

**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 redo 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

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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
Charles E. Harris, II

EXHIBIT A

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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, and)
JIM DURKIN, in his official)
capacity as Minority Leader of the)
Illinois House of Representatives)
and individually as a registered)
voter,)

Plaintiffs,)

v.)

ILLINOIS STATE BOARD OF)
ELECTIONS, 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..)

Docket No. 21 CV 3091

Chicago, Illinois
September 1, 2021
12:30 P.M.

JULIE CONTRERAS, IRVIN FUENTES,)
ABRAHAM MARTINEZ, IRENE PADILLA,)
and ROSE TORRES,)

Plaintiffs,)
vs.)

ILLINOIS STATE BOARD OF ELECTIONS)

Docket No. 21 CV 3139

Chicago, Illinois
September 1, 2021
12:30 P.M.

1 CHARLES W. SCHOLZ, IAN K.)
 LINNABARY, WILLIAM J. CADIGAN,)
 2 LAURA K. DONAHUE, WILLIAM R.)
 HAINE, WILLIAM M. MCGUFFAGE,)
 3 KATHERINE S. O'BRIEN, and)
 CASANDRA B. WATSON, in their)
 4 official capacities as members of)
 the Illinois State Board of)
 5 Elections, DON HARMON, in his)
 official capacity as President of)
 6 the Illinois Senate, and THE)
 OFFICE OF THE PRESIDENT OF THE)
 7 ILLINOIS SENATE, EMANUEL)
 CHRISTOPHER WELCH, in his)
 8 official capacity as Speaker of)
 the Illinois House of)
 9 Representatives, and the OFFICE)
 OF THE SPEAKER OF THE ILLINOIS)
 10 HOUSE OF REPRESENTATIVES,)
)
 11 Defendants.)

12 TRANSCRIPT OF PROCEEDINGS - HEARING

13 BEFORE THE HONORABLE CIRCUIT JUDGE MICHAEL B. BRENNAN
 14 BEFORE THE HONORABLE CHIEF DISTRICT JUDGE JON E. DEGUILIO
 15 BEFORE THE HONORABLE DISTRICT JUDGE ROBERT M. DOW, JR.

16 THREE-JUDGE COURT
 PURSUANT TO 28 U.S.C. SECTION 2284(a)

17 APPEARANCES:

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18 J. Cadigan, Laura K.
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20 Haine, William M.
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22 O'Brien and Casandra B.
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1 (The following court proceedings were had by
2 videoconference.)

3 THE CLERK: Okay. This is McConchie versus the
4 Illinois State Board, 21 Civil 3091; Contreras versus Illinois
5 State Board, 21 Civil 3139.

6 DISTRICT JUDGE DOW: Okay. And just a reminder to
7 please mute if you're not speaking, just because we have got so
8 many people on this call. But I am going to go ahead and take
9 attendance if I can. So can I ask who's on the line for the
10 McConchie plaintiffs, please?

11 THE COURT REPORTER: I am not hearing anybody.

12 DISTRICT JUDGE DOW: Okay. One second. The court
13 reporter is going to put her headphones on so she can hear
14 better, and I will try to help her out here. I heard
15 Mr. Harris on for the plaintiffs, and I heard Mr. Panoff. And
16 the next two I think were a little garbled, so there were two
17 other people who identified themselves. Can you try again,
18 please?

19 MR. LEUTKEHANS: Yes, sir. Phil Leutkehans on behalf
20 of the McConchie plaintiffs.

21 DISTRICT JUDGE DOW: Okay.

22 MR. MEZA: And also Ricardo Meza, M-e-z-a, your Honor.

23 DISTRICT JUDGE DOW: Are you on behalf of the
24 McConchie plaintiffs as well, then?

25 MR. MEZA: Yes.

1 DISTRICT JUDGE DOW: Okay. Great.

2 MR. FOGARTY: Your Honor, good afternoon. John
3 Fogarty on behalf of the Illinois Republican Party.

4 DISTRICT JUDGE DOW: Okay. Great.

5 Anybody else on the McConchie plaintiff side?

6 Okay. Let's try the Contreras plaintiffs then. Who's
7 on for the Contreras plaintiffs, please?

8 MR. HERRERA: Good morning, your Honor. This is
9 Ernest Herrera for the Contreras plaintiffs, and I have some
10 co-counsel on the line with me.

