IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RACHEL RAAK LAW and MICAH BROEKEMEIER, individuals, Plaintiffs v. ROBERT GAST, in his official capacity as State Court Administrator for the Iowa Judicial Branch, Defendant.	)	Case No. 4:22-cv-00176-SMR-SHL **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **EXPEDITED RELIEF REQUESTED** **ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Other Authorities

INTRODUCTION

Justice Ruth Bader Ginsburg, when asked when there will be enough women on the Supreme Court, famously replied, "when there are nine." Yet an all-female Supreme Court would be impossible if it were governed by the Gender Quota at issue in this case. Pursuant to the Gender Quota, there must always be an equal number of male and female commissioners elected to the Judicial Nominating Commission, a state commission that interviews and selects jurists to serve on the Iowa Court of Appeals and the Iowa Supreme Court. *See* Iowa Code § 46.2(1).

The Gender Quota's fixation on proportional group representation stifles individual opportunity. Men are only considered for vacancies previously held by other men; women are only considered for vacancies previously held by other women. Plaintiff Rachel Raak Law has served Iowans for six years as a member of the District Nominating Commission, where she interviewed judicial candidates for vacancies on Iowa's district courts. But the Gender Quota disqualifies her from being considered for an upcoming vacancy on the Judicial Nominating Commission in her congressional district because the open seat will be reserved for a man. Plaintiff Micah Broekemeier interviews prospective candidates for public office as part of the Johnson County Republicans. But the Gender Quota disqualifies him from being considered for an upcoming vacancy on the Judicial Nominating Commission in his district because the open seat will be reserved for a woman.

This Court should issue a preliminary injunction enjoining Defendant from enforcing the Gender Quota. All of the factors for preliminary relief are met. First, the Gender Quota plainly violates the Equal Protection Clause of the Fourteenth Amendment. As discussed below, the Quota's legislative history does not evince any remedial purpose. Even if it did, a rigid and perpetual quota is not substantially related to an interest in remedying past discrimination. Second, absent an injunction, Plaintiffs will suffer irreparable harm because the Gender Quota will deprive

them of the opportunity to compete for vacancies on the Judicial Nominating Commission in roughly six months. Third, the balance of equities tips sharply towards granting the preliminary injunction because the government cannot claim any real hardship from being forced to allow qualified men and women to run for open seats on the State Judicial Nominating Commission. Finally, it is always in the public's interest to ensure that the government follows the Constitution. Plaintiffs' Motion for Preliminary Injunction should be granted.

STATEMENT OF FACTS

I. Legal Background

In the late 1980s, the Iowa Legislature enacted a host of laws that mandate gender balance on public boards. *See, e.g.*, Iowa Code § 69.16A (requiring gender balance on "[a]ll appointive boards, commissions, committees, and councils of the state" unless otherwise provided by law). These efforts were driven by a desire to ensure gender balance. According to a state legislator who played a key part in enacting these laws, gender quotas were meant to solve the perceived problem that women did not serve "on the Planning and Zoning Commission" and "men did not serve on the Social Welfare Board."[1]

The law at issue in this case imposes a gender quota for elected commissioners on the State Judicial Nominating Commission. It provides that "[t]he resident members of the bar of each congressional district shall elect two eligible electors of different genders to the state judicial nominating commission." Iowa Code § 46.2(1). This means that the two elected commissioners in each of Iowa's four congressional districts must be comprised of one male and one female commissioner.

[1] *See* Boise State University, Gender Balance Legislation at the State and Local Level (June 4, 2015), https://www.boisestate.edu/bluereview/gender-balance-legislation-state-local-level/.

The State Judicial Nominating Commission plays an important role in selecting judges and justices for the Iowa Court of Appeals and the Iowa Supreme Court. The commissioners interview judicial candidates and submit a list of nominees to the Governor, who must appoint a person from the list. Iowa Code § 46.15. The Commission is composed of 17 members: nine appointed by the Governor and eight elected by resident members of the Iowa Bar. *See* Iowa Code §§ 46.1–46.2. The elected commissioners serve staggered six-year terms and are elected in the month of January for terms commencing July 1 of odd-numbered years. Iowa Code § 46.2(2).

