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)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS THE AMENDED COMPLAINT FILED BY DEFENDANTS WELCH, OFFICE OF THE SPEAKER, HARMON, AND OFFICE OF THE PRESIDENT

Plaintiffs file this Memorandum in Opposition to the Motion to Dismiss the Amended Complaint (the "Motion") [Dkt. No. 80] filed by Defendants Emanuel Christopher Welch, in his official capacity as the Speaker of the Illinois House of Representatives; the Office of the 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 (collectively, the "Leadership Defendants"). For the reasons shown below, the Motion should be denied in its entirety.

INTRODUCTION

The First Amended Complaint [Dkt. No. 51] ("FAC") seeks to invalidate the map of House and Senate Districts (the "Legislative Map" or "Map") contained in the legislative redistricting plan passed by the Illinois General Assembly in May 2021 and approved by Governor Pritzker on June 4, 2021. On August 19, 2021, just days after the Census Bureau released the official 2020 census population data, Plaintiffs filed a Motion for Summary Judgment [Dkt. No. 54] ("MSJ") and Memorandum of Law [Dkt. No. 55] ("MSJ Memo"), which demonstrate that the Legislative Map results in maximum population deviations nearly ***three times higher*** than the 10% limit set by the Supreme Court. MSJ Memo at 3-4; *see also* Statement of Material Facts [Dkt. No. 79] ("SOF") ¶¶ 28-36 (citing Affidavit of Dr. Jowei Chen [Dkt. No. 79-1] ("Chen Aff.") ¶¶ 10-18).

Later in the day on August 19, 2021, the Leadership Defendants filed their Motion to Dismiss the FAC, which asserts three arguments for dismissal: (1) lack of standing, (2) failure to state a claim with respect to Plaintiffs' request for an order requiring the appointment of members to a legislative redistricting commission, and (3) failure to join the Illinois Supreme Court and Secretary of State as allegedly necessary parties. Motion at p. 3-15. Each argument is baseless, and the Court should therefore deny the Motion to Dismiss in its entirety.

First, Plaintiffs have sufficiently alleged both individual and associational standing, either

of which alone is sufficient to satisfy the standing requirement. When Plaintiffs filed the FAC, the Census Bureau had not yet released the 2020 population data. However, the FAC alleges upon information and belief that the census data will show that the Legislative Map is malapportioned and that voters are therefore residing in overpopulated districts, which harms them by diluting their voting power. *See* FAC ¶¶ 85-89. Indeed, that is precisely what the census data demonstrates. *See* MSJ Memo at 3-4. Even the Leadership Defendants have now conceded that the Map is "malapportioned" and thus "presumptively unconstitutional." Sept. 1, 2021 Tr. at 18:7-8 (**Ex. A**).

With respect to individual standing, Plaintiff Dan McConchie is the Senate Minority Leader and votes in and represents the 26th Senate District, and Plaintiff Jim Durkin is the House Minority Leader and votes in and represents the 82nd House District. FAC ¶¶ 16-17. As shown in the affidavit of Plaintiffs' expert, Dr. Jowei Chen, both the 26th Senate District and the 82nd House District are overpopulated. Chen Aff. at Table 2, p. 10, 12. The 26th Senate District contains 2,733 persons more than the ideal district and contains 19,982 persons more (9.99% more) than the least-populated Senate District in the Map. And the 82nd House District contains 1,210 persons more than the ideal district and contains 17,401 persons more (18.8% more) than the least-populated House District in the Map. *Id.* Accordingly, Leaders McConchie and Durkin have suffered and are suffering concrete and particularized injuries by having their voting power diluted. This is more than sufficient to establish individual standing.

