IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COMMON CAUSE INDIANA, et al.,	)	
	)	
Plaintiff,	)	
v.	)	23-CV-1022-JRS-TAB
	)	
CITY OF ANDERSON COMMON COUNCIL, and the MADISON COUNTY BOARD OF ELECTIONS,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CITY OF ANDERSON COMMON COUNCIL'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) and 19

In its opening brief, Anderson Council demonstrated that it was entitled to dismissal of Plaintiffs' Complaint because it is undisputed, from the face of Plaintiffs' Complaint, that: (1) Plaintiffs' cause of action is barred in its entirety by the doctrine of *laches*; (2) Plaintiffs have failed to join indispensable parties; and (3) Plaintiffs' prayer for injunctive relief asks this Court to enter an injunction pursuant to Section 2 of the Voting Rights Act of 1965 "prohibiting racial discrimination in voting." (Compl., Prayer for Relief ¶b)," despite Plaintiffs' total failure to allege the necessary prerequisite for such a claim: intentional discrimination against African-American voters. Instead of addressing the merits of those arguments, Plaintiffs erroneously claim Anderson Council has not read Plaintiffs' Complaint and is making "straw man" arguments. For the reasons set forth below, Plaintiffs' arguments lack merit and the Motion to Dismiss should be **GRANTED**.

I. ARGUMENT

A. Plaintiffs' Arguments are Procedurally Improper.

While the parties generally agree about the standards governing a Rule 12(b)(6) motion to dismiss, as discussed *infra*, Plaintiffs' response brief commits two (2) impermissible tactics in their

attempts to defeat dismissal.

First, they have affirmatively alleged facts demonstrating that they are not entitled to relief sought in their Complaint, *i.e.*, they have pled themselves out of Court. *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2011) ("allegations must suggest that [party] has a right to the relief . . . if they do not, the plaintiff pleads itself out of court."). Second, Plaintiffs' solution to that problem is to raise arguments in their response brief, which essentially seek to amend the complaint as a means to defeat the motion to dismiss. *Chavez v. Illinois State Police*, 251 F.3d 612, 650 (7th Cir. 2001) (holding new factual allegations outside the four corners of Plaintiff's Complaint and raised for the first time in response brief cannot be used to amend a complaint).

Here, in two (2) different instances, Plaintiffs' Complaint demonstrates that they have pled themselves out of Court. In each instance, Plaintiffs attempt to avoid dismissal by raising arguments and facts in their response brief that are outside the four corners of Plaintiff's Complaint, constituting an improper amendment of the Plaintiffs' Complaint.

B. Plaintiffs Have Pled Themselves Out of Court – *Laches*.

Plaintiffs' Complaint alleges facts that conclusively establish that they slept on their rights by not commencing this lawsuit long before the 2023 Primary Election. That is not an "affirmative defense" to plead around, but rather, an equitable defense to election challenges that has been accepted on *multiple* occasions by federal courts, including most recently, the Seventh Circuit in *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060-61 (7th Cir. 2016) (holding that Plaintiffs' request for injunctive relief was barred by *laches* where Plaintiffs waited 3 months to challenge election authorities' refusal to include referendum question on ballot for upcoming election). Rather than address *Jones*, Plaintiffs erroneously argue "[Anderson Council] cites only a single federal case where a claim challenging an election procedure was dismissed based on *laches*,

Fulani v. Hogsett, 917 F.2d 1028, 2013 (7th Cir. 1990)." (Dkt. 26, p. 7).

That argument is demonstrably false. In addition to *Fulani*, Anderson Council explicitly cited *Jones* in its *laches* argument (Dkt. 24, p.7 – "[in the election law context], the Seventh Circuit has clearly held that 'the obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept.'"), which Plaintiffs entirely ignore. *Jones* is not only controlling Seventh Circuit precedent, but also cited as positive authority by *Trump v. Biden*, 394 Wis.2d 629, 636, 951 N.W.2d 568, 572 (2000) to bar an election challenge due to *laches*.

