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 Defendant's Motion to Dismiss**

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INTRODUCTION

The people of Iowa have entrusted the State Judicial Nominating Commission with evaluating the lawyers who apply to serve as judges or justices on Iowa's appellate courts and nominating the best applicants for consideration of appointment by the Governor. *See* Iowa Const. art. V, §§ 15–16. And to ensure the Commission effectively performs this duty with the confidence of all Iowans, Iowa law requires geographic and gender balance of commissioners. *See* Iowa Code §§ 46.1(3), (5), 46.2(1). Nine commissioners are appointed by the Governor; eight are elected by Iowa lawyers in elections held every two years for staggered six-year terms. Iowa Code §§ 46.1, 46.2. So in each of Iowa's four congressional districts, once every six years, the lawyers elect a woman; once, they elect a man; and once, they have no election. In sum, this means the lawyers elect four men and four women.

Plaintiffs claim they want to be elected to serve on the Commission. Raak Law is a woman living in Iowa's fourth congressional district, which elected a woman in 2019 and will be electing a man in the next election in 2023. And Plaintiff Micah Broekemeier is a man living in the first congressional district, which elected a man three years ago and will be electing a woman in 2023. So neither is eligible to seek election from their "home" districts right now. But nothing prevents them from seeking election from a different district in 2023—each other's district, for example—or waiting until they would next be eligible for election from their "home" districts in 2025.

Plaintiffs sue to enjoin the gender-balance requirement for elected commissioners so they can be listed on the ballot for the upcoming elections in January 2023. They argue that requiring equal balance of men and women is a violation of the Equal Protection Clause. But the lawsuit cannot move forward because Plaintiffs lack a judicially enforceable injury that confers

standing. First, if the asserted injury is a purported inability to appear on the ballot at all, that's incorrect as a matter of law. Plaintiffs can appear on the ballot in 2023 because, unlike the district nominating commissions, eligibility for an election to the *state* judicial nominating commission does not require a candidate to be a resident of the district where the election is occurring. All the statute requires is that the candidate satisfy some modest prerequisites—such as obtaining signatures from eligible voters in the district and filing paperwork with the judicial branch. So Plaintiffs *can* appear on the ballot in 2023—just not in the districts where they reside. But that mild limitation, which allows them to run in another district in 2023, to run in their "home" districts in 2025, or both, doesn't impose a constitutional harm.

Second, Plaintiffs also lack standing because they haven't actually made efforts to satisfy those modest prerequisites. Plaintiffs claim they want to be elected to the state judicial nominating commission, but they haven't submitted any signatures or paperwork, nor have they actually been excluded from the ballot. Under the circumstances, that means their purported harm is not sufficiently concrete and imminent.

Finally, the Complaint does not state a viable claim because the gender-balance requirement for elected state commissioners does not violate the Equal Protection Clause. It doesn't discriminate against either men or women—they are provided *equal* opportunities to serve on the State Judicial Nominating Commission. A statute that operates equally—rather than imposing differential treatment—doesn't implicate the Equal Protection Clause.

The Court should dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) or (6).

FACTUAL BACKGROUND

In 1962, the people of Iowa ratified a constitutional amendment altering the State's method of selecting judges. *See* Iowa Const. amd. 21. The amendment replaced partisan elections with an appointment process in which the Governor appoints judges from a slate of nominees approved by a judicial nominating commission. *See id.*; *see also* Iowa Const. art. V, § 15; Complaint ¶ 12.

Nominees for the Supreme Court are selected by the State Judicial Nominating Commission. *See* Iowa Const. art. V, § 16. The Constitution sets only a few fixed requirements for the makeup of the Commission. *Id.* It requires commissioners to be chosen with "due consideration" to "area representation" and "without reference to political affiliation." *Id.* It requires Commissioners to serve staggered, six-years terms. *Id.* And it prohibits commissioners from holding an "office of profit of the United States or the state during their terms" or from serving a second full term on the Commission. *Id.*

From the beginning, the Legislature implemented the Constitution's requirement for geographic diversity by tying appointments and elections to Iowa's congressional districts. But originally, the Legislature did not attempt to ensure gender diversity on the Commission. Then, in 1987, the Legislature mandated that commissioners be balanced among men and women. *See* Act of June 7, 1987, ch. 218, § 2, 1987 Iowa Acts 364, 364 (codified at Iowa Code § 46.2 (1989)). At the time, each congressional district only elected one commissioner, so the statute mandated that the district alternate between electing a man or a woman to the Commission. *See id.*; *see also* Complaint ¶ 20.