In addition, the Republican Caucuses of the Illinois House of Representatives and Senate and the Illinois Republican Party (collectively, the "Associational Plaintiffs") have associational standing. As alleged in the FAC, the Associational Plaintiffs have members who reside in, vote in, and represent overpopulated House and Senate Districts. FAC ¶¶ 88-89. These members have suffered and are suffering concrete and particularized injuries through the reduction of their voting

power. The Associational Plaintiffs have an interest in ending and redressing the injuries to their members, and the participation of individual members is not necessary in this case. *Id.*

Second, the Leadership Defendants argue that Plaintiffs have failed to state a claim for relief because the Court allegedly cannot grant one of Plaintiffs' requested forms of relief, which asks for an order requiring the Leadership Defendants to appoint members to a legislative redistricting commission, as required by the Illinois Constitution. Mot. at 9-14. As an initial matter, this is not a proper argument for a motion to dismiss under Rule 12(b)(6) because it does not challenge the pleading of either of the two claims in the FAC, but instead challenges the availability of one of the forms of relief sought. As one of the Judges on this Court has explained previously, "even if . . . [the plaintiff] is seeking relief to which he's not entitled, this would not justify dismissal of the suit." *Gardunio v. Town of Cicero*, 674 F. Supp. 2d 976, 992 (N.D. Ill. 2009) (Dow, J.) (quoting *Bontkowski v. Smith*, 305 F.2d 757, 762 (7th Cir. 2002)). Indeed, Plaintiffs seek several forms of potential relief for their claims, including declaratory judgment, injunctive relief, and equitable relief under Section 1983. FAC at p. 45-46. Plaintiffs also specifically ask for any other forms of relief that the Court deems to be proper and just. *Id.* at p. 46. For this reason alone, the Leadership Defendants' second argument fails to support dismissal.

Moreover, the Leadership Defendants are incorrect in asserting that the Court cannot order the creation of a redistricting commission to draft a valid map. Federal courts have broad authority to order equitable and prospective relief to redress malapportioned state legislative maps. *See* FAC ¶ 105. And because this case involves violations of federal law, including the Fourteenth Amendment, the Court need not refer any issues to the Illinois Supreme Court.

Third and finally, the Leadership Defendants argue that Plaintiffs' claims should be dismissed for failure to join the Illinois Supreme Court and Secretary of State as allegedly

necessary parties. Mot. at 14-15. To the contrary, these officials are not necessary parties to this case because the Court can afford complete relief among the existing parties by ordering the Leadership Defendants to appoint members to a redistricting commission. *See* FAC at p. 45-46. Moreover, dismissal under Rule 12(b)(7) would be appropriate only if any necessary parties could not be feasibly joined to the case and if those parties also are "indispensable." *See BCBSM, Inc. v. Walgreen Co.*, 512 F. Supp. 3d 837, 848 (N.D. Ill. 2021). Neither of those elements are met here, so the Leadership Defendants' final argument also fails for this additional reason.

As explained in detail below, the Court should deny the Motion to Dismiss in its entirety. However, if the Court is inclined to grant any part of the motion, Plaintiffs respectfully request that the Court grant them leave pursuant to Rule 15(a)(2) to cure any defects in the pleadings as part of the October 1, 2021 amended complaint already allowed by the Court [Dkt. No. 94].

BACKGROUND

Plaintiffs filed this lawsuit to protect the fundamental rights of Illinois voters and invalidate the unconstitutional state legislative redistricting plan passed by the General Assembly in May 2021 and approved by Governor Pritzker on June 4, 2021. Complaint [Dkt. No 1]. Plaintiffs explained that the Legislative Map is malapportioned and violates the "one person, one vote" principle derived from the Equal Protection Clause of the Fourteenth Amendment. *Id.* ¶¶ 1-14.

On July 29, 2021, Plaintiffs filed the FAC, which asserts two claims: (1) a claim for violation of the Equal Protection Clause, actionable under 42 U.S.C. § 1983 (FAC ¶¶ 90-105); and (2) a claim for declaratory judgment under 28 U.S.C. §§ 2201, 2202 (*id.* ¶¶ 106-111). Plaintiffs ask the Court to declare that the Legislative Map is unconstitutional, invalid, and void *ab initio*; enjoin Defendants from enforcing the Map; and either grant prospective relief under Section 1983 requiring the Leadership Defendants to appoint members to a redistricting commission with the

authority to draw a valid map, appoint a special master to draw a valid map, or grant such other appropriate relief that allows for the drawing of a valid map. *Id.* at p. 45-46.

