

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

JULIE CONTRERAS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	Case No. 1:21-cv-3139
	)	
v.	)	Circuit Judge Michael B. Brennan
	)	Chief District Judge Jon E. DeGuilio
ILLINOIS STATE BOARD OF	)	District Judge Robert M. Dow, Jr.
ELECTIONS, <i>et al.</i> ,	)	
	)	Three-Judge Court
Defendants.	)	Pursuant to 28 U.S.C. § 2284(a)
	)	

**DEFENDANTS ILLINOIS STATE BOARD OF ELECTIONS AND ITS MEMBERS’  
REPLY IN SUPPORT OF THEIR MOTION TO DISMISS  
PLAINTIFFS’ AMENDED COMPLAINT**

Defendants, the Illinois State Board of Elections (the “Board”), together with Rick S. Terven, Sr.<sup>1</sup>, Ian K. Linnabary, William M. McGuffage, William J. Cadigan, Catherine S. McCrory, Laura K. Donahue, Cassandra B. Watson, and William R. Haine<sup>2</sup>, in their official capacities as members of the Illinois State Board of Elections (collectively, the “Board Members,” and together with the Board, the “Board Defendants”), by their attorney, Kwame Raoul, Attorney General of Illinois, state as follows in further support of their motion to dismiss Plaintiffs’ amended complaint.

**INTRODUCTION**

Plaintiffs’ Amended Complaint alleges that the state legislative districting plan signed into law on June 4, 2021 (“2021 Redistricting Plan”) is malapportioned and violates the equal

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<sup>1</sup> On July 1, 2021, Board Member Charles W. Scholz was replaced with Rick S. Terven, Sr., and Board Member Katherine S. O’Brien was replaced with Catherine S. McCrory. Because Board Members Scholz and O’Brien were named in their official capacity, the new members were automatically substituted as the appropriate defendants pursuant to Federal Rule of Civil Procedure 25(d).

<sup>2</sup> Member Haine passed away on August 16, 2021. *See* <https://www.thetelegraph.com/news/article/Senator-William-Haine-dead-16390775.php>.

protection clause of the Fourteenth Amendment. ECF No. 37 ¶ 2; ECF No 68 at 1-2. After this amended complaint was filed, the Illinois General Assembly reconvened and passed a new legislative map that is pending signature by the Governor. Plaintiffs have indicated that they will challenge the constitutionality of the new map and name the Board Defendants in any amended complaint. As such, it is particularly important to address whether Plaintiffs have standing to bring these claims against the Board Defendants. For the reasons discussed in the Board and Board Members opening brief, the Eleventh Amendment bars any suit against the Board itself, and Plaintiffs effectively concede this point by failing to respond to it. Moreover, Plaintiffs do not have standing to bring these claims against the Board or Board Members and have failed to state viable claims under 42 U.S.C. § 1983 against the Board Members. As such, Plaintiffs' Amended Complaint against the Board and the Board Members should be dismissed.

### **ARGUMENT**

Throughout their response, Plaintiffs incorrectly assert that the Board Defendants do not dispute certain allegations relating to the Plaintiffs and the constitutionality of the June 4, 2021 map. ECF 68 at 1-8. This assertion is wrong and is a blatant attempt to confuse the issues and make it appear as though the Board Defendants concede that there is an underlying issue with the June 4, 2021 map. The Board Defendants have consistently stated that they take *no position* on the constitutionality of the underlying map or the validity of the redistricting process. The Board Defendants' decision to move for dismissal on specific grounds—the Eleventh Amendment, Article III standing, and insufficient pleadings—does not mean that the Board Defendants agrees with any remaining allegations in the Amended Complaint; nor does it mean that the Board Defendants could not dispute these allegations at a later stage in the litigation.

**I. PLAINTIFFS HAVE WAIVED THEIR CLAIMS AGAINST THE BOARD.**

In their opening brief, the Board Defendants explained that Plaintiffs' claims against the Board itself are barred by the Eleventh Amendment. ECF No. 41 at 3-4; *see Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (holding that the Eleventh Amendment prohibits suit against a state or state agency without the state's consent). The Board Defendants also explained that any suit against the Board itself fails because the Board is not a "person" that can be sued under Section 1983. ECF No. 41 at 4; 42 U.S.C. § 1983.

Plaintiffs' response abandons any reference to the Board itself and frames all of its arguments in terms of the Board Members. As such, Plaintiffs have waived any arguments related to their claims against the Board and are attempting to proceed with only their Section 1983 claim against the individual Board Members in their official capacity. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) (holding that an argument is waived when a party fails to respond on a motion to dismiss). Because Plaintiffs have failed to respond to any of the arguments regarding their allegations against the Board itself (and because the Eleventh Amendment clearly bars any such claims against the Board), this Court should dismiss Plaintiffs' claims against the Board. *See id.*

**II. PLAINTIFFS DO NOT HAVE STANDING TO SUE THE BOARD MEMBERS.**

"To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotations omitted). After Plaintiffs filed their amended complaint, the General Assembly reconvened and passed a new redistricting map. As such, the map at issue in this amended complaint is moot. As such, Plaintiffs lack standing to bring their claims, and the Amended Complaint should be dismissed. *See Milwaukee*

*Police Ass'n v. Bd. of Fire & Police Comm'rs of Milwaukee*, 708 F.3d 921, 929 (7th Cir. 2013) (“If at any point the plaintiff would not have standing to bring suit at that time, the case has become moot.”).