11 DISTRICT JUDGE DOW: Okay. Great. Thank you. And
12 who are the co-counsel? If they would like to be identified
13 for the record, they can go ahead and do so, please.

14 MR. DEL CASTILLO: Francisco Fernandez Del Castillo for
15 the Contreras plaintiffs.

16 THE COURT REPORTER: I didn't get that.

17 DISTRICT JUDGE DOW: Can you say your name one more
18 time, please?

19 MR. DEL CASTILLO: Yes. Francis Fernandez Del
20 Castillo.

21 DISTRICT JUDGE DOW: Okay. Very good. Thank you.

22 Okay. Is that it for the Contreras plaintiffs, then?

23 Okay, great.

24 For the State Board of Elections?

25 MS. JOHNSTON: Good afternoon, it's Mary Johnston on

1 behalf of the State Board and in both actions.

2 DISTRICT JUDGE DOW: Okay. Thank you. And on behalf
3 of the speaker and the president of the senate?

4 MR. BERKOWITZ: Sean Berkowitz on behalf of the
5 president of the senate, your Honors.

6 MR. KASPER: Michael Kasper on behalf of the speaker
7 and the senate president. And I apologize, your Honors, for
8 reasons I don't understand, my video camera doesn't appear to
9 be working.

10 DISTRICT JUDGE DOW: Well, we can hear you loud and
11 clear, so that's great.

12 MR. BRUCE: Devon Bruce, your Honor, for the president
13 and speaker.

14 DISTRICT JUDGE DOW: It sounded like you were a
15 lightning strike in the middle of that, but we got you, so
16 thank you.

17 Anybody else who has got -- would like to be
18 recognized on the record here?

19 MR. VAUGHT: Good afternoon, your Honor. Adam Vaught
20 on behalf of the president and speaker.

21 DISTRICT JUDGE DOW: Anybody else?

22 MS. LOPEZ: Your Honor, Veronica Lopez. I'm here on
23 behalf of the petitioner, intervenor defendant Angelica
24 Guerrero-Cuellar.

25 DISTRICT JUDGE DOW: Okay. Wonderful. Thank you.

1 Anybody else? Okay. Great.

2 So I guess all I can say is I read the paper this
3 morning, and I also saw the McConchie plaintiffs filed a status
4 report that's more of a backward-looking report than a
5 forward-looking report. And it's basically reporting on their
6 version of the events that have transpired over the last week
7 that led up to the passage of the law last night.

8 Let me just direct my question, first, to counsel for
9 the speaker and the president of the senate. Has the governor
10 said anything about his time frame for dealing with this
11 legislation, which I assume has been transmitted to his desk?

12 MR. BERKOWITZ: I'm going to defer to Mr. Kasper on
13 that, your Honor. I don't believe -- I think the answer is I
14 don't believe so, but he may have more current information.

15 MR. KASPER: Yes, your Honor. Michael Kasper. I
16 agree with that. I'm not aware of any pronouncements from the
17 governor about if and when he will take up the legislation that
18 passed last night.

19 DISTRICT JUDGE DOW: Okay. And going back to
20 Mr. Berkowitz because he is the person I think I had the more
21 extended conversation with last time. Assuming that the
22 governor does sign this legislation, you will no longer be
23 defending the old map, you will only be defending this map; is
24 that right?

25 MR. BERKOWITZ: Correct.

1 DISTRICT JUDGE DOW: Okay. Very good. That's
2 helpful.

3 Now, I read, and I assume my colleagues have also read
4 the plaintiff's status report, which is really all about the
5 process. But I think for looking forward, obviously, you can
6 raise any objections you have in regard to the process and
7 we'll certainly allow the defendants to say their piece in the
8 process, too, but we have a map, and let's just assume for the
9 moment that the governor's going to sign it.