On August 12, 2021, the Census Bureau released the 2020 census population data. Chen Aff. ¶ 12. Plaintiffs' expert, Dr. Jowei Chen, used the data to calculate the populations of the House and Senate Districts in the Legislative Map. *Id.* ¶¶ 11-14. Dr. Chen then calculated the maximum population deviation—defined as the sum of the percentage deviations from perfect population equality of the most- and least-populated districts—for the House and Senate Districts in the Map. *Id.* Dr. Chen's calculations demonstrate that the maximum population deviation of the House Districts in the Map is **29.88%**, and the maximum population deviation of the Senate Districts in the Map is **20.25%**. *Id.* ¶¶ 33-36. Just days later, on August 19, 2021, Plaintiffs filed their MSJ, which demonstrates that the maximum population deviations in the Map far exceed the Supreme Court's 10% threshold, and the map is thus "presumptively impermissible" and invalid under the Equal Protection Clause of the Fourteenth Amendment. MSJ Memo at 6-7. Plaintiffs therefore are asking the Court to enter judgment in their favor with respect to their claim under Section 1983 and their claim for declaratory judgment. *Id.* at 8-10.

Later in the day on August 19, 2021, the Leadership Defendants filed their Motion to Dismiss pursuant to Rule 12(b)(6), which asks the Court to dismiss Plaintiffs' claims. For the reasons stated herein, the Court should deny the Motion to Dismiss in its entirety.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion, a pleading must comply with Rule 8(a) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief." *Herrea v. Di Meo Brothers, Inc.*, No. 19-cv-8298, 2021 WL 1175212, at *2 (N.D. Ill. Mar. 29, 2021) (Dow, J.). In reviewing a Rule 12(b)(6) motion, "the Court accepts as true all of Plaintiff's well-pleaded

factual allegations and draws all reasonable inferences in Plaintiffs' favor." *Id.*

ARGUMENT

I. Plaintiffs Have Sufficiently Alleged Both Individual and Associational Standing.

In their first argument, the Leadership Defendants assert that Plaintiffs have failed to sufficiently allege standing to bring suit in federal court. Mot. at 3-9. In order to survive a motion to dismiss for lack of standing, "the plaintiff's complaint must contain sufficient factual allegations of an injury resulting from the defendants' conduct, accepted as true, to state a claim for relief that is plausible on its face." *Diedrich v. Ocwen Loan Serv., LLC*, 839 F.3d 583, 588 (7th Cir. 2016). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to satisfy the standing requirement. *Id.* "[W]here at least one plaintiff has standing, jurisdiction is secure and the court will adjudicate the case whether the additional plaintiffs have standing or not." *Korte v. Sebelius*, 735 F.3d 654, 667, n.8 (7th Cir. 2013).

As shown below, Plaintiffs have sufficiently pled facts to establish both individual or associational standing, either of which are sufficient to satisfy the standing requirement.

A. Plaintiffs have sufficiently alleged individual standing.

The Leadership Defendants first argue that Plaintiffs have failed to allege "that any Plaintiff resides and votes in a district that is overpopulated in an unconstitutional amount." Mot. at 6. As an initial matter, this statement appears to misstate the relevant standard by suggesting that a plaintiff must show that their district is overpopulated in any particular "amount" in order to have standing to challenge a malapportioned map. To be sure, the Supreme Court has set a 10% threshold, above which a map is presumptively invalid. *Evenwel v. Abbott*, 577 U.S. 937, ---, 136 S. Ct. 1120, 1124 (2016). However, this threshold relates to the "maximum population deviation," which is defined as "the sum of the percentage deviations from perfect population equality of the

most- and least-populated districts." *Id.* at 1124, n.2. The Supreme Court has not held that a particular plaintiff must reside in a district that is overpopulated by 10%—or by any particular percentage—in order to have standing to challenge a malapportioned map. Such a requirement would make no sense given the need to add the sum of the most- and least-populated districts to determine the validity of the map. *Id.* Instead, a plaintiff residing in a district that is overpopulated—by any amount—has suffered an injury-in-fact sufficient to confer standing. *See Baker v. Carr*, 369 U.S. 186, 206 (1962) (voter living in an overpopulated district suffers "disadvantage to [herself] as [an] individual" sufficient to confer standing in a "one person, one vote" case).

