UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al*.,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as the Secretary of State of Michigan, *et al.*,

Defendants.

Case No. 1:22-CV-00054-PLM-SJB

Three-Judge Panel
28 U.S.C. § 2284(a)

PLAINTIFFS' OPPOSITION TO DEFENDANT SECRETARY'S PARTIAL CONCURRENCE IN MOTION TO DISMISS

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INTRODUCTION

Plaintiffs have brought a claim under the Fourteenth Amendment's Equal Protection Clause, but the Defendant Commission (the "Commission") is adamant that they allege only a state-law injury. Rather than filing a separate Motion to Dismiss, the Defendant Secretary has opted to concur in the sovereign immunity arguments advanced by the Commission in its own Motion to Dismiss. Secretary Mot. to Dismiss at 3 (ECF No. 44, PageID.931). Therefore, Plaintiffs advance the same sovereign immunity arguments below that they offer in response to the Defendant Commission's Motion. The Secretary takes no position on the constitutionality of the new congressional district map, so those arguments are not addressed herein. Secretary Mot. to Dismiss at 4 (ECF No. 44, PageID.932).

Although the doctrine of sovereign immunity shields state officers from being hailed into federal court under state-law causes of action, *Ex Parte Young* permits an exception when state officers are alleged to have violated *federal* law as Plaintiffs allege here. This Court should therefore deny the Commission's Partial Motion to Dismiss.

STANDARD OF REVIEW

In general, the deferential standard of review applicable to 12(b)(6) motions also governs this Court's review of a motion to dismiss under Fed. R. Civ. P. 12(b)(1). *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1045 (6th Cir. 2015). This Court does not, however, "presume the truth of factual allegations" that concern the Court's jurisdiction. *See id*. And although it is the Plaintiffs' burden to prove jurisdiction, *id*. at 1045, it is the Secretary's burden to prove that she is entitled to sovereign immunity in this instance. *See, e.g.*, *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2262 (2021); *Heike v. Guevara*, 654 F. Supp. 2d 658, 668 (W.D. Mich. 2009) (stating that the defendant raising the sovereign immunity defense "has the burden to show that it is entitled to immunity") (citing *Gragg v. Ky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002)).

Ultimately, the burden to prove that this Court has jurisdiction at the pleadings stage is light. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). The burden imposed on a plaintiff to prove jurisdiction depends on the stage of litigation, and at the pleading stage "general factual allegations of injury resulting from the defendant's conduct may suffice." *Id*. This is because when reviewing a motion to dismiss for lack of jurisdiction, courts still presume that a plaintiff's "general allegations embrace those specific facts that are necessary to support the claim." *Id*. (internal quotation marks and alterations omitted).

ARGUMENT

The Commissioners' major premise, which the Secretary shares—that Plaintiffs have brought a state-law claim against State Defendants in federal court—leads the Secretary to mistakenly conclude that Plaintiffs' Count II is barred by sovereign immunity. *See* Secretary Mot. to Dismiss at 3-4 (ECF No. 44, PageID.931-932); Commission Mot. to Dismiss at 8-10 (ECF No. 41, PageID.712-714). But the Secretary's sovereign immunity defense fails because Plaintiffs' Count II presents a straightforward *federal* equal protection claim against Michigan's state officers in federal court. When state officers undertake state action that violates federal law, they lose the shield of sovereign immunity per *Ex Parte Young*. Accordingly, this Court should deny the Commissioners' Motion to Dismiss.

I. SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFFS' CLAIM BECAUSE COUNT II FITS WITHIN THE *EX PARTE YOUNG* EXCEPTION.

The Commissioners argue that "[t]his Court lacks jurisdiction to order the Commission to comply with" the state constitution and therefore that the Commission's sovereign immunity bars Plaintiffs' Count II. Commission Mot. to Dismiss at 8 (ECF No. 41, PageID.712). This would be true if Plaintiffs were seeking to compel compliance with the state constitution, but they are not. Plaintiffs have brought a federal equal protection claim premised on the State Defendants'

violation of traditional redistricting criteria; although Article IV, Section 6 of the Michigan Constitution now reflects these traditional criteria, it is not the sole source of these standards and it is not the law that Plaintiffs seek to enforce in this action.

States derive sovereign immunity from two constitutional sources, and the protections that state officers draw from these sources, although similar in effect, are different in kind. The first form of sovereign immunity is inferred from the structure of the Constitution itself. *See Franchise Tax Bd. v. Hyatt,* 139 S. Ct. 1485, 1493-94 (2020). This immunity applies to suits where, like here, the plaintiffs are citizens of Michigan suing Michigan officials. *See Allen v. Cooper,* 140 S. Ct. 994, 999-1000 (2020) (citizen of North Carolina suing North Carolina in federal court and North Carolina invoking the "general rule that federal courts cannot hear suits brought by individuals against nonconsenting States"). This structural immunity defense is waivable if not raised by state officials. *See Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998); *see id*. at 394 (Kennedy, J., concurring) (stating that Eleventh Amendment immunity, in a case involving a citizen of Wisconsin suing a Wisconsin government agency, sounds in personal jurisdiction).

