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

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| JULIE CONTRERAS, IRVIN FUENTES, ABRAHAM MARTINEZ, IRENE PADILLA, and ROSE TORRES,<br><br>Plaintiffs,<br><br>v.<br><br>ILLINOIS 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<br><br>Defendants. | Case No. 1:21-cv-03139<br><br>Circuit Judge Michael B. Brennan<br>Chief Judge Jon E. DeGuilio<br>Judge Robert M. Dow, Jr.<br><br>Three-Judge Court<br>Pursuant to 28 U.S.C. § 2284(a) |

**DEFENDANTS WELCH, OFFICE OF THE SPEAKER, HARMON, OFFICE OF THE PRESIDENT'S RULE 12(B) MOTION TO DISMISS**

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 (collectively "the Presiding Officer Defendants"), by their attorneys, respectfully request that this Court dismiss Plaintiffs' Complaint in accordance with Federal Rule of Civil Procedure 12(b). In support, the Presiding Officer Defendants state as follows.

## Introduction

Plaintiffs' Complaint asks this Court to find the Illinois legislative redistricting plan that became effective on June 4, 2021 unconstitutional for the sole reason that the General Assembly used the U.S. Census Bureau's American Community Survey ("ACS") data rather than (still) unavailable 2020 final U.S. Census Bureau P. L. 94-171 data ("census data"). Plaintiffs' Complaint should be dismissed for the following legal deficiencies. *First*, Plaintiffs' lack standing because they have made no district specific allegations of harm, *Second*, no Court has ever held the use of ACS data in redistricting is improper, much less unconstitutional *per se*; and *Third*, Plaintiffs claims are not ripe because the 2020 census data has still not been released.

## Argument

### I. Plaintiffs Lack Standing to Challenge the General Assembly's Decision to Utilize ACS Data in its Redistricting Plan.

In challenging the current redistricting plan, Plaintiffs allege that *any* plan relying on ACS data is *per se* unconstitutional in violation of one-person, one-vote principles of the Equal Protection Clause. Dkt. #1 ("Compl."), ¶ 54.

The three-part test for Article III standing requires that a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016). The Supreme Court has also concluded that "[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 v. Whitford*, 138 S.Ct. 1916, 1920 (2018) (emphasis added) (*quoting Reynolds* v. *Sims,* 377 U. S. 533, 561 (1964) and *Baker v. Carr*, 369 U. S. 186, 206 (1962).

Plaintiffs lack standing to bring this claim because they have not alleged any "disadvantage to themselves as individuals" sufficient to confer Article III standing. In their Complaint, Plaintiffs identify themselves and the Representative District in which they reside. Compl. ¶¶ 9-13. Nowhere do they claim that the fact that they reside in their districts has caused them, or any other residents of their districts, any injury at all. Plaintiffs also fail to allege any other personal injury to them, anywhere in the Complaint, that would give them standing in this case.

The Supreme Court has held that, in the redistricting context, "a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so," including that he has "a personal stake in the outcome" distinct from a "generally available grievance about government." *Gill*, 138 S.Ct. at 1923 (*citing Baker*, 369 U. S. at 204, and *Lance* v. *Coffman*, 549 U. S. 437, 439 (2007) (*per curiam*)).

In *Gill*, individual Wisconsin voters challenged the redistricting plan approved by the Wisconsin legislature. 138 S.Ct. at 1923. The Supreme Court recognized that some of the *Gill* plaintiffs alleged the necessary personal injury, but "never followed up with the requisite proof." *Id*. The requisite proof went to Plaintiffs' standing. The Court held a person's right to vote is "individual and personal in nature" and "to the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific." *Id*. at 1929-1930. At trial in *Gill*, however, the plaintiffs "failed to

meaningfully pursue their allegation of meaningful harm" and instead rested their case "on their theory of statewide injury to Wisconsin Democrats[.]" *Id.* at 1932. Accordingly, the Supreme Court found the plaintiffs failed to demonstrate standing. *Id.* at 1934.

In contrast, Plaintiffs here have not even alleged any injury that is personal to them. They have not alleged—nor can they allege—that their personal voting strength is diluted by the current redistricting plan. They have not alleged, for example, that their votes are diluted by overpopulation in their districts when compared to the voting power of those residing in less populated districts. In *Gill*, the Supreme Court squarely addressed this situation by noting that "the plaintiffs' alleged harm is the dilution of their votes" and that "injury is district specific." *Id.* at 1930. In finding that the *Gill* plaintiffs' failure to establish a district specific injury deprived them of standing, the Supreme Court concluded that "[a] plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Id.* (*quoting United States* v. *Hays*, 515 U. S. 737, 745 (1995) (finding that a plaintiff complaining of racial gerrymandering has standing only to challenge their own district)). Here, as in *Gill* and *Hays*, Plaintiffs complain of vote dilution, but neither alleges that they live in a diluted district. Accordingly, as in *Gill*, Plaintiffs are asserting "only a generalized grievance against government conduct" (here, the decision to use ACS data) of which they "do not approve." *Gill,* at 1921.

