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. ILLINOIS STATE BOARD OF ELECTIONS, CHARLES W. SCHOLZ, IAN K. LINNABARY, WILLIAM J. CADIGAN, LAURA K. DONAHUE, WILLIAM R. HAINE, WILLIAM M. MCGUFFAGE, KATHERINE S. O'BRIEN, and CASANDRA B. WATSON in their official capacities as members of the Illinois State Board of Elections, DON HARMON, in his official capacity as President of the Illinois Senate, and THE OFFICE OF THE PRESIDENT OF THE ILLINOIS SENATE, EMANUEL CHRISTOPHER WELCH, in his official capacity as Speaker of the Illinois House of Representatives, and the OFFICE OF THE SPEAKER OF THE ILLINOIS HOUSE OF REPRESENTATIVES, Defendants.	Case No. 1:21-cv-03139 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)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO BOARD DEFENDANTS' OPPOSITION

Plaintiffs Julie Contreras, Irvin Fuentes, Abraham Martinez, Irene Padilla, and Rose Torres ("Plaintiffs") file this reply in support of their motion for summary judgment (Dkt. 63) and memorandum of law in support (Dkt. 65) under Local Rule 56.1(c)(1), and in response to Defendants Illinois State Board of Elections, Charles W. Scholz, Ian K. Linnabary, William J. Cadigan, Laura K. Donahue, William R. Haine, William M. McGuffage, Katherine S. O'Brien, and Casandra B. Watson's ("Board Defendants") Opposition to Plaintiffs Motion for Summary

Judgment. *See* Dkt. 78 ("Board Defs.' Opp'n"). Plaintiffs are entitled to declaratory judgment on their malapportionment claim. As of the date of this filing, Governor Pritzker has yet to sign the plans passed by the General Assembly on August 31, 2021 as Senate Bill 0927 ("August Plans"). Therefore, it is undisputed that the only state legislative plans in effect are severely malapportioned plans that violate Plaintiffs' right to equal representation under the Fourteenth Amendment.[1] Judgment should issue on that violation, and the remedy phase should commence as soon as possible so that legal plans can be approved by the court in time for the deadlines associated with the March 2022 primary.

Board Defendants fail to show in their opposition why Plaintiffs are not entitled to summary judgment. They do not raise any genuine dispute as to the degree to which the House and Senate maps enacted as part of Public Act 102-0010 on June 4, 2021 ("Enacted Plans") are unconstitutionally malapportioned and furthermore Plaintiffs have shown that the Enacted Plans are malapportioned beyond tolerable limits. Plaintiffs have standing to bring their malapportionment claim and their claims are not barred by the Eleventh Amendment.

Finally, Plaintiffs address the Court's questions regarding a remedial phase, which the Court must enter once it grants Plaintiffs' motion.

[1] The last "Action" listed on the Illinois General Assembly website is "Sent to the Governor," dated September 2, 2021. Bill Status of SB0927, 102nd General Assembly – 1st Special Session, https://ilga.gov/legislation/billstatus.asp?DocNum=927&GAID=16&GA=102&DocTypeID=SB&LegID=133554&SessionID=111&SpecSess=1#actions (last accessed on Sept. 14, 2021).

ARGUMENT

I. Board Defendants Fail To Raise A Genuine Dispute Of The Material Facts Showing That The Enacted Plan Is Unconstitutionally Malapportioned.

Plaintiffs provide evidence in support of their motion for summary judgment showing that the Enacted Plans are malapportioned beyond tolerable limits and Board Defendants do not dispute this evidence.

Board Defendants do not meet their burden to defeat Plaintiffs' motion for summary judgment. "Once the moving party puts forth evidence showing the absence of a genuine dispute of material fact, the burden shifts to the non-moving party to provide evidence of specific facts creating a genuine dispute." *Carroll v. Lynch*, 698 F.3d 561, 564 (7th Cir. 2012) (internal citation omitted).

In support of their motion for summary judgment, Plaintiffs provide David R. Ely's expert analysis of the degree to which the Enacted Plans are malapportioned. Mr. Ely's calculations establish that the House Plan enacted in June has an overall variance, or maximum deviation, of 29.9%, and the Senate Plan enacted in June has a maximum deviation of 20.3%. *See* Plaintiffs' Statement of Material Facts (Dkt. 66) ("SOF") ¶¶ 34-39; Exhibit A, David Ely Declaration (Dkt. 66-1). Plans with such maximum deviations exceed "tolerable limits" that cannot be justified with a rational policy. *See* Plaintiffs' Memorandum of Law In Support of Their Motion for Summary Judgment (Dkt. 65) ("Pls.' Mem.") at 11; *see also Mahan v. Howell*, 410 U.S. 315, 329, *modified*, 411 U.S. 922 (1973) (warning that 16% maximum deviation approaches "tolerable limits").

