UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JULIE CONTRERAS, IRVIN FUENTES, ABRAHAM MARTINEZ, IRENE PADILLA, and ROSE TORRES,

Plaintiffs,

v.

LLINOIS STATE BOARD OF ELECTIONS, CHARLES W. SCHOLZ, IAN K. LINNABARY, WILLIAM M. MCGUFFAGE, WILLIAM J. CADIGAN, KATHERINE S. O'BRIEN, LAURA K. DONAHUE, CASANDRA B. WATSON, and WILLIAM R. HAINE, in their official capacities as members of the Illinois State Board of Elections, EMANUEL CHRISTOPHER WELCH, in his official capacity as Speaker of the Illinois House of Representatives, the OFFICE OF SPEAKER OF THE ILLINOIS HOUSE OF REPRESENTATIVES, DON HARMON, in his official capacity as President of the Illinois Senate, and the OFFICE OF THE PRESIDENT OF THE ILLINOIS SENATE,

Defendants.

Case No. 1:21-cv-03139

CIRCUIT JUDGE MICHAEL B. BRENNAN; CHIEF JUDGE JON E. DEGUILIO; JUDGE ROBERT M. DOW, JR.

Three-Judge Panel
Pursuant to 28 U.S.C. § 2284(a)

OPPOSITION TO DEFENDANTS ILLINOIS STATE BOARD OF ELECTIONS AND ITS MEMBERS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

INTRODUCTION

The Fourteenth Amendment of the U.S. Constitution states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. From this guarantee comes the now-familiar maxim of "one person, one vote."

For a half-century, in an unbroken line of cases, the "one person, one vote" rule has helped realize the constitutional promise of inclusion and equal access to our nation's representative bodies. This bedrock principle guards against discrimination and ensures that everyone is counted when legislative districts are redrawn.

To fulfill their constitutional requirements, States are required to use granular levels of data to demonstrate a good-faith effort to achieve precise mathematical equality between voting districts. Plaintiffs allege—and Board Member Defendants apparently do not deny—that as a result of Legislative Defendants' use of the U.S. Census Bureau's American Community Survey ("ACS") data to draw redistricting maps, Plaintiffs live in malapportioned districts. Plaintiffs allege—and Board Member Defendants apparently do not deny—that as a result of living in malapportioned districts, Plaintiffs' Constitutional right to an equal vote has been invaded. And Plaintiffs allege—and Board Member Defendants apparently do not deny—that they are charged with enforcing the map created by the Legislative Defendants in the upcoming 2022 election.

It could not be clearer, if the Board Members Defendants are not enjoined from enforcing the map passed by Legislative Defendants, then Board Member Defendants will be taking action that is consistent with their statutory duties, but nonetheless invades Plaintiffs' Constitutionally protected interests. This is exactly the type of case the Supreme Court held this Court can hear in *Ex parte Young*, 209 U.S. 123 (1908).

This Court should dismiss Board Member Defendants' Motion to dismiss in its entirety.

BACKGROUND

The Illinois State Board of Elections ("the Board") supervises the administration of registration and election laws throughout Illinois under Article III, Section 5 of the Illinois Constitution and 10 ILCS 5/1A-1, *et seq.* (ECF 37. Compl. ¶ 15.)

On Thursday May 27, 2021, House and Senate Democrats issued a press release announcing the release of updated maps. (*Id.* ¶ 47.) According to House and Senate Democrats, "the maps were generated using five-year ACS data and 'other election data.'" (*Id.*)

The map drawn using "five-year ACS data and 'other election data'" passed the legislature and was signed into law. (*Id.* ¶ 49, 51.)

As a result, Plaintiffs live in malapportioned and underrepresented districts. (*Id.* ¶¶ 10–14.)

Unless this Court intervenes, the Board will enforce the Enacted Plans in the 2022 general election for the General Assembly. (*Id.* ¶ 52.)

The Board's enforcement of the enacted plan dilutes the votes of Plaintiffs who live in underrepresented districts. (*Id.*)

LEGAL STANDARD

Defendants' 12(b)(1) motion does not deny any of the factual allegations in the Complaint, and it is therefore a facial challenge to this Court's subject matter jurisdiction. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009). "Facial challenges require only that the court look to the complaint and see if the plaintiff has sufficiently *alleged* a basis of subject matter jurisdiction." *Id.* at 443 (emphasis in original) (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir.1990)).