The Leadership Defendants rely heavily on the Supreme Court's decisions in *Gill v. Whitford*, --- U.S. ---, 138 S. Ct. 1916 (2018) and *U.S. v. Hays*, 515 U.S. 737 (1995). Mot. at 7. But neither case involved a challenge to the distribution of the population under the "one person, one vote" principle. Instead, both cases involved gerrymandering claims in which the plaintiffs did not reside or vote in gerrymandered districts. Accordingly, neither case is relevant here.

In the context of "one person, one vote" claims, courts have consistently held "that a voter from a district that is overpopulated and under-represented suffers an injury-in-fact." *Hancock Cnty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x. 189, 196 (5th Cir. 2012); *see also Nation v. San Juan Cnty.*, 150 F. Supp. 3d 1253, 1260 (D. Utah 2015) ("a plaintiff who lives in a district that is 'under-represented' but that deviates from an ideal population by less than ten percent" has an injury-in-fact and thus has standing to challenge the redistricting plan). And a plaintiff that lives in an overpopulated district "may challenge *in its entirety* the redistricting plan that generated his harm." *Larios v. Perdue*, 306 F. Supp. 2d 1190, 1209 (N.D. Ga. 2003) (emphasis in original).

In this case, when Plaintiffs filed the FAC, the Census Bureau had not had yet released the

2020 population data. However, the FAC alleges upon information and belief that the census data will show that the Legislative Map is malapportioned. *See* FAC ¶¶ 85-89. It is well established that allegations made upon information and belief are sufficient and permissible under the applicable federal rules. *See Trustees of the Auto. Mechanics' Indust. Welfare and Pension Funds Local 701 v. Elmhurst Lincoln Mercury*, 677 F. Supp. 2d 1053, 1054-55 (N.D. Ill. 2010) (collecting cases). Indeed, when the Census Bureau released the 2020 census population information on August 12, 2021, the data confirmed that the Map is malapportioned. In fact, at the September 1, 2021 status hearing, the Leadership Defendants conceded on the record that the Map is "malapportioned" and thus "presumptively unconstitutional." Sept. 1, 2021 Tr. at 18:7-8 (**Ex. A**).

As the data confirms, Leaders McConchie and Durkin are two of the many individuals who reside in and vote in overpopulated districts under the Legislative Map. Leader McConchie votes in and represents the 26th Senate District, and Leader Durkin votes in and represents the 82nd House District. FAC ¶¶ 16-17. As shown in the affidavit of Plaintiffs' expert, Dr. Jowei Chen, both the 26th Senate District and the 82nd House District are overpopulated. Chen Aff. at Table 2, p. 10, 12. The 26th Senate District contains 2,733 persons more than the ideal district and contains 19,982 persons more (9.99% more) than the least-populated Senate District in the Map. And the 82nd House District contains 1,210 persons more than the ideal district and contains 17,401 persons more (18.8% more) than the least-populated House District in the Map. *Id.* Accordingly, Leaders McConchie and Durkin have suffered and are suffering concrete and particularized injuries by having their voting power diluted. This is more than sufficient to establish individual standing. *See, e.g.*, *Baker*, 369 U.S. 206; *Hancock Cnty*, 487 F. App'x. at 196. Only one named plaintiff need demonstrate standing. *Korte*, 735 F.3d at 667, n.8. Thus, on this basis alone, Plaintiffs have satisfied the standing requirement.

B. Plaintiffs have sufficiently alleged associational standing.

In addition to individual standing, the Associational Plaintiffs also have associational standing to pursue the claims in the FAC. "An association has standing to bring suit on behalf of its members when any one of its members would have individual standing to sue, the interests involved are germane to the organization's purpose, and neither the claim nor the requested relief are of the type that would require individual member participation." *Shakman v. Clerk of Cook County*, 994 F.3d 832, 840 (7th Cir. 2021) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The Associational Plaintiffs satisfy all three prongs.