10 How much time would the plaintiffs need on
11 both -- both sets of plaintiffs -- to decide whether they have
12 an amended complaint to file? And I guess embedded in that
13 question is, I think the last time you told us your experts
14 were able in a very quick period of time to determine if there
15 were malapportionment problems. Have they already been able to
16 determine that or do you need further discovery before the
17 experts are even able to do the math problem, much less
18 identify any other legal challenges to this new map, assuming
19 that it becomes the operative map?

20 And I will start with the McConchie plaintiffs. What
21 do you have to say on that question?

22 MR. LUETKEHANS: Your Honor, this is Phil Luetkehans.
23 As of right now we believe the malapportionment issues are
24 taken care of. We are still analyzing, but it does appear that
25 issue has been resolved.

1 DISTRICT JUDGE DOW: Okay. So it sounds to me like,
2 then, if I remember from your complaint you really had two
3 issues. One is the malapportionment issue, which was framed as
4 a federal constitutional challenge. The other is this issue of
5 whether the legislature gets a second bite at the apple or a
6 commission should have been formed.

7 There's a decent argument that if that were the only
8 argument you had, that's an argument that ought to be deferred
9 to the Illinois Supreme Court, as opposed to a federal
10 three-judge panel, because it arises under the Illinois
11 Constitution. It's a matter of first impression. The Illinois
12 Constitution provides a direct action in the Supreme Court.
13 But the other question that the panel, I'm sure, would be very
14 interested in, but perhaps you haven't had time and you would
15 have to tell us how much time you would need is, are there
16 other potential federal claims here that would be
17 constitutional or Voting Rights Act or anything else. And do
18 you guys have a sense of how long it will take you to figure
19 that out? Because if you're agreeing that the malapportionment
20 problems have been solved, all that's left of your complaint, I
21 think, as it now stands, is the claim that this should have
22 gone to a commission.

23 So what do you guys have to say on that piece?

24 MR. LUETKEHANS: Your Honor, I do believe we'll be
25 filing an amended complaint as it relates to the racial and

1 ethnic components of this map. Exactly what that looks like
2 now is too early to tell. Those types of claims, as I know
3 you're aware of, are very election and fact intensive and
4 require certain expert attention. And due to the fact that we
5 still don't have the actual Shaver block, once he files his --
6 was passed last night -- we obviously -- to start that process.

7 THE COURT REPORTER: I'm losing him.

8 DISTRICT JUDGE DOW: Okay. So we're not hearing you
9 very well, unfortunately. And I don't think my court reporter
10 picked all of that up. And I only think I know what you said
11 because I was anticipating that you were going to say that
12 based on what was filed this morning about what you've
13 received. Some of that is a discovery issue. Some of that is
14 an expert issue. But do you want to try repeating that? And I
15 don't know if you can get closer to wherever your microphone
16 source is because my court reporter was not able to pick it all
17 up.

18 MR. LEUTKEHANS: I apologize, your Honor. I'll try
19 and speak louder.

20 DISTRICT JUDGE DOW: You are doing much better now.
21 So wherever you are now, don't move.

22 MR. LEUTKEHANS: I'll try. I get a little quiet, so I
23 apologize.

24 The points the situation, as you know, as you can
25 imagine, these are very expert-related issues. We do not

1 believe that -- or we believe that we will still have federal
2 claims, both either equal protection claims or Voting Rights or
3 Section 2 claims that we will be proceeding under.

4 And the fact that we don't have the full map yet, it
5 is impossible for us to know. We have not been able to start
6 that.

7 DISTRICT JUDGE DOW: Okay. That makes sense to me.
8 Someone has got to mute. Well, let's hope that's
9 better.

10 Okay. That's helpful. And I'm going to defer that,
11 the issue when you're going to get that data for a minute here
12 because I want to hear from the Contreras plaintiffs how they
13 see their claims evolving, and maybe it's the same as you do,
14 but let me hear from them, please.

15 MR. HERRERA: Good morning, your Honors. Right now,
16 before I get to the potential that counsel for the McConchie
17 plaintiffs was addressing, we don't believe this case is mooted
18 by the maps. First of all, they're not signed by the governor.
19 And your Honors have before you a motion for summary judgment.
20 We believe that plaintiffs are entitled to declaratory
21 judgment, that the maps are unconstitutionally malapportioned
22 as we presented in our motion for summary judgment.

