself, could preclude them from having standing. *Id.*
75. 113 S. Ct. 2816 (1993).

have been denied under the *Hays* doctrine. As a practical matter, the decision in *Hays* will have differing results. Not only will the decision ease judicial administration and discourage nongenuine claims, but it will also effectively change the application of Federal Rule of Civil Procedure 8(a) on racial gerrymandering cases, modify the pre-existing pleading rules for standing in that area, and give rise to possible future equal protection problems. By forcing those who are not residents of the district which is being racially gerrymandered to provide specific evidence of harm, the Court created a clear rule that makes it easier to determine which plaintiffs have standing. Rather than wasting time and money on a case only to find that the plaintiffs were not harmed and had no standing at the outset,[76] the Court eliminated most standing problems before the parties come to trial. The Court altered the pleading requirements for standing—at least in their application to racial gerrymandering cases—created in *Lujan* by negating one of the stages. After *Hays*, at the pleading stage the plaintiff will either make general allegations of fact if that party is a resident of the gerrymandered district *or* make those allegations and support them by affidavit or other specific evidence if that party lives outside such district.[77] The pleading requirement at the summary judgment stage is effectively negated by the decision in *Hays* because 1) there is a presumption that residents of a gerrymandered district are harmed,[78] and 2) nonresidents of gerrymandered districts have already supported their facts with affidavits or other specific evidence at the pleading stage. By creating this new first pleading requirement, the Court will dispose of those cases in which the plaintiff has no standing before the case comes to trial. The new pleading requirement may also discourage nongenuine claims by those who seek a remedy without having been wronged. It is conceivable that those who are residents of gerrymandered districts may bring nongenuine claims,[79] but such claims will be few, if any, as a result of the Court's presumption of harm to those residents. The real effect will be on claims by nonresidents. Unless nonresidents can support allegations of injury with specific evidence in the complaint, they

76. Such was the case in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

77. Originally the plaintiff had to state general factual allegations at the pleading stage, support the facts with affidavit or other evidence on a motion for summary judgment, and, finally, support those facts, if controverted, by all the evidence adduced at trial. *Lujan*, 504 U.S. at 561.

78. *Hays*, 115 S. Ct. at 2436.

79. Although the Court has presumed that residents of racially gerrymandered districts are harmed, not all residents may be harmed in fact. There may be those who bring claims and have not suffered a concrete injury resulting from the mandate of segregation that a racial gerrymander represents.

will lack standing for failure to meet the pleading standards.[80] Whereas nonresidents were encouraged by the expansive rule of *Shaw v. Reno* to bring claims, there is now a disincentive for nonresidents to bring claims.[81] Not only did the Court affect the pleading requirements of standing, but it also changed Federal Rule of Civil Procedure 8(a). Rule 8(a) requires the plaintiff to provide a short and plain statement upon which the court can rest its jurisdiction. After *Hays*, the plaintiff must present virtually the entire case, including such supplementary material as affidavits, in the complaint rather than the short and plain statement allowed before.[82] It would seem that the Court legislated rather than interpreted the Rule as it unilaterally changed the Rule in relation to racial gerrymandering cases. The change is narrow in scope, though, and deals with a highly litigated area of the law. Were the Court to wait for Congress to pass an amendment to the Rule, even more money and time would be wasted on nongenuine cases and the judicial process in this area would remain cumbersome. Although the Court's holding serves to ease judicial administration and discourage nongenuine claims, it could also pose a constitutional problem. The Court has created a virtually unintelligible distinction between residents and nonresidents of racially gerrymandered districts, which may result in equal protection problems. Although an equal protection problem regarding standing to sue will receive low scrutiny by the courts—even in the arena of racial gerrymandering—there is no real difference between residents and nonresidents in reference to racially gerrymandered districts, as Justice Stevens noted in his concurring opinion.[83] Those who reside outside the gerrymandered district may be harmed in the same manner and receive the same injuries as those who are residents of that district.[84] The Court made clear in *Shaw v. Reno* that racial gerrymandering harms everyone—including those outside the affected district—by "reinforc[ing] racial stereotypes and threaten[ing] to undermine our system of representative democracy."[85] In fact, the Court agreed in that case that white voters not residing in the gerrymandered district were harmed by being denied the right to a "colorblind" election.[86] The only difference between residents and nonresidents of gerrymandered districts who are harmed equally is that residents do not have to carry as heavy a pleading burden as nonresi-

80. *Hays*, 115 S. Ct. at 2436.
81. 113 S. Ct. 2816, 2830 (1993); *see also* Shaw v. Hunt, 861 F. Supp. 408, 426 (1994).
82. *Hays*, 115 S. Ct. at 2436.
83. *Id.* at 2440 (Stevens, J., concurring).
84. *Id.*
85. 113 S. Ct. at 2828.
86. *Id.* at 2824.

dents.[87] The Court offered no special reason for drawing the distinction other than a conclusory presumption that those who do not reside in gerrymandered districts suffer no harm from the gerrymandering.[88] Even under low level scrutiny, the Court may not have given a rational reason for drawing this distinction. The practical effects of the decision, which were probably foremost on the Justices' minds at the time, would serve as a rational basis for separating residents from nonresidents.. Yet the problems that the decision could create and the rights that it might suppress probably outweigh the need to ease judicial administration and discourage nongenuine claims.

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87. In fact, residents are presumed to be harmed and therefore have little or no pleading requirement to sustain standing initially, while nonresidents must carry the unusually heavy burden of supplying evidence to support their allegations of harm in order to get a foot in the courtroom doors.

88. *Hays*, 115 S. Ct. at 2436.