The statutes governing the election of lawyers to the Commission have been amended several times since then, most recently in 2019. *See* Act of May 8, 2019, ch. 89, §§ 47, 51–56, 2019 Iowa Acts 302, 312–15. In that 2019 amendment, the Legislature reaffirmed the gender-balance requirement. *See id.* § 47

(codified at Iowa Code § 46.2(1) (2021)). Under the current statute, nine commissioners are appointed by the Governor, and "[n]o more than a simple majority" of those commissioners can "be of the same gender." Iowa Code § 46.1(3); *see also id.* § 46.1(1). Eight commissioners are elected by Iowa lawyers. *See id.* § 46.2. The lawyers in each of Iowa's four congressional district elect two of the commissioners—who must be "of different genders." *Id.* § 46.2(1); *see also* Complaint ¶ 21. But because of the staggered six-year terms held every two years, *see* Iowa Code § 46.2(2), this means that in each of the districts, once every six years, the lawyers elect a woman; once, they elect a man; and once, they have no election. Complaint ¶ 15.

While the voters and nominators must reside in the congressional district, Iowa law does not require the eligible elector seeking election to reside in the district. *See* Iowa Code §§ 46.2(1), 46.10(1); *see also* Iowa Code § 46.4 (adding the requirement that *district* commissioners must be "eligible electors of the district," rather than merely "eligible electors" as for the state commissioners in section 46.2(1)); Act of May 8, 2019, ch. 89, § 47, 2019 Iowa Acts 302, 312 (striking a prior version of the section in the 2019 Iowa Code that required state commissioners to also be of the congressional district).

Plaintiff Rachel Raak Law is a woman who resides in Woodbury County, a part of the new fourth congressional district. Complaint ¶¶ 8, 14. She wants to be on the ballot when the lawyers of her congressional district elect a replacement for John Gray, a male lawyer whose term on the Commission expires in 2023. Complaint ¶¶ 19, 24-26. Because the lawyers of her district elected a female commissioner three years ago in 2019, only men are eligible to run in this 2023 election. Complaint ¶¶ 24, 26.

Similarly, Plaintiff Micah Broekemeier is a man who resides in Johnson County, a part of the new first congressional district. Complaint ¶ 27. And he

wants to be on the ballot when the lawyers of his district elect a replacement for Dorothy O'Brien, a female lawyer whose term also expires in 2023. Complaint ¶¶ 27-28. The lawyers in Broekemeier's district elected its male commissioner in 2019 and will not do so again until 2025. So in 2023, only women are eligible to be nominated for election to the Commission. Complaint ¶ 28.

Despite their interest in serving on the State Commission, neither Plaintiff has submitted a nominating petition with ten signatures of eligible electors to the State Court Administrator as required by Iowa law. Gast Dec., Doc. 20-1, ¶ 9. Nor have they even asked for a nominating petition form from the Administrator. *Id.*

LEGAL STANDARD

A factual challenge to the Court's jurisdiction under Rule 12(b)(1) is distinct from a facial challenge to the merits under Rule 12(b)(6). *See Gerhart v. United States Dep't of Health & Human Servs.*, 242 F. Supp. 3d 806, 811 (S.D. Iowa 2017). A facial challenge succeeds "if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). But for a factual attack, the Court may consider matters outside the pleadings without converting the motion to one for summary judgment. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990); *Gerhart*, 242 F. Supp. 3d at 811. Standing is a factual jurisdictional challenge. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 869-70 (8th Cir. 2013).

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a complaint must include "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). An equal protection claim can be decided under Rule 12(b)(6) at the motion to dismiss stage. *See Carlson v. Wiggins*, 675 F.3d 1134, 1138 (8th Cir. 2012).

ARGUMENT

I. Plaintiffs lack standing to challenge the gender-balance requirement in Iowa Code section 46.2 because they *can* seek election to the State Judicial Nominating Commission in 2023 and because they haven't taken sufficient efforts to be placed on the ballot to make any injury concrete and imminent.

