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

DAN MCCONCHIE, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 1:21-CV-3091
	)	
v.	)	Circuit Judge Michael B. Brennan
	)	Chief District Judge Jon E. DeGuilio
CHARLES W. SCHOLZ, *et al.*,	)	District Judge Robert M. Dow, Jr.
	)	
Defendants.	)	Three-Judge Court
	)	Pursuant to 28 U.S.C. § 2284(a)
	)	

DEFENDANT MEMBERS OF THE ILLINOIS STATE BOARD OF ELECTIONS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants, Rick S. Terven, Sr.[1], Ian K. Linnabary, William M. McGuffage, William J. Cadigan, Catherine S. McCrory, Laura K. Donahue, Casandra B. Watson, and William R. Haine[2], in their official capacities as members of the Illinois State Board of Elections (collectively, the "Board Members") 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 allege that the state legislative districting plan signed into law on June 4, 2021 ("2021 Redistricting Plan") violates the equal protection clause of the Fourteenth Amendment. *See* ECF No. 51 & 103. After this amended complaint was filed, the Illinois General Assembly

[1] 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).
[2] Member Haine passed away on August 16, 2021. *See* https://www.thetelegraph.com/news/article/Senator-William-Haine-dead-16390775.php.

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 Members as defendants in any amended complaint. As such, it is particularly important to address whether Plaintiffs have standing to bring these claims against the Board Members. For the reasons discussed in the Board Members' opening brief, Plaintiffs do not have standing to bring their claims against the 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 Members should be dismissed.

ARGUMENT

The Board Members take *no position* on the constitutionality of the underlying map or the validity of the redistricting process. However, because Plaintiffs lack standing to bring their claims against the Board Members and have failed to state claims against the Board Members, the Board Members have moved for dismissal on those specific grounds. This does not mean that the Board Members agree with any remaining allegations in the Amended Complaint, including Plaintiffs' request for relief under the Declaratory Judgment Act; nor does it mean that the Board Members could not dispute these allegations at a later stage in the litigation.

I. 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.'" *Arizonans 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. 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. 103 at 6-9. 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 *California v. Texas*, --- U.S. ---, 141 S. Ct. 2104 (2021) (generally discussing pre-enforcement standing, but ultimately holding that plaintiffs did not have standing); *Babbitt v. Farm Workers*, 442 U.S. 289 (1979) (evaluating First Amendment

claim challenging statute with potential criminal prosecution); *Massachusetts v. Melon*, 262 U.S. 447, 488 (1923) (holding that no party was injured and to exercise jurisdiction would require "authority which plainly we do not possess"); *Libertarian Party of Ill. v. Ill. State Bd. of Elections*, No. 12-C-2511, 2012 WL 3880124 (N.D. Ill. Sept. 5, 2012) (addressing First Amendment claims).

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. 51 & 103. 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. 103 at 8. 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).

II. PLAINTIFFS' CONCLUSORY PLEADINGS AGAINST THE BOARD MEMBERS DO NOT SATISFY THE RULE 8 PLEADING REQUIREMENTS.

Plaintiffs' response argues that they have stated a viable equal protection claim against the Board Members because they allege that the Board Members will administer an election based on the June 4, 2021, map. ECF No. 103 at 13-14. As the Board Members have explained in their opening brief and in this reply, that allegation does not satisfy the Article III standing requirements, let alone state a viable claim. Plaintiffs have not alleged that the Board Members have taken any personal or official actions or made any decisions with regard to the 2021 Redistricting Plan. *See* ECF Nos. 51 & 103. 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 Illinois State Board of Elections' Members, Defendants respectfully request that this Court dismiss Plaintiffs' claims against them.

September 17, 2021

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

/s/ Mary A. Johnston
Mary A. Johnston
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-4417
Mary.johnston@ilag.gov

Counsel for Illinois State Board of Elections' Member Defendants