Besides the Gender Quota in Section 46.2(1), Iowa law contains few eligibility restrictions for Iowans who seek to serve as elected members on the State Judicial Nominating Commission. A prospective commissioner must be a citizen of the United States, an Iowa resident, and at least eighteen years old. Iowa Code § 48A.5. He or she must also have never served on the Commission nor hold an office for profit at the state or federal level at the time of the election. Iowa Code § 46.2(4)–(5). Finally, a person seeking to be placed on the ballot for an upcoming election must submit, with the State Court Administrator, a nominating petition signed by ten Iowans eligible to vote in the candidate's district. Iowa Code § 46.10.

The State Court Administrator is responsible for conducting each election. *See* Iowa Code § 46.9(1). The Administrator issues notices of upcoming vacancies on the Commission, Iowa Code § 46.9A, and conducts the election in accordance with Iowa law, including the Gender Quota contained in Section 46.2(1). For instance, the Administrator's Notice for the 2021 election cited Section 46.2(1) and dictated that "[t]he person to be elected in District One shall be a female and the person to be elected in District Three shall be a male." *See* Compl., Exh. A. In that election,

only female candidates appeared on the ballot for District One and only male candidates appeared on the ballot for District Three. *See id.*, Exh. B.[2]

II. Factual Background

Plaintiffs are Iowans who are interested in serving on the State Judicial Nominating Commission but precluded from running on the basis of their gender. Rachel Raak Law has interviewed candidates for Iowa's district courts as a former member of the District Judicial Nominating Commission. *See* Raak Law Decl. ¶ 4. She seeks to use her experience to now serve Iowans by interviewing candidates for Iowa's appellate courts as a member of the State Judicial Nominating Commission. *Id.* Ms. Raak Law resides in the Fourth Congressional District, which will elect a new commissioner in January 2023. But because the Gender Quota requires that commissioner to be a man, Ms. Raak Law is excluded from consideration.

Mr. Broekemeier presently serves on the candidate nominating committee for the Johnson County Republicans. Broekemeier Decl. ¶ 4. As part of that committee, Mr. Broekemeier interviews Iowans who would make good candidates to run for public office. *Id.* Today, Mr. Broekemeier seeks to serve Iowans by interviewing candidates for Iowa's appellate courts as a member of the State Judicial Nominating Commission. *Id.* ¶ 5. Mr. Broekemeier resides in the First Congressional District, which will elect a new commissioner in January 2023. But because Iowa law requires that commissioner to be a woman, Mr. Broekemeier is excluded from consideration.

Plaintiffs filed this federal civil rights lawsuit on May 24, 2022. They allege that the Gender Quota contained in Section 46.2(1) violates the Equal Protection Clause of the Fourteenth

[2] In November 2021, the Governor signed Senate File 621, which redrew the district lines in Iowa. A map of the new congressional districts is available at ¶ 14 of Plaintiffs' complaint and at https://media.tegna-media.com/assets/WOI/images/d331411c-b2ab-49e4-ae5a-aade5b4de677/d331411c-b2ab-49e4-ae5a-aade5b4de677_1140x641.jpg.

Amendment to the United States Constitution. Plaintiffs seek an injunction preventing the State Court Administrator from enforcing the Gender Quota and a declaration that the Gender Quota violates their rights under the Equal Protection Clause. This motion for preliminary injunction follows.

STANDARD OF REVIEW

When determining whether to issue a preliminary injunction, the Court must consider "(1) the likelihood of success on the merits; (2) the presence or risk of irreparable harm; (3) the balancing of the harms of granting or denying an injunction; and (4) the public's interest." *CDI Energy Servs. v. W. River Pumps, Inc.*, 567 F.3d 398, 401–02 (8th Cir. 2009) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)). When the government is the opposing party, the last two factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

I. Plaintiffs Are Likely to Prevail on the Merits of Their Claim That the Gender Quota Violates the Equal Protection Clause of the Fourteenth Amendment

Plaintiffs are likely to prevail on the merits of their equal protection claim. There is a strong presumption that gender-based classifications are invalid. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring). Such classifications are subject to intermediate scrutiny, which requires the government to provide an "exceedingly persuasive justification" for its gender-based distinctions, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)—a "demanding" burden that "rests entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

