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

DAN MCCONCHIE, et al, Plaintiffs, v. ILLINOIS STATE BOARD OF ELECTIONS, et al, Defendants.	)	Case No. 1:21-CV-03091 Circuit Judge Michael B. Brennan Chief Judge Jon E. DeGuilio Judge Robert M. Dow, Jr., Three-Judge Court Pursuant to 28 U.S.C. § 2284(a)

DEFENDANTS WELCH, OFFICE OF THE SPEAKER, HARMON, AND OFFICE OF THE PRESIDENT'S RULE 12(B) MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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' Amended Complaint in accordance with Federal Rule of Civil Procedure 12(b). In support, the Presiding Officer Defendants state as follows.

Introduction

Plaintiffs' Amended Complaint asks this Court to find the Illinois legislative redistricting plan that became effective on June 4, 2021 unconstitutional, arbitrary, and/or discriminatory all for the sole reason that the General Assembly used the U.S. Census Bureau's American Community Survey ("ACS") data rather than (at the time) unavailable 2020 final U.S. Census Bureau P. L. 94-171 data ("census data"). *See* Dkt. No. 51 ("Am. Compl"). The allegations are largely the same as in the original

Complaint, though Plaintiffs have removed their Count for Mandamus against the President Harmon and Speaker Welch. *See* Dkt. No. 1 ("Compl.").

Though the allegations are largely the same, the Amended Complaint adds new Plaintiffs: the House and Senate Republican Caucuses and the Illinois Republican Party of Illinois. Am. Compl. ¶¶ 18-20. As a remedy, Plaintiffs ask this Court to find the redistricting plan void *ab initio*, and to order "equitable relief requiring" the Speaker of the House and President of the Senate to appoint members "to a bipartisan Commission with the responsibility for enacting a redistricting plan pursuant to the procedures set forth in Article IV, Section 3 of the Illinois Constitution." *Id*. prayer for relief ¶ 5. That provision of the Illinois Constitution, however, only applies when "no redistricting plan becomes effective by June 30." Ill. Const. Art. IV Sec. 3(b). Because the General Assembly created a plan and the Governor signed the legislation before June 30, the Constitution's backup plan of empaneling a bipartisan Commission to create a plan was never activated.

Further, under the Illinois Constitution, any bipartisan Commission had only until August 10, 2021 to approve a plan. Ill. Const. (1970), art. IV, § 3(b). As that date has passed, Plaintiffs seek to have the responsibility for the State's decennial redistricting skip the Legislature, and go straight to the appointment of one tie-breaking member to be selected randomly from two names of people from opposite political parties.

In other words, despite the fact that Illinois voters have provided Plaintiffs' political party with super-minority status in the legislature, Plaintiffs ask this Court

to give just five Illinois Republicans an arbitrary 50% shot at having 100% control over enacting the redistricting plan for the State. This lawsuit, therefore, reflects Plaintiffs' efforts to exploit exigencies resulting from a global pandemic, which were out of the Legislature's control, for political gain. Not only would Plaintiffs' desired relief subvert the will of the Illinois voting population, but it finds no support in the law or Constitution. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (explaining "that Congress is the federal body explicitly given constitutional power over elections is also a noteworthy statement of preference for the democratic process" and that "the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress").

This Court should dismiss Plaintiffs' Complaint for the following legal deficiencies. *First*, Plaintiffs fail to allege they have standing because they have made no district-specific allegations of harm. *Second*, Plaintiffs have failed to state a claim for the requested Commission relief. And finally, Plaintiffs have failed to name the Illinois Supreme Court and Secretary of State as necessary parties for the relief Plaintiffs seek.

Argument

I. Plaintiffs' Amended Complaint Fails to Allege that Plaintiffs Have Standing to Challenge the Redistricting Plan on One-Person, One-Vote Principles.

In challenging the current redistricting plan, Plaintiffs allege that *any* plan relying on ACS's five-year population estimates from 2015 through 2019 is *per se* unconstitutional in violation of the Equal Protection Clause's one-person, one-vote principle. According to Plaintiffs, this alleged unconstitutionality arises because the

use of ACS data is destined to result in substantial population deviations when compared to the (at the time of the filing of the Complaint) unreleased complete census data, and in itself renders the plan arbitrary and discriminatory. Am. Compl. ¶¶ 1, 6, 9-11.

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, 1929 (2018) (emphasis added) (quoting *Reynolds* v. *Sims,* 377 U.S. 533, 561 (1964) and *Baker v. Carr*, 369 U.S. 186, 206 (1962)). Plaintiffs bear the burden of proof that they meet standing requirements. *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 865 (7th Cir. 1996).

