

FAX COVER SHEET

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From: Judge Nash Office
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Date: July 18, 2011

Re: Michael Archuleta, et al. v. City of ABQ, et al:
Second Judicial District Court - CV 2011-5792

Please find attached an endorsed copy of the Order Denying Motion for Preliminary
Injunction filed July 18, 2011.

12 pages including cover sheet

SHANARA GREEN

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

ENDORSED
FILED IN MY OFFICE THIS

JUL 18 2011

MICHAEL ARCHULETA, RICHARD DINEEN,
CAROLE EBERHARDT, and ART GONZALES,
Plaintiffs,

Quinn M. Dwan
CLERK DISTRICT COURT

vs.

No. CV-2011-05792

CITY OF ALBUQUERQUE, NEW MEXICO,
RICHARD BERRY, in his official capacity as
Mayor of the City of Albuquerque, DON HARRIS,
TRUDY JONES, BRAD WINTER, REY GARDUNO,
DAN LEWIS, ISAAC BENTON, DEBBIE O'MALLEY,
KEN SANCHEZ and MICHAEL COOK, in their official
capacities as members of the City Council of the City of
Albuquerque; and AMY B. BAILEY, in her official
capacity as the City Clerk for the City of Albuquerque,
Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER came before the Court on Plaintiffs' Motion for Preliminary Injunction on July 11, 2011, and July 12, 2011. Plaintiffs are represented by FREEDMAN, BOYD HOLLANDER GOLDBERG IVES & DUNCAN, P.A. and ACLU of New Mexico. Defendants are represented by STELZNER WINTER WARBURTON FLORES, SANCHEZ & DAWES, P.A. The Court having considered the file and pleadings, and considered the testimony, evidence and argument of counsel and being otherwise fully informed, now FINDS and ORDERS:

1. The Court has jurisdiction over this matter.
2. Under the fundamental constitutional command of one person, one vote, the City Council for the City of Albuquerque ("Council") has the duty, under state and federal law and the Charter of the City of Albuquerque ("City"), to redraw the Council districts every ten years, after the federal census is completed.

2. The federal census occurred in 2010 and the deadline for the delivery of the official 2010 Census Bureau results was April 1, 2011.
3. Pursuant to its duty, specifically City Charter Art. IV, § 3, on August 16, 2010, the Council passed Resolution R-10-109 which established a Redistricting Committee¹ ("Committee"), to review the district boundaries after the 2010 census and to make recommendations for redistricting to the Council "within fifteen (15) days of receipt of the official 2010 Census Data." The City also contracted with Research and Polling, Inc. to serve as the technical consultants for the redistricting.
4. Research and Polling, Inc. developed a timeline and plan for the Committee's work. The plan included training and discussion during November and December 2010, followed by a two-month period, during January and February 2011, wherein the Committee would review and seek public comment on proposed redistricting plans based upon estimated population data.² The timeline required the Committee to submit its final redistricting recommendations to the Council by April 15, 2011.
5. The Committee began its work in November 2010 and continued into December 2010.
6. Ultimately, some Committee members determined that they were not comfortable using estimated data to develop proposed redistricting plans. While the estimates by Research and Polling, Inc. were good estimates, Research and Polling, Inc. could not specify how much the estimates would deviate from the actual census data. Those Committee members were not comfortable utilizing resources and engaging the public without accurate census data for the proposed redistricting plans.

¹ Each Councilor appointed one Committee member and one alternate Committee member.

² The estimated data was developed from residential and commercial building permits. Research and Polling, Inc. had only developed one prior redistricting plan using estimated data.

