UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

PAUL BERRY III,	)	
	)	
Plaintiff,	)	
	)	Case No. 4:22-cv-00465-JAR
v.	)	
	)	
JOHN R. ASHCROFT, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION TO CONVENE A THREE-JUDGE PANEL

Defendants Secretary of State John R. Ashcroft and State of Missouri (collectively, "the State") respectfully request that this Court deny the motion for Temporary Restraining Order because it seeks an advisory opinion and because Plaintiff Paul Berry III ("Berry" or "Plaintiff") does not make the required showing of cognizable irreparable harm. The State does not oppose Berry's motion to convene a three-judge panel under 28 U.S.C. § 2284.

I. Berry's Application for Temporary Restraining Order Should Be Denied.

Under 28 U.S.C. § 2284(b)(3), a single judge in a case challenging the constitutionality of the apportionment of congressional districts "may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted…." 28 U.S.C. § 2284(b)(3). The traditional factors governing whether to issue a TRO are: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

Here, Berry's request for a Temporary Restraining Order (TRO) should be denied for two principal reasons. First, he is unlikely to succeed on the merits. What he seeks is not a true TRO,

but an improper advisory opinion on how the law would apply to future contingencies that are both remote and hypothetical. Second, he does not make a showing of cognizable irreparable harm to justify the extraordinary relief of a TRO.

A. Berry's TRO Application Seeks an Advisory Opinion on Remote, Hypothetical Situations That Have Not Yet Come To Pass.

A TRO functions to prevent immediate, irreparable injury for a short period until more significant relief—such as a preliminary injunction—can be granted. *See* Fed. R. Civ. P. 65(b)(2) ("The [TRO] order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension."); 28 U.S.C. § 2284(b)(3) (requiring "a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted").

Berry's verified motion for temporary restraining order, Doc. 2, does not specify what relief he actually seeks. *See* Doc. 2, at 34. *But see* Fed. R. Civ. P. 65(d)(1)(C) ("[E]very restraining order must … describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."). Berry evidently intends, in his TRO Application, to seek the relief set forth in Paragraph A of the Prayer for Relief in his Complaint for Declaratory and Injunctive Relief, Doc. 1, at 28, which requests that the Court "[g]rant a temporary restraining order prohibiting Defendants" from doing four things: (1) "Conducting any 2022 Missouri congressional election using the 2012 Missouri Congressional Map;" (2) "Conducting any 2022 Missouri congressional election using any congressional map enacted by the 101st Missouri General Assembly without an emergency clause"; (3) "Conducting any 2022 Missouri Primary congressional election on any date other than August 2, 2022"; and (4) "Permitting any Missouri congressional candidate to file or amend a congressional candidate filing for the 2022 Missouri Primary congressional election after 5:00pm on March 29, 2022." Doc. 1,

at 28. Berry does not allege any facts that indicate that any of these four eventualities is imminent and likely to occur within the next fourteen days, and in fact there is no reasonable prospect that any of them they will occur so quickly.

First, Berry does not allege any facts to suggest that Defendants are likely to "conduct[] any 2022 Missouri congressional election using the 20212 Missouri Congressional Map" within the next fourteen days. *Id.* ¶ A.1. Berry himself alleges that the primary election is set by Missouri law for August 2, 2022. He does not allege that there is any specific plan to move that election date. Most notably, he does not contend that there is any prospect of moving it *forward* by three months—on the contrary, Berry's concern appears to be that the date might be moved *later*, thus allowing unspecified hypothetical candidates more time to materialize and compete with him. And, needless to say, the State has no current plan to conduct the Missouri primary election for congressional candidates three months early, in May 2022. Berry's concern on this point, therefore, is not a proper basis for a TRO.

In fact, Berry makes clear that he seeks a TRO on this issue specifically as an advisory opinion to the Missouri legislature. He notes that the last day for the Missouri General Assembly to enact a congressional map during the current legislative session is May 13, 2022, and he seeks a TRO from this Court before that date for the explicit purpose of trying to spur the General Assembly into action. He notes that the ordinary preliminary-injunction briefing schedule "would eliminate any meaningful opportunity for the Missouri General Assembly to enact any 2022 Missouri congressional map based upon the Court's declaration that the 2012 Missouri Congressional Map is unconstitutional for the purpose of conducting the 2022 Missouri congressional election because the last day of the Missouri General Assembly general session is May 13, 2022." Doc. 2, at 29-30. He states that he seeks "immediate preliminary declarations of