Federal Rule of Civil Procedure 8(a)(2) prescribes a plaintiff's pleading standards, and it requires only that a complaint plead "a short and plain statement of the claim showing that the pleader is entitled to relief." If a complaint fails to meet this standard, it may be dismissed under

Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead facts to "state a claim that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Fundamentally, "the plausibility determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 676 (7th Cir. 2016) (quotations omitted).

ARGUMENT

I. THIS CASE FALLS INTO THE *EX PARTE YOUNG* EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment does not bar Plaintiffs from seeking prospective injunctive relief against state officials who, acting in their official capacity, violate federal law. *Ex parte Young*, 209 U.S. 123 (1908); *see also Frew v. Hawkins*, 540 U.S. 431, 437 (2004) ("To ensure the enforcement of federal law . . . the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law."); *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997)); *Papasan v. Allaub*, 478 U.S. 265, 277 (1986) ("*Young* has been focused on cases in which a violation of federal law by a state official is ongoing"). This "straightforward inquiry" leads to the simple conclusion that this suit is not barred by the Eleventh Amendment.

Plaintiffs request only prospective injunctive relief for an ongoing constitutional violation, and make no claim for money damages. The *Ex parte Young* exception thus clearly applies. Contrary to Defendants' claims, Plaintiffs have plausibly alleged that the challenged redistricting lines create an ongoing harm. In particular, Plaintiffs allege that Defendants will use the malapportioned map to supervise the 2022 elections in violation of the constitutional principle of representational equality. *See* Compl. ¶¶ 16–23, 52; *see also Reynolds v. Sims*, 377 U.S. 533 (1964) ("[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people."). Plaintiffs therefore seek to enjoin Board Member Defendants from engaging in conduct that is in-line with their statutory duties yet unconstitutional. This suit is not barred by the Eleventh Amendment.

II. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS

A Plaintiff has standing if (1) "the plaintiff suffers an actual or impending injury"; (2) "the injury is caused by the defendant's acts"; and (3) "a judicial decision in the plaintiff's favor would redress the injury." *Ezell v. City of Chicago*, 641 F.3d 684, 694–95 (7th Cir. 2011). (internal quotations omitted); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998) (footnote omitted). At the pleading stage, a plaintiff must establish each element of Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiffs satisfy each element.

A. Plaintiffs have sufficiently alleged an actual or impending injury.

Plaintiffs have adequately pleaded an injury as to each Board Member Defendant. First, Board Member Defendants do not—and cannot—dispute that Plaintiffs have a legally protected interest in an equal vote. *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 331–32 (1999) ("In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because '[t]hey are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" (quoting *Baker v. Carr*, 369 U.S. 186, 208 (1962))).

And as to each of the Board Member Defendants, Plaintiffs allege that he or she "supervises the administration of registration and election laws throughout Illinois" and that each "[Board Member] will supervise the administration of the 2022 general election." *See* Compl. ¶¶ 16–23. Plaintiffs also allege that "[u]nless this Court intervenes, the Enacted Plans will be used in the 2022 general election for the General Assembly, diluting the votes of Plaintiffs and others who live in underrepresented districts." *Id.* ¶ 52.

This is all that is required under the law. "[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) ("[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." (quotation marks omitted))).

Indeed, the Supreme Court confronted—and rejected—a similar argument to Defendants' in *Babbit*, 442 U.S. 289. There, the Court confronted an election law that would have disenfranchised certain voters with regard to the election of employee bargaining representatives. *Id.* at 293–93. The plaintiffs "adduced evidence tending to prove, that the statutory election procedures frustrate rather than facilitate democratic selection." *Id.* at 300. The defendant argued that the Court lacked standing, and "should decline to entertain [plaintiffs'] challenge until they undertake to invoke the Act's election procedures. In that way, the Court might acquire information regarding how the challenged procedures actually operate, in lieu of the predictive evidence that appellees introduced at trial." The Court rejected that argument, and held "an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all." *Id.* at 301.

While this case proceeds under the Equal Protection clause, the same principle holds true. If the map is malapportioned as Plaintiffs allege, then the actual administration of the election will not be required to determine that it will invade Plaintiffs' Constitutionally protected interest in an equal vote. And absent an Order from this Court finding the map unconstitutional, the Board Members will be required under operation of law to enforce this map with respect to the 2022 election. *See* 10 ILCS 92(h) (General Assembly Redistricting Act of 2021) ("The State Board of Elections ***shall*** prepare and make available to the public a metes and bounds description of the Legislative and Representative Districts created under this Act.") (emphasis added); *see also* 10 Ill. Comp. Stat. 5/1A-8(11) ("The State Board of Elections ***shall*** . . . Supervise the administration of the registration and election laws throughout the State." (emphasis added)). And even the Board Member Defendants' brief acknowledges that "this Court should presume that the Board Members will properly discharge their official duties." (ECF 41, Mot. at 7.)

