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

RACHEL RAAK LAW and MICAH BROEKEMEIER, 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-SBJ ORDER ON PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs have filed a Motion for Injunction Pending Appeal to stop enforcement of Iowa Code § 46.2 in the upcoming Iowa State Bar Association ("ISBA") election for the State Judicial Nominating Commission. For the reasons detailed below, the Motion is DENIED.

I. GOVERNING LAW

A. Injunction Pending Appeal

"It is generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Knutson v. AG Processing, Inc.*, 302 F. Supp. 2d 1023, 1030 (N.D. Iowa 2004) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). To avoid this issue, filing of a notice of appeal generally "confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Twin Cities Galleries, LLC v. Media Arts Grp., Inc.*, 431 F. Supp. 2d 980, 982 (D. Minn. 2006) (quoting *Liddell v. Bd. of Educ.*, 73 F.3d 819, 823 (8th Cir. 1996)). The Federal Rules of Civil Procedure provide some narrow exceptions to this rule. One allows a district court to "grant an injunction on terms for bond or other terms that secure the

opposing party's rights" when "an appeal is pending from an interlocutory order . . . that . . . refuses . . . an injunction." Fed. R. Civ. P. 62(d).

When considering whether to grant an injunction pending appeal, the court must conduct the same inquiry as the initial grant or denial of a preliminary injunction. *Shrink Missouri Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998); *Nebraska v. Biden*, No. 22-3179, 2022 WL 16912145, at *1 (8th Cir. Nov. 14, 2022) (quoting *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982)). This requires the Court to consider the following four factors for an injunction pending appeal, which are: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other [] litigant[s]; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) (en banc). A court considering a motion under Federal Rule of Civil Procedure 62(d) need not engage in the same "detailed analysis of [] probability of success on the merits." *Walker*, 678 F.2d at 71.

B. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Fourteenth Amendment renders invalid statutes that classify individuals based on a protected characteristic. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). To survive a constitutional challenge brought under the Fourteenth Amendment, sex classifications "must bear a close and substantial relationship to important governmental objectives." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979). "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. by Bao Xiong v. Minnesota State High Sch. League*, 917 F.3d 994, 1001 (8th Cir. 2019) (quoting *United States v. Virginia.*, 518 U.S. 515, 533 (1996)). This test is less exacting than strict scrutiny. *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010) (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). "The burden . . . rests entirely on the State." *Virginia*, 518 U.S. at 533 (1996) (citation omitted).

II. ANALYSIS

Plaintiffs have not demonstrated the *Dataphase* factors weigh in favor of an injunction pending appeal for the reasons discussed in detail below. The Motion is DENIED.

A. Likelihood of Success on the Merits

The first step in analyzing likelihood of success on the merits is identifying whether the moving party needs to show: (1) a fair chance of succeeding on the merits; (2) or show they are likely to succeed on the merits. *D.M. by Bao Xiong*, 917 F.3d at 999. Plaintiffs must show they are "likely to prevail on the merits" because they seek to enjoin enforcement of a duly enacted state statute. *See Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc). Plaintiffs have not provided the Court with a reason to believe they are likely to succeed on the merits, only that they have a fair chance of success, which is insufficient to entitle them to an injunction pending appeal. *Mgmt. Registry, Inc. v. A.W. Co., Inc.*, 920 F.3d 1181, 1183 n.2 (8th Cir. 2019).

i. Previous Merits Discussion

The Court previously addressed the merits of Plaintiffs' Equal Protection claim in its order on Plaintiffs' motion for a preliminary injunction. [ECF No. 36 at 22]. The ISBA had not elected a woman to serve on the Judicial Nominating Commission in the twenty-five years from its inception to the enactment of Iowa Code § 46.2. *Id.* at 21. The Court reasoned the absence of

women among ISBA elected members on the Commission, when viewed alongside evidence that "women [were] interested in the Commission and qualified to serve," showed that sex played a factor in exclusion.[1] *Id.* at 23. Likewise, the Court considered data showing that women remain underrepresented in the underlying group of individuals, lawyers, from which ISBA elected Commissioners are typically drawn. *Id.* at 23–24. Based on this conclusion and the law's narrow scope, the Court concluded the relevant standard had been satisfied. *Id*. at 26.

ii. Merits Discussion for Injunction Pending Appeal

Plaintiffs present several distinct arguments in support of their contention they are likely to succeed on the merits or, at least, raise substantial questions to justify an injunction of the law. None are sufficient to convince the Court to abandon or modify its prior merits determination.