law" that will place "the entire population of Missouri on notice of the initial consideration by the Court regarding rudimentary and relevant election procedures that Defendants are likely required to utilize during the 2022 Missouri congressional elections." Doc. 2, at 31. He urges that "it is in the public interest for this Court to immediately declare the law necessary for the Missouri General Assembly to enact a legal 2022 Missouri congressional map." *Id.* at 33. He contends that "[t]he Court's instant temporary restraining order supports the public interest of Missouri legislators enacting a congressional map on behalf of all Missouria[n]s, in lieu of, this Honorable Court having to expedite drafting of a congressional map on behalf of Missouri voters." *Id.* And he argues that "[t]he Court's issuance of the instant temporary restraining order … is likely the last opportunity for Plaintiff and all Missourians to avoid the Court drafting Missouri's congressional map over the elected Representatives and Senators of the Missouri General Assembly." *Id.* at 34.

In other words, Berry would prefer that the Missouri General Assembly enact a new map. It has not yet done so, and its deadline to do so in the current legislative session (absent a special session called by the Governor) is approaching. So Berry asks this Court to enter a "preliminary declaration[]" that the 2021 map is unconstitutional to spur the General Assembly to act before the May 13 deadline. Doc. 2, at 32. This is a quintessential advisory opinion. "[I]t is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quotation omitted). Such an advisory opinion is also unnecessary, because the Missouri General Assembly is perfectly capable of assessing the possible legal consequences of its own action or failure to act on issues such as redistricting.

Berry's request, moreover, misapprehends the role of the federal courts in the redistricting process. The Supreme Court has counseled the federal courts *against* injecting themselves into

ongoing state political processes or attempting to influence the outcomes of state-level political processes on redistricting. *See, e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993) ("Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.").

The same problems afflict Berry's other requests for relief. Berry's second request is to ask this Court for a declaration that Missouri may not conduct federal congressional elections using a new map enacted by the Missouri General Assembly unless the new map is enacted with an emergency clause. Doc. 1, at 28, ¶ A(ii). But he does not allege that the Missouri General Assembly has passed a new map without an emergency clause, and in fact (as of this date) it has not. So he asks this Court to opine on a hypothetical state of facts that has not yet come to pass—which would be an advisory opinion. *See, e.g., KCCP Tr. v. City of N. Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005) ("One kind of advisory opinion is an opinion advising what the law would be upon a hypothetical state of facts.") (quoting *Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005)).

Next, Berry asks this Court to declare that Missouri may not "conduct[] any 2022 Missouri Primary congressional election on any date other than August 2, 2022." Doc. 1, at 28, ¶ A(iv). But Berry does not allege that there is any specific plan to change the primary date from that set forth in Missouri statutes, and he does not allege that there is any imminent probability that the date will be changed. Indeed, August 2 is three months away, and there is no significant likelihood that the date would be moved *earlier* even if such a plan to move the date existed. As a result, Berry's request for a TRO "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," and thus it is "not ripe for adjudication." *KCCP Tr.*, 432 F.3d at 899 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

Fourth, Berry asks the Court to prohibit Missouri from "permitting any Missouri congressional candidates to file or amend a congressional candidate filing for the 2022 Missouri Primary congressional election after 5:00pm on March 29, 2022." Doc. 1, at 28, ¶ A(v). Again, no such plan to allow late-filing candidates to participate in the primary has been announced, and Berry does not allege any specific facts to demonstrate that such a plan is "certainly impending." *City of Kearney*, 401 F.3d at 932 ("Before a claim is ripe for adjudication, … the plaintiff must face an injury that is 'certainly impending.'") (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

In sum, Berry seeks, not a true TRO, but a temporary declaration of legal principles which he believes will partially entitle him to relief later in the case, if certain as-yet unrealized eventualities come to pass—what he describes variously as "immediate preliminary declarations of laws," and "immediate statutory declarations of election laws." Doc. 2, at 31, 32. In other words, he seeks an advisory opinion on matters that are still hypothetical and have not yet come to pass, and his TRO application "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *KCCP Tr.*, 432 F.3d at 899.

B. Berry Fails to Make a Showing of Imminent, Cognizable Irreparable Harm.

In addition, Berry fails to make a showing of imminent, cognizable irreparable harm, and so there is no basis for this Court to make "a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted." 28 U.S.C. § 2284(b)(3). Further, Berry makes no showing that any harm is likely to occur within the next 14 days, which would be required to justify issuing a TRO. *See* Fed. R. Civ. P. 65(b)(2). As noted above, Missouri is not currently scheduled to conduct its primary election until August 2, 2022; the Missouri legislature has not yet enacted a congressional map without an emergency clause; Berry identifies

no specific plan to change the date of the primary election; and Berry identifies no specific plan to re-open candidate filing in the event that a new map is adopted. *See* Doc. 1, at 28, ¶ A(i)-(v). Accordingly, Berry "has failed to show that irreparable harm is imminent without the Court issuing the requested TRO." *Walker v. Watson*, No. 6:20-CV-6114, 2021 WL 5139523, at *2 (W.D. Ark. Nov. 3, 2021).