First, the government must show that its gender-based classifications further an important governmental objective. The government's justifications "must be genuine, not hypothesized or invented post hoc in response to litigation," and "must not rely on overbroad generalizations about

the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533 (citations omitted). ***Second***, intermediate scrutiny requires the government to show that its gender-based distinctions are "substantially related to the achievement of those objectives." *Mississippi Univ. for Women*, 458 U.S. at 724 (citations omitted). Iowa's Gender Quota fails on both accounts. The government lacks the evidence required to show that it is pursuing the important governmental objective of remedying discrimination. Further, the Gender Quota is not substantially related to any important governmental objective because it does not tailor its gender classifications to the scope of the discrimination it is attempting to remedy, but instead adopts a rigid and perpetual quota that continues to deprive individuals—no matter how qualified—of the opportunity to serve on the State Judicial Nominating Commission.

A district court enjoined a similar gender quota for exactly these reasons in *Back v. Carter*, 933 F. Supp. 738, 759 (N.D. Ind. 1996). There, the plaintiff raised an equal protection challenge to an Indiana law mandating that two men and two women serve as the attorney members of a county judicial nominating commission. *See id.* at 746. The court held that the plaintiff was likely to prevail on the merits of his claim and granted his request for a preliminary injunction. *Id.* at 759, 762. In so doing, the court first explained that the government could not point to crude "disparit[ies] between the number of women in the community and the lack of JNC women attorney members" to justify the law as a remedial measure. *Id.* at 758. But even if the government could show an important government interest, the gender quota was not substantially related to that interest—both because it lacked an end date and because the government failed to show that it was remedying discrimination in the relevant field. *Id.* at 759 ("If the interest justifying the classification is discrimination against women attorneys during the election, the classification should be tied to the percentage of women attorneys rather than to attempt to strike simple gender

balancing."). Just as the federal court in Indiana issued a preliminary injunction in *Back*, this Court should do so here.

A. The Gender Quota Does Not Further an Important Governmental Objective

The government may point to two interests that it sees as important governmental objectives: (1) remedying past discrimination in elections for the State Judicial Nominating Commission, and (2) maintaining gender parity on the State Judicial Nominating Commission. Neither withstands scrutiny.

First, gender-based distinctions designed to remedy past discrimination may only be upheld when they "intentionally and directly assist members of the sex that is disproportionately burdened." *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1002 (8th Cir. 2019) (citations omitted). "In other words, for a government actor to classify individuals based on gender for the purpose of remedying a prior lack of opportunities, the individuals must continue to lack opportunities or the classification is not constitutionally justified." *Id.* Absent evidence of discrimination, remedial measures transform into laws aimed at balance for its own sake, an impermissible goal. Given that the Gender Quota discriminates against men and women alike, evidence of discrimination against *both* men and women is necessary to sustain the Gender Quota. Yet there is no evidence in the public record of discrimination against *either* men or women in the election of members to the State Judicial Nominating Commission, and there is no evidence that discrimination exists now. The government therefore lacks the predicate discriminatory evidence that is needed to justify the Gender Quota as a remedial measure.

Second, the legislative history suggests that the Gender Quota was driven not by an intention to remedy discrimination, but instead a desire to mandate gender parity on public boards and commissions. But Supreme Court precedent plainly precludes parity for its own sake as a important government interest under the Equal Protection Clause. In *Regents of Univ. of California*

v. Bakke, 438 U.S. 265, 307 (1978), for instance, the Supreme Court approved of limited, holistic racial preferences for the purpose of attaining educational benefits. It rejected, however, an interest in increasing group membership for its own sake, holding that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." That Section 46.2 pursues gender balancing rather than racial balancing makes no difference. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