Plaintiffs' Complaint simply disagrees with the General Assembly's decision to use ACS data to prepare a redistricting plan in furtherance of its undisputed constitutional duty to redraw the legislative districts by June 30, 2021. *See* Compl. ¶ 42. Plaintiffs' failure to allege any individualized harm to themselves as a result of that decision demonstrates that they lack standing to claim harm.

## II. The Supreme Court Has Concluded that States Are Not Required to Use Census Population Figures in Redistricting, and Courts Have Routinely Accepted the use of ACS Data.

The entire premise of Plaintiffs' Complaint is the use of ACS data, rather than decennial census data, is *per se* unconstitutional. Yet neither the Supreme Court nor any other court has *ever* held that the U.S. Constitution dictates the use of any particular set of data be used in drawing state legislative districts. Instead, the Supreme Court, and other federal courts, have long recognized the flexibility the Constitution affords states in redrawing their own legislative districts.

The Equal Protection Clause requires that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Over time, the Court made clear that, as a general matter, a state legislative redistricting plan "with a maximum population deviation under 10%" is presumed to comply with the Fourteenth Amendment, while a plan at or above the 10% threshold "creates a prima facie case of discrimination and therefore must be justified by the State." *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

Subsequently, the Supreme Court expressly held that "the Equal Protection Clause *does not require the States to use total population figures derived from the*

*federal census* as the standard by which this substantial population equivalency is to be measured." *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (emphasis added). In *Burns*, the Supreme Court held that Hawaii could use a registered-voter population base, rather than a census based total population number, in apportioning the State Senate. *Id.*

The use of non-decennial census data expressly authorized in *Burns* has been echoed for decades by other federal courts, including the Seventh Circuit. *See Tucker v. U.S. Dep't of Com.*, 958 F.2d 1411, 1418 (7th Cir. 1992) (citing *Burns*, 384 U.S. at 92-97 ("states are not required to use census figures for the apportionment of their legislatures")); *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) (holding that states are only required to use the best population data available in redistricting); *Garza v. City of Los Angeles*, 918 F.2d 763, 773 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (finding that the practice of using non-decennial census data in redistricting makes sense not only where census data is not available but also where census data is almost a decade old and no longer accurate); *Martin v. Venables*, 401 F. Supp. 611 (D. Conn. 1975) (upholding use of registered voter figures for municipal redistricting, in part because census population figures were out of date and did not reflect recent population growth); *Meeks v. Avery*, 251 F. Supp. 245, 250 (D. Kan. 1966) (finding the use of the state's agricultural census for congressional districts permissible).

More recently, in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), the Supreme Court analyzed whether the Constitution required Texas to use citizen voting age

population numbers instead of the state's preferred total population numbers in drawing its districts. The Supreme Court specifically declined to dictate the use of any particular population basis. *Id.* at 1132-33. In his concurring opinion, Justice Thomas concluded: "a State has wide latitude in selecting its population base for apportionment," because "the choice is best left for the people of the States to decide for themselves how they should apportion their legislature." *Id.* at 1142 (Thomas, J. concurring).

This Court has also recognized the validity of ACS data. In *Wilson v. Illinois Cent. R. Co.*, 2012 WL 135446 (N.D. Ill. Jan. 12, 2012), this Court took judicial notice of racial breakdowns provided via 2005-2009 ACS data, and noted that ACS data has been used by other courts. *Id.* at *3 (collecting cases). The Court explained that "[a]t least one court has expressly found the ACS to be sufficiently accurate and reliable and expressly took judicial notice of data for a particular community." *Id.* (citing *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709 (N.D. Tex. 2009)).