Indeed, the irreparable harm of which Berry complains is not concrete injury but "uncertainty." *See* Doc. 2, at 13-14, ¶ 44. *Id.* He alleges that he "sits under irreparabl[e] harm by Defendants intending to utilize the 2012 Missouri Congressional Map to conduct the 2022 Missouri Primary congressional election and the *uncertainty* of whether Defendants may legally reschedule the 2022 Missouri primary election…" *Id.* (emphasis added). But merely alleging "uncertainty" about things that may or may not happen three months from now falls short of meeting Berry's burden of demonstrating "specified irreparable damage" that "will result if the [TRO] is not granted." 28 U.S.C. § 2284(b)(3). As Berry concedes, to obtain a TRO, he "must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." Doc. 2, at 27 (quoting *Roudachevski v. All-Am. Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). He fails to do so here.

Berry's only suggestion of *immediate* irreparable harm relates to his claim of current confusion about how to campaign in the second Missouri congressional district (CD-2) for which he has filed as a candidate. He argues that "Defendant Missouri filing to enact a 2022 Missouri congressional map causes Plaintiff's congressional campaign irreparable harm because Plaintiff is barred by Defendant's actions from knowing who is congressional voters will be, which frustrates congressional voter engagement and fundraising." Doc. 2, at 28. He claims that "Plaintiff's congressional campaign is also unable to conduct election polling of Missouri Congressional

District 2," because its final boundaries are still allegedly uncertain. *Id.* Even assuming such confusion about how to conduct his campaign constitutes irreparable injury, Berry's assertion of such injuries here fails to meet his burden to obtain a TRO, for at least three reasons.

First, the TRO relief he seeks would not remediate this harm. Berry claims, in essence, that he cannot conduct a congressional campaign properly without knowing what the boundaries of the district are and who the voters will be. In order to remediate that injury, the TRO would have to tell Berry what the final boundaries of CD-2 will be. But Berry does not seek that relief in a TRO—nor could he, as it would be unreasonable to ask the Court to draw a new congressional map in the context of a TRO proceeding. Instead, Berry seeks four declarations of *negative* legal principles which, if granted, would still not establish the precise borders of CD-2. *See* Doc. 1, at 28, ¶ A. Even if the Court were to grant Berry all the relief he seeks—declaring that the current map is unconstitutional, that a new map passed without an emergency clause could not be used, that the August 2, 2022 primary date cannot be extended, and that no new congressional candidates may file, *see id.*—all the "uncertainty" about the contours of his congressional district would still exist. In fact, the first two declarations he seeks—*i.e.*, that the current map is unconstitutional and cannot be used, and that a new map passed without an emergency clause also cannot be used—would *increase* uncertainty by abolishing the existing map and leaving Missouri, for the time being, with no map at all. Because the TRO that Berry requests would not remediate the only irreparable injury he claims, his request is self-defeating.

Second, regardless of the merits of Berry's claims, the *Purcell* principle weighs against significant court intervention to redraw the boundaries of Missouri's congressional districts at this late stage. As Berry concedes, "[t]he *Purcell* principle is a series of rulings from the United States Supreme Court that … would prohibit Plaintiff from receiving judicial relief from Defendants

utilizing an unconstitutional congressional map at an unset date prior to the 2022 Missouri primary congressional election." Doc. 2, at 8, ¶ 22. The U.S. Supreme Court has repeatedly emphasized that last-minute changes to any election laws are strongly disfavored, especially given "the imminence of the election." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). As the Supreme Court held recently, "[b]y changing the election rules so close to the election date . . . the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm*., 140 S. Ct. 1205, 1207 (2020) (allowing Wisconsin's challenged absentee voter statutes to remain in effect immediately before an election and staying lower court's grant of preliminary injunction) (citing *Purcell*, 549 U.S. at 5); *see also, e.g., Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014)); *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868 (U.S. July 16, 2020). Courts routinely refuse to impose changes to election procedures just weeks before an election—let alone changing procedures that are already in process. *See, e.g., Veasey v. Perry*, 769 F.3d 890, 981 (5th Cir. 2014) ("The Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an election"). Indeed, the Supreme Court has already relied on the *Purcell* principle twice this year to reject court orders that would have required the rewriting of federal congressional districts for the 2022 election. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (U.S. Feb. 7, 2022) (staying a district court order requiring the redrawing of Alabama's congressional districts); *id.* (Kavanaugh, J., concurring) ("[T]his Court's election-law precedents … establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle.") (citing *Purcell*, 549 U.S. 1); *Moore*