First, the Leadership Defendants argue that Plaintiffs have failed to allege that any members of the Associational Plaintiffs have standing to sue on their own behalf. Mot. at 8. This is flatly incorrect. The FAC alleges that individual members of the Associational Plaintiffs reside in overpopulated districts and have therefore suffered injuries through the dilution of their voting power. FAC ¶¶ 86-89. Dr. Chen's Affidavit identifies many districts that are overpopulated as compared to the ideal district and which are represented by the members of the Republican Caucuses, including House Districts 20, 37, 42, 47, 50, 51, 52, 54, 63, 64, 65, 70, 73, 75, 82, 87, 89, 90, 93, 95, 97, and 109, and Senate Districts 26, 32, 33, 35, 38, 41, 45, and 55. *Compare* Chen Aff. at p. 8-13, Tables 2 and 3 (listing overpopulated districts), *with* SOF ¶¶ 3-4 (listing districts represented by members of the Republican Caucuses). And each member of the caucuses resides in and votes in a Senate or House District that is more populated than the least-populated district under the Map. *See id.* Thus, each member has standing to sue on their own behalf.

In addition, the Illinois Republican Party has members in every Senate and House District in the State and thus has members in overpopulated districts who have standing to sue on their own behalf. SOF ¶ 5. *See, e.g.*, *Smith v. Boyle*, 959 F. Supp. 982, 986 (C.D. Ill. 1997) (holding

that Illinois Republican Party has associational standing to bring suit on behalf of its members in Illinois). Thus, the first prong of the test for associational standing is met.

Second, the Leadership Defendants argue that the interests at issue in this case are not germane to the purposes of the Associational Plaintiffs because allowing the Associational Plaintiffs to proceed could create a "conflict of interest" among their members. Mot. at 8. To the contrary, all of the members of the Associational Plaintiffs have a unified interest in being able to vote in districts with substantially equal populations. *See Baker*, 369 U.S. at 206. Thus, creating a valid map with substantially equal districts does not cause any "direct detriment" to any of the individual members of the Associational Plaintiffs. *See, e.g.*, *Builders Ass'n of Greater Chicago v. City of Chicago*, 170 F.R.D. 435, 439 (N.D. Ill. 1996) (explaining that a conflict of interest requires a "direct detriment" to members' interests).

Moreover, even where there is a detriment to some members' interests, such a conflict "will not preclude associational standing when the organization has properly authorized the litigation." *Id.* And there is no dispute here that the Associational Plaintiffs have properly authorized this lawsuit. *See* FAC ¶¶ 18-20 (including Associational Plaintiffs as parties). Finally, even if there were a conflict with individual members, there are "less drastic" ways to protect the rights of dissenting members, including allowing them to intervene or refusing to preclude subsequent claims by dissenting members. *Id.* at 439. For all of these reasons, there is no conflict preventing associational standing, and the second prong of the test is also met.

Third and finally, the Leadership Defendants briefly assert that the claims asserted and relief requested require the participation of individual members in this case. Mot. at 9. Plaintiffs briefly note that the right to vote is "individual and personal in nature." *Id.* (citing *Gill*, 138 S. Ct. at 1923). However, as the Supreme Court has held, "so long as the nature of the claim and the

relief sought does not make individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Likewise, the Seventh Circuit has held that the third prong of the test is not violated unless there is a need to establish "individualized proof" for individual members. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-02 (7th Cir. 1993).

Here, there is no need for "individualized proof" from any of the members of the Associational Plaintiffs. Instead, the Court can review the population numbers and calculations performed by Dr. Chen to determine that the Map is invalid and malapportioned. There is no need for individualized testimony or evidence from any particular individual members. And the prospective nature of the relief sought does not require individualized evidence. *Id.* at 602 (individualized proof is generally unnecessary for claims seeking "[d]eclaratory, injunctive, or other prospective relief"). Thus, all three prongs of the test for associational standing are satisfied.

II. Plaintiffs Have Stated Claims for Relief Against the Leadership Defendants.

The Leadership Defendants next argue that Plaintiffs have failed to state a claim because the Court allegedly cannot grant one of the Plaintiffs' requested forms of relief, which asks for an order requiring the Leadership Defendants to appoint members to a redistricting commission with the authority to pass a valid map. Mot. at 9-14. This argument fails because it is not a proper argument for a motion to dismiss and because the Court has authority under federal law to grant relief from an invalid legislative map, including requiring that a commission draw a valid map.

