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

DAN MCCONCHIE, in his official capacity as Minority Leader of the Illinois Senate and individually as a registered voter, JIM DURKIN, in his official capacity as Minority Leader of the Illinois House of Representatives and individually as a registered voter, the REPUBLICAN CAUCUS OF THE ILLINOIS SENATE, the REPUBLICAN CAUCUS OF THE ILLINOIS HOUSE OF REPRESENTATIVES, and the ILLINOIS REPUBLICAN PARTY,

Plaintiffs,

vs.

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-03091

Circuit Judge Michael B. Brennan
Chief District Judge Jon E. DeGuilio
District Judge Robert M. Dow, Jr.

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

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The U.S. Supreme Court has adopted a clear, bright-line rule for determining whether a state legislative map complies with the Equal Protection Clause's "one person, one vote" requirement. If the maximum population deviation—i.e., the sum of the percentage deviations from perfect population equality of the most- and least-populated districts—exceeds 10%, the map is "presumptively impermissible." *Evenwel v. Abbott*, 577 U.S. 937, ---, 136 S. Ct. 1120, 1124 (2016). The legislative map passed by the Illinois General Assembly and approved by Governor Pritzker in June has a maximum population deviation nearly ***three times*** the Supreme Court's limit: **29.88%** for House Districts and **20.25%** for Senate Districts. Thus, the map is unconstitutional, invalid, and void *ab initio*.

The Census Bureau released the official population data on August 12, 2021. The data confirm that the maximum population deviations in the House and Senate Districts far exceed the 10% threshold adopted by the Supreme Court. Even if the State could point to any legitimate policy justification for these deviations—which it cannot—the level of deviation is simply too large and exceeds any tolerable limits under the Equal Protection Clause.

As Judge Dow noted at the July 14, 2021 hearing, this is a "simple[]" case. July 14, 2021 Hearing Tr. [Dkt. No. 70-2] at 26:23-27:9. And as Chief Judge DeGuilio observed, the claims in this case "really come down to the census numbers and whether or not they demonstrate the deviations that are unacceptable." *Id.* at 14:24-15:5. The official Census numbers have now been released and confirm that the deviations in the redistricting plan are well in excess of the constitutionally acceptable amounts.

There are no disputes of material fact preventing entry of summary judgment in Plaintiffs' favor with respect to the two claims alleged in the First Amended Complaint ("FAC" or "Amended

Complaint") [Dkt. No. 51]. First, Plaintiffs are entitled to prospective relief under 42 U.S.C. § 1983 to prevent the ongoing Equal Protection violation created by the unequal districts in the redistricting plan. Second, Plaintiffs are entitled to declaratory relief to resolve the actual controversy between the parties regarding the constitutionality, validity, and effectiveness of the redistricting plan. For the reasons set forth below and in the Statement of Material Facts being filed herewith, Plaintiffs respectfully request that the Court grant summary judgment in their favor with respect to both claims in the Amended Complaint and award Plaintiffs their requested declaratory, injunctive, and prospective equitable relief.

STATEMENT OF FACTS

The material facts are more fully set forth in Plaintiffs' Statement of Material Facts Pursuant to Local Rule 56.1(a)(3) (hereinafter "SOF ¶__"). Plaintiffs summarize those facts briefly here for background purposes.

I. The General Assembly Passed the Redistricting Plan and Governor Pritzker Approved the Plan Without Supporting Census Data.

To enable state officials to draw legislative districts of substantially equal population, the U.S. Census Bureau (the "Bureau") generally provides states with the official census population counts per Public Law 94-171 (the "PL 94-171 Data") within one year of the April 1st census date. 13 U.S.C. § 141(c). The most recent census date was April 1, 2020, so the date for the Bureau to release the PL 94-171 Data to the states was March 31, 2021. SOF ¶ 20. However, the Bureau was unable to release the data by that date. *Id.* Instead, in March 2021, the Bureau announced that it would provide the PL 94-171 Data to the states by mid-August of 2021. *Id.*

On May 28, 2021, despite lacking the PL 94-171 Data, the Illinois General Assembly passed, on a purely partisan roll call, a state legislative redistricting plan (the "Redistricting Plan" or "Plan"), which includes a legislative map setting forth districts for the Illinois House of

Representatives ("House Districts") and the Illinois Senate ("Senate Districts"). *Id.* ¶ 21. On June 4, 2021, Governor Pritzker approved the Redistricting Plan. *Id.* ¶ 22.