Plaintiffs' allegations that the Board Members will be statutorily required to take action inconsistent with the Constitution is exactly the type of "real, immediate, and direct" injury that the Courts ought to hear. *See Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.") (citing *Pennsylvania v. West Virginia*, 262 U.S. 553, 592—593 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."); *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) ("Prevention of impending injury by unlawful action is a well-recognized function of courts of equity."); *Carter v. Carter Coal Co.*, 298 U.S. 238, 287 (1936) (same).

Indeed, the Supreme Court has explicitly held in the context of redistricting that allegations of "standing on the basis of the expected effects" are sufficient. *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999).

B. Causation & Redressability

Plaintiffs have adequately pleaded causation and redressability. The Board Member Defendants' arguments to the contrary are not only wrong, but are also so inconsistent that they are essentially unintelligible. Defendants first argue that "The Illinois Constitution gives the Illinois Supreme Court 'exclusive jurisdiction over actions concerning redistricting the House and Senate.' Ill Const. art. IV, § 3. As such, Plaintiffs do not and cannot allege that an order in their favor against the Board or its members would redress their alleged injuries." (ECF 41, Mot. at 6.) But *in the very next paragraph*, they state that "Plaintiffs have provided no reason to believe that the Board will violate any orders entered in this case." (*Id.* at 6–7.) Indeed, Plaintiffs not only provide "no reason to believe that the Board will violate any orders entered in this case," but in fact allege that if this Court enters an Order enjoining them from administering an election with an unconstitutional map, that the Board Member Defendants will be duty-bound to comply.

And that Order will of course redress any injury caused by Defendant Board Member's administration of an unconstitutional map. If no such Order is entered, and no Constitutional map is drawn, then the Board will instead by required to enforce an unconstitutional map. Indeed, Plaintiffs cite *U.S. v. Lee*, 502 F.3d[1] 691, 697 (7th Cir. 2007) for the proposition that "it is presumed that the official acts of public officers will be discharged properly." (ECF 41, Mot. at 7.) While that case is clearly not on point because it only holds that a Court can assume that a police officer will not intentionally break the chain of custody for a piece of physical evidence, Defendants fail

[1] Defendants' brief incorrectly cites the U.S. Reporter. Based on the name of the parties and the context of the opinion, Plaintiffs believe this opinion is the one Defendants intended to cite.

to recognize that the "official acts" they are required to perform is to the enforcement of the map drawn by the Legislative Defendants. *See* 10 ILCS 92(h) (General Assembly Redistricting Act of 2021) ("The State Board of Elections ***shall*** prepare and make available to the public a metes and bounds description of the Legislative and Representative Districts created under this Act.") (emphasis added); *see also* 10 Ill. Comp. Stat. 5/1A-8(11) ("The State Board of Elections ***shall*** . . . Supervise the administration of the registration and election laws throughout the State." (emphasis added)).

So even by the Board Member Defendants' logic, this Court can assume Board Defendants will administrate an unconstitutional map absent an order to the contrary from this Court.

III. PLAINTIFFS HAVE PLAUSIBLY STATED A CLAIM

Board Member Defendants' 12(b)(6) argument is a regurgitation of their stranding arguments. They argue that Plaintiffs have failed to state a claim because "Plaintiffs have not alleged that the Board Members have taken any personal or official actions or may any decision with regard to the 2021 Redistricting Plan." (ECF 41 Mot. at 7.) But as discussed above, Plaintiffs have adequately alleged that they suffer imminent injury as a result of the malapportioned map, and that the Illinois State Board of Elections is required by law to administrate an election that will invade Plaintiffs' Constitutionally protected interest in an equal vote.

For the avoidance of doubt, Board Member Defendants do not dispute:

- That Plaintiffs live in malapportioned districts;
- That there is no compelling state reason justifying the existence of malapportioned districts; or
- That absent an Order from this Court, that they will enforce a map that unconstitutionally deprives Plaintiffs of an equal vote.

Having failed to even dispute these well-pleaded allegations, it is clear that this Court should deny Board Member Defendants' Motion to Dismiss in its Entirety.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss.

Dated: August 25, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2021, a copy of the foregoing document was filed electronically in compliance with Local Rule 5.9.

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