"If a litigant lacks standing to bring [the] claim, then [the Court has] no subject matter jurisdiction over the suit." *Iowa League of Cities*, 711 F.3d at 869. This "irreducible constitutional minimum" of standing requires an actual or imminent, concrete, nonconjectural injury; caused by the defendant; that is likely to be redressed by a favorable decision. *See Hillesheim v. Holiday Stationstores, Inc.*, 900 F.3d 1007, 1010 (8th Cir. 2018); *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (establishing the phrase "irreducible constitutional minimum"). Here, Iowa Code chapter 46 has not caused Plaintiffs an actual, concrete, nonconjectural injury—both because they can in fact appear on the ballot in 2023 and because they have not actually taken steps to do so. *Cf. Lyon v. Krol*, 127 F.3d 763, 765 (8th Cir. 1997) ("Since Lyon has not shown that [the statute] has caused an actual injury, he does not have standing to assert that this deprivation violates his right to equal protection. We therefore do not have jurisdiction . . . ." (footnote omitted)).

First, if they satisfy the minimal statutory prerequisites, Plaintiffs can appear on the election ballot in 2023 in the district where an election of a commissioner matching their gender is occurring. Unlike the district nominating commissions, the state judicial nominating commission does not require that elected commissioners be residents of the districts they represent. *Compare* Iowa Code 46.2(1) (requiring voters to elect "two eligible electors" to the state Commission), *with* Iowa Code § 46.4(1) (requiring voters to elect "five eligible electors *of the district*" to each district commission (emphasis added)). And this

distinction makes sense. Whereas district commissions operate only within a particular district, the state commissioners select judicial candidates to serve the entire state. Even though the constitution requires "due consideration" of "area representation," Iowa Const. art. V, § 16, that is accomplished because the electorate in each election consists of licensed lawyers in a particular congressional district.

Further, there may be scenarios when it makes perfect sense for a prospective commissioner to run for election in a district where they do not reside. For example, perhaps a candidate lives in northern Warren County—part of the first congressional district (Complaint ¶ 14)—but works in Polk County, in the third district, and knows or interacts with many lawyer-voters there. After all, Warren County is a suburb of Des Moines. *Cf. Water Dev. Co. v. Lankford*, 506 N.W.2d 763, 764 (Iowa 1993) (discussing a water utility that provided service to "suburban or outlying areas around Des Moines in Polk, Dallas, and Warren Counties"). The candidate might logically wish to seek election in the third district because those are the constituents they want to represent. Or, perhaps a candidate resides in Story County (fourth district) because they are pursuing education at Iowa State University, but they maintain strong ties to their hometown in Davenport (first district) and wish to represent that hometown on the commission. Or, perhaps a candidate only recently moved across the state from one district to another, and has more connection with the district they left while they build relationships in their new district. Or, perhaps a candidate lives in Cedar Rapids (second district) but their professional expertise often involves or requires projects in, or travel to, all the other districts.

In each of these scenarios, chapter 46 allows the candidate to run in any district, not just the one where they reside. And if their "preferred" district is

not holding an election for their gender in a particular year, yet they are motivated by a desire for public service that simply cannot wait until the next election, they can run in any district with an opening.

Properly understood, then, chapter 46 does not impose an Article III injury on Plaintiffs. They can be on the nominating commission ballot in 2023, and the statute does not foreclose that result. The ballot they can appear on may not be in the district where they reside, but the statute isn't meant to (and doesn't) limit potential candidates to the district where they reside. And the potential tradeoff of waiting a short period until an election occurs in a "preferred" district does not inflict an unconstitutional wrong.

Second, even if Plaintiffs' inability to appear on the ballot specifically in their preferred districts is a cognizable injury, Plaintiffs still lack standing because they haven't been excluded from the ballot. And that's because Plaintiffs haven't taken any action to attempt to place their name on the ballot. Gast Dec., Doc. 20-1, ¶ 9. The period for submitting nominating petitions doesn't close for another six months. *Id.* ¶ 7. But Plaintiffs have not submitted any nominating petitions, nor have any been denied, rejected, or returned. *Id.* ¶ 9.

"[I]f a plaintiff is required to meet a precondition or follow a certain procedure to engage in an activity or enjoy a benefit and fails to attempt to do so, that plaintiff lacks standing to sue because he or she should have at least taken steps to attempt to satisfy the precondition." *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1161 (8th Cir. 2008). Thus, in *Pucket*, the plaintiffs lacked standing to challenge a school district's discontinuance of busing when there was "no evidence [they] actually requested that the School District reinstate busing." *Id.* This principle appears across several cases and contexts. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490 516-17 (1975) (finding two litigants lacked standing in a housing case when one litigant had not "applied . . . for a building

permit or a variance with respect to any current project," and the other had not "taken any step toward building housing"); *Bernbeck*, 829 F.3d at 647-48 (finding a plaintiff lacked standing to challenge a signature requirement for placing a citizen initiative on the ballot because he "never submitted a signed petition"); *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996) (finding a plaintiff lacked standing to challenge a residency requirement for lottery operator licenses because he had "not applied individually for a license as an operator").