Similarly, this Court also relied upon the five-year ACS survey in upholding Illinois' 2011 Congressional redistricting plan. *Comm. for a Fair & Balanced Map v. Illinois State Board of Elections,* 835 F. Supp. 2d 563, 586 (N.D. Ill. 2011). In doing so, this Court found that "[b]ecause rough proportionality under the totality of circumstances test looks to citizen voting-age population at the statewide level, we find that ACS figures are reliable for this purpose." *Id.* To further support its finding of rough proportionality in Latino representation, the Court accepted the State's expert testimony: "Dr. Lichtman testified that even though these data are derived

from samples they are accurate on a statewide level within a few tenths of a percentage point." *Id*

Similar holdings were made in a federal case before a three-judge court and the Colorado Supreme Court. *Alabama v. United States Dep't of Com.*, 2021 WL 2668810, at *6 fn. 3 (M.D. Ala. June 29, 2021) (noting that Alabama has the option of using other data for redrawing state legislative districts where the federal decennial census was not taken or was not satisfactory) and *In re Interrogatories on Senate Bill 21-247 Submitted by the Colorado General Assembly*, 2021 WL 2197398, at ¶33 (Colo. 2021) (finding that Colorado's independent redistricting commission could use other reliable sources of population data, including ACS data, in drafting state and congressional plans as long as the final plans comply with constitutional requirements).

Also, in *Holloway v. City of Virginia Beach*, 2021 WL 1226554 (E.D. Va. Mar. 31, 2021), the court concluded, "ACS data is reliable Census data and it is commonly used by expert witnesses in Voting Rights Act cases. The ACS is the only source of local information on the citizen voting age population (CVAP)." *Id.* at *27. The court noted that "sister jurisdictions have consistently relied upon ACS for examining demographic information of minority populations for Section 2 cases." *Id.* In explaining this conclusion, the Court explained:

> ACS data can be relied upon as the Census Bureau has utilized ACS data in lieu of long form survey data since 2010. ACS meets the standards which make it indistinguishable in terms of accuracy and reliability from the Census figures. Moreover, ACS sampling errors are transparent and may be accounted for using the margins of error published by the ACS and the use of confidence intervals . . . [T]he Court

> concludes that Mr. Fairfax's [the expert witness] use of ACS data is thoroughly documented, has a high degree of accuracy, and is clear, cogent and convincing enough to overcome doubts.

*Id.* (internal citations omitted).

In short, the Illinois General Assembly complied with its constitutional directive to enact a new redistricting plan prior to June 30, 2021. Nothing in the U.S. Constitution or Illinois' Constitution or statutes mandates only the use of final census numbers in redistricting. The General Assembly's decision to utilize the five-year ACS data was justified under any circumstances based upon all of the precedent for its usage cited above. However, given the fact that the complete census data was not, and still is not, available to the State, it cannot be seriously argued that the ACS data was not the best data available to the General Assembly at the time. Plaintiffs do not suggest that the General Assembly should have used a different data set – Plaintiffs only suggest that the General Assembly, led by Defendants Welch and Harmon, should have done nothing and simply ignored the directives of the State Constitution. The federal Constitution does not require such inaction on the part of State officials.

Regardless the population data used, Plaintiffs' Complaint lacks any factual allegation of a population deviation between districts in the 2021 redistricting plan required to show a "one person, one vote" violation, much less a significant deviation requiring justification.

## III. Plaintiffs' Claims are Not Ripe.

Plaintiffs' Complaint also presents claims that are not yet ripe for adjudication because, under their theory of the case, there is no way to measure the validity of

Plaintiffs' equal protection allegations until the Census Bureau issues the 2020 census data.

Ripeness is a justiciability doctrine designed to prevent courts from deciding potential disputes that have not yet crystallized into concrete injuries. The doctrine of ripeness, like other Article III doctrines, is "an idea ... about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citation omitted); *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) ("Ripeness is predicated on the 'central perception . . . that courts should not render decisions absent a genuine need to resolve a real dispute.'") (citations omitted). Ripeness is ultimately a question of timing. *See Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 538 (7th Cir. 2006).

Plaintiffs' entire Complaint is based on speculative allegations about why Plaintiffs *believe* ACS data is not as accurate as the census count. *See*, e.g., *Id.* ¶ ¶ 35-41. Nowhere in the Complaint do Plaintiffs allege the ACS data resulted in their districts unconstitutionally deviating from the 2020 census data. Nor could the Complaint make such an allegation as the 2020 census data will not be available until at least August 16, 2021.

Until such time as the Census Bureau issues the 2020 final census data, Plaintiffs' allegations are purely speculative. Plaintiffs' Complaint alleges a constitutional violation based on a benchmark that is not yet available. This Court should therefore dismiss Plaintiffs' Complaint for lack of ripeness.

## Conclusion

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

Dated: July 16, 2021

Respectfully submitted,

*/s/Adam R. Vaught*

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 16, 2021, I electronically filed the above Defendants Welch, Office of the Speaker, Harmon, Office of the President of the Illinois Senate's Rule 12(B) Motion to Dismiss, 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*