IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DAN MCCONCHIE, et al, Plaintiffs, v. ILLINOIS STATE BOARD OF ELECTIONS, et al, Defendants.	)	Case No. 1:21-CV-03091 Circuit Judge Michael B. Brennan Chief Judge Jon E. DeGuilio Judge Robert M. Dow, Jr., Three-Judge Court Pursuant to 28 U.S.C. § 2284(a)

DEFENDANTS WELCH, OFFICE OF THE SPEAKER, HARMON, OFFICE OF THE PRESIDENT OF THE ILLINOIS SENATE'S REPLY IN SUPPORT OF THEIR RULE 12(B) MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants Emanuel Christopher Welch, Office of the Speaker of the Illinois House of Representatives, Don Harmon, and Office of the President of the Illinois Senate, by their attorneys, respectfully reply in support of their Rule 12(b) Motion to Dismiss Plaintiffs' Amended Complaint (Dkt. #80 ("Mot.")).

Introduction

Plaintiffs' Amended Complaint alleges the Illinois legislative redistricting plan that became effective on June 4, 2021 ("the June Plan") violates the Constitution's one person, one vote requirement. Defendants have moved to dismiss arguing Plaintiffs' Amended Complaint fails to allege standing on the part of any plaintiff, fails to state a claim of relief against Speaker Welch or President Harmon, and failed to name the Illinois Supreme Court and Secretary of State as necessary parties. *See*, Mot.

On August 31, 2021, the General Assembly convened and passed an amended plan that incorporated the official data released from the United States Census

Bureau on August 12, 2021 ("the Current Plan"). Plaintiffs have conceded the Current Plan has fixed the one person, one vote issues alleged in the Amended Complaint. *See* Hr'g Tr. (Sept. 1, 2021) at 9:23-24 ("As of right now we believe the malapportionment issues are taken care of.").

Despite the Current Plan, Plaintiffs ask this Court to deny Defendants' Motion to Dismiss the Amended Complaint. This Court should grant the motion because (1) the Amended Complaint is moot; (2) Plaintiffs' Amended Complaint fails to allege standing by any Plaintiff; (3) the "equitable relief" requested by the Amended Complaint is unavailable under state or federal law; and (4) the Illinois Supreme Court and Secretary of State are necessary parties for the relief sought. For these reasons, Defendants respectfully request this Court grant their Motion to Dismiss without prejudice.

Argument

I. Plaintiffs' Amended Complaint is Moot.

Plaintiffs' Amended Complaint is based on purported unconstitutional population deviations in the June Plan. *See*, Dkt. #51. On August 31, 2021, the General Assembly passed the Current Plan that amended the redistricting plan to incorporate the Census Bureau's official data that was released on August 12, 2021.[1]

The Current Plan, once signed by the Governor, will moot Plaintiffs' Amended Complaint on the June Plan. In one person, one vote cases, the way to vindicate an

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[1] https://www.ilga.gov/legislation/BillStatus.asp?DocNum=927&GAID=16&DocTypeID=SB&LegId=133554&SessionID=110&GA=102

individual plaintiff's right to an equally weighted vote may be through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018), quoting *Reynolds v. Sims*, 377 U. S. 533, 561 (1964). Here, however, that restructuring already has occurred through the Current Plan. Plaintiffs have even conceded that their "malapportionment" charge has been cured, thereby admitting the harm they allege has been remedied. Hr'g Tr. (Sept. 1, 2021) at 9:23-24. The Amended Complaint is therefore moot and should be dismissed.

II. Plaintiffs' Response Does Not Cure Plaintiffs' Amended Complaint's Failure to Plead Standing.

The Supreme Court has concluded "[t]he right to vote is 'individual and personal in nature,' [ ] and that 'voters who allege facts showing disadvantage to *themselves* as individuals have standing to sue' to remedy that disadvantage[.]" *Gill*, 138 S.Ct. at 1929 (emphasis added) (quoting *Reynolds,* 377 U. S. at 561 and *Baker v. Carr*, 369 U. S. 186, 206 (1962).

Defendants' Motion argues Plaintiffs have failed to plead standing because the Amended Complaint does not allege any plaintiff suffered any injury in fact, nor does it allege Defendants' actions resulted in any disadvantage to Plaintiffs as individuals sufficient to confer Article III standing. Mot. at 4. Specifically, the Motion argues, Plaintiffs have failed to allege they live in districts that violate their one-person, one-vote rights.

