UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COMMON CAUSE INDIANA, ANDERSON-MADISON COUNTY NAACP BRANCH 3058, LEAGUE OF WOMEN VOTERS OF INDIANA, CASSANDRA RIGGS, and JEFFREY J. COTTRELL,	)	
Plaintiffs,	)	
v.	)	CAUSE NO. 1:23-cv-1022-JRS-TAB
CITY OF ANDERSON COMMON COUNCIL, and the MADISON COUNTY BOARD OF ELECTIONS,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSTION TO DEFENDANT CITY OF ANDERSON COMMON COUNCIL'S MOTION TO DISMISS

Defendant, City of Anderson Common Council ("Council") on August 11, 2023, filed a motion to dismiss Plaintiffs' Complaint with prejudice pursuant to Fed. R. Civ. P.12(b)(6). The Council's motion to dismiss should be denied for reasons explicated below:

I. INTRODUCTION

Plaintiffs are two voters in Anderson who reside and vote in a severely overpopulated Council district and three non-partisan public interest organizations, who filed this action seeking a declaration that the six (6) single-member districts

from which members of the Council are elected are malapportioned in violation of the Equal Protection Clause of the Fourteenth Amendment. Notwithstanding these severely malapportioned districts, the Council failed and refused to approve a new redistricting plan after the 2020 census numbers became available at a Council meeting on December 11, 2022. Complaint, paras. 16-20. Plaintiffs have brought this action against the Council and defendant county election board ("Board") pursuant to 42 U.S.C. 1983. They ask the Court to declare those districts unconstitutional and to enjoin any further elections after the imminent November 7, 2023, election until new constitutionally-acceptable districts are in place that are substantially equal in population.

II. ARGUMENT

A. Legal standards applicable to a motion under Rule 12(b)(6).

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint as measured against the standards of Fed. R. Civ. P. 8(a). *Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 806 (7th Cir. 2020) (quoting *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 526 (7th Cir. 2015)). Rule 8(a) establishes a notice pleading regime and requires that a complaint contain only a short and plain statement showing that the pleader is entitled to relief. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002). Though detailed factual allegations are not required, any factual allegations must state a claim to relief that is "plausible on its

face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible if it contains factual allegations that allows the court to draw a reasonable inference that the defendant is liable and that Plaintiffs are entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Plaintiffs easily meet this undemanding pleading requirement and have spelled out their constitutional theory, which relies on long-established constitutional and legal precedents and is anything but novel or outlandish.

When considering a motion to dismiss for failure to state a claim, this Court is required to "take all the factual allegations in the complaint as true," *Kittrell v. Ind. Women's Prison,* 2022 WL 17091886, *3 (S.D. Ind. 2022) (Sweeney, J.), drawing all reasonable inferences in the plaintiff's favor, citing *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

B. Plaintiffs are not required to allege or prove race discrimination in a challenge to malapportioned electoral districts.

The Council repeatedly in its 14-page legal memorandum mischaracterizes Plaintiffs' complaint as alleging violations of Section 2 of the Voting Rights Act. It then faults Plaintiffs (at pp. 1-2, 6, 11-12) for failing to include in their complaint "any allegation of race discrimination, as required by Section 2." After erecting this straw man, the Council expends considerable unnecessary effort to knock it down.

Had the Council conducted even a cursory review of the Complaint, it should have been apparent that Plaintiffs make no claim under Section 2 of the Voting Rights Act. Rather than race discrimination, Plaintiffs' action is exclusively for malapportioned electoral districts under the Equal Protection Clause of the 14th Amendment. Nor are Plaintiffs required to allege or prove that these malapportioned districts reflect an effort to dilute any group's voting strength in a malapportionment action, or that the malapportionment has that effect. "It is enough that the [Council's] districts are malapportioned." *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411, 1414 (7th Cir. 1992); *City of New York v. U.S. Dept. of Commerce,* 34 F.3d 1114, 1129-30 (2nd Cir. 1994) ("Although for most types of equal protection claims, a plaintiff must show that the government's discrimination was intentional [citations omitted], the Supreme Court has not imposed such a requirement in any of the cases involving apportionment.").

