UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Charles Walen, an individual; and Paul Henderson, an individual. Plaintiffs, vs. DOUG BURGUM, in his official capacity as Governor of the State of North Dakota; ALVIN JAEGER in his official Capacity as Secretary of State of the State of North Dakota, Defendants, and The Mandan, Hidatsa and Arikara Nation, Cesar Alvarez, and Lisa Deville Defendant-Intervenors.	CASE NO: 1:22-CV-00031-CRH

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Respectfully submitted this 18th day of April, 2022.

EVENSON SANDERSON PC
Attorneys for Plaintiffs
1100 College Drive, Suite 5
Bismarck, ND 58501
Telephone: 701-751-1243

By: */s/ Paul R. Sanderson*
Paul R. Sanderson (ID# 05830)
psanderson@esattorneys.com
Ryan J. Joyce (ID# 09549)
rjoyce@esattorneys.com

Robert W. Harms
Attorney for Plaintiffs
815 N. Mandan St.
Bismarck, ND 58501
Telephone: 701-255-2841

By: */s/ Robert W. Harms*
Robert W. Harms (ID# 03666)
robert@harmsgroup.net

ARGUMENT

I. The recent Supreme Court opinion in Wisconsin Legislature v. Wisconsin Elections Comm'n establishes Plaintiffs will succeed on the merits.

After filing Plaintiffs' Motion for a Preliminary Injunction, the United States Supreme Court issued its opinion in Wisconsin Legislature v. Wisconsin Elections Comm'n, No. 21A471, 2022 WL 851720 (U.S. Mar. 23, 2022), which is directly on point and should control the analysis applied by this Court for Plaintiff's Motion. In Wisconsin Legislature, the plaintiffs challenged the creation of new majority-minority districts in Wisconsin's redistricting maps. Id. at 1. Plaintiffs argued the majority-minority districts were racial gerrymanders that were not supported by evidence showing they were narrowly tailored to achieve a compelling government interest under Gingles. Id. The Governor and the Wisconsin Supreme Court justified the decision by claiming such racially motivated districts were required by Section 2 of the Voting Rights Act. Id.

In a per curiam decision, it was held the scant evidence presented could not justify the drawing of district boundaries based on race under the Voting Rights Act. Id. Both the Governor and the lower court failed to present evidence meeting the Gingles preconditions. Id. at 2. Even though the Wisconsin Supreme Court analyzed expert reports from multiple parties, such evidence could not justify separating individuals into voting districts based on race. Id. at 4. Accordingly, the Supreme Court remanded the case to correct the issues before the upcoming 2022 elections.

The Wisconsin Legislature opinion establishes the required evidence to support racial gerrymandering far exceeds the lay testimony contemplated by the North Dakota Legislative Assembly ("Assembly") in this case. The Assembly compiled no expert reports or statistical analyses of prior elections in either Subdistrict. It conducted no meaningful legislative inquiry to determine whether the Gingles preconditions were met. Following the clear precedent in Wisconsin Legislature, Plaintiffs' claims will succeed on the merits.

II. Plaintiff's Motion for Preliminary Injunction should be granted because Purcell does not constitute an absolute bar on injunctions before an election.

The Defendants' chief opposition to Plaintiffs' Motion is that the Purcell principle bars courts from granting injunctions on election rules before an election. However, Defendants have misconstrued Purcell, which "held only that courts must take careful account of considerations specific to election cases, not that election cases are exempt from traditional stay standards." Veasey v. Perry, 574 U.S. 951, 135 S. Ct. 9, 10–11 (2014).

The concerns expressed by the Court in Purcell are not present here and should not result in a denial of Plaintiffs' Motion. In Purcell, 549 U.S. at 2, plaintiffs challenged the constitutionality of Arizona's new voter identification law, which required both proof of citizenship and a valid I.D. to vote in the upcoming election. Just weeks before the election, the Ninth Circuit enjoined Arizona from implementing the law. Id. On appeal, the Supreme Court stayed the Ninth Circuit's injunction because changing the rules or procedures of an election weeks before the election could cause voter confusion and fundamentally impact the election process. Id. at 5.

Purcell does not stand for an absolute bar on injunctions before an election. Veasey, 574 U.S. 951; Feldman v. Arizona Sec'y of State's Office, 843 F.3d 366, 368 (9th Cir. 2016) (noting "[i]t is important to remember that the Supreme Court in Purcell did not set forth a per se prohibition against enjoining voting laws on the eve of an election."). Rather, Purcell focused on the effect changes to the election might have on voters and election officials. Craig v. Simon, 493 F. Supp. 3d 773, 789 (D. Minn. 2020) (holding Purcell does not favor denying an injunction where it would not "[f]undamentally alter the nature or rules of the election, create voter confusion, or create an incentive for voters to remain away from the polls."). Purcell instructs courts to apply, not depart from, the usual rules of equity. Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 42 (2020). Under Purcell, Courts must consider all relevant factors, not just the

calendar. Id. (explaining "there is not a moratorium on the Constitution as the cold weather approaches. Remediable incursions on the right to vote can occur in September or October as well as in April or May.").