As an initial matter, this is not a proper argument for a motion to dismiss under Rule 12(b)(6) because it does not challenge the pleading of either of the two claims set forth in the FAC, but instead challenges the availability of one form of relief sought in the FAC. Even if Plaintiffs

were not entitled to the relief they are seeking—which they are—"this would not justify dismissal of the suit." *Gardunio*, 674 F. Supp. 2d at 992 (quoting *Bontkowski*, 305 F.2d at 762). As one of the Judges on this Court has previously held, "[b]ecause the prayer for relief 'is not itself a part of the plaintiff's claim, . . . failure to specify relief to which the plaintiff was entitled would not warrant dismissal under Rule 12(b)(6).'" *Id.* (quoting *Bontkowski*, 305 F.2d at 762).

Indeed, Plaintiffs seek several forms of potential relief for their claims, including declaratory judgment, injunctive relief, and equitable relief under Section 1983. FAC at p. 45-46. Among other things, Plaintiffs request that the Court grant prospective relief and either order the Leadership Defendants to appoint members to a commission, appoint a special master to draft a valid map, or grant other appropriate relief that allows from the drafting of a valid map. *Id.* Therefore, the Court has a variety of options to provide relief for Plaintiffs' claims. For this reason alone, the Leadership Defendants' argument should be denied. *See Gardunio*, 674 F. Supp. 2d at 992 (denying motion to dismiss premised on plaintiff's failure to seek available relief).

In any event, Plaintiffs' argument misstates the law and attempts to unduly limit this Court's authority to redress an unconstitutional and invalid legislative map. It is well-established that federal courts have broad authority under Section 1983 to order equitable and prospective relief and enjoin ongoing violations of federal law by state officials in connection with legislative redistricting. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (in state legislative apportionment cases, "any relief accorded can be fashioned in the light of well-known principles of equity"). Courts undertake an "equitable weighing process" to select a fitting remedy in redistricting cases. *North Carolina v. Covington*, --- U.S. ---, 137 S. Ct. 1624, 1625 (2017). In this process, courts consider "what is necessary, what is fair, and what is workable." *Id.* Courts employ a variety of different methods to remedy invalid maps, including overseeing the drawing of a new map

consistent with the Court's orders and appointing special masters or other experts to draw a map.[1]

Thus, the Court has ample authority under federal law, including Section 1983, to order the Leadership Defendants to appoint members to a redistricting commission. Indeed, this is precisely what is contemplated by the Illinois Constitution when the legislature fails to enact a valid map with the full force and effect of law by June 30th of the year following the census. Ill. Const. 1970, art. IV, § 3(b). Indeed, a commission has drawn a map in four of the five redistricting cycles since the passage of the Illinois Constitution in 1970. *See* FAC ¶ 41. Thus, requiring that a commission draw the map is "necessary," "fair," and "workable." *Covington*, 137 S. Ct. at 1625.

The Leadership Defendants also raise two additional arguments in opposition to the request that the Court order the appointment of members to a commission. For the reasons explained above, the Court need not resolve these arguments in order to decide the Motion to Dismiss. For the sake of completeness, however, neither argument has merit.

First, the Leadership Defendants argue that the Court cannot order the creation of a redistricting commission because the General Assembly was able to pass a redistricting plan that was approved by Governor Pritzker before June 30th, regardless of whether the Plan is ultimately found to be void *ab initio*. Mot. at 10-13. This is nonsensical. Under the Leadership Defendants' interpretation, the June 30th deadline for the General Assembly to enact a plan would be meaningless. Indeed, the General Assembly could simply re-enact the exact same map from the prior decade before June 30th, wait until someone files a lawsuit challenging the map, allow the