7. Committee members communicated their concerns to the councilors that appointed them and to City officials.
8. On December 20, 2010, at a regular Council meeting, the Council discussed amending R-10-109 to establish new timelines for the completion of the Committee's work in light of the conflict between the date of the expected official census results (between March 15, 2011 and April 1, 2011) and the date of the beginning of the 2011 Council election cycle (March 15, 2011). The Council also discussed the limited time for the Council to consider and receive public input on proposed redistricting schemes under the current schedule. After some discussion, the Council passed Council Resolution R-10-173, a resolution ultimately approving the postponement of the Council redistricting process until after the October 4, 2011, Council election.
9. R-10-173 specifically postponed the Committee's work until July 2011 and postponed the date for the Committee's final redistricting recommendations to be presented to the Council until the first meeting of September 2011.
10. While R-10-173 did not specify when the new Council districts, based upon the redistricting, would become effective, it is clear from the Council discussion on December 20, 2010, that it was contemplated that the new districts would not become effective until the 2013 elections.³
11. The City maintains a staggered election calendar with even numbered Council districts voting in the October 2011 election and odd numbered Council districts voting in October 2013. Charter, Art. II, § 2, Art. IV, §4.
12. Plaintiffs reside in odd numbered Council districts.

³ Defendants now represent in their closing argument that "[a]s soon as a redistricting plan is approved by the Mayor and is published for 5 days, it will go into effect. City Charter, Art. XI, §§ 3,6."

13. The U.S. Census Bureau final data, released on March 15, 2011, showed that the current Council districts are severely mal-apportioned.

14. Albuquerque's current Council districts possess a total deviation of 64.65% from the ideal district size. The most significantly impacted districts are District 1 and District 5, and the voters in those districts are underrepresented.

15. The campaign in Districts 2, 4, 6 and 8 began on March 15, 2011, and is currently underway. The candidates and the City have complied with the election deadlines set forth in the City Charter and the Council Candidate Calendar for the 2011 Regular and Runoff Municipal Elections. Several candidates qualified for public financing, and \$134,000.00 in public financing has been distributed. Absentee voting is set to begin August 30, 2011. The election is scheduled for October 4, 2011.

16. Neither side disputes that redistricting must occur in the City. Plaintiffs seek an injunction enjoining the City from holding the Council elections, scheduled for October 4, 2011, until redistricting has occurred.

17. To obtain a preliminary injunction Plaintiffs must show: 1) irreparable injury to Plaintiffs; 2) the threatened injury outweighs any harm an injunction may cause Defendants; 3) the injunction would not be adverse to the public interest; and 4) a substantial likelihood of success on the merits. *See Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992).

A. Irreparable Injury to Plaintiffs

18. The one person, one vote standard of the Equal Protection clause of the Fourteenth Amendment requires states to construct and utilize legislative districts as nearly of equal

population as is practicable. *See Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *Brown v. Thomson*, 462 U.S. 835, 842 (1983).⁴

19. It is undisputed that the existing Council districts are mal-apportioned under the one person, one vote standard. The mal-apportionment is significant and results in a severe dilution of Plaintiffs' votes and representation. This underrepresentation is not cured because Plaintiffs do not elect a city councilor in their district this election cycle. Allowing the election of city councilors in overrepresented districts perpetuates the harm to Plaintiffs because it perpetuates the over-representation of other city voters.

20. The harm to Plaintiffs will continue if the October 4, 2011, election goes forward without redistricting.

21. Other courts, however, have recognized that such harm is inevitable and that it is not constitutionally fatal if "a rational approach to readjustment" is underway. *See French v. Boner*, 963 F.2d 890 (6th Cir. 1992); *Fleteau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982) appeal dismissed at 458 U.S. 1123 (1983); *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837 (N.D. Cal. 1992), *Political Action Conference of Illinois v. Daley*, 976 F.2d 335 (7th Cir. 1992).

22. Therefore, if Defendants are pursuing a rational approach to readjustment, Plaintiffs' injuries are not irreparable.

B. Harm to Defendants

23. Enjoining the election until redistricting occurs would create considerable hardship for Defendants. The current election cycle is both underway and impending, with absentee voting set to begin August 30, 2011.

⁴ The one person, one vote standard also applies to local governing bodies. *See Avery v. Midland County*, 390 U.S. 474 (1968).