Plaintiffs' Complaint fails to satisfy Federal Rule of Procedure 8(a)(2), which provides that a pleading must include "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). Rule 8 "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation and quotations omitted). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions,

and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiffs have failed to plead standing to bring this claim because they have not alleged that they suffered any concrete injury in fact, nor have they alleged that the actions of Defendants resulted in any "disadvantage to themselves as individuals" sufficient to confer Article III standing. Specifically, Plaintiffs have failed to allege they live in districts that violate their one-person, one-vote rights.

In their Amended Complaint, Plaintiffs tellingly identify Legislative and Representative districts only once – in the section identifying Plaintiffs McConchie and Durkin. Am. Compl. ¶¶ 16-17. The Amended Complaint alleges only that "Plaintiffs are informed and believe that at least eight members of the Republican Caucus of the Illinois Senate reside in proposed Senate Districts under the Redistricting Plan with estimated populations that exceed the ideal (or average) population of a Senate District." *Id.* ¶ 18. For the House Republican Caucus, the Amended Complaint makes the same allegation, except alleges it is 18 members. *Id.* ¶ 19. The Amended Complaint, however, fails to identify the actual district and member alluded to, and furthermore only alleges these unnamed members live in districts that exceed the ideal population, but not that the population in any district deviates in an unconstitutional amount. And for the Republican Party of Illinois, the Amended Complaint only alleges it "is comprised of hundreds of thousands of members and voters who reside in every Senate District and Representative District in the State of Illinois." *Id.* ¶ 19.

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*)). Nowhere do Plaintiffs allege that any Plaintiff resides and votes in a district that is overpopulated in an unconstitutional amount. Plaintiffs also fail to allege any other personal injury to themselves anywhere in the Complaint that would give them standing in this case.

For example, 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 the plaintiffs' standing. The Court reasoned that a person's right to vote is "individual and personal in nature," meaning that any alleged threat to it requires an "injury [that] is district specific." *Id.* Vote dilution occurs on a district level, and allegations of a "statewide injury" does not suffice. *Id.* at 1930.

Plaintiffs' Amended Complaint suffers the same fatal flaw. As pleaded, the Amended Complaint makes a generalized grievance about the redistricting plan, but fails to provide any district-specific allegations that any of the Plaintiffs *individually* suffered a constitutional injury as a result of the redistricting plan. "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.* at 1921 (*quoting United States* v. *Hays*, 515 U.S. 737, 745 (1995) (holding a plaintiff complaining of racial gerrymandering has standing only to challenge their own district)). Here, as in *Gill* and *Hays*, Plaintiffs merely allege vote dilution, but neither claims to live in a diluted district. Accordingly, as in *Gill*, Plaintiffs are asserting "only a generalized grievance" against the Illinois General Assembly's decision to use ACS data in creating the redistricting plan, a decision of which they "do not approve." *Gill*, at 1921.

Furthermore, the Republican Party of Illinois and the Republican Caucuses lack standing to bring a one-person, one-vote claim. Neither is an individual who can claim its voting power has been diluted by the redistricting plan. The Amended Complaint instead assumes the Party and Caucuses has associational standing by referring to them as "Associational Plaintiffs." Am. Compl. ¶ 8.

An organization has associational standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). It is insufficient to have "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem[.]" *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

First, Plaintiffs have failed to plead the Republican Party of Illinois or the Caucuses have associational standing because they have failed to allege facts that would support that any *individual* member has standing to sue in their own right.

Second, assuming for purposes of this Motion that Plaintiffs could amend to allege a violation, permitting the Republican Party of Illinois and the Caucuses to proceed as Plaintiffs would create a conflict of interest in their membership. Inherent in a one person, one vote claim, is that one district is overpopulated in an unconstitutional deviation from an underpopulated district. This inevitably would create a conflict of interest between members in the overpopulated and underpopulated district. "A profound conflict arises where the association's suit, if successful, would cause a direct detriment to the interests of some of its members[.]" *Retired Chicago Police Ass'n*, 76 F.3d at 864. "A direct, detrimental effect to some members' interests constitutes a conflict of interest in the associational standing context because it implicates two of the concerns that question the appropriateness of representational standing." *Id*. Because successful litigation would harm some members' interests, Courts should be concerned that the litigation is not germane to the association's purposes. *Id*. Further, if the litigation is successful and harms some members' interests, Courts are concerned that "the association will not be fully committed to the litigation and, as a result, will not pursue the litigation with the zealous advocacy necessary to be an adequate representative." *Id*. at 864-65. Because the Party and Caucuses would inevitably be creating a conflict of interest between

their members, this Court should find they lack associational standing to bring these claims.

Finally, to establish associational standing, a Plaintiff must establish "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. As *Gill* makes clear, however, a person's right to vote is "individual and personal in nature." 138 S. Ct. 1923. Individual members are therefore necessary to bring a one-person, one-vote claim.