23 The case should proceed to a remedial phase during
24 which there would be court oversight of compliance, with
25 federal --

1 THE COURT REPORTER: Excuse me. Wait. Something
2 is --

3 DISTRICT JUDGE DOW: Hold on, Mr. Herrera. Mr.
4 Herrera, I think everybody except the person speaking needs to
5 mute and maybe we do, too. We can do that. Let's try that
6 again, Mr. Herrera, because there was a blast of a foghorn.
7 There it goes again.

8 Carolyn, can you mute everybody? And then unmute
9 people. Maybe we need to have people raise their hands and get
10 unmuted. I have muted everybody.

11 MR. HERRERA: Good morning, your Honor. I will start
12 from the beginning. Before we get to the position about
13 amended complaints, we believe that Contreras plaintiffs as it
14 stands are entitled to declaratory judgment today on our
15 malapportionment claims. The maps are malapportioned and there
16 are not new maps yet because the governor has not signed them.
17 We understand that the legislature passed the maps late last
18 night, but they're not signed yet and so we do not have maps
19 that are constitutional right now.

20 What your Honors do have before you is our motion for
21 summary judgment. We believe we're entitled to declaratory
22 judgment, and we think that the case should proceed to a
23 remedial phase during which this Court would have oversight to
24 make sure that the maps comply with federal constitutional and
25 statutory law, including Section 2 of the Voting Rights Act,

1 the Federal Voting Rights Act.

2 Now, from what we have been able to tell, based on the
3 maps that were passed, and assuming we have the correct maps,
4 because there's kind of been a ball-and-cup game with the
5 legislative leaders on which map -- which map file actually
6 corresponds with what is being voted on, and there was not
7 otherwise public disclosure of those maps.

8 What we understand is the picture looks like this for
9 Latino voters. All of our clients are Latino voters in the
10 State of Illinois. And what the picture looks like is Latinos
11 grew in populations by 309,832 people over the course of the
12 last decade. Meanwhile the Illinois population shrank.

13 In that same time, and as the map that may be signed
14 by Governor Pritzker today indicates, Latinos were not rewarded
15 or given their fair share of districts after that population
16 growth. Latinos were, in fact, penalized, and they're -- in
17 the last decade there were three senate districts that had
18 majority of Latino citizen voting age populations. Now there
19 are two, if these maps are signed by Governor Pritzker.

20 In the last decade under the old maps, Latinos in the
21 house had five districts in which they were the majority of
22 citizen voting age population. Now there are only four such
23 districts in the House, based on the maps that were given to us
24 in our data analysis. So we believe there are serious,
25 potentially constitutional, but very likely Section 2 of the

1 Federal Voting Rights Act claims here.

2 Of course citizen voting age population is just one of
3 the many things that needs to be examined when seeing if there
4 are constitutional or Section 2 concerns or claims to be made.
5 Therefore, we would probably need about a month, or at least a
6 month, to be able to amend our complaint.

7 DISTRICT JUDGE DOW: Okay. And that's kind of what I
8 anticipated that all of you would say.

9 Can you all hear me? Can you hear me?

10 Okay. So that's what I kind of expected you all would
11 say.

12 MR. HERRERA: I'm sorry Judge. I can't --

13 DISTRICT JUDGE DOW: Okay. How's that?

14 THE CLERK: Okay. I have tried to unmute you. You
15 are unmuted.

16 DISTRICT JUDGE DOW: Can anybody hear me now?

17 No.

18 THE CLERK: Okay. I have tried to unmute you. You
19 are unmuted.

20 DISTRICT JUDGE DOW: Can you hear me now? And now we
21 get the echo.

22 THE CLERK: Try it now.

23 DISTRICT JUDGE DOW: Okay, how is that?

24 CIRCUIT JUDGE BRENNER: We hear you, but there is an
25 echo.

1 DISTRICT JUDGE DOW: Okay. I am going to see if I can
2 get somebody from our tech department to come up and fix that.
3 How's that? You know what I am going to do? I am going to go
4 back into my office. I am going to go to my office and sign
5 in.