In passing the Redistricting Plan, the General Assembly acknowledged that the Bureau had not yet provided the PL 94-171 Data and, therefore, the General Assembly could not use the data to draw the legislative map. *Id.* ¶ 23. Instead, the General Assembly stated that it drew the map using population ***estimates*** derived from the 2015-2019 five-year responses to the American Community Survey ("ACS"), along with certain unspecified "election data" and "public input." *Id.* ¶ 24. The General Assembly did not acknowledge, let alone attempt to justify, any population deviations between the districts in the Plan. *Id.* ¶ 25. Instead, it incorrectly claimed that "each of the Districts contained in the 2021 General Assembly Redistricting Plan was drawn to be substantially equal in population." *Id.*

II. The Redistricting Plan Results in Maximum Population Deviations Well Above the Ten Percent Constitutional Threshold

On August 12, 2021, the Census Bureau released the PL 94-171 Data. SOF ¶ 28. Plaintiffs' expert, Dr. Jowei Chen, then used the PL 94-171 Data to calculate the populations in each House and Senate District in the Redistricting Plan. *Id.* ¶ 29. Dr. Chen is an associate professor in the Department of Political Science at the University of Michigan, has extensive academic publications and experience regarding legislative districting and political geography, and has testified at deposition or trial in a number of redistricting cases. *Id.* ¶ 30.

To calculate the populations of the House and Senate Districts in the Plan, Dr. Chen identified the districts to which each 2020 Census block is assigned and overlaid the appropriate Census block shapefiles provided by the Leadership Defendants onto the districts. *Id.* ¶ 32. Dr. Chen then used the PL 94-171 Data files to calculate the population of each House and Senate District in the Plan. *Id.*

With respect to House Districts, Dr. Chen calculated that the ideal population of each of the 118 House Districts is 108,580.6. *Id.* ¶ 33. This number is based on the total Illinois population of 12,812,508, as reflected in the PL 94-171 Data. *Id.* Dr. Chen calculated that the lowest-populated district is House District 83, whose population is 14.91% below the ideal population, and the highest-populated district is House District 5, whose population is 14.97% above the ideal population. *Id.* ¶ 34. Therefore, the maximum population deviation of the House Districts in the Plan is **29.88%**, the sum of the percentage deviations of House Districts 5 and 83. *Id.*

With respect to Senate Districts, Dr. Chen calculated that the ideal population of each of the 59 Senate Districts is 217,161.2, which again is based on the total Illinois population of 12,812,508. *Id.* ¶ 35. Dr. Chen calculated that the lowest-populated district is Senate District 42, whose population is 7.94% below the ideal population, and the highest-populated district is House District 3, whose population is 12.31% above the ideal population. *Id.* ¶ 36. Therefore, the maximum population deviation of the Senate Districts in the Plan is **20.25%**, the sum of the percentage deviations exhibited by Senate Districts 3 and 42. *Id.*

LEGAL STANDARD

Fed. R. Civ. P. 56(c) allows a party to move for entry of summary judgment with respect to any claim or defense in a case when "there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact does not mean the mere existence of "some alleged factual dispute between the parties." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Nor does it mean the existence of "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the

nonmoving party." *Estate of Simpson v. Gorbett*, 863 F.3d 740, 745 (7th Cir. 2017) (quoting *Anderson*, 477 U.S. at 248). A fact is material only if it might affect the outcome of the lawsuit. *See First Ind. Bank v. Baker*, 957 F.2d 506, 508 (7th Cir. 1992).

ARGUMENT

I. A Redistricting Plan with a Maximum Population Deviation Above 10% is Presumptively Impermissible and Unconstitutional.

For over 50 years, federal courts have heard cases challenging state legislative districting plans. In the 1960s, the U.S. Supreme Court issued a number of decisions that together articulated the "one person, one vote" principle guaranteed by the Equal Protection Clause. *See Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964). As the Court explained, "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds*, 377 U.S. at 568. Moreover, state legislative districts must be drawn to contain "substantially equal" populations. *Id.*

The Court subsequently held that a plan resulting in legislative districts with a maximum population deviation above 10% "creates a prima facie case of discrimination." *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). Most recently, the Court addressed these standards in the 2016 *Evenwel* case, reiterating that "[m]aximum deviations above 10% are presumptively impermissible" and explaining that:

> Maximum population deviation is the sum of the percentage deviation from perfect population equality of the most- and least-populated districts. For example, if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map's maximum population deviation is 6.8%.

Evenwel, 136 S. Ct. 1120, 1124 n.2 (internal citation omitted).[1]

[1] Even where a redistricting plan results in a maximum population deviation of less than 10%, the plan may be impermissible if the districts are drawn using arbitrary or discriminatory

II. The General Assembly's Redistricting Plan Creates Maximum Population Deviations Far Above 10% and is Therefore Unconstitutional, Invalid, and Void *Ab Initio*.