Board Defendants fail to offer any expert testimony or evidence that would contradict Mr. Ely's calculations. *See* Defendants' Response to Plaintiffs' Statement of Material Facts (Dkt. 79) ("Defs.' Resp. to SOF").

Plaintiffs demonstrate that the Enacted House Plan and Senate Plan have maximum deviations greater than tolerable limits, greater than what could possibly be justified by Defendants. These specific facts raise the absence of a genuine dispute of material fact. *See Carroll v. Lynch*, 698 F.3d at 564. Plaintiffs are therefore entitled to judgment as a matter of law. *See id*.

II. 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 applies. Contrary to Defendants' claims, the challenged redistricting lines create an ongoing harm. Defendants will use the malapportioned map to supervise the 2022 elections in violation of the constitutional principle of representational equality. *See 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 thus seek to enjoin Board Member Defendants from engaging in conduct that is in-line with their statutory duties yet unconstitutional. This suit is therefore not barred by the Eleventh Amendment.

III. The State Board of Elections Is A "Person" That Is Subject To Suit Under 42 U.S.C. § 1983.

Defendants argue that summary judgment cannot be granted as to the board because the board is not a person for purposes of 42 U.S.C. §1983, relying on the Supreme Court's decision in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). But as the Supreme Court noted in *Will*, "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." Will, 491 U.S. at 71 n.10 (1989) (internal quotation marks and citations omitted).

IV. Plaintiffs Have Standing.

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). A plaintiff must establish each element of Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiffs satisfy each element.

1 Plaintiffs will suffer an actual or impending injury.

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 each of the Board Member Defendants "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. Furthermore, "[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 293–94. 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." Board Defs.' Opp'n at 6.

The Board Members will be statutorily required to take action inconsistent with the Constitution; this 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).

2 Causation & Redressability

Board Defendants have caused Plaintiffs' injury and Plaintiffs' injury is redressable. 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." Board Defs.' Opp'n 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 be required to enforce an unconstitutional map. Indeed, Board

Defendants cite *U.S. v. Lee*, 502 F.3d[2] 691, 697 (7th Cir. 2007) for the proposition that "it is presumed that the official acts of public officers will be discharged properly." Board Defs.' Opp'n at 6-7. 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 to recognize that the "official acts" they are required to perform are 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.

V. Plaintiffs' Malapportionment Claim Is Not Moot

Board Defendants incorrectly suggest that Plaintiffs' claims are probably moot due to the General Assembly's passage of new redistricting plans on August 30, 2021, and August 31, 2021. *See* Board Defs.' Opp'n. at 3.

As an initial matter, the Governor of Illinois has yet to sign the August 2021 plans. Therefore, Plaintiffs' claims present live controversies. *See Brown v. Kentucky Legislative Rsch. Comm'n, 966 F. Supp. 2d 709, 718* (E.D. Ky. 2013), *judgment entered*, No. CV13CV25DJBGFVTWOB, 2013 WL 12320875 (E.D. Ky. Oct. 31, 2013) ("The injury claimed

[2] 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.

by the Plaintiffs is vote dilution caused by malapportionment of the 2002 legislative districts, which is an injury that is current and on-going[…]as those districts are still in place, nothing has occurred to render them moot.").

Furthermore, the Court has yet to address a constitutional violation committed by Board Defendants that very well may be repeated in the near or distant future. *Ciarpaglini v. Norwood,* 817 F.3d 541, 544–45 (7th Cir. 2016) (internal citations omitted) ("the mere cessation of the conduct sought to be enjoined does not moot a suit to enjoin the conduct, lest dismissal of the suit leave the defendant free to resume the conduct the next day"). This case is not moot merely because the General Assembly has passed new maps. Rather, "subsequent events [must make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Ciarpaglini v. Norwood*, 817 F.3d 541, 545 (7th Cir. 2016). Even after Gov. Pritzker signs the plan, there is a live controversy. There would be nothing to stop Defendants from reverting to the June 2021 plan without a declaratory judgment. Until the Court rules that the June 2021 Enacted Plans were malapportioned, this case is not moot.

VI. The Court May Proceed To A Remedial Phase To Oversee Enactment Of Legal Maps After Entering Judgment

The Court has asked the parties to address three specific questions regarding the remedy phase of this lawsuit. (Dkt. 72 at 1). Plaintiffs incorporate their arguments about a remedial phase from their reply in support of their motion for summary judgment in reply to Legislative Defendants' Opposition. (*See* Dkt. 86) at 11-14.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment, enjoin the June 2021 Enacted Plans, and enter remedial proceedings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, a copy of the foregoing document was filed electronically in compliance with Local Rule 5.9.

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