24. Councilors O'Malley (Dist. 2), Winter (Dist. 4), Garduno (Dist. 6) and Jones (Dist. 8) have complied with campaign deadlines and been certified as council candidates. Councilors O'Malley, Winter and Garduno have additionally been certified to receive public financing.

25. Enjoining the election until redistricting has occurred would necessarily allow other potential candidates to enter the council races in districts 2, 4, 6 and 8. These new candidates would be eligible citizens who would be incorporated into the districts by the redistricting. New candidates would need to engage in the election process, become certified as candidates and potentially become certified to receive public financing.

26. Current candidates would need to be recertified and would need to get additional signatures. The City currently has no recertification process and would need to develop one.

27. Public financing would need to be reviewed and reassessed for the qualifying candidates.⁵ Monies would potentially need to be returned. The Council would need to determine how to address monies that have already been spent.

28. Any new processes developed by the City and Council would potentially need to be approved by the voters, if they amended the current City Charter, under City Charter Article VI. Alternatively, such process could be designed or approved by the Court.⁶

29. The Court must consider "the proximity of the forthcoming election," "the mechanics and complexities of ... election laws," and should "endeavor to avoid a

⁵ City Charter Article XVI. The Open and Ethical Elections Code, adopted in 2005, commonly referred to as "Public financing" has resulted in an earlier election cycle than prior to its inception. The 2001 redistricting was accomplished before the Council election cycle began but also before public financing required and earlier campaign cycle.

⁶ The *Reynolds* Court has cautioned lower courts that "legislative reapportionment is primarily a matter of legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds*, 377 U.S. at 586.

disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demand on a State in adjusting to the requirements of the court's decree." *Reynolds*, 377 U.S. at 585.

30. The Court must also consider that the main harm to Defendants is the expenditure of funds to correct the problem that they created in not satisfying their duty to redistrict.

See Cook v. Luckett, 575 F.Supp. 479, 485 (S.D. Miss 1983).

31. On balance, while the process would be extremely difficult, the threatened injury to Plaintiffs outweighs the harm it would cause the Defendants.

C. Public Harm

32. In analyzing the public harm, the Court must consider the interests of the public at large. The Court should consider the "expense to the public, the disruption of campaign organizations, and the confusion which would inevitably result" from the delay. *In re Pennsylvania Congressional Districts in....*, 535 F. Supp 191, 194 (M.D. Pa. 1982).

33. Plaintiffs propose conducting the election on the scheduled date or on the date currently set for run-off elections, November 8, 2011. Plaintiffs offered several proposals for truncating the redistricting process and the election process.

34. Redistricting cannot be compressed into several weeks. According to Research and Polling, Inc. president Brian Sanderoff, the Committee and public need at least two months to consider alternate redistricting plans. The Committee must then make its recommendations to the Council and the Council and the Mayor must approve a

redistricting plan, which will add at least several weeks to the process. The harm to the public in rushing the redistricting process is considerable.⁷

35. Enjoining the election until after the redistricting is completed would result in considerable expense, disruption and confusion.

36. Unless the Court chose to manage the rescheduled election, which courts should generally not do,⁸ the Council would need to amend the City Charter to create a recertification process and address the public finance issues created by the rescheduled election and possibility of new candidates. The public must vote on the amendments in a special election at a considerable expense to the citizens of Albuquerque. City Charter, Art. VI.

37. In addition to the Council elections, there are a number of bond issues on the October 4, 2011, ballot. Therefore, two elections, one on the bond issues on October 4, 2011, and another on the Council seats at some later date might need to be held, again at considerable expense to the citizens of Albuquerque.

38. The disruption to the campaign organizations is also considerable. The City has paid out \$134,000.00 in public financing for the upcoming election. Because the election is underway, some of the funds have been spent by the candidates. It is hard to conceive of a process to review, recall and redistribute these funds without considerable disruption to the campaign organizations and the City.