On August 16, 2021, the Bureau released the PL 94-171 Data for the 2020 Census. SOF ¶ 28. Within an hour of its release, Dr. Chen was able to analyze that data and calculate the populations of the House and Senate Districts in the General Assembly's Redistricting Plan. *Id.* ¶ 31. Dr. Chen's calculations demonstrate that the maximum population deviation of the House Districts in the Plan is **29.88%** and the maximum population deviation of the Senate Districts in the Plan is **20.25%**. *Id.* ¶¶ 33-36. Accordingly, the maximum population deviations in the Redistricting Plan are far above the 10% threshold set forth by the U.S. Supreme Court. *See Evenwel*, 136 S. Ct. 1120, 1124. The Plan is therefore "presumptively impermissible" and violates the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution. *Id.*

Moreover, the state has provided ***no*** justification for the deviations in the Plan—nor is there any valid justification. To the contrary, in passing the Plan, the General Assembly incorrectly claimed that "each of the Districts contained in the [Plan] was drawn to be substantially equal in population." SOF ¶ 25. The House of Representative falsely asserted that the "largest deviation [with respect to House Districts is] 0.37%, or 398 people, under the target population," while the Senate similarly and falsely asserted that the "largest deviation [with respect to Senate Districts is] +0.2%/-0.17%, or +422/-368 people, from the target population." *Id.* ¶¶ 26-27. Because the General Assembly asserted there would be no significant population deviation—let alone a

criteria. *Roman v. Sincock*, 377 U.S. 695, 710 (1964). Because the Redistricting Plan at issue results in maximum population deviations far above 10%, Plaintiffs do not directly address the arbitrary or discriminatory criteria in this motion. Nonetheless, as alleged in the FAC (¶¶ 71-84), the redistricting process used here was both arbitrary and discriminatory, as evidenced by the lack of any legitimate policy consideration that could justify the excessive population deviations in the Plan. Plaintiffs reserve their rights to challenge the arbitrary and discriminatory nature of the redistricting process at an appropriate time in the future.

deviation of almost three times the presumptive limit set by the Supreme Court—it has not articulated, and cannot articulate, any "rational state policy" that would support such a deviation.

Moreover, even if the General Assembly could point to any such "rational state policy"—and it cannot—the deviations are simply too large to satisfy the requirements of the Equal Protection Clause. If a state enacts a plan that results in districts of unequal population, the state must demonstrate that the deviations "are based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. Even if a state can articulate such a rational policy, there are "tolerable limits" to the amount of deviation allowed under the Equal Protection Clause. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973); *see also Daly v. Hunt*, 93 F.3d 1212, 1218 (4th Cir. 1996) ("there is a level of population disparity beyond which a state can offer no possible justification"). The Supreme Court has previously suggested that a maximum deviation of 16.4% would "approach tolerable limits." *Mahan*, 410 U.S. at 329. The deviations in this case are well above that figure—nearly 30% for the House Districts and over 20% for the Senate Districts. SOF ¶¶ 33-36. Plaintiffs are not aware of any court decision upholding a redistricting plan with population deviations anywhere near as large as those present here—nor could there be given the Supreme Court's clear guidance to lower courts on this issue in *Evenwel*.

Thus, the Redistricting Plan violates the "one person, one vote" principle derived from the Equal Protection Clause, and the Plan is therefore unconstitutional, invalid, and void *ab initio*. *See, e.g.*, *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1282-85 (10th Cir. 2019) (holding that plan resulting in maximum population deviation of 38% was unconstitutional because it was "well over the 10% threshold").

III. The Court Should Grant Summary Judgment for Plaintiffs with Respect to Both Claims in the Amended Complaint and Grant Declaratory and Injunctive Relief.

Plaintiffs assert two claims in the FAC: (1) violation of the Equal Protection Clause, as actionable under 42 U.S.C. § 1983; and (2) Declaratory Judgment. FAC ¶¶ 90-111. There are no disputes of material fact with respect to either claim, and Plaintiffs are therefore entitled to summary judgment in their favor with respect to both claims.

First, under 42 U.S.C. § 1983, a party may file suit against state officials seeking prospective equitable relief for ongoing violations of federal law. *See Ex parte Young*, 209 U.S. 123 (1908); *see also Indiana Protection and Advocacy Servs. v. Indiana Fam. And Social Servs. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010). "A court applying the *Ex parte Young* doctrine now 'need only conduct a 'straightforward inquiry' into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* (quoting *Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002)).