In response, Plaintiffs do not cite to their Amended Complaint to argue they have sufficiently pleaded they have standing. Instead, Plaintiffs cite to an affidavit

submitted in support of their Motion for Summary Judgment.[2] *See,* Resp. at 8 (As shown in the affidavit of Plaintiffs' expert, Dr. Jowei Chen, both the 26th Senate District and the 82nd House District are overpopulated. Chen Aff. at Table 2, p. 10, 12.)[3]

Citation to an expert report is insufficient to cure the deficiency in Plaintiffs' Amended Complaint. Plaintiffs should be required to plead which districts are being challenged, why, and how the Plaintiff (or Plaintiffs) challenging the district has standing. As this Court has stated, a complaint alleging such facts is necessary "so that the panel and the parties can readily identify the bases for any challenges to the operative proposed map and assess whether those challenges arise under the federal or state constitution or under the Voting Rights Act." Dkt. #94 at. 1. The Court explained that "[t]he need to create a clear record for appellate review and for the parties and the panel to have an easily accessible and comprehensible road map to the issues to be litigated on an expedited basis support the panel's insistence that the parties advance their claims and defenses through formal pleadings." *Id.*

As the Amended Complaint currently stands, Plaintiffs challenge all districts in the June 4, 2021 redistricting plan. Mot. at 3-4. It is obviously impossible that all districts violate the one person, one vote rule—inevitably at least *one* district must be underpopulated to create overpopulated districts. Defendants are entitled to know

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[2] Plaintiffs argue Plaintiffs McConchie and Durkin as having individual standing and the Caucus Plaintiffs and Illinois Republican Party as having associational standing. Resp. at 6-11. But the distinction is without a difference because both arguments fail to identify which districts are being challenged.

[3] Dr. Chen's affidavit is at Dkt. #79-1.

what specific districts Plaintiffs are challenging and why. It should not be left to the summary judgment stage for Plaintiffs to unveil their cause of action. Facts necessary to establish standing must not only be proven, but must be alleged at the pleading stage. *Gill*, 138 S. Ct. at 1931, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

As a result, this Court should dismiss Plaintiffs' Amended Complaint. Defendants' Motion asked this Court to dismiss the Amended Complaint with prejudice. This Court also stated, however, "as any dismissal order likely would be issued without prejudice in view of the potential for different claims to be advanced challenging the revised map[.]" *Id.* Plaintiffs' Response suggests Plaintiffs are capable of pleading standing for at least some Plaintiffs. Plaintiffs should be granted leave to clearly plead facts that establish (1) the district being challenged; (2) under what legal theory the district is being challenged; and (3) and how the Plaintiff challenging the district has standing.

III. Plaintiffs' Response Fails to Support the Requested to Relief that this Court Order a Legislative Redistricting Commission under the Illinois Constitution.

Defendants' Motion next argues Plaintiffs have failed to establish how this Court may order a Legislative Redistricting Commission under the Illinois Constitution as "equitable relief." Mot. at 9-13. In response, Plaintiffs argue "[t]his argument fails because it is not a proper argument for a motion to dismiss and because the Court has authority under federal law to grant relief from an invalid legislative map, including requiring that a commission draw a valid map." Resp. at 11.

Plaintiffs' argument ignores their Amended Complaint. Plaintiffs did not request a Legislative Redistricting Commission under *federal* law, but under Illinois law. The Amended Complaint asks this Court to find the redistricting plan is void *ab initio* and grant "equitable relief" to order President Harmon and Speaker Welch "to appoint members to a bipartisan Commission with the responsibility for enacting a redistricting plan pursuant to the procedures set forth in Article IV, Section 3 of the Illinois Constitution." Dkt. #53, prayer for relief ¶ 5. Thus, contrary to Plaintiffs response, the relief the Amended Complaint seeks is under Illinois law, not federal law.