II. Plaintiffs' Complaint Fails to State a Claim for Relief Against Speaker Welch and President Harmon.

As discussed above, Plaintiffs' alleged *concern*—that the redistricting plan was created using ACS data instead of decennial census data, and their desired *relief*—that a procedure resulting in a randomly selected single person be appointed to decide which redistricting plan is enacted—do not match. If Plaintiffs' purpose with this lawsuit were truly to ensure that Illinois' redistricting plan was created with decennial census data, their desired relief would be for the General Assembly to amend the redistricting plan with the now-released official census data—as the nonpartisan plaintiffs in the related action seek. *See Contreras v. Ill. State Bd. of Elections, et al.*, 1:12-cv-3139 at Prayer ¶ 3. By seeking to circumvent the Illinois Constitution's clear mandate that the democratically elected General Assembly create the redistricting plan, Plaintiffs seek to exploit the US Census Bureau's pandemic related delays and skip to the provision's last resort of a single-person tie-

breaker, thus demonstrating Plaintiffs purely political motivations.[1] *See Hooker v. Illinois State Board of Elections*, 2016 IL 121077, at ¶ 5 (2016) (explaining that the Redistricting Commission is a "backup provision"). Plaintiffs' requested remedy lacks any basis in law, and should be dismissed.

Plaintiffs ask this Court to order President Harmon and Speaker Welch to appointment members to a Redistricting Commission, but fail to provide an adequate legal theory for this Court should do so. The original Complaint sought a count for mandamus against President Harmon and Speaker Welch to accomplish Plaintiffs' goal. Plaintiffs' Amended Complaint, however, lacks a mandamus count but still asks this Court to find the redistricting plan is void *ab initio* and grant "equitable relief" to order President Harmon and Speaker Welch "to appoint members to a bipartisan Commission with the responsibility for enacting a redistricting plan pursuant to the procedures set forth in Article IV, Section 3 of the Illinois Constitution." Am. Compl., prayer for relief ¶ 5. Plaintiffs have failed to plead a cause of action for such relief.

A. Plaintiffs Fail to State a Claim Because There Is No Dispute That "A Plan" Was Effective Before June 30, 2021 as Required by the Illinois Constitution.

The Illinois Constitution provides that "[i]n the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts. *If no redistricting plan becomes effective*

[1] The mismatch between Plaintiffs' purported and true motivations is also demonstrated by their failure to address why, had a commission been empaneled following June 30, that commission's creation of a redistricting plan using non-official census data (which was unavailable until August 12) would not also be unconstitutional per se, arbitrary, and discriminatory as their Amended Complaint alleges.

by June 30 of that year, a Legislative Redistricting Commission shall be constituted not later than July 10." Ill. Const. (1970), art. IV, § 3(b) (emphasis added).

Plaintiffs' claims fail for the simple reason that they do not dispute that the redistricting plan, Public Act 102-0010, was signed into law prior to June 30, 2021. Public Act 102-0010 was passed by the General Assembly on May 28, 2021, and provides that "[t]his Act takes effect upon becoming law." Public Act 102-0010, Section 99. Governor Pritzker signed the bill on June 4, 2021.[2]

Thus, under the provisions of Public Act 102-0010 and the Illinois Constitution, the redistricting plan became effective on June 4, 2021, well before the June 30 deadline. The constitutional prerequisite for the Legislative Redistricting Commission to be constituted was not met. As a result, there is no basis for Plaintiffs' request for this Court to order the President and Speaker to empanel such a Commission.

B. Even if the Redistricting Plan Is Held to Be Void Ab Initio, There Is No Basis for the Creation of a Redistricting Commission.

Even if this Court were to find the redistricting plan is void *ab initio* as Plaintiffs allege, under Illinois law, the Illinois Constitution's requirement that a

[2] Under the Illinois Constitution, "[t]he General Assembly shall provide by law for a uniform effective date for laws passed prior to June 1 of a calendar year. The General Assembly may provide for a different effective date in any law passed prior to June 1." Ill. Const. (1970), art. IV, § 3. Article IV, Section 9(a) of the Illinois Constitution provides, "[e]very bill passed by the General Assembly shall be presented to the Governor within 30 calendar days after its passage. The foregoing requirement shall be judicially enforceable. If the Governor approves the bill, he shall sign it and it shall become law." Ill Const. (1970), art. IV, § 9(a).

redistricting plan enacted by the General Assembly become effective by June 30 was still met.

According to the Illinois Supreme Court, "[w]hen a statute is held facially unconstitutional, *i.e.*, unconstitutional in all its applications, the statute is said to be void *ab initio*." *People v. Blair*, 2013 IL 114122, ¶ 28 (internal citation omitted). "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* (quoting *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)). This is known as the void *ab initio* doctrine.