6 (District Judge Dow exited the courtroom.)

7 DISTRICT JUDGE DOW: Hello.

8 THE CLERK: Hi, Judge. We can hear you.

9 (District Judge Dow re-entered the courtroom.)

10 DISTRICT JUDGE DOW: Okay.

11 THE CLERK: Try it now. Okay. How is that? Can
12 everybody hear me?

13 DISTRICT JUDGE DOW: Okay. How's that? It's still
14 echoing.

15 (Audio issues addressed by Systems.)

16 DISTRICT JUDGE DOW: Can you all hear me now?

17 All right. Thank you. Success. I'm sorry about
18 that. I don't know if it's because we have too many
19 microphones going here because we have to do the court
20 reporting in this room, too. I am sorry for that delay, but I
21 think we're good now.

22 I think what I was about to say was I sort of expected
23 what both set of plaintiffs said. My concern is there is going
24 to be some discovery need here before the experts can even do
25 their work.

1 Let me ask Mr. Herrera, for what purpose would we
2 issue a summary judgment ruling on the old map if the governor
3 signs the bill before we get to the ruling? Is it just for
4 attorneys' fees, or for what other issue would we be issuing a
5 ruling on a defunct map?

6 MR. HERRERA: Your Honor, it would be a much faster
7 use of judicial resources and the parties' resources if you
8 rule on that on the map that is still in place at this moment.
9 We would be able to move to a remedial phase, which there would
10 still be some work involved, of course, to get the new
11 information on the maps, but it would give the Court oversight
12 and that would include the Section 2 issues.

13 Going through amended complaints, other filings, would
14 take quite a bit more time.

15 DISTRICT JUDGE DOW: So your position is we can't go
16 to a remedial phase until we've ruled on that motion. And the
17 fact that the general assembly has essentially abandoned the
18 old maps as soon as the governor signs this isn't sufficient?

19 MR. HERRERA: We still have no proof that these are
20 legal maps, your Honor, and we have constitutional and Section
21 2 concerns with them. Even though in the maps -- assuming
22 they're signed -- the malapportionment issues seem to have been
23 addressed.

24 MR. LEUTKEHANS: Your Honor, this is Phil Leutkehans.
25 We do agree with the Herrera -- or with the Contreras

1 plaintiffs, it would be appropriate to rule on the fact that
2 the first maps were invalid. I think that does come into play
3 as we go forward.

4 THE COURT: Okay. Let me ask the defendants. Does
5 anybody take issue with the proposition that the first maps are
6 invalid and they were in violation of the law?

7 MR. BERKOWITZ: So, Judge, I think that what we would
8 say is they were malapportioned and presumptively
9 unconstitutional. I don't think we're willing to on this call
10 today that they were an unconstitutional violation of the law.
11 The issues have not been reached. There are different analyses
12 that would need to be done.

13 I do believe that your Honor's perspective that from
14 the judicial economy standpoint debating over a map that's no
15 longer in play doesn't make a lot of sense, and we ought to
16 determine whether the current map, assuming, as we all do, that
17 the governor will sign that map shortly, makes the most sense
18 to focus on, and attacking the constitutionality of that map if
19 plaintiffs believe there is an issue or concern with that map
20 is the appropriate course of action.

21 DISTRICT JUDGE DOW: Do the defendants take the
22 position that we would not be in a remedial phase at this
23 point? The mere abandonment of the map isn't sufficient?

24 MR. BERKOWITZ: I don't believe we're in a remedial
25 phase. I do believe that this Court, as you indicated last

1 time, Judge Dow, is overseeing in some way, shape, or form
2 because there's litigation. The maps that have been created
3 and amended, and you would be able to evaluate what's done. I
4 would say, for example, while we didn't file a status report,
5 we vehemently disagree with the characterizations. And I don't
6 think we need to get into the historical issues on that today
7 to the extent that there's anything about how the maps were
8 created, what went into it, what processes were given. We feel
9 very comfortable in defending that and talking about that, and
10 to follow the basis. I think that's where the focus ought to
11 be, not on whether maps that were done based on the best
12 available data ended up being malapportioned, which they did.