It is a basic constitutional maxim, established decades ago by *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), that an individual's right to vote is unconstitutionally impaired in violation of the Equal Protection Clause when its weight is substantially diluted compared with the votes of other citizens in the jurisdiction. Commonly known as the "one person/one vote" principle, the Supreme Court in post-*Reynolds* cases has applied this principle to electoral districts of local legislative bodies. *Avery v. Midland County, Tex.,* 390 U.S. 474,

481-85 (1968). Indiana examples include *Williams v. City of Jeffersonville, Indiana,* 2003 WL 1562565 (S.D. Ind. 2003), where then district court Judge David Hamilton held that city council districts were malapportioned in violation of Equal Protection Clause and ordered the implementation of a remedial plan, and *Vigo County Republican Cent. Comm. v. Vigo County Comm'rs,* 834 F. Supp. 1080 (S.D. Ind. 1993), where then district judge John Tinder struck down a severely malapportioned single-district apportionment plan used to elect county commissioners challenged as unconstitutional under the Equal Protection Clause.

A local legislative apportionment plan with total deviations that exceed 10% is presumptively unconstitutional. *Voinovich v. Quilter*, 507 U.S. 146, 161-62 (1993); *Brown v. Thompson*, 462 U.S. 835, 843 (1983) (plans of local legislative bodies with population deviations under 10% are considered *de minimis*, while a plan with a larger deviation must be justified by important state interests); *Mahan v. Howell*, 410 U.S. 315, 325-30 (1973) (a plan with a total deviation of 16%, though "approach[ing] tolerable limits," was justified based on state's consistent policy of preserving political subdivision lines); *Swann v. Adams*, 385 U.S. 440, 444 (1967) (deviations of 30% "can hardly be deemed *de minimis*"); *Williams v. City of Jeffersonville, supra* (total deviation in city council districts of 69.9% unconstitutional under one person/one vote principle).

Plaintiffs have alleged (Complaint, paras. 16-17) that the total deviation in the Council's districts is 46%, and that allegation must be accepted as true for purposes of a Rule 12(b)(6) motion to dismiss. Plaintiffs' Complaint more than adequately states a cognizable claim for malapportionment under the 14th Amendment.

C. Alleged laches does not justify dismissal under Rule 12(b)(6).

The Council next argues (at pp. 6-10) that Plaintiffs' Equal Protection claims should be dismissed pursuant to Rule 12(b)(6) based on laches. Laches is an affirmative defense that will bar a plaintiff's claim seeking equitable relief only if a defendant meets its burden of showing both (1) unreasonable and inexcusable delay, and (2) a change in circumstances caused by the delay which results in prejudice to the defendant. *Dickinson v. Indiana State Election Bd.,* 933 F.2d 497, 502 (7th Cir. 1992); *Jeffries v. Chi. Transit Auth.,* 770 F.2d 676, 679 (7th Cir. 1985). Because laches is an equitable affirmative defense, the Council bears the burden of proof, which in a Rule 12(b)(6) motion must be established on the face of the Complaint. *Topping v. Fry,* 147 F.2d 715, 718 (7th Cir. 1945) (dismissal based on an affirmative defense appropriate only where the validity of the defense is apparent from the facts alleged in the complaint). As a general rule, affirmative defenses do not justify dismissal under Rule 12(b)(6). *Xechem, Inc. v. Bristol-Myers Squibb Co.,* 372 F.3d 899, 901 (7th Cir. 2004) (dismissal under Rule 12(b)(6) not

appropriate where affirmative defenses are invoked, for parties "need not anticipate and attempt to plead around all potential defenses"); *Doe v. GTE Corp.,* 347 F.2d 655, 657 (7th Cir. 2003) (affirmative defenses do not justify dismissal under Rule 12(b)(6)).[1]

The 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, 1031 (7th Cir. 1990), *cert. denied* 501 U.S. 1206 (1991). *Fulani* involved a complaint brought three weeks before the November general election in which plaintiffs sought to have improperly certified candidates removed from the presidential ballot. The court found that the plaintiffs' 11-week delay in filing the lawsuit after the irregularities had become a matter of public record was both excessive and prejudicial because the final ballots had already been printed and absentee balloting had begun. *Fulani* foreshadowed *Purcell v. Gonzalez,* 549 U.S.