In this case, an injunction would not prevent any citizen from voting. It would not change the precincts for voting. It would not disturb any existing election procedures or rules. It would not alter the duties of any election officials in either District. It would not even require a redrawing of either District. Put simply, granting this Motion would not fundamentally impact the election process. Rather, granting the injunction would return the election to the status quo before to the creation of the unconstitutional Subdistricts. Granting the injunction would not result in any voter confusion or dissuasion from voting. Self Advoc. Sols. N.D. v. Jaeger, 464 F. Supp. 3d 1039 (D.N.D. 2020) (rejecting State's Purcell challenge six days before the North Dakota primary).

Furthermore, any inconvenience an injunction would cause the State cannot outweigh Plaintiffs' Constitutional right to equal protection under the law. See Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) ("When a law is likely unconstitutional, the interests of those the government represents . . . do not outweigh a plaintiff's interest in having constitutional rights protected."). This Court recently concluded a deprivation of a voter's constitutional rights outweighs the impact to election officials under Purcell. Self Advoc., 464 F. Supp. 3d at 1055.

Federal courts have previously rejected a state's Purcell redistricting challenge months prior to an election, and as such, sufficient time exists to ensure Plaintiffs' constitutional rights are protected and a fair election can occur. See Wisconsin Legislature, 142 S. Ct. 1245 (2022) (holding that five months is sufficient for Wisconsin to either implement maps consistent with Equal Protection principles); see also Thomas v. Bryant, 919 F.3d 298 (5th Cir. 2019) (concluding four months was more than adequate to enact a map that was constitutional); Ohio A. Philip Randolph

Inst. v. Householder, 373 F. Supp. 3d 978 (S.D. Ohio 2019), *rev'd on other grounds* (rejecting the state's Purcell arguments stating the election "is over four months away. Accordingly, there is enough time to implement a remedy on Defendants' own timetable, hence negating the risk of voter confusion."); Patino v. City of Pasadena, 229 F. Supp. 3d 582 (S.D. Tex. 2017) (rejecting Purcell argument holding that three months was ample time to implement the previous map and restore the status quo). With over six months to the general election, there exists sufficient time to conduct an election that does not violate Plaintiffs' constitutional rights.

The Defendants argument that this Court has no power to enjoin the challenged subdistricts is erroneous. See Doc. #18 at 8. Federal courts routinely strike down and redraw unconstitutional district maps. See Upham v. Seamon, 456 U.S. 37, 39 (1982). Enjoining the challenged subdistricts is well within this Court's authority. Thus, the State's concern about the Assembly being forced to change the boundaries of either District is unwarranted.

III. Defendants' own actions and delays have created the Purcell issues.

This Court should reject Defendants' opposition to this Motion because it was Defendants' actions alone that have caused the timing and deadline issues of which they complain. See Sierra Club v. U.S. Army Corps of Engineers, 645 F.3d 978 (8th Cir. 2011) (discounting potential harm an injunction would cause to non-moving party where such harm "was largely self-inflicted."); Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578 (3d Cir. 2002) ("[t]he injury a defendant might suffer if an injunction were imposed may be discounted by the fact that the defendant brought that injury upon itself."); Midwest Guar. Bank v. Guaranty Bank, 270 F. Supp. 2d 900 (E.D. Mich. 2003) (holding that a party "cannot place itself in harm's way, and then later claim that an injunction should not issue because of costs which it must incur in order to remedy its own misconduct.").

Defendants' actions alone have caused the timing and deadline issues of which they complain. Despite knowing the constitutional redistricting requirements created by the 2020 census, Governor Burgum waited until April 21, 2021, to establish the Interim Legislative Redistricting Committee and gave it a deadline of November 30, 2021, to submit a redistricting plan. See Doc. #19, Ex. A. The Redistricting Committee did not begin holding meetings until July 29, 2021, and concluded meetings on September 29, 2021. See Doc. #20. Governor Burgum then waited until October 29, 2021, to order a special session to begin on November 8, 2021. See Doc. # 1 at 5.