Bernbeck is instructive. There, a plaintiff challenged the signature threshold "for placing initiatives on Nebraska state and municipal ballots." *Bernbeck*, 829 F.2d at 644-45. He claimed the signature threshold violated his equal protection interest in placing an initiative on the ballot because it had the effect of "placing attenuated value and influence upon the signatures of each voter from a highly populated county as compared with the signatures of each voter from a less populated county." *Id.* at 647. However, the United States Court of Appeals for the Eighth Circuit concluded he lacked standing because he did not show an actual injury. He "essentially claim[ed] injury from [the secretary of state]'s enforcement of the signature-distribution requirement," but he did not prove "that this injury [wa]s actual" because the plaintiff "never submitted a signed petition, and so it is not possible for [the secretary of state] to have enforced the signature-distribution requirement by rejecting a submitted petition." *Id.*

Importantly, the plaintiff asserted he *wanted to* submit an initiative—he just hadn't done so. The Eighth Circuit concluded that wasn't enough. His future "wish, even if evidenced by a sworn statement," could not "establish an imminent threat" of enforcement or injury. *Id.* Plaintiffs must generally prove a "high degree of immediacy," and "a mere statement of intent" does not

provide that immediacy when "the acts necessary to bring [the plaintiff's] injury into existence are entirely within his control." *Id.*

Here, Plaintiffs' Complaint suffers from an identical defect. Plaintiffs claim imminent injury from Defendant Gast's prospective future enforcement of Iowa Code chapter 46, but they haven't submitted signatures or paperwork that would even necessitate applying chapter 46 in the first place. *See id.* While Plaintiffs may wish to, and may even swear they will, file that paperwork, standing does not exist until they do. *See id.* Under *Burbeck* and *Pucket*, Plaintiffs' Complaint must be dismissed because Plaintiffs have not taken any steps necessary to bring the injury they claim to fruition. They therefore lack standing.

A futility exception exists whereby a plaintiff may have standing "even if he or she has failed to take steps to satisfy a precondition if the attempt would have been futile." *Pucket*, 526 F.3d at 1162. That exception does not apply here because an attempt wouldn't be futile; Plaintiffs can appear on the commission ballot in 2023 by submitting nominating petitions containing the requisite signatures from voters in the districts holding elections for their respective genders. In *Pucket*, the futility exception did not apply because while the plaintiffs wanted the school district to reinstate busing, they never made the request—and the district even expressed some interest in reinstating busing upon finding satisfactory answers to some potential legal problems it had identified. *See id.* Likewise, submitting papers to get on the ballot in this case would not be futile because Plaintiffs can in fact get on the ballot.

Because Plaintiffs can appear on the ballot in 2023; because they have not submitted any paperwork attempting to do so; and because that submission would not be futile, Plaintiffs lack standing and the Court must dismiss the case.

II. Section 46.2 doesn't violate the Equal Protection Clause because it doesn't impose differential treatment based on gender—men and women have equal opportunities to serve on the State Judicial Nominating Commission.

"[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). But that word "classification" can't be glossed over. It means "differential treatment," *United States v. Virginia*, 515 U.S. 515, 532–33 (1996), or employing discriminatory means, *see Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). But section 46.2, taken as a whole, does neither. It does not draw a classification *between* women and men, does not treat them differently, and does not discriminate against either gender. It expressly holds them equal. Therefore, the complaint fails to state an equal protection claim.

Section 46.2(1) does not treat men and women differently. The challenge thus fails at a threshold step and necessitates dismissal. "In the context of gender-based discrimination, the U.S. Supreme Court has interpreted th[e] clause to mean that unless a government actor can meet the 'demanding' burden of showing an 'exceedingly persuasive' justification *for treating males differently from females*, the differential treatment is unconstitutional." *D.M. v. Minn. State High Sch. League*, 917 F.3d 994, 1001 (8th Cir. 2019) (quoting *Virginia*, 518 U.S. at 533) (emphasis added). But section 46.2 does not treat males differently from females.