Tacitly conceding the fatal nature of their delay, Plaintiffs claim it is "not their fault" that they delayed because there was a previously pending bill in the Indiana House that would have extended the deadline for Anderson Council to redraw its boundaries from December 31, 2022 to May 15, 2023, but that the legislation did not pass. (Dkt. 26, p. 8, n.1) Reliance on the pending bill is improper to defeat a motion to dismiss, as it is outside the four-corners of Plaintiffs' Complaint and a response brief cannot be used as a means to amend the Complaint to defeat a motion to dismiss, which is precisely what Plaintiffs' Footnote 1 improperly attempts to do. Even if the Court could consider the House Bill reference (which it cannot), that does not change the fact that per *Jones*, Plaintiffs had clear and unequivocal notice of Anderson Council's decision on the redistricting and the time to take action was effective December 11, 2022 – not six months later, after a primary election had already been held.

C. Plaintiffs Have Pled Themselves Out of Court – Race Discrimination.

Similarly, in their prayer for relief, Plaintiffs request that this Court enter an injunction pursuant to Section 2 of the Voting Rights Act of 1965 "prohibiting racial discrimination in voting." (Compl., Prayer for Relief ¶b). But, as explained in Anderson Council's brief (Dkt. 24, pp.6-7), that allegation is deficient for failure to allege race discrimination as required under

Thornburg v. Gingles, 478 U.S. 30, 36 (1986). Again, instead of conceding their error, Plaintiffs accuse Anderson Council of not reading Plaintiffs' Complaint, falsely claiming that Plaintiffs only intend to raise a malapportionment claim, entirely ignoring how Plaintiffs' Complaint explicitly requests an injunction barring "racial discrimination in voting." Somebody obviously did not closely read Plaintiffs' Complaint, but it wasn't Anderson Council. Plaintiffs cannot amend their Complaint in a response brief to add or subtract facts. In this instance, Plaintiffs seek to excise their race discrimination allegation from the Complaint to avoid the obvious embarrassment that they are requesting an injunction to bar race discrimination in voting practices, but cannot allege the predicate existence of race discrimination, consistent with their Rule 11 obligations. Tellingly, Plaintiffs continue to decline to explain why or address Footnote 2 of Defendants' brief. (Dkt. 24, p. 12, n. 2)

D. Plaintiffs' Complaint Remains Barrerd by *Laches*.

That Plaintiffs unreasonably delayed in their pursuit of this lawsuit is established beyond any doubt. Anderson Council's December 11, 2022 vote to not redistrict clearly put Plaintiffs on notice that the May 2023 election would use those boundaries absent prompt action. But Plaintiffs did not act promptly. Instead, they allowed the election to proceed without earlier challenge. They cannot dispute that fact and make no meaningful attempt to do so in their response. Nor do Plaintiffs address how their inexcusable delay would adversely prejudice the voters, candidates and election authorities who voted for the candidates in the 2023 election.

Instead, Plaintiffs falsely claim that Anderson Counsel has only identified a "single" federal court case -- *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) -- that barred untimely

election contests on the basis of *laches*. That assertion is demonstrably false.[1] As addressed above, Anderson Council cited *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060-61 (7th Cir. 2016), where the Seventh Circuit affirmed the denial of a preliminary injunction in an election contest concerning a municipal ballot initiative. In *Jones*, Calumet City, Illinois passed a ballot initiative on June 18, 2016, which would create term limits, barring prospective Mayoral candidates "if they held elective office of either Mayor or Alderman of . . . Calumet City." 842 F.3d at 1056. If successful, the referendum would have prohibited five-term Alderman Thaddeus Jones from running for Mayor of Calumet City. *Id.* On September 15, 2016 -- 3 months after the ballot initiative was passed -- Jones filed suit in federal court, seeking a TRO and preliminary injunction, seeking an order to modify the candidate qualifications. *Id.* at 1057. As the Seventh Circuit reasoned in affirming the denial of the preliminary injunction:

> In assessing the balance of harms, the district court thought that the delay in bringing suit was "the most important driver for the decision." It thought that the Petition Plaintiffs' delay created significant harm for the public at large. Illinois prepared its ballots to be sent overseas by September 23, and the state authorized voting by mail and early voting beginning September 29. As we are well past these dates, and citizens of Calumet may well have been voting at the time of our summary affirmance, these interests quite appropriately weight heavily in the district court's analysis.
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> * * * *
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> We believe that the district court was on solid ground in making this determination. "*Laches* arises when an unwarranted delay in brining suit or otherwise pressing a claim produces prejudice." [citing *Fulani v. Hogsett*]. The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept. We previously have suggested that claims must be brought "expeditiously" . . . to afford the district court "sufficient time in advance of an election to rule without disruption of the electoral cycle."

[1] And ironic considering Plaintiffs' reliance on *Bowes v. Indiana Sec'y of State*, 837 F.3d 813, 818 (7th Cir. 2016), which denied the plaintiffs' request for injunctive relief, in part, due to *laches*.

* * * *

> Moreover, the complaint admits the City Council published an agenda on June 21, which describe the ballot initiatives. The City Council published the minutes from the same meeting, noting that all three ballot initiatives had passed. Finally, as we have noted earlier, at least one plaintiff, Mr. Jones, was present at the meeting and voted against the measure. There is ample evidence to conclude that the plaintiffs knew that the Rule of Three displaced their ballot initiative by the end of June, but delayed filing this action until September 15.

Id. at 1061.

Tellingly, Plaintiffs chose to ignore *Jones*. If a three-month delay in seeking injunctive relief was too late in *Jones*, then here Plaintiffs' six-month delay is far more fatal. Tacitly conceding the fatal nature of their inexcusable delay, Plaintiffs erroneously claim that their delay is no big deal because their prayer for relief would not interfere with the existing election cycle, but rather would impact only the 2024 Election Cycle, which they argue is acceptable, because "numerous federal courts, including the Seventh Circuit, have ordered special elections as part of a remedy for a governmental unit maintaining and using unconstitutional electoral districts." (Dkt. 26, p. 11). Plaintiffs, again, misstate the law.

In *Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 478 (7th Cir. 1986), the Court agreed with the district court's holding that an eligibility requirement for ward committeeman candidates to obtain signatures from 10% of the elected voters within a ward was a ballot access barrier that violated the Fourteenth Amendment, but reversed the district court's remedy to order state election officials to convene a special election. As the *Gjersten* Court noted,

> [A]though federal courts have the power to invalidate elections held under unconstitutionally infirm conditions . . . **[t]he remedy of a special election has been described by courts as drastic if not staggering, and as an extraordinary remedy which the courts should grant only under the most extraordinary of circumstances.** 791 F.2d at 479. **A federal court reaching into the state political process to invalidate an election necessarily implicates important concerns of federalism and state sovereignty. It should not resort to this intrusive remedy until it has carefully weighed all equitable considerations.** *Id*. (cleaned up)

* * * *

> Rather than utilizing a general rule, each case must be considered individually. There is no all-encompassing list of factors which a court must consider in determining whether to order special elections. In each case, **the court must carefully consider both the integrity of the electoral system and the necessities of the process of governing**. For instance, t**he district court must consider whether the plaintiffs filed a timely pre-election request for relief.** The court must also require the plaintiffs to demonstrate that the unconstitutional practice had a significant impact on the particular election they seek to have declared invalid. **If the plaintiffs establish that they pursued their rights in a timely fashion and that the election is suspect, the court must balance the rights of the *candidates* and *voters* against the state's significant interest in getting on with the process of governing once an election cycle is complete. Special elections not only disrupt the decision-making process but also play heavy campaign costs on *candidates* and significant election expenses on local government. The state also has an interest in placing a reasonable limit on the number of times voters are called to the polls.**

Gjersten, 791 F.2d at 479 (reversing relief of a court-ordered special election) (emphasis added).