v. Harper, 142 S. Ct. 1089 (U.S. March 7, 2022) (Kavanaugh, J., concurring in denial of application for stay) ("In their emergency application, … the applicants are asking this Court for extraordinary interim relief—namely, an order from this Court requiring North Carolina to change its existing congressional election districts for the upcoming 2022 primary and general elections. But this Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election.").

Especially in light of *Merrill* and *Moore*, the Court is likely to apply the *Purcell* principle in this case. Here, the primary election campaign has already begun, and the deadline for candidate filing passed five weeks ago, on March 29, 2022. The deadline for finalizing the first mail-in ballots for the primary election is upcoming in June 2022. The courts are unlikely to implement significant changes—if any—to Missouri's congressional map in the midst of a congressional election season that is already well underway. Under *Purcell* and its progeny, the courts are unlikely to engage in a significant rewriting of Missouri's congressional map during the current election cycle. As *Purcell* itself stated, "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5. Accordingly, under *Purcell*, the boundaries of CD-2 are likely to remain the same, or at least very similar, to those in the current 2012 map—and Berry's current district boundaries and voters are unlikely to change significantly.

Third, even aside from *Purcell*, the Supreme Court counsels that federal courts in redistricting cases should pursue a "least-changes" approach to state-drawn maps, limiting any court-ordered changes to the minimum necessary to correct constitutional deficiencies. "Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of reconciling the requirements of the

Constitution with the goals of state political policy. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are *limited to those necessary to cure any constitutional or statutory defect*." *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (emphasis added); *see also, e.g., Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Thus, even if the Court were to reach the merits and agree with Berry's claim that the current map is unconstitutional under the one-man, one-vote principle, the Court would likely make only minor changes to the current map to correct the population malapportionment that Berry alleges. The largest malapportionment that Berry alleges is -7.0 percent from ideal in CD-1, and the malapportionment he alleges for CD-2 (the district where Berry is campaigning) is only +1.0 percent over ideal. *See* Doc. 2, at 4. Even if the Court rules in Berry's favor and orders changes to the congressional map to correct the alleged infirmities, the changes are unlikely to result in any major shifts to the current borders of CD-2. For this reason as well, Berry's claim of irreparable harm from confusion and uncertainty over the final boundaries of CD-2 does not warrant a TRO, which is an extraordinary form of relief.

II. The State Does Not Oppose Berry's Motion to Convene a Three-Judge Panel.

In addition to his motion for TRO, Berry has also filed a motion to convene a three-judge panel to hear this case. Doc. 13, at 1-2. The State does not oppose this request.

Section 2284(a) of title 28 provides: "A district court of three judges shall be convened … when an action is filed challenging the constitutionality of the apportionment of congressional districts.…" 28 U.S.C. § 2284(a). Berry's lawsuit qualifies as "an action … challenging the constitutionality of the apportionment of congressional districts." *Id.* Section 2284(b) provides that, "[u]pon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge

of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." 28 U.S.C. § 2284(b)(1). Missouri does not dispute that three judges are required here, and Missouri concedes that the Court should follow this statutory procedure. *See, e.g., Shapiro v. McManus*, 577 U.S. 39, 43 (2015) (holding that, upon the filing of a request for a three-judge panel in a case challenging the constitutionality of congressional districts, "the district judge was required to refer the case to a three-judge court, for § 2284(a) admits of no exception, and the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion") (citation omitted). In the meantime, "[a] single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection." *Id.* § 2284(b)(3).

CONCLUSION

For the reasons stated, Berry's motion for TRO should be denied, and his motion to convene a three-judge panel should be granted.

Dated: May 3, 2022

Respectfully submitted,

ERIC S. SCHMITT
MISSOURI ATTORNEY GENERAL

/s/ D. John Sauer
D. John Sauer, MO 58721
Solicitor General
Jeff P. Johnson
Deputy Solicitor General
Supreme Court Building
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870 (Telephone)
(573) 751-0774 (Facsimile)
john.sauer@ago.mo.gov
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, the foregoing was filed electronically through the Court's CM/ECF system, to be served electronically upon all parties to the case.

/s/ D. John Sauer