13 DISTRICT JUDGE DOW: Did the McConchie plaintiffs
14 think that you need approximately a month to file an amended
15 complaint?

16 UNIDENTIFIED ATTORNEY: We do, your Honor.

17 DISTRICT JUDGE DOW: And that is what we need for the
18 Contreras plaintiffs as well?

19 MR. HERRERA: Yes, your Honor.

20 DISTRICT JUDGE DOW: All right. Judge Brennan, Judge
21 DeGuilio, any questions you have for the assembled masses here?

22 CIRCUIT JUDGE BRENNAN: Just clarification from
23 Mr. Herrera. Are you, in effect, asking for a two-track
24 approach, that you want this Court to go to a remedial phase on
25 the original map, you also want to amend your complaint to

1 offer the arguments that you've offered here today on the
2 amended map, and you're also making the argument that this is
3 toward the service of judicial economy? Is that correct?

4 MR. HERRERA: No, your Honor. We wouldn't see it as a
5 two-track approach. It would be -- in a remedial phase it
6 would be overseeing the maps, whichever maps are before us, so
7 which ones are actually enacted.

8 CIRCUIT JUDGE BRENNAN: Yet you're also submitting
9 your amended complaint for purposes of adding the Section 2
10 allegations.

11 MR. HERRERA: No, your Honor. If we moved to a
12 remedial phase now, an amended complaint would be unnecessary.

13 The Court would still -- there would not need to be a
14 new complaint in a remedial phase in order to address other
15 federal legal issues such as Section 2 of the Voting Rights
16 Act.

17 CIRCUIT JUDGE BRENNAN: So it's your position that the
18 original complaint encompasses some of the things that you
19 talked about today because -- is that the case?

20 MR. HERRERA: I think if it would help to illustrate.
21 If there were no special session that was, let's just say if
22 there were no maps that we were looking at that were coming
23 down, we could be going to a remedial phase based on the
24 original -- the current, the live complaint for the Contreras
25 plaintiff. And in that remedial phase, the Court would not

1 just be addressing the malapportionment claims. The Court
2 would still have to approve a map that is entirely legal. That
3 meets the malapportionment claims. That does not run afoul of
4 the Shah line of cases on the fourteenth amendment. That does
5 not run afoul of Section 2 of the Voting Rights Act. And that
6 would be what the Court is overseeing, therefore there would
7 not be a new claim necessary.

8 CIRCUIT JUDGE BRENNAN: Thank you for that
9 clarification.

10 DISTRICT JUDGE DOW: And how do we know what your
11 claims are and your problems are with the map if you don't give
12 us an amended complaint? How do you convey to us your issues
13 with the amended map?

14 MR. HERRERA: Your Honor, from what I have seen in
15 remedial phases in -- on -- in Section 2 cases or in
16 constitutional malapportionment cases, whatever the case is,
17 when you're in a remedial phase on those maps, experts and
18 others may still submit briefs, briefing, and other information
19 on whether the new proposed maps are sufficient and legal. And
20 so it would not be in the form of a new lawsuit, but it would
21 be in the form of the experts and the parties providing their
22 arguments as to why maps are constitutional or legal or not.

23 DISTRICT JUDGE DOW: Okay. So you just tee them up by
24 briefs instead of a complaint?

25 MR. HERRERA: That's right, your Honor.

1 DISTRICT JUDGE DOW: It doesn't make much difference
2 to me, practically. I've always said that an answer is about
3 the most useless document in litigation. You very seldom learn
4 anything from an answer. So I don't think it's -- it's a
5 matter of substance as long as we know what the problems are,
6 and in the end we have to sign off on a map that's lawful. I'm
7 not sure it matters much exactly how it all gets teed up.

8 But I think what you're also saying, then, and this
9 goes to Judge Brennan's question, too, is that it'll be at
10 least a month before your experts can even tell us what's wrong
11 with the current map, assuming the governor signs it; is that
12 accurate?

13 MR. HERRERA: Your Honor, we have already identified
14 some initial problem areas, but it is correct that we would
15 need a bit more time to do some of the other analysis, and that
16 would require gathering some other data.