The Illinois Supreme Court has held, however, that "the void *ab initio* doctrine does not mean that a statute held unconstitutional never existed." *Id.* ¶ 29 (internal quotations admitted). Instead, "[t]he actual existence of a statute, prior to a determination that the statute is unconstitutional, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Id.* (internal quotations omitted). "In short, a statute declared unconstitutional by this court 'continues to remain on the statute books[.]'" *Id.* ¶ 30 (quoting Laurence H. Tribe, American Constitutional Law § 3-3, at 28 (2d ed. 1988)).

As a result, even a declaration by this Court that the redistricting plan is void *ab initio* would not erase the redistricting plan from existence. The plan became effective prior to June 30, 2021; therefore, no Legislative Redistricting Commission may be constituted because a plan deemed constitutionally defective would still have

been effective by June 30 under the Illinois Constitution. A remedy, if needed, would not be to enjoin the Speaker and President to appoint members to a commission, but rather to remand the redistricting plan to the General Assembly to pass a new plan in light of this Court's ruling. This Court should therefore find that even if it were to grant Plaintiffs the declaratory relief they seek, it cannot grant the "equitable" relief requested.

C. If the Court Finds There is an Open Question of Law Over Whether the Legislative Redistricting Commission May be Constituted, this Court Should Decline to Exercise Supplemental Jurisdiction over Count III.

Though the Amended Complaint does not address the jurisdictional issues in their prayer for relief, they are effectively requesting this Court exercise supplemental jurisdiction over a question of first impression in Illinois law, namely what happens under the Illinois Constitution if a Court finds the redistricting plan passed by the General Assembly has a Constitutional defect.

This Court, however, may decline to exercise supplemental jurisdiction as this "claim raises a novel or complex issue of State law[.]" 28 U.S.C. § 1367(c)(1). Since the adoption of 1970 Constitution, the General Assembly has passed a redistricting plan prior to June 30 only twice, in 2011 and 2021. *Hooker*, 2016 IL 121077, at ¶ 5; Compl. ¶ 1. In 2011, no attempt was made to constitute a Legislative Redistricting Commission through a judicial process.

The Illinois Constitution provides that the Illinois Supreme Court shall have "original and exclusive jurisdiction of all actions concerning the redistricting of the Illinois House and Senate[.]" Ill. Const. (1970), art. IV, § 3(b). The original and exclusive provision deprives all Illinois Courts except the Illinois Supreme Court of

jurisdiction to hear redistricting cases. *See Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, ¶ 13.

As a result, if this Court finds it may reach the question of whether the Commission may be constituted, it would be a novel question of state law. This Court should decline to exercise supplemental jurisdiction and dismiss Count III without prejudice to file in the Illinois Supreme Court.

III. Plaintiffs have Failed to Name the Illinois Supreme Court and Secretary of State as Necessary Parties for the Relief they Seek.

As stated above, Plaintiffs' Amended Complaint's prayer for relief asks this Court to order President Harmon and Speaker Welch to appoint members to a "bipartisan" commission under Article IV, Section 3 of the Illinois Constitution. Plaintiffs, however, have failed to name the Illinois Supreme Court or Illinois Secretary of State as defendants. Because the August 10 deadline imposed by the Illinois Constitution for a bipartisan commission to enact a redistricting plan has passed, the Supreme Court and Secretary are necessary parties for the relief Plaintiffs seek. Dismissal of Plaintiffs' requested relief is therefore appropriate.

Article IV, Section 3(b) states "If the Commission fails to file an approved redistricting plan [by August 10], the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1. Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission." Ill. Const. (1970), art. IV, § 3(b). The Constitution then requires

that "[n]ot later than October 5, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members." *Id.*

Even assuming this Court were to determine Public Act 102-0010 was not effective by June 30, 2021, to grant the relief Plaintiffs seek this Court would also have to order the Illinois Supreme Court and Secretary of State to perform their constitutional duties in order to effectuate the commission process. Yet Plaintiffs have failed to name the Supreme Court or Secretary of State as parties. Federal Rule of Civil Procedure 19 states a party is required if "in that person's absence, the court cannot accord complete relief among existing parties[.]" Fed. R. Civ. P. 19(a). Dismissal is appropriate for a plaintiff's failure to name an indispensable party. Fed. R. Civ. P. 12(b)(7). This Court cannot provide the relief Plaintiffs seek without the Illinois Supreme Court and Secretary of State also being ordered to perform their assigned duties under Article IV, Section 3(b). This Court should therefore dismiss Plaintiffs' requested relief that this Court order President Harmon and Speaker Welch to appoint members to a redistricting commission.

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: August 19, 2021

Respectfully submitted,

/s/Adam R. Vaught

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 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 Plaintiffs' Amended Complaint, 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*