First, Plaintiffs maintain that the Court erred by making an "unrealistic assumption that minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." [ECF No. 38 at 3] (quoting *City of Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989)). Plaintiffs do not specify the language in the written order that runs contrary to this admonishment in *Croson*. [ECF Nos. 36 at 21–23; 38 at 2–3]. The Court did not suggest women were interested in elected positions at the same rate as men, only that the demographic breakdown of individuals who applied for and were appointed to Commission supported the conclusion that women had serious interest in these roles. [ECF No. 36 at 23]. From this fact, as well as the absence of elected women on the Commission, the Court reasoned sex could fairly be said to be a motivating factor in their exclusion from elected positions despite a lack of direct evidence. *Duckworth v. St. Louis Metro. Police Dep't*, 491 F.3d 401, 405 (8th Cir. 2007) (citing

[1] A trial court may reach the conclusion that discrimination exists based on "reasonable inferences drawn from circumstantial evidence" when direct evidence of discrimination is unavailable. *See Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1117 (10th Cir. 2004).

Griffith v. City of Des Moines, 387 F.3d 733, 738 (8th Cir. 2004)) ("discrimination may be shown by direct or circumstantial evidence"). Accordingly, Plaintiffs argument that the Court erred by making this assumption is unconvincing.

Second, Plaintiffs assert that the Court erred by relying on statistical disparities to find a current remedial justification for Iowa Code § 46.2.[2] [ECF No. 38 at 4]. Although Plaintiffs criticize the use of statistics, they have been used by courts in the past to identify potential or actual constitutional discrimination. *Duckworth*, 491 F.3d at 405; *Griffith*, 387 F.3d at 738; *D.M. by Bao Xiong*, 917 F.3d at 1002. The statistics provided to support the law, while certainly imperfect, show there is underrepresentation of women in the legal profession, and by extension, a continuing remedial interest in a gender balance among individuals seeking election to the State Judicial Nominating Commission. Plaintiffs have not provided relevant statistical evidence to suggest the Court incorrectly considered or relied upon this evidence. *See Danskine v. Miami Dade Fire Dep't*, 253 F.3d 1288, 1296 (11th Cir. 2001) (holding that a party can succeed on an equal protection challenge by submitting data that is "sufficiently developed to demonstrate that the challenged plan is unlawful."). Thus, this argument is not compelling.

Finally, Plaintiffs argue the Court should grant an injunction pending appeal because the case involves substantial questions of law that could ultimately be adjudicated in favor of either party. [ECF No. 38 at 5] (citing *Perrin v. Papa Johns Int'l, Inc.*, No. 4:09-CV-01335, 2014 WL 306250, at *2 (E.D. Mo. Jan. 28, 2014)). Individuals are entitled to relief under the substantial question doctrine when they show three factors: 1) a close and substantial legal question of great

[2] The Order on the Motion for Preliminary Injunction provided interlocking reasons for its holding: 1) the statistics are probative evidence women remain excluded from the group of individuals from whom Commissioners are selected; and 2) there was no information beyond these statistics that spoke on the necessity of the current law. [ECF Nos. 20-2 at 2 (Critelli Affidavit); 36 at 24].

importance; 2) they seek to preserve a status quo; and 3) granting the motion would not "impose an undue burden on the State." *Walker*, 678 F.2d at 71.

The three factors weigh against the Motion for Injunction Pending Appeal. With respect to the first element, this case presents a novel challenge to the constitutionality of a decades-old Iowa statute and will have a significant impact on Iowa courts regardless of the outcome of the final adjudication. However, the instant motion seeks to halt enforcement of Iowa Code § 46.2, which would be a departure from this status quo. This departure would impose a burden on the State of Iowa because it would prohibit the State from filling judicial vacancies until the resolution of this case. Iowa Code § 46.15(A)(2). Plaintiffs are not entitled to an injunction.

iii. Conclusion

For the reasons discussed above, Plaintiffs have not shown they are likely to succeed on the merits of their Equal Protection Claim at this stage. However, the Court notes further factual development may lead to a different decision at the final merits stage.