[1] The Council acknowledges that despite knowing its malapportioned districts were malapportioned, it voted not to redistrict on December 11, 2022. It then asserts (at 2-3) that as of that date or at latest December 31, 2022, which was the statutory deadline for municipalities to redistrict, Plaintiffs were on notice that the Council would not comply with its constitutional obligations. It should be noted that the 2023 session of the Indiana General Assembly, which ended in late April, was considering a bill, HB 1116, that would have extended the deadline for municipalities to redistrict, or certify its existing districts as complying with existing law, from December 31, 2022, to May 15, 2023. That bill passed the Indiana House by a vote of 73-24 on February 20 and then moved to the Indiana Senate, where on March 20 a Senate committee gave a "do pass" recommendation to the full Senate. Thereafter the Senate took no further action before *sine die* adjournment in late April.
https://iga.in.gov/legislative/2023/bills/house/1116/actions

1 (2006), in which the Supreme Court cautioned that last-minute court interventions to change voting rules, including changes to voting districts, *see, e.g., Merrill v. Milligan,* 142 S. Ct. 878 (2022) (staying redistricting order because it would disrupt imminent election), are strongly disfavored because they could cause confusion among the electorate. *Purcell* in turn echoes the concerns expressed in *Reynolds v. Sims,* 377 U.S. at 585, that where (as here) an election is imminent, equitable considerations may justify a court withholding the granting of immediate relief even after an existing apportionment plan has been found unconstitutional.

Unlike *Fulani*, Plaintiffs here are not seeking to have candidates removed from the ballot three weeks before an election. Rather, the relief sought by Plaintiffs would in no way interfere with the administration of the upcoming November 2023 election. Instead, Plaintiffs request injunctive relief that would go into effect in 2024, including ordering special elections to be held coterminous with the May and November 2024 elections. This is fully in accord with *Purcell* and Seventh Circuit precedent as explained below.

D. Implied waiver

The Council in one paragraph consisting of two sentences (at 9) contends, without citing a single federal case, that Plaintiffs' Complaint should be dismissed based upon the theory of "implied waiver." Like laches, implied waiver is an affirmative defense which requires proof of prejudice and/or detrimental reliance.

Estate of Luster v. Allstate Ins. Co., 598 F.2d 903, 911 (7th Cir. 2010) (citing *Tate v. Secura Ins.,* 587 N.E.2d 665, 671 (Ind. 1992)). The Council, which has the burden of proof, must show a "clear, unequivocal, and decisive act" manifesting an intention by Plaintiffs to waive its rights. *PQ Corp. v. Lexington Ins Co.,* 860 F.3d 1026,1035 (7th Cir. 2017). The Council asserts no prejudice from Plaintiffs' alleged "delay" in bringing their constitutional claim. The Council's implied waiver defense suffers from the same defects as their laches defense—it is a fact-intensive defense wholly unsuited for disposition on a Rule 12(b)(6) motion to dismiss.

