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
IAN K. LINNABARY, *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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants, Ian K. Linnabary, William M. McGuffage, William J. Cadigan, Laura K. Donahue, Cassandra B. Watson, Rick S. Terven, Sr., and Katherine S. McCrory (collectively the "Board Members"), in their official capacities as members of the Illinois State Board of Elections, by their attorney, Kwame Raoul, Attorney General of Illinois, in support of their Motion to Dismiss Plaintiffs' Second Amended Complaint state as follows:

INTRODUCTION

Plaintiffs allege that the state legislative districting plan signed into law on June 4, 2021 ("June 2021 Redistricting Plan") is void *ab initio*. ECF No. 116 ¶ 2. On September 24, 2021, a new redistricting plan was signed into law ("September 2021 Redistricting Plan"), replacing the June 2021 Redistricting Plan. Plaintiffs allege that the September 2021 Redistricting Plan also violates Section 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10101 *et seq.*, and the Fourteenth Amendment. *Id.* at Counts IV-VII.

The Illinois Constitution requires that the 59 Senate Districts and 118 Representative Districts be redistricted the year after each decennial census; this requirement means redistricting

must be completed in 2021. *Id.* ¶ 42. The General Assembly is tasked with passing a redistricting plan. *Id.* ¶ 43. If a plan is not signed into law by June 30 of the applicable year—here June 30, 2021—a bipartisan redistricting commission comprised of eight members is appointed to draft a redistricting plan. *Id.*

The U.S. Census Bureau provides the decennial census data to the states in the year following each census. *Id.* at ¶ 48. Typically, the decennial census data is available in April of the year follow the census. *See id.* This year, due to complications related to COVID-19, the decennial data necessary to begin state redistricting was not received until August 12, 2021. *Id.* Due to these delays, the June 2021 Redistricting Plan was based on the U.S. Census Bureau's American Community Survey's five-year population estimates from 2015-2019 ("ACS data") instead of the decennial census data. *Id.* at ¶ 50.

Plaintiffs allege that the ACS data is not a proper substitute for the census data. *Id.* at ¶ 51. Plaintiffs allege that the ACS data should not be used for redistricting maps because it does not provide accurate housing or population counts. *Id.* Plaintiffs allege that the June 2021 Redistricting Plan violates the Fourteenth Amendment. *Id.* at Count I. Plaintiffs further allege that the September 2021 Redistricting Plan fails to accurately reflect the voting strength of the Latino and Black voters in Illinois in violation of the VRA and the Fourteenth Amendment. *Id.* at Counts IV-VII.

Plaintiffs seek declaratory and injunctive relief. *Id.* at Prayer for Relief. Plaintiffs' claims against the Board Members must be dismissed because Plaintiffs have not alleged that any Board Members took any action to cause any alleged injury and, therefore, Plaintiffs lack standing under Article III to bring any claims against the Board Members. Plaintiffs also do not state a viable claim against the Board Members because they do not allege a plausible basis to conclude that any

of them personally engaged in conduct that violates the Constitution. Plaintiffs' claims against the Board Members should be dismissed.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) provides that a party may move to dismiss a case based on "lack of subject matter jurisdiction." F.R.C.P. 12(b)(1). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." *Id*. at (h)(3).

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. A complaint should be dismissed if the plaintiff fails to allege sufficient facts to state a cause of action that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A sufficient complaint must allege "more than a sheer possibility that a defendant has acted unlawfully" and be supported by factual content, as "[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678. When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all well-pleaded facts as true, but it must also "draw on its judicial experience and common sense" to determine if the plaintiff has stated a plausible claim for relief. *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009), *quoting Iqbal* 556 U.S. at 678. If, upon its review, the court determines that a plaintiff has failed to meet this plausibility requirement, the matter should be dismissed.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO BRING THEIR CLAIMS AGAINST THE BOARD MEMBERS.

Defendants reassert their position that Plaintiffs' claims against the Board Members fail because Plaintiffs have not sufficiently alleged that the Board Members' actions have caused any alleged injury. "Article III restricts the judicial power to actual 'Cases' and 'Controversies,' a

limitation understood to confine the federal judiciary to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury." *Ezell v. City of Chicago*, 641 F.3d 684, 694–95 (7th Cir. 2011). Accordingly, a plaintiff lacks standing unless (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." *Id.* (internal quotations omitted). This "triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998) (footnote omitted). At the pleading stage, a plaintiff must establish each element of Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

First, Plaintiffs' request for declaratory relief regarding the June 2021 Redistricting Plan is moot, as that plan has no practical effect moving forward. *H.P. by and Through W.P. v. Naperville Comm. Unit Sch. Dist. #203*, 910 F.3d 957, 960 (7th Cir. 2018) (stating that a case becomes moot when "a court's decision can no longer affect the rights of the litigants in the case before them"). Plaintiffs allege that the June 2021 Redistricting Plan is not moot because, if the September 2021 Redistricting Plan is found to be invalid, the June 2021 Redistricting Plan will be reinstated. ECF No. 116 at ¶ 108. However, this position is purely speculative and cannot be used to assert Article III standing because an opinion regarding the June 2021 Redistricting Plan would be 'an opinion advising what the law would be upon a hypothetical state of facts." *H.P. by and Through W.P.*, 910 F.3d at 960 (internal quotations omitted).