**A. Plaintiffs’ claims do not fall under the narrow exception to Eleventh Amendment immunity created by *Ex Parte Young*.**

*Ex Parte Young* creates a narrow exception to Eleventh Amendment immunity that allows plaintiffs to bring suit against a state official in their official capacity for prospective injunctive relief. *Ex Parte Young*, 209 U.S. 123, 157-58 (1908). However, this exception applies only when two conditions are satisfied: the officer must (1) have “some connection” to the enforcement of the act, and he or she must (2) “threaten” to enforce the act. *Id.* at 157. As discussed in more detail below, given that the June 4, 2021 map is moot, there is no “threat” that it will be implemented. Furthermore, Plaintiffs’ argument that the Board Members would administer an election based on a future map that is deemed unconstitutional is pure speculation and does not amount to a prospective injury sufficient to establish Article III standing.

**B. Plaintiffs have not shown that the Board Members have caused or are likely to cause them any injuries or that an order against the Board Members would redress their claims.**

Even if Plaintiffs’ claims were not barred by the Eleventh Amendment, Plaintiffs have not established that they have suffered or will suffer an injury because of the Board Members’ actions. Plaintiffs’ response argues that their speculative allegations about what the Board Members may do satisfies the Article III harm requirement. *See* ECF No. 68 at 5. To support this position, Plaintiffs largely rely on cases where the possibility of injury prior to the enforcement of a statute was evaluated based on less exacting standards than those that normally apply. *See* ECF No. 68 at 5-6 (citing *Davis v. Fed. Election Comm’n*, 544 U.S. 724 (2008)) (evaluating a First Amendment claim); *Babbitt v. Farm Workers*, 442 U.S. 289 (1979) (evaluating First

Amendment claim challenging statute with potential criminal prosecution); *Reg'l Rail Reorg. Act Cases.*, 419 U.S. 102 (1974) (examining Fifth Amendment taking claim)).

However, Plaintiffs' allegations of the alleged harm are too speculative to meet the requirement that the injury be "concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Here, Plaintiffs' claims against the Board Members rely on their allegations that the Board Members oversee elections in Illinois. *See generally* ECF Nos. 37 & 68. While the General Assembly Redistricting Act of 2021 provides that the Board "shall prepare and make available" the metes and bounds (10 ILCS 92/20(h), and the Illinois Election Code states that the Board "shall" supervise the administration of the election laws (10 ILCS 5/1A-8(12) "mandatory language does not necessarily deny a court of equity of flexibility." *Reg'l Rail Reorg. Act Cases*, 419 U.S. at 141. Here, the Court should use its judgment to hold that there is no imminent threat of harm that the Board Members will administer an election based on a map that this Court deems unconstitutional. The Board Members will oversee the election based on the map that is ultimately enacted by the General Assembly; this Court should hesitate to accept Plaintiffs' theory of standing that "rest[s] on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, 569 U.S. 398, 414 (2013).

Plaintiffs also have failed to adequately plead that an order against the Board Members will redress their claims. Plaintiffs' response argues that, if the Board Members are not enjoined from overseeing an election based on the current map, they will do so, even if this Court finds that map to be unconstitutional. ECF No. 68 at 9. But as discussed, it is unreasonable and speculative to assume that the Board Members would administer an election that they know would violate this Court's orders and be deemed unconstitutional. As such, any order against the Board Members would serve no purpose because a claim for injunctive relief is "effectively

moot” where there is “no need to enjoin prospective action that that would violate federal law.”

*Wernsing v. Thompson*, 423 F.3d 732, 745 (7th Cir. 2005).

**III. PLAINTIFFS’ CONCLUSORY PLEADINGS AGAINST THE BOARD MEMBERS DO NOT SATISFY THE RULE 8 PLEADING REQUIREMENTS.**

Finally, Plaintiffs argue that, because the Board Defendants did not dispute certain facts related to Plaintiffs and the June 4, 2021, map, Plaintiffs have necessarily stated a viable equal protection claim against the Board Members. ECF No. 68 at 8. But as discussed above, the Board Defendants have not conceded that any of Plaintiffs’ alleged facts are true. Moreover, even if Plaintiffs’ argument that the Board Defendants did not dispute their allegations regarding the June 4, 2021 map were true (and again, it is not), Plaintiffs do not allege that the Board Members have taken any actions against them. *See* ECF No. 41 at 7. As such, Plaintiffs have not stated any viable claims against the Board Members and their Amended Complaint should be dismissed.

**CONCLUSION**

Because Plaintiffs do not and cannot allege a viable or justiciable claim against the State Board of Elections or its Members, the Board Defendants respectfully request that this Court dismiss Plaintiffs’ claims against them.

September 17, 2021

Respectfully submitted,

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