E. Alleged failure to join indispensable parties

The Council next argues (at 10-11) that Plaintiffs' Complaint should be dismissed with prejudice under Rule 12(b)(6) for failure to join as defendants "successful candidates" in the May 2, 2023, primary who will be on the general election ballot on November 7 of this year. Although the Council characterizes this defense as one under Rule 12(b)(6), a motion to dismiss for failure to join indispensable parties is properly brought under Rule 12(b)(7). A Rule 12(b)(7) motion also requires a court to accept the allegations of a complaint as true, *Davis Cos. v. Emerald Casino, Inc.* 268 F.3d 477, 480 n. 4 (7th Cir. 2001), and the movant bears the burden of demonstrating that the absent party is a necessary and indispensable party that must be joined. *NanoeXa Corp. v. Univ. of Chicago,* 2011 WL 4729797, at *1 (N.D. Ill. 2011). The Seventh Circuit has cautioned that

dismissal for failure to join a party claimed to be indispensable "is not the preferred outcome under the Rules." *Askew v. Sheriff of Cook Cty,* 568 F.3d 632, 634 (7th Cir. 2009).

Analysis of a Rule 12(b)(7) motion proceeds in two steps. First, the Court must determine whether a party is one that should be joined, if feasible under Rule 19(a). *Askew*, 568 F.3d at 635; *Davis Cos.*, 268 F.3d at 481 (citing *Thomas v. United States*, 189 F.3d 662, 667 (7th Cir. 1999)). Second, if the Court determines that the necessary party cannot be joined for jurisdictional reasons, the Court must then determine whether the party is indispensable. *Id.* Here, the Court need not proceed beyond the first step.

The Council, which bears the burden of proving an absent party's indispensability, cites no authority for its claim that candidates who have been nominated but are not currently serving, or incumbents, are indispensable parties in a malapportionment suit, and Plaintiffs are unaware of any such authority so holding. *BCBSM, Inc. v. Walgreen Co.,* 512 F. Supp.2d 837, 849 (N.D. Ill. 2021) (quoting *Rotec Indus., Inc. v. Aecon Grp.,* 436 F. Supp.2d 931, 937 (N.D. 2006) (denying Rule 12(b)(7) motion because "nothing in the record demonstrates that [the absent party] is claiming an interest in this action."). If these candidates were to claim an interest, they may move to intervene under Fed. R. Civ. P. 24, or the

Court may order their joinder under Rules 19(a)(2) and/or 21. However, under no circumstances is dismissal of Plaintiffs' Complaint warranted under Rule 12(b)(7).

F. Ample authority exists for the equitable remedies Plaintiffs seek.

Lastly, the Council (at pp.13-14) claims Plaintiffs' request to order a special election and shorten the terms of elected councilors exceeds the power of this Court. Even if this were true, it is difficult to fathom how a plaintiff proposing a remedy, even one that was wholly unwarranted, would justify dismissal of a complaint that, as here, clearly states a cognizable and firmly-established constitutional cause of action. The Council cites no federal cases supporting its novel proposition, no doubt because there are none.

Contrary to the Council's assertion, 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, *see, e.g., Cousins v. City Council of the City of Chicago,* 503 F.2d 912, 914 (7th Cir. 1974); and ordered terms of office shortened. *Smith v. Beasley,* 946 F. Supp. 1174, 1212 (D.S.C. 1996) (truncating terms of legislators elected from unlawful districts after ordering special elections). It is well-settled that federal courts, after carefully considering the integrity of the electoral system and the necessities of the process of governing, have the equitable power to order a special election where the unconstitutional districts had a significant impact on the particular election they

seek to have declared invalid, particularly when *Sims/Purcell* considerations militate against changing electoral rules when an election is imminent. *Bowes v. Ind. Sec'y of State,* 837 F.3d 813, 817-18 (7th Cir. 2016); *see also DeCola v. Starke County Election Bd.,* 2020 WL 6161307, *4 (N.D. Ind. 2020) (after invalidation of a past election, a federal court may order a special election in limited circumstances, citing, *inter alia, Gjersten v. Bd. of Election Comm'rs for the City of Chicago,* 791 F. 2d 472, 478-80 (7th Cir. 1986)).

III. CONCLUSION

Accordingly, the Court should deny the Council's motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certified that the foregoing has been filed via the electronic filing system on August 22, 2023. Notice of filing will be performed by the Court's electronic filing system, and Parties may access the document through the electronic filing system.

/s/ William R. Groth
William R. Groth