[1] *See, e.g.*, *Sanchez v. State of Colo.*, 97 F.3d 1303, 1329 (10th Cir. 1996) ("Order[ing] the State to implement a remedial plan of redistricting consistent with this opinion."); *Johnson v. Miller*, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994) ("Reserve[ing] decision and jurisdiction to reconfigure the Eleventh Congressional District in a manner consistent with this opinion and after reviewing the parties' suggestions."), *aff'd and remanded*, 515 U.S. 900 (1995); *Covington v. North Carolina*, 283 F. Supp. 410, 458 (M.D.N.C. 2018) (adopting in part special master's recommended plan for redistricting), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018).

lawsuit to progress for several months, and then reconvene another session later in the year to re-do the map. This would dramatically undermine the role of the legislative redistricting commission, which was enshrined in the Illinois Constitution and ratified by Illinois citizens, not to mention subvert the Court's proper role in ensuring that federal constitutional rights are upheld.

Second, the Leadership Defendants argue that the Court should refer the case to the Illinois Supreme Court before ordering the creation of a redistricting commission. Mot. at 13-14. To the contrary, however, the Court's authority to remedy unconstitutional and invalid legislative maps arises from *federal* law, including Section 1983 and the Fourteenth Amendment. *See Reynolds*, 377 U.S. at 585; *Covington*, 137 S. Ct. at 1625. The Illinois Supreme Court does not have the authority to define the remedies available to this Court, even if the Court decides to use a remedy contemplated under the Illinois Constitution, such as the creation of a redistricting commission. Accordingly, there are no questions to refer to the Illinois Supreme Court.

III. Plaintiffs Have Not Failed to Join Any Necessary Parties.

Finally, the Leadership Defendants argue that Plaintiffs' claims should be dismissed for failure to join the Illinois Supreme Court and the Illinois Secretary of State as allegedly necessary parties to this case. Mot. at 14-15. The Leadership Defendants argue that the Court cannot "accord complete relief" among the existing parties without joining these additional parties. *Id.*

"The term complete relief refers only to relief between the persons already parties, and not as between a party and the absent person whose joinder is sought." *Ochs v. Hindman*, 984 F. Supp. 2d 903, 908 (N.D. Ill. 2013) (quoting *Perrian v. O'Grady*, 958 F.2d 192, 196 (7th Cir. 1992)). Here, the Court can "accord complete relief" between the parties by ordering the Leadership Defendants to appoint members to a redistricting commission. Even if the Supreme Court or Secretary of State are required to take additional steps to support the commission's work, there is

no indication that either party will refuse to take such steps, especially since they are required to do so under the Illinois Constitution. *See* Ill. Const. 1970, art. IV, § 3(b). Accordingly, neither party are "necessary" to the claims or relief at issue.

Moreover, even if the Supreme Court or Secretary of State were "necessary" parties to this case—and they are not—this would still not constitute grounds for dismissal under Rule 12(b)(7) unless the parties could not be joined to the case and they were also "indispensable." *See BCBSM*, 512 F. Supp. 3d at 848 (movant on a Rule 12(b)(7) motion "bears the burden of demonstrating that the absent party is necessary and indispensable"). The Leadership Defendants do not even address these requirements in their Motion. A party is not "indispensable" unless there is no way for the Court "to structure a judgment in the absence of the party that will protect both the party's own rights and the rights of the existing litigants." *Ochs*, 984 F. Supp. 2d at 908. Here, the Court can certainly structure a judgment in the absence of the Supreme Court and Secretary of State, and thus neither party is necessary or indispensable to this action.

IV. If Necessary, Plaintiffs Should be Granted Leave to Amend the Claims in the FAC.

As shown herein, the Court should deny the Leadership Defendants' Motion to Dismiss in its entirety. If the Court is inclined to grant any part of the motion, Plaintiffs respectfully request that the Court grant them leave pursuant to Rule 15(a)(2) to cure any defects in the pleadings as part of the October 1, 2021 amended complaint already allowed by the Court [Dkt. No. 94]. *See D.A.N. Joint Venture III, L.P. v. Touris*, No. 18-cv-349, 2021 WL 365609, at *2 (N.D. Ill. Feb. 3, 2021) (Dow, J.) (leave to amend "should 'freely' be granted 'where justice so requires'").

CONCLUSION

The Court should deny the Leadership Defendants' Motion to Dismiss in its entirety.

Dated: September 10, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 10, 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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