17 DISTRICT JUDGE DOW: Okay.

18 Judge DeGuilio, do you have any questions for the
19 assembled masses here?

20 CHIEF JUDGE DEGUILIO: Just maybe a follow-up to your
21 question, Judge Dow. Counsel, I think, initially indicated
22 that their problem with the amended map is that it doesn't
23 sufficiently represent minority citizens, and I think both
24 plaintiffs suggested that that would be at least one theory
25 that you would raise.

1 Are you suggesting, Mr. Herrera, that there might be
2 other issues as well that you're going to raise once an expert
3 reviews the map?

4 MR. HERRERA: There are Section 2 -- potential Section
5 2 issues that we have raised. But are you asking, your Honor,
6 in addition to those?

7 CHIEF JUDGE DEGUILIO: Yes.

8 MR. HERRERA: From what we can tell, that's all we
9 know at the moment.

10 CHIEF JUDGE DEGUILIO: So it's at least possible
11 that if the governor signs the map, and if the Court -- if the
12 panel chooses to proceed with the amended map, that could very
13 well be that this lawsuit comes down to the singular issue of
14 whether or not the maps sufficiently represent minority
15 citizens; is that correct?

16 MR. HERRERA: Yes, your Honor, and that could fall
17 under Section 2. That also could potentially -- the
18 representation of minorities also potentially brings in a
19 fourteenth and fifteenth amendment claims regarding intentional
20 discrimination.

21 CHIEF JUDGE DEGUILIO: But you don't feel confident
22 limiting the issues to that until your experts review the map;
23 is that right?

24 MR. HERRERA: That's right, your Honor.

25 CHIEF JUDGE DEGUILIO: Okay.

1 MR. HERRERA: I think as I was conveying earlier, and
2 as I am sure the panel is aware, besides citizen voting age
3 population and demographic percentages, of course there are
4 other factors that go into such claims.

5 CHIEF JUDGE DEGUILIO: And you agree with that
6 Mr. Harris?

7 MR. HARRIS: Mr. Leutkehans, I will defer to him as he
8 is kind of our legislative expert.

9 MR. LETUKEHANS: This is Phil Leutkehans. Yes, we do
10 agree that right now we're looking at minority-type claims,
11 yes. We have not had a chance to look into everything,
12 obviously.

13 DISTRICT JUDGE DOW: Okay.

14 CHIEF JUDGE DEGUILIO: One last question, then, from
15 the defendant's perspective or the representative of the
16 Illinois Election Board, what kind of a delay -- what
17 consequences arise from this kind of a delay, in terms of the
18 next election?

19 MR. BERKOWITZ: This is Sean Berkowitz. As I
20 understand, and certainly interested in what the Board of
21 Elections has to say, I think that we would need a decision by
22 early January in order to be able to implement things. That's
23 my understanding. But please correct me, Illinois Election
24 Board, if I have it wrong.

25 MS. JOHNSTON: Good afternoon, your Honor. This is

1 Mary Johnston on behalf of the Illinois Board of Elections. I
2 have spoken with my client about the latest date they would be
3 able to receive a decision. Again, it's been the Board's
4 position throughout this that they don't take any position of
5 the underlying merits of any side, but that they will adhere to
6 court decisions. But I think that sometime in January sounds
7 reasonable for them to be able move forward with whatever it is
8 that this Court has decided.

9 MR. KASPER: And, your Honor, this is Michael Kasper
10 on behalf of the legislative leaders if I might.

11 DISTRICT JUDGE DOW: Yes. Go ahead.

12 MR. KASPER: I believe the time to begin gathering the
13 nominating petitions necessary for the next election is
14 sometime in January, so that's where that January date that
15 Mr. Berkowitz talked about, and it's certainly our position
16 that if we just have Section 2 claims or any other claims about
17 the map that was passed last night, they should bring them and
18 take the appropriate amount of time to bring them and then
19 we'll defend them.

20 MR. LUETKEHANS: Your Honor, this is Phil Luetkehans.
21 Historically, I know, we have tried these cases in
22 December/January. That was with the March primary. That
23 doesn't mean we shouldn't be trying to reach that January date
24 but just to kind of give you a historical perspective of that.