Similarly, in *Bowes v. Indiana Sec'y of State*, the Court applied *Gjersten* to hold that plaintiffs engaged in *laches* by waiting 1½ years before a general election to challenge an Indiana statute that changed the manner for conducting primary elections for candidates seeking state judicial office. 837 F.3d 813, 817-18 (7th Cir. 2016). As the *Bowes* Court reasoned, "[t]he district court's conclusion that plaintiffs' request for relief was untimely was reasonable . . . we must consider the fact that plaintiffs were aware of the Common Cause suit when it was filed in November 2012, became primary candidates in early February 2014, two months after losing the primary election . . . *Gjersten* teaches that context matters, and that plaintiffs in general must act quickly once they become aware of a constitutional violation . . . even if we were to accept plaintiffs' special election proposal . . . the district court's conclusion about the degree of burden was reasonable . . . if we were to require a special election, we would need to specify an election process for Indiana to use in that election, or order that Indiana enact new constitutional processes

right away. Either approach would significantly encroach into Indiana's election machinery, which ought to be a matter for legislative consideration and determination." 837 F.3d at 820. In short, the Seventh Circuit does not favor special elections for plaintiffs who engage in *laches*, particularly where a state legislature should, if necessary, have the first opportunity to solve the problem as held by *Gjersten* and *Bowes*.

Nor does *Cousins v. City Council of Chicago*, support Plaintiffs' argument that special elections permit federal courts to truncate terms of duly elected officials, the Seventh Circuit held the exact opposite when declaring several City of Chicago wards the product of gerrymandering, and ordering they be redrawn by the City Council, but expressly stating "insofar as the judgments and orders appealed from ordered a change in the boundaries of the 7th and 8th wards of the City, they are reversed, **except that said reversal shall not affect the status of the aldermen of those wards, now serving, before the end of the current term of office.**" 503 F.2d 912, 925 (7th Cir. 1974)(emphasis added).

Tellingly, the only case Plaintiffs could find that purported to enter an injunction truncating the terms of elected officials is the outlier 1996 decision in *Smith v. Beasley*, rendered by the District Court of South Carolina. In *Smith*, the district court ordered the South Carolina General Assembly to redraw the maps for South Carolina's Congressional and Senate Seats, concluding that the boundaries were the result of unlawful gerrymandering. Ultimately, the district court enjoined South Carolina from further using those unlawful boundaries, ordering the General Assembly to redraw its own maps and create its own rules creating special elections, purportedly truncating the terms of persons elected in 1996 to one year. 946 F. Supp. 1174, 1213 (D.S.C. 1996). The decision, however, is questionable as it is outside the Seventh Circuit and was not reviewed by the Fourth Circuit.

Gjersten and its progeny make it clear that federal courts should not interfere with state election machinery, that special elections are the most drastic of drastic remedies, and truncating the terms of duly elected officials has never been a remedy imposed by the Seventh Circuit. And the Indiana legislature has expressly retained the exclusive power to wield such power.

Here, Indiana law is clear: unless otherwise prohibited by the Indiana Constitution, an office created by the legislature "may be enlarged, abridged, or abolished entirely by the legislation. Absent some constitutional prohibition, an office created by the legislature may be abolished by the legislature during the term of the incumbent." *Stoffel v. Daniels,* 908 N.E.2d 1260, 1263 (Ind. Ct. App. 2009). These statutory offices are "almost completely under the control of the legislature, and the term might begin or end at any time, or be lengthened or shortened, at the will of the legislature." *Scott v. State*, 151 Ind. 56, 569 (Ind. 1898) (holding that the legislature could fix the terms of when a county treasurer took office); *see also State ex. rel. Yancey v. Hyde*, 129 Ind. 296, 302 (1891) (holding that the terms of a statutory office may be shortened by the legislature).

The office of city council is a statutory office created by the state legislature in the Indiana Code which states: "A common council, which is the city legislative body, shall be elected under IC 3-10-6 by the voters of each city." IN Code § 36-4-6-2. The Indiana Constitution does not specifically prohibit the alteration of terms for the office of city council. Because the duration of the term is not provided by the Indiana Constitution, "it may be declared by law; and, if not so declared, such office shall be held during the pleasure of the authority making the appointment." Ind. Const. Art. 15, § 2.