39. And while the Court has determined that the harm to the City in redesigning processes and recertifying candidates was outweighed by the injury to the plaintiffs,

⁷ Based upon Defendants' proposed schedule of the Committee beginning its work on July 20, 2011, the Council will have the Committee's redistricting recommendation by September 2011 and redistricting will be completed shortly after the October 4, 2011, election, if the election is not enjoined.

⁸ "Apportionment is a political and legislative process with respect to which judicial caution is indicated." *Flateau v. Anderson*, 537 F.Supp 257, 265 (1982). See FN 6.

ultimately the public would bear the considerable expense of the extra work and additional elections and such expense must be considered in gauging any harm to the public.

40. It is likely that changing the election date would result in some confusion to voters who associate Council elections with the first Tuesday in October and plan accordingly.

41. This case is, and was at the time it was filed, the type of case recognized by the *Reynolds* Court where “[u]nder certain circumstances, such as where an impending election is imminent and a State’s election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediate effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.” 377 U.S. at 585.

42. Granting the injunction would be adverse to the public interest.

D. Success on the Merits

43. Success on the merits largely depends on the standard the Court must apply in reviewing the Council’s actions in postponing the redistricting until after the October 2011 election.

44. Citing *Connor v. Finch*, 431 U.S. 407, 420 (1977), Plaintiffs argue that the current deviation of greater than 64% “cannot be tolerated” in the absence of some “compelling justification,” and that the Council had no “compelling justification” for postponing the redistricting until after the October 4, 2011, election.

45. Defendants argue that *Reynolds* and cases interpreting and applying *Reynolds*

have established a rational basis test and that if the Council has a "reasonable plan for periodic revision of [its] apportionment scheme," the Court must uphold that plan.

46. The majority of courts have declined to enjoin elections or grant similar relief, even in situations with deviations as large as the one at issue here, where the election was impending and found instead that a temporary departure from the one-person, one-vote principle, pending adoption of a permanent redistricting plan may be constitutional. *See, e.g. Cardona v. Oakland Unified School District*, 785 F. Supp. 837 (N.D. Cal. 1992), *Fairley, et al. v. Forrest County*, 814 F. Supp. 1327 (S.D. Miss. 1993); *French v. Boner*, 963 F.2d 890 (6th Cir. 1992); *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991); *Dontatelli v. Mitchell*, 2 F.3d 508 (3rd Cir. 1993).

47. Therefore, while Plaintiffs would prevail on the fact of mal-apportioned districts, the Court cannot find that they would likely prevail in showing that the current redistricting plan is in violation of the Equal Protection Clauses of the New Mexico and United States Constitutions and the City Charter of Albuquerque.

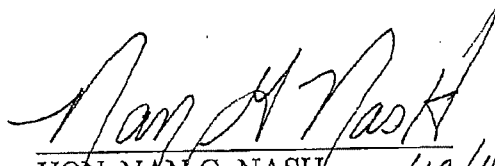
E. Conclusion

48. "A preliminary injunction enjoining an election is an extraordinary remedy involving the exercise of a very far-reaching power... Here caution is especially necessary because if an injunction is granted at this time, a ... court will be interrupting a state's election process." *Diaz v. Silver*, 932 F. Supp. 462, 465 (E.D.N.Y. 1996).

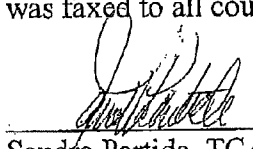
49. Because injunctions involve such far-reaching power, parties seeking an injunction must satisfy all four elements: (1) irreparable injury to plaintiff if the injunction is not granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the

public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits. *Nat'l Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 595, 874 P.2d 798 (Ct. App. 1994).

50. Plaintiffs have failed to satisfy all four elements and therefore the Motion for Preliminary Injunction enjoining Defendants from holding the October 4, 2011, Albuquerque Council election is denied.


HON. NAN G. NASH 7/18/11
District Court Judge

I hereby certify that a copy of this order
was faxed to all counsel/parties of record.


Sandra Partida, TCAA