Defendants argue Plaintiffs lacked diligence in filing their Complaint and Motion. Plaintiffs filed their Complaint on February 16, 2022, 97 days after the Subdistricts were signed into law by Governor Burgum. Sixteen days later, Plaintiffs filed their Motion for Preliminary Injunction. These facts establish Plaintiffs diligently pursued their claim and injunctive relief. See Self Advoc., 464 F. Supp. 3d at 1055. Any issues regarding diligence falls squarely on the Defendants. Defendants immediately contacted Plaintiffs' counsel to request a 20-day extension for responding to the Motion for Preliminary Injunction so transcripts of the hearing could be prepared. See Affidavit of Paul R. Sanderson at 2. Defendants also requested a 44-day extension to answer the Complaint. Id. Defendants' opposition to the Motion should be rejected when it is their own actions that have caused the delays. See Curling v. Raffensperger, 493 F. Supp. 3d 1264, 1310-1311 (N.D. Ga. 2020) (discounting State's Purcell argument where it was the state and other third parties, not the Plaintiff, who delayed or slowed the pace of litigation); Feldman, 843 F.3d 366 (denying State's Purcell argument noting plaintiffs have pursued expedited consideration of their claims at every stage of the litigation and the State opposed an expedited schedule.).

Defendants' argument of onerous election deadlines is further misplaced in considering the

upcoming election in District 4. The State Legislators in District 4 were elected to four-year terms in 2020. Article IV, Section 4, of the Constitution of North Dakota requires that state senators and representatives be elected to four-year terms. Thus, legislative elections in North Dakota are held biennially, alternating every two years between even and odd number districts. Because of the creation of the subdistricts, both Representatives in District 4 are required to run for re-election after just two years. Although the State relies on Purcell to argue the inconvenience of an injunction, the State's decision to create subdistricts is the sole reason District 4 is on the ballot. If this Court grants the preliminary injunction, there would be no basis for an election in District 4.

IV. Sufficient evidence exists proving racial gerrymandering.

In its Response, MHA Nation asks the Court to disregard the evidence the Assembly allowed race to predominate its decision to create the challenged subdistricts. MHA Nation accuses Plaintiffs of using "a few, off-handed remarks by individual representatives out of context." See Doc. #21 at 10. At public hearings, on the record, the Assembly announced the subdistricts were intentionally drawn to place Forth Berthold and Turtle Mountain in majority-minority districts.[1] This admission is fatal. Out of 47 legislative districts, only these two were selected for subdistricts. Moreover, the Redistricting Committee only considered creating subdistricts in legislative districts *with* a Native American Reservation. Because the evidence shows race predominated the Assembly's decision to create the challenged subdistricts, this Court should reject MHA Nation's call to ignore this evidence.

Similarly, MHA Nation tries to claim racial considerations were not predominant because the Redistricting Committee allegedly respected "traditional redistricting principles." Such an argument has routinely been rejected by the Supreme Court. See Shaw v. Hunt 517 U.S. 899, 907

[1] *Nov. 9 North Dakota House of Representatives Floor Session, 67th Leg., 1st Spec. Sess.*1:49:10 (N.D. Nov. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20211118/-1/22663#agenda_

(1996). For example, the Court explicitly rejected the exact argument MHA Nation is making. Bethune-Hill v. Virginia State Bd. of Elections, 137 S.Ct. 788, 798-799 (2017) (noting traditional redistricting principles are numerous and malleable). A state cannot escape the consequences of unconstitutional racial gerrymandering by arguing, *after-the-fact*, the gerrymandered districts comply with traditional redistricting principles.

Finally, MHA Nation argues even if race predominated, the gerrymandered subdistricts are narrowly tailored to achieve a compelling government interest. As evidence, MHA Nation points almost exclusively to PowerPoint presentations given to the Committee on redistricting laws, and lay testimony provided by tribal members. Such evidence is far from meeting an adequate legal justification. The PowerPoint presentations cited by MHA Nation establish the Committee was advised repeatedly that a statistical analysis of voting patterns *must* be conducted by an expert to satisfy the Gingles preconditions.[2] No such analysis was prepared or considered. Neither MHA Nation nor Defendants can cite to any expert testimony or analysis of past election results required to comply with Gingles. Moreover, the Supreme Court has rejected the argument lay testimony by members of a minority group constitutes a justification for racial gerrymandering. See Abbott v. Perez 138 S.Ct. 2305, 2334 (2018) (rejecting lay testimony as insufficient and stating one group's demands cannot be enough).

CONCLUSION

This Court should not allow an election to proceed in November that violates Plaintiffs' constitutional rights. The injunction will maintain the status quo pending a determination on the merits. Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Preliminary Injunction.

---

[2] *Aug. 26 Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Sess.* 10:44:01 (N.D. Aug. 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210825/-1/21573. (emphasis added).