It is axiomatic that federal courts are courts of limited jurisdiction that should not interfere in the orderly administration of the states. There is a panoply of federal statutes that empower

federal interests to intervene in state issues, including elections. Here, Section 2 of the Voting Rights Act of 1965. If Plaintiffs cannot muster necessary allegations to state a cognizable cause of action under Section 2 or any other section of the Voting Rights Act that confers available relief, then this Court should not and cannot go out of its way to create from whole cloth a radical form of relief that is contrary to Indiana law. Plaintiffs' dilatory conduct in pursuing this election challenges demonstrates they are not entitled to the drastic remedy they seek. *Jones, Gjersten* and *Bowes* further demonstrate that interference with Indiana's sovereign right to manage its elections should not be tinkered with lightly. If Plaintiffs want a remedy, they can pursue it with the Indiana General Assembly, preferably sooner than later.

E. Plaintiffs Have Failed to Join Indispensable Parties.

In its opening brief, Anderson Council demonstrated that the candidates who were elected in the 2023 Primary Election cycle must be joined as parties because each of those candidates have a direct interest -- both personally and derivatively to the voters who nominated the candidates to the General Election -- to see the election proceed as scheduled and, absent joinder, will be unable to raise any defenses to this suit *or* have their interests adequately represented in this suit.

Plaintiffs do not deny the merits of Anderson Council's argument, but suggest the motion should be denied because Anderson Council did not cite an election law case applying the Rule 19 factors. Plaintiffs ignore, *again*, the Seventh Circuit's admonition in *Gjersten*:

> If the plaintiffs establish that they pursued their rights in a timely fashion and that the election is suspect, **the court must balance the rights of the *candidates* and *voters* against the state's significant interest in getting on with the process of governing once an election cycle is complete. Special elections not only disrupt the decision-making process but also play heavy campaign costs on *candidates* and significant election expenses on local government. The state also has an interest in placing a reasonable limit on the number of times voters are called to the polls.**

Gjersten, 791 F.2d at 479 (reversing relief of a court-ordered special election) (emphasis added).

Also in the election context, the Seventh Circuit has recognized the strong interest of political parties and candidates to access the ballot and advance their common political goals "place burdens on . . . the right of individuals to associate for the advancement of political beliefs," *Navarro v. Neal*, 716 F. 3d 425, 430 (7th Cir. 2013) (quoting *Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006), which is entirely useless if candidates are elected to office and then almost immediately are stripped of office. In addition to the constitutional rights of a political party candidate, the citizens' right to vote for the candidates of their choice should also be considered, and "is of paramount importance, because it preserves all other civil and political rights." *Paul v. State of Indiana Election Board*, 743 F. Supp. 616, 625-26 (S.D. Ind. 1990) (citing *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362 (1964), and *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064 (1886)). It is a right that is afforded significant constitutional protections. *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

Controlling Seventh Circuit case law makes it abundantly clear that candidates, particularly candidates who have won a primary election, have significant interest in a lawsuit seeking a special election to deprive them of their full term in office. As such, Anderson Council has met its burden to have this case dismissed, on the alternative basis, for failure to join indispensable parties under Fed. R. Civ. P. 19.

VI. CONCLUSION

For the reasons set forth above and in Anderson Council's underlying motion and memorandum of law, Plaintiffs' Complaint should be dismissed with prejudice in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) and 19.

Respectfully submitted,

CITY OF ANDERSON COMMON COUNCIL

By: /s/ *Devlin Joseph Schoop*
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CERTIFICATE OF SERVICE

The undersigned certifies that on August 28, 2023, the foregoing **DEFENDANT CITY OF ANDERSON COMMON COUNCIL'S REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUAN TO FED. R. CIV. P. 12(b)(6) and 19** was electronically filed with the United States District Court for the Southern District of Indiana by filing though the Court's CM/ECF system, which served a copy of the foregoing upon all counsel of record.

By: *Devlin Joseph Schoop*