Under Illinois law, however, there is no Legislative Redistricting Commission because the General Assembly passed, and the Governor signed, an effective redistricting plan by June 30, 2021. See Ill. Const. (1970), art. IV, §3(b). A Legislative Redistricting Commission is only constituted if the General Assembly fails to enact an effective redistricting plan by June 30 in the year following the decennial census. *Id.* Plaintiffs argue this interpretation of the Illinois Constitution is "nonsensical" because it "would dramatically undermine the role of the legislative redistricting commission, which was enshrined in the Illinois Constitution and ratified by Illinois citizens, not to mention subvert the Court's proper role in ensuring that federal constitutional rights are upheld." Resp. at 14. Plaintiffs' argument, of course, ignores the role the Constitution, ratified by Illinois citizens, gives to the General Assembly to enact a redistricting plan in the first instance. The General Assembly met its

Constitutional obligation; thus no Legislative Redistricting Commission may be constituted under the Illinois Constitution.

Plaintiffs' new theory—that this Court may constitute a Commission under federal law—also fails. The Supreme Court has long held that redrawing should be left to the state legislatures in the first instance. *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978) ("redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt"); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); *Gaffney* v. *Cummings*, 412 U.S. 735, 749 (1973); *Burns* v. *Richardson*, 384 U.S. 73, 84-85 (1966) ("When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."). In other words, when legislative action can remedy an unconstitutional plan, the redistricting should be left to the elected legislature which is vested with that responsibility. *See Perry v. Perez*, 132 S.Ct. 934, 941 (2012).

Plaintiffs ask this Court, were they to prevail, to ignore the Illinois General Assembly and constitute through federal judicial power a Commission to draw an entirely new plan—a remedy that would give Plaintiffs a 50/50 chance of drawing the entire redistricting plan on their own. But taking the power to draw the plan from the General Assembly and placing it in the hands of Plaintiffs would be inapposite to

the direction the Supreme Court has given to District Courts. This Court should reject Plaintiffs' invitation to do so.

IV. Plaintiffs Have Failed to Join the Illinois Supreme Court and Illinois Secretary of State as Necessary Parties.

Defendants' Motion argues Plaintiffs have failed to name the Illinois Supreme Court and Illinois Secretary of State as necessary parties under Federal Rule of Civil Procedure 19. Mot. at 15. The Motion argues this Court cannot provide the Commission relief Plaintiffs seek without the Illinois Supreme Court and Secretary of State also being ordered to perform their assigned duties under Article IV, Section 3(b).

In Response, Plaintiffs argue "the Court can 'accord complete relief' between the parties by ordering the Leadership Defendants to appoint members to a redistricting commission." Resp. at 15-16. The Motion then argues, "[e]ven if the Supreme Court or Secretary of State are required to take additional steps to support the commission's work, there is no indication that either party will refuse to take such steps, especially since they are required to do so under the Illinois Constitution. *See* Ill. Const. 1970, art. IV, § 3(b)." *Id.*

The Illinois Constitution, however, states that "If the Commission fails to file an approved redistricting plan [by August 10], the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1. Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission." Ill. Const. (1970), art. IV, § 3(b). September 1

passed without the Supreme Court submitting names to the Secretary.[4] And September 5 passed without the Secretary attempting to draw a name by random.

Plaintiffs also argue that "even if the Supreme Court or Secretary of State were 'necessary' parties to this case—and they are not—this would still not constitute grounds for dismissal under Rule 12(b)(7) unless the parties could not be joined to the case and they were also 'indispensable.'" Resp. at 16. The Illinois Constitution requires that the Legislative Redistricting Commission with the tie-breaking member has until October 5, 2021 to file a redistricting plan approved by five members. Ill. Const. (1970), art. IV, § 3(b). Under that process, the Illinois Supreme Court must pick two names, and the Secretary must draw one name at random, for a plan to be enacted. That plan must be filed by October 5, 2021. Indispensability, if it is not currently present, is certainly approaching quickly.

Conclusion

WHEREFORE, for the reasons stated, the Presiding Officer Defendants respectfully request this Court dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b).

Dated: September 17, 2021

Respectfully submitted,

/s/Adam R. Vaught

[4] To be clear, Defendants are not arguing the Supreme Court has failed to perform any duty under the Constitution. Instead, it is clear the Supreme Court does not believe the Commission process has been triggered.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, I electronically filed the above Defendants Welch, Office of the Speaker, Harmon, Office of the President of the Illinois Senate's Reply in Support of Their Rule 12(B) Motion to Dismiss Plaintiffs' Amended Complaint, with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to all counsel of record.

By: */s/Adam R. Vaught*