B. The Gender Quota Is Not Substantially Related to Any Important Governmental Objective

The Gender Quota is also unconstitutional because it is not substantially related to any important governmental objective it might serve. This is so for three reasons. ***First***, the government cannot satisfy the substantial-relationship requirement merely by offering general evidence of gender discrimination. Instead, the government must come forward with a specific showing of gender discrimination in the relevant field. *See, e.g.*, *Mississippi Univ. for Women*, 458 U.S. at 729 (state made no showing that "women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field"); *Contractors Ass'n of E. Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1010–11 (3d Cir. 1993) (striking down gender preferences because city relied on statistics related to contracting generally, rather than the construction industry, and anecdotal evidence was not enough). Yet, here, there is no evidence in the legislative record of gender discrimination in the election of members to the State Judicial Nominating Commission. ***Second***, remedial measures must be time limited, but the Gender Quota has remained in place for over thirty years and is, in fact, perpetual. That the gender-based classifications are "imposed indefinitely" means that they "can outlive the interest that justifies its use"—if there

were any in the first place. *Back*, 933 F. Supp. at 759 (citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1582 (11th Cir. 1994)). ***Third***, Section 46.2 does not merely utilize gender as one factor in the selection process, it makes gender *the* factor by imposing a rigid and inflexible quota. But gender balancing, just like racial balancing, is patently unconstitutional because it fails to afford individualized consideration of any sort. *See Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722–23 (2007).

II. Plaintiffs Will Suffer Irreparable Harm Absent Preliminary Relief

Iowa's Gender Quota inflicts irreparable harm on Plaintiffs by violating their fundamental rights under the Equal Protection Clause. The deprivation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (noting that the plaintiff's "showing that the ordinance interfered with the exercise of its constitutional rights . . . supports a finding of irreparable injury").

The looming election also justifies preliminary relief. The election will take place in January, and candidates must file their applications to appear on the ballot before that. *See* Compl., Exh. A (requiring candidates to file "completed nominating petition with State Court Administration no later than December 31"). Absent preliminary relief, Plaintiffs would be deprived of the opportunity to compete for soon-to-be-vacant seats on the State Judicial Nominating Commission in the upcoming election. *Cf. Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding that the injury-in-fact in a case involving racial discrimination is "the inability to compete on an equal footing").[3]

[3] Because this case involves purely questions of law, this Court may wish to consolidate the preliminary injunction hearing with a trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2).

III. Balance of Hardships and Public Interest Weigh in Plaintiffs' Favor

The balance of hardships and public interest factors merge in cases where the government is the opposing party. *Nken*, 556 U.S. at 435. Both factors weigh in favor of preliminary relief. As discussed above, Plaintiffs will suffer irreparable harm absent a preliminary injunction. In stark contrast, it is difficult to imagine any harm that would befall Defendant from merely having to allow otherwise eligible Iowans to run for vacancies on the State Judicial Nominating Commission—regardless of whether they are male or female. As the Eighth Circuit recently observed, "the public is served by the preservation of constitutional rights." *D.M. by Bao Xiong*, 917 F.3d at 1004; *see also Pursuing America's Greatness v. F.E.C.*, 831 F.3d 500, 511 (D.C. Cir. 2016) (the enforcement of an unconstitutional law is always "contrary to the public interest"); *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) (similar).

IV. No Security Should Be Required

Although "[c]ourts in this circuit have almost always required a bond before issuing a preliminary injunction," *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016), no bond is required where there is no evidence of "damages resulting from a wrongful issuance of an injunction." *See id.*; *see also* Fed. R. Civ. P. 65(c) (noting that security must be in the amount that "the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained").

Here, Defendant is not threatened with any damages resulting from a wrongful issuance of an injunction. The preliminary injunction sought in this case would merely require Defendant allow otherwise eligible candidates to run for vacancies on the State Judicial Nominating Commission—without regard to gender. Security in this case should therefore be waived or set at a nominal amount.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be granted.

DATED: June 14, 2022

Respectfully Submitted,

s/ *Wencong Fa*

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CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Jeffrey Thompson, one of the attorneys representing the Defendant, by telephone on June 6, 2022, and by email on several occasions. The relief requested in Plaintiffs' Motion for Preliminary Injunction is opposed.

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2022, I submitted the foregoing to the Clerk of the Court via the District Court's CM/ECF system, which will provide notice of the submission of this document to all counsel of record.

s/ *Wencong Fa*
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