25 DISTRICT JUDGE DOW: Right. That is very helpful and,

1 obviously, I read the memo you filed last night. One of the
2 complaints that many people have leveled at the process is that
3 it should have taken longer. It should have taken 30 more days
4 and they should have heard more voices, and that's at odds with
5 the trial date that right now is three weeks off or something
6 like that. But it sounds to me that nobody thinks that trial
7 date needs to hold, and it sounds like nobody really thinks it
8 can hold, given that we have new maps and new expert work to be
9 done.

10 Please speak now if anybody wants to state the case
11 for having a trial on September 27th.

12 MR. LUETKEHANS: Your Honor, this is Phil Leutkehans,
13 again. I'm not sure a trial makes sense, but I think this
14 preliminary matter of the maps as Mr. Herrera said needs to be
15 decided, whether that is through summary judgment or a trial
16 date. I mean, we have kind of lost some of our timing on
17 experts, obviously, because of the schedule to be postponed on
18 experts. But I think while September 27th may not be, I think,
19 as Mr. Herrera said, briefing the motions for summary judgment
20 and getting some rulings on whether the first map is valid is
21 important as we go forward.

22 DISTRICT JUDGE DOW: Okay. That's helpful. Thank
23 you.

24 Colleagues, any other questions you all had for today?
25 Judge Brennan?

1 CIRCUIT JUDGE BRENNAN: I do not have any more
2 questions.

3 DISTRICT JUDGE DOW: Okay. Judge DeGuilio?

4 CHIEF JUDGE DEGUILIO: I do not. Thank you, Judge
5 Dow.

6 DISTRICT JUDGE DOW: Okay. I think for discovery
7 purposes, it's very likely you will be seeing Magistrate Judge
8 Jantz very soon. I don't see any reason you guys shouldn't
9 keep moving forward. I am sure she is going to be interested
10 in making sure the general assembly has provided every piece of
11 backup for the map that was drawn so the experts can get to
12 work.

13 The panel will get together and figure out all of
14 these other issues as quickly as we can and give you further
15 guidance and probably set you for another call. Okay?
16 Anything else for today?

17 MR. BERKOWITZ: Thank you, Judge. I would say we have
18 already provided a substantial amount of information. We will
19 be happy to discuss with Magistrate Judge Jantz, and understand
20 the need to get information to the plaintiffs, so that is all
21 for us.

22 MS. JOHNSTON: Your Honor, Mary Johnston on behalf of
23 the Board if I may. So previously all of the defendants, we
24 had filed motions to dismiss those amended complaints. And I
25 believe that the Contreras plaintiffs did file a response to

1 the Board's motion at least. I just want to confirm that there
2 would be no further deadlines for a reply and all briefing on
3 any pending motions to dismiss is stayed for the time being.

4 DISTRICT JUDGE DOW: Well, at the moment. But once
5 the panel confers, we may set briefing schedules on all sorts
6 of pending motions. We'll have to sort that out. But at the
7 moment there are no deadlines because we didn't know what was
8 going to happen yesterday. Now that we know what happened, I
9 think we'll be setting some deadlines soon.

10 MS. JOHNSTON: Okay. And, again, just wanted to
11 confirm that I hadn't missed any deadline that had been
12 previously set or that this would be coming from you in a
13 future order.

14 DISTRICT JUDGE DOW: Exactly.

15 MS. JOHNSTON: Thank you.

16 DISTRICT JUDGE DOW: Thank you.

17 Anybody else have an issue they want to raise today?

18 Okay. Thank you, everybody. Appreciate it.

19 Judges, can I call you back at the same number I used
20 last time?

21 CIRCUIT JUDGE BRENNAN: Yes, sir.

22 DISTRICT JUDGE DOW: Okay. Bye now.

23 (Proceedings concluded at 1:12 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

<u>/s/Kristin M. Ashenhurst, CSR, RDR, CRR</u>	<u>September 2, 2021</u>
Kristin M. Ashenhurst, CSR, RDR, CRR	Date
Federal Official Court Reporter	