By contrast, the Eleventh Amendment sovereign immunity that the Commissioners invoke here applies "only if the plaintiff is *not* a citizen of the defendant State." *Allen*, 140 S. Ct. at 1000 (emphasis added). Although Eleventh Amendment immunity is often used as a convenient shorthand, *Alden v. Maine*, 527 U.S. 706, 713 (1999), structural sovereign immunity and Eleventh Amendment immunity are two different concepts that should be properly distinguished. Because this case involves citizens of Michigan suing Michigan state officials in federal court, the Secretary is wrong to assert that Eleventh Amendment immunity applies here. If any form of sovereign immunity applies, and Plaintiffs contend that it does not, then it is structural sovereign immunity.

Even assuming that the Secretary has correctly invoked structural sovereign immunity, however, her defense still fails because it sidesteps the relevant *Ex Parte Young* exception. 209 U.S. 123 (1908). The Supreme Court has repeatedly affirmed that "the States have retained their traditional immunity from suit, 'except as altered by the plan of the Convention or certain constitutional amendments'" such as the Fourteenth Amendment. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011) (quoting *Alden*, 527 U.S. at 713). Under the *Ex Parte Young* doctrine, the Eleventh Amendment cannot bar actions in federal court that seek to restrain state officials from enforcing state laws when the challenged state action violates federal law. *See, e.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 527 (2021). Because state laws that violate the federal constitution are void, any state official who enforces such a law "'comes into conflict with the superior authority of [the] Constitution,' and therefore is 'stripped of his official [] character . . . . The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.'" *Va. Office for Prot. & Advocacy*, 563 U.S. at 254 (quoting *Ex Parte Young*, 209 U.S. at 159-60). The Secretary cannot infer from the structure of the federal constitution the authority to act in violation of that very document.

Plaintiffs allege that the Commissioners enacted a new congressional district map that inconsistently and arbitrarily applied traditional redistricting criteria in violation of the Equal Protection Clause. FAC ¶¶ 7, 121 (ECF No. 7, PageID.58, 75). Further, Plaintiffs allege that the Defendant Secretary is enforcing this unconstitutional map, thereby violating the rights of Michigan's citizens as guaranteed by the Equal Protection Clause. FAC ¶ 29 (ECF No. 7, PageID.61). The official actions of Michigan state officials are not insulated from this Court's review when Michigan's officers are circumventing "a federally protected right." *Gray v. Sanders*, 372 U.S. 368, 381 (1963). Plaintiffs' Complaint alleges that state officials are violating rights

guaranteed to Michiganders under the U.S. Constitution; the fact that the state action challenged here simultaneously violates Article IV, Section 6 of the Michigan Constitution is related but incidental to the merits of Plaintiffs' federal claim. This claim therefore fits neatly within the *Ex Parte Young* exception and the Secretary is not entitled to immunity from a lawsuit intended to enforce compliance with the Fourteenth Amendment's Equal Protection Clause.

The Secretary falls back on *Pennhurst State School & Hospital v. Halderman*, citing that case for the proposition that the *Ex Parte Young* exception is inapplicable "when a plaintiff alleges that a state official has violated state law." 465 U.S. 89 (1984). But this confuses Plaintiffs' evidence with their cause of action. Plaintiffs allege that the State Defendants have violated the Equal Protection Clause by arbitrarily and inconsistently assigning Plaintiffs to districts. As evidence in support of this argument, Plaintiffs point to the Commissioners' failure to adhere to traditional redistricting criteria that require equal district populations and the minimization of splits of political subdivisions; although these traditional criteria have been applied by other courts in other states, they have also been reflected since 2018 in Article IV, Section 6 of Michigan's state constitution. It is nonsensical to claim that the fact Michigan voters decided to codify traditional redistricting criteria gives the Commissioners carte blanche to violate that same criteria; otherwise, states can immunize themselves from the strictures of federal law by simply copying-and-pasting it into their own constitutions. Accordingly, structural sovereign immunity does not shield the State Defendants' actions from federal judicial review because Plaintiffs are asking this Court to restrain state officials from violating federal law. *Pennhurst*, therefore, does not bar Plaintiffs' claim. *See, e.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 527 (2021).

CONCLUSION

Plaintiffs respectfully request that the Court deny the Secretary's Partial Concurrence in the Commissioners' Motion to Dismiss Count II of the Amended Complaint.

Dated: February 23, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that:

1. This Brief complies with the word-count limitation of W.D. Mich. LCivR 7.2(b)(i) because this Brief contains 1,597 words (including headings, footnotes, citations, and quotations but not the case caption, cover sheets, table of contents, table of authorities, signature block, attachments, exhibits, or affidavits).

2. The word processing software used to create this Brief and generate the above word count is Microsoft Word 2016.

Dated: February 23, 2022

/s/ Charles R. Spies
Charles R. Spies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on February 23, 2022.

Dated: February 23, 2022

/s/ Charles R. Spies
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