Both men and women can serve as members elected by the lawyers of each congressional district. They must simply await the staggered time at which that position is up for election. *See* Iowa Code §46.2(2) (requiring staggered terms and providing that terms for "no more than three of the commissioners shall expire within the same two-year period"). The result of Iowa Code

chapter 46 is that voting lawyers elect eight commissioners: four men and four women. Neither gender is favored; neither is disfavored. The statute does not draw any eligibility classification on its face, and the only classification that occurs—administering elections such that the eligible voters in a particular district may only get to elect one commissioner in a given year—is necessary to carry out the statutory staggered terms.

With full understanding of chapter 46's framework, Plaintiffs' complaint loses much of its force. Plaintiffs' complaint here is that they are precluded from seeking election (1) in 2023, (2) by the eligible voters in the respective congressional district where Plaintiffs reside—not that they are precluded from seeking election *forever* because of their gender. Plaintiffs could have run for the respective elective openings in the districts where they reside in 2019, and can do so in 2025 after the six-year term expires. *See* Iowa Code § 46.2(2). A statute that merely requires a little patience (because it otherwise operates equally) is not a constitutional affront. Even more, nothing prevents them from seeking election now from a different district electing their gender, such as each other's districts. Put another way, because under chapter 46 there is no "differential treatment of similarly situated persons," the complaint "fails to state an equal protection claim." *L.L. Nelson Enters. v. Cty. of St. Louis*, 673 F.3d 799, 807 (8th Cir. 2012).

The Washington Supreme Court upheld a materially similar statute, which required that two positions on a state political party committee be gender balanced, against a constitutional challenge under that state's Equal Rights Amendment. *See Marchioro v. Chaney*, 582 P.2d 487, 493 (Wash. 1978). In *Marchioro*, the plaintiffs asserted a similar "deprivation" of the "right to run for a position on the state committee." *Id.* at 492. They contended they were unlawfully excluded from running for a position on the committee because of a

statute that required gender balance. But the Washington Supreme Court rejected the argument, because it concluded a constitutional provision meant to guarantee equality would not invalidate a state statute that *already* operated equally:

> The legislature has found that in the conduct of the offices of state committees there shall be an absolute equality of rights between the sexes. An equal number of both sexes must be elected to the committee . . . . Neither sex may predominate. Neither may discriminate or be discriminated against. There is an equality of numbers and an equality of rights to be in office and to control the affairs of the committee. The ironic result of plaintiffs' theory would be to abolish a statute which mandates equality by invoking a provision of the constitution passed to guarantee equality.
>
> The major objection of plaintiffs seems to be the mandate by statute that one of the positions on the state committee from each county is reserved for a female and the other for a male and that this violates the equal rights amendment. *But if the statute simply said, "The state committee of each major political party shall be composed of an equal number of women and men" there clearly would be no abridgment* or denial on account of sex of any equality of rights under the law.

Id. (emphasis added). Chapter 46 operates in exactly this fashion: it provides that the elected membership of the state judicial nominating commission shall contain an equal number of women and men. There is no abridgment or denial on account of sex.[1] Accordingly, the complaint fails to state an equal protection claim and must be dismissed.

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[1] Although an Iowa Attorney General opinion is not binding on this Court, a published opinion from 1992 concluded that a proposed Iowa equal rights amendment would not invalidate a corollary gender balance statute, Iowa Code section 69.16A, which generally applies to membership on appointive state boards and commissions. Op. No. 92-10-6, 1992 WL 470369, at *3 (Iowa Att'y Gen. Oct. 28, 1992).

CONCLUSION

The complaint "has not even colorably alleged a differential-treatment injury because there is no differential treatment." *Cutler v. United States Dep't of Health & Human Servs.*, 797 F.3d 1173, 1183 (D.C. Cir. 2015). More importantly, the complaint does not demonstrate Article III injury sufficient for standing because Plaintiffs can appear on the ballot in 2023 yet have not submitted any paperwork in pursuit of doing so. Defendant respectfully requests that the Court dismiss the case, assess all costs to Plaintiffs, and award any other relief appropriate under the circumstances.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served on counsel for all parties of record by delivery in the following manner on July 8, 2022:

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ CM/ECF
- ☐ FAX
- ☐ Overnight Courier
- ☐ Other

Signature: */s/ Samuel P. Langholz*