As demonstrated directly above in Section II, the Redistricting Plan violates the Equal Protection Clause of the Fourteenth Amendment and the violation is ongoing. In the FAC, Plaintiffs seek prospective relief to address this violation, including issuing a declaration that the Plan is invalid, enjoining the enforcement of the Plan, and ordering that a legislative redistricting commission draft a new plan that creates substantially equal districts. FAC at Prayer for Relief, p. 45-46. Accordingly, Plaintiffs are entitled to summary judgment with respect to their claim under the Equal Protection Clause and Section 1983.

Second, pursuant to 28 U.S.C. § 2201(a), a court may issue a declaratory judgment in a "case of actual controversy." *See Amling v. Harrow Indust. LLC*, 943 F.3d 373, 377 (7th Cir. 2019). In this case, there is an actual controversy between the parties as to whether the Redistricting Plan is constitutional and valid. As demonstrated in Section II above, the Plan

violates the Equal Protection Clause and is therefore invalid and void *ab initio*. Plaintiffs are thus entitled to summary judgment with respect to their claim for declaratory judgment.

Federal courts have broad authority to order equitable and prospective relief and to enjoin ongoing violations of federal law by state officials in connection with legislative redistricting. *See, e.g.*, *Reynolds*, 377 U.S. at 585 (in state legislative apportionment cases, "any relief accorded can be fashioned in the light of well-known principles of equity") (quoting *Baker*, 369 U.S. at 250 (Douglas, J., concurring)). Courts undertake an "equitable weighing process" to select a fitting remedy for violations of federal law in redistricting cases. *North Carolina v. Covington*, --- U.S. ---, 137 S. Ct. 1624, 1625 (2017) (quoting *NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 183 n.36 (1985)). In this process, courts consider "what is necessary, what is fair, and what is workable." *Id.* (quoting *New York v. Cathedral Academy*, 434 U.S. 125, 129 (1977)).

Applying these principles, the Court should grant Plaintiffs the relief requested in the Amended Complaint. FAC at Prayer for Relief, p. 45-46. Specifically, the Court should issue a declaratory judgment that the Redistricting Plan is unconstitutional, invalid, and void *ab initio* and issue a permanent injunction enjoining Defendants, their agents, employees, and those persons acting in concert with them, from enforcing or giving any effect to the Redistricting Plan, including enjoining Defendants from conducting any elections based on the Plan.

In addition, the Court should issue prospective equitable relief and order that a legislative redistricting commission draft a new redistricting plan pursuant to the procedures set forth in Article IV, Section 3 of the Illinois Constitution. As explained in the Amended Complaint (¶¶ 35-40), the Illinois Constitution directs the General Assembly to enact a valid redistricting plan in the first instance. Ill. Const. 1970, art. IV §§ 3(b). However, if the General Assembly does not enact a valid redistricting plan with the full force and effect of law by June 30, 2021, regardless of the

reason for that failure, the Illinois Constitution shifts the responsibility for drafting a plan from the General Assembly to a redistricting commission. *Id.* There is no provision of the Illinois Constitution that shifts redistricting authority back to the General Assembly after June 30th thereby giving the General Assembly a "do over." To do so would undermine the very process enshrined in the Illinois Constitution, and ratified by Illinois citizens, vesting such power with the redistricting commission.

Further, the equities weigh against allowing the General Assembly to have another attempt at drawing a legislative map. The Leadership Defendants must have known that a map drawn using ACS estimates would be unconstitutional but drew such a map anyway. According to the Census Bureau, ACS estimates are not intended to be used for redistricting or apportioning people in districts.[2] The federal courts have also made clear for years that ACS estimates are not precise enough for redistricting purposes.[3] Thus, the Court should give force and effect to the procedures in the Illinois Constitution and order that a commission draft a new, valid redistricting plan.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant summary judgment in their favor with respect to both claims in the Amended Complaint and award Plaintiffs their requested declaratory, injunctive, and prospective equitable relief.

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[2] ACS Key Facts, Census.gov (https://www.census.gov/content/dam/Census/programs-surveys/acs/news/10ACS_keyfacts.pdf) ("ACS Key Facts"), at p. 1.

[3] *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1022 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018) (ACS results are estimates and should not be used for population counts); *Pope v. Cty. of Albany*, No. 1:11-CV-0736 LEK/CFH, 2014 WL 316703, at *13 n.22 (N.D.N.Y. Jan. 28, 2014) (Census Bureau acknowledged that estimates provided by the ACS are not intended to be used in redistricting); *Benavidez v. Irving Indep. Sch. Dist., Tex.*, 690 F. Supp. 2d 451, 458 (N.D. Tex. 2010) (ACS estimates have higher margins of error compared to Census data).

Dated: August 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 19, 2021, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will provide notice to all counsel of record in this matter.

/s/ Charles E. Harris, II
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