Moreover, with regard to both the June 2021 Redistricting Plan and the September 2021 Redistricting Plan, Plaintiffs have not satisfied the causation requirement to establish standing because they make no factual allegations establishing a causal connection. Plaintiffs fail to allege facts establishing that the alleged injury is "fairly traceable to the challenged action of the

defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 650 (1992).

As in the Complaint and Amended Complaint, the only allegations that relate to the Board Members in this Second Amended Complaint merely name the individual Board Members and make the blanket assertion that they are responsible for administering elections. *See* ECF No. 116. Plaintiffs do not make any factual allegations that establish that the Board Members have taken any specific actions, let alone any actions that injured Plaintiffs. *See id*. Without any alleged connection between some action of the Board Members and Plaintiffs' alleged injury, Plaintiffs have "fail[ed] to show a nexus between the alleged violations and their claimed injury." *Paher v. Cegavske*, No. 3:20-cv-00243, 2020 WL 2748301 (D. Nev. May 27, 2020). Other than merely identifying the Board Members and speculating about what they may do in the future, every factual allegation in the Second Amended Complaint refers to alleged conduct of other individuals. Because Plaintiffs have failed to sufficiently allege that any activity fairly traceable to the Board Members caused any injury, "they fall short in their attempt to establish standing." *Hope, Inc. v. DuPage County, Ill.*, 738 F.2d 797, 807–808 (7th Cir. 1984).

Plaintiffs also have not sufficiently alleged that the Board Members can offer any relief to redress their alleged injuries or that their claims are concrete and imminent and not speculative. Plaintiffs seek injunctive relief against the Board Members preventing them from overseeing an election based on the allegedly unconstitutional June or September 2021 Redistricting Plans. ECF No. 116 at Prayer for Relief. To be ripe, a claim must point to an alleged injury that is "actual and imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560. However, Plaintiffs' allegations supporting their request for injunctive relief against the Board Members are speculative; they rely on the assumption that, if this Court finds the September 2021 Redistricting

Plan to be unconstitutional, the Board Members will still conduct an election based on the June or September 2021 Redistricting Plans despite this Court's holding. Thus, Plaintiffs' allegations are purely speculative and not ripe for review. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) (ripeness requirement "prevent[s] the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.").

This Court should presume that the Board Members will properly discharge their official duties. *See U.S. v. Lee*, 502 U.S. 691, 697 (7th Cir. 2007) (it is presumed that the official acts of public officers will be discharged properly). Plaintiffs' position is based on their belief that the Board Members would blindly adhere to the current election schedule regardless of how this Court rules. However, this position ignores significant practical considerations. First, there is simply no reason that the Board Members would think that administering an election based on a map that a federal court has deemed unconstitutional or in violation of the VRA is an appropriate manner of discharging their official duties. Second, Plaintiffs' position ignores the reality of what will happen if the September 2021 Redistricting Plan is deemed unconstitutional or in violation of the VRA, which is that the General Assembly would need to reconvene to make any necessary amendments to the map and/or election schedule—a process that does not involve the Board Members in any capacity. As such, there is no reason to enter an injunction against the Board Members because there is no real concern that the Board Members will, at any point, take action that may violate Plaintiffs' rights. For these reasons, Plaintiffs lack standing to bring their claims against the Board Members.

Finally, Plaintiffs cannot obtain relief under the Declaratory Judgment Act, 28 U.S.C. 2201, 2202. *See* ECF No. 116 at Counts II & III. The Declaratory Judgment Act is not an independent basis for jurisdiction. *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 231 (7th Cir. 1993). Because

Plaintiffs lack standing to bring their claims against the Board Members, they cannot seek relief under the Declaratory Judgment Act. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (explaining that suits under the Declaratory Judgment Act must satisfy the Article III case-or-controversy requirement).

II. PLAINTIFFS HAVE NOT PLED ANY VIABLE CLAIMS AGAINST THE BOARD MEMBERS.

If the Court determines that Plaintiffs have standing to pursue its VRA and equal protection claims against the Board Members, it should dismiss those claims under Rule 8(a) and Rule 12(b)(6) for failure to state a plausible claim. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Section 1983 limits liability to "a defendant's personal acts or decisions." *Vinning-El v. Evans*, 657 F.3d 591, 592 (7th Cir. 2011). Here, Plaintiffs have not alleged that the Board Members have taken any personal or official actions or made any decisions with regard to either the June or September 2021 Redistricting Plans. Plaintiffs instead rely on "unadorned, the-defendant-unlawfully-harmed-me accusation[s]," but as the Supreme Court has held, "[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. With no substantive allegations against the Board Members, Plaintiffs have not stated a viable claim under the VRA or Section 1983.

CONCLUSION

Because Plaintiffs lack standing and do not and cannot allege a viable claim against the Illinois State Board of Elections' Members, Defendants respectfully request that this Court dismiss Plaintiffs' claims against them.

October 15, 2021

Respectfully submitted,

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