B. Equitable Factors

Plaintiffs argue that the three equitable factors support the grant of an injunction pending appeal. [ECF No. 38 at 5–6]. Each factor supports the denial of this injunction.

i. Irreparable Harm to Movant

Plaintiffs are not eligible to run in the upcoming ISBA election in the absence of a court order prohibiting the enforcement of Iowa Code § 46.2. [ECF No. 36 at 27]. Plaintiffs assert exclusion from the election is a form of irreparable harm because it denies them a "temporally isolated opportunit[y]." [ECF No. 38 at 5] (citing *D.M. by Bao Xiong*, 917 F.3d at 1003).

This argument is unpersuasive because the previous decision is distinguishable from the instant case in two respects. First, the Eighth Circuit decided Plaintiffs were likely to succeed on

the merits of their constitutional claim in the cited case. *See D.M. by Bao Xiong*, 917 F.3d at 1002. From this, the panel reasoned that denying boys the opportunity to join the cheerleading team because of their sex was a constitutional violation, which caused them irreparable harm. *Id.* at 1003. No similar likelihood of success on a constitutional claim, and therefore irreparable harm, has been shown in this case. [ECF No. 36 at 27].

Second, the case addressed "temporally isolated opportunities" in the context of the boys *permanently* losing the opportunity to participate in cheerleading. *D.M. by Bao Xiong*, 917 F.3d at 1003. Specifically, the temporally isolated opportunity was defined as such because the boys could not participate in the current or upcoming cheerleading season, after which they would be permanently ineligible for scholastic sports due to their graduation. *Id.* No equivalent bar exists for Plaintiffs, as they may run for the ISBA elected seats in upcoming elections even if they are ineligible for the current election. Although they may miss a discrete opportunity to run in an election due to enforcement of this law, Plaintiffs have not shown this is their only opportunity to participate in the elections.

Plaintiffs have not provided a persuasive reason to depart from its prior finding that they will not suffer irreparable harm without an injunction. This element supports Defendant.

ii. Merged Factors[3]

The final issue is whether the merged factors of assessing the harm to the opposing party and weighing the public interest support the grant of the injunction pending appeal. They do not.

With respect to these factors, the Court notes the State of Iowa would suffer two distinct harms if the requested injunction were granted. First, the State of Iowa would "suffer a form of

[3] When the government is the opposing party on a preliminary injunction, the factors that call "for assessing the harm to the opposing party and weighing the public interest" are merged. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Court shall consider these factors together.

irreparable injury" by not being allowed to enforce its duly enacted law. *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 909 (8th Cir. 2020) (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). This interest applies unless the law in question is unconstitutional. *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)) ("[u]nless th[e] statute is unconstitutional, this would seriously and irreparably harm the State."). Having found Plaintiffs are not likely to succeed on the merits, the State of Iowa retains this strong interest in enforcing its laws.

Second, the State of Iowa would not be allowed to fill vacancies on any Iowa court, not just vacancies on the Iowa Supreme Court and Iowa Court of Appeals, if the injunction were granted. Iowa Code § 46.15A(2). This harm is significant. It is not speculative because there are pending court vacancies and upcoming Commission meetings. [ECF Nos. 36 at 28; 40 at 4]. This harm supports the denial of the injunction at this time and in this case, although the Court may find that less protection of the State of Iowa's interests is warranted in future lawsuits if the State of Iowa places similar "exploding" anti-injunction provisions in future laws.[4]

III. CONCLUSION

Plaintiffs' Motion for an Injunction Pending Appeal, [ECF No. 36], is DENIED.

IT IS SO ORDERED.

Dated this 30th day of November, 2022.

STEPHANIE M. ROSE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[4] This comment is based on the Court's concern that allowing the State of Iowa to rely on self-inflicted wounds to avoid injunctions beyond this context would create a strong perverse incentive to draft laws in this manner moving forward.