

The Honorable Robert S. Lasnik

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

SUSAN SOTO PALMER, et al.,

 Plaintiffs,

 v.

STEVEN HOBBS, in his official capacity
as Secretary of State of Washington, and
the STATE OF WASHINGTON,

 Defendants,

 and

JOSE TREVINO, ISMAEL G. CAMPOS,
and State Representative, ALEX YBARRA,

 Intervenor-Defendants.

NO. 3:22-cv-5035-RSL

DEFENDANT STATE OF
WASHINGTON’S REPLY IN
SUPPORT OF MOTION TO
MODIFY SCHEDULING ORDER
AND EXTEND TRIAL DATE
AND RELATED DATES

NOTE FOR MOTION
CALENDAR: JULY 8, 2022

I. INTRODUCTION

The State of Washington asks the Court to extend the case schedule to reflect the State’s late entry into this case. Good cause supports the State’s request: Since appearing in the case, the State has diligently worked towards meeting the deadlines set by the Court’s Minute Order Setting Trial Dates and Related Dates (Dkt. # 46), but notwithstanding its best efforts, the State cannot meet the upcoming July 13, 2022 deadline for serving expert reports and would likely be precluded from seeking follow-up written discovery. Because the State would be deprived of the

1 opportunity to defend itself absent an extension, good cause exists for modifying the current
2 case schedule.

3 II. ARGUMENT

4 As the State established in its opening motion, all four factors courts consider in granting
5 a motion for a continuance support the State's request. *See United States v. Flynt*, 756 F.2d 1352,
6 1358, *amended*, 764 F.2d 675 (9th Cir. 1985) (looking to (1) the moving party's diligence; (2) the
7 need for the continuance; (3) prejudice to the opposing party; and (4) prejudice to the moving
8 party). Plaintiffs' recasting of the facts do not change this analysis.

9 ***Prejudice to Plaintiffs.*** Plaintiffs primarily argue that a four-to-six month extension to
10 the case schedule would severely prejudice them, particularly in the 2024 election cycle. *See*
11 *Dkt. # 81* at 4–6. This specious argument should be rejected because it is not supported by the
12 calendar and election cycle deadlines set by state statute and is actually contradicted by
13 Plaintiffs' prior position in their motion for a preliminary injunction. Even assuming the Court
14 grants a six-month extension (the maximum time requested by the State), there remains ample
15 time for the Court to make a final decision on the merits, and if Plaintiffs prevail, for the
16 appropriate governmental entities to develop, approve, and implement a remedial plan before
17 the 2024 election cycle. A 6-month extension would move the bench trial to early June 2023.
18 This is well ahead of the March 2024 deadline needed to finalize the legislative district map.

19 This March 2024 deadline is based on the deadlines set by statute and the lead-time
20 needed by the Secretary of State and local elections offices to comply with those deadlines. As
21 the Court is aware, the Secretary of State previously asked this Court that no injunction altering
22 legislative district boundaries issue after March 28, 2022 in order to avoid disruption to the
23 2022 primaries. *Dkt. # 50* at 8. Following those statutory deadlines in 2024, the State foresees
24 that a similar timeframe would apply—making the final week March 2024 the latest date to
25 finalize the legislative district map without significant disruption to the election cycle.
26 *See Wash. Rev. Code* §§ 29A.16.040 (deadline for revising precinct boundaries), 29A.24.050

1 (candidate filing period); Dkt. # 50 at 4–5 (Secretary Hobbs’s response describing the 2022
 2 elections timeline). This means that, even under the most generous extension requested by the
 3 State, over nine months would remain for the Court to render its decision and for Plaintiffs to
 4 obtain relief. This is well within the several weeks to several months timeline Plaintiffs now
 5 anticipate as the process for crafting a remedial plan. *See* Dkt. # 81 at 5–6; *see also* Dkt. # 38
 6 at 3 (Motion for Preliminary Injunction) (previously arguing that four months was sufficient to
 7 “implement[] new districts” in time for the August 2022 primary election). The timeline also
 8 allows for the parties to seek expedited appellate review if necessary.

9 Plaintiffs’ other claim of prejudice is based on attorney commitments between May
 10 through July of 2023. Dkt. # 81 at 6. There are eleven counsel of record on behalf of Plaintiffs,
 11 yet they do not identify which counsel have conflicts and the specific dates of those conflicts.
 12 Should the Court direct the parties to propose a new case schedule, the State would work with
 13 counsel for Plaintiffs to accommodate as many of these conflicts as possible. Alternatively, the
 14 Court can set a new trial date and direct counsel to notify the Court’s judicial assistant about
 15 irreconcilable conflicts, as it did with the currently operative schedule. *See* Dkt. # 46 at 2.

16 ***The State’s Diligence.*** Next, Plaintiffs cast aspersion on the State’s diligence. But this
 17 argument falls short as well. As Plaintiffs are well aware, the State was not added as a defendant
 18 until May 13, Dkt. # 70, and counsel for the State appeared in the case on May 20, 2022,
 19 Dkts. ## 72, 73. And since that time, the State has worked assiduously to assess the factual
 20 allegations and legal claims in the Amended Complaint; interviewed and attempted to engage a
 21 testifying expert;¹ sent discovery requests to Plaintiffs; is currently preparing discovery
 22 responses to requests sent to the State by Plaintiffs; and have spoken with Plaintiffs’ counsel
 23 several times to get more information about Plaintiffs’ claims, confer about the scope of their
 24

25 _____
 26 ¹ As the State previously explained, it has not yet been able to retain a testifying expert as the experts the
 State has contacted have competing obligations and are not available to begin work in this case until later this month
 (July) making the current expert-report deadline impossible for the State to comply with. Dkt. # 80 at 2 ¶ 6.

1 discovery requests, and go over case management concerns. This is a far cry from Plaintiffs’
 2 assertions of “lack of diligence.” Dkt. # 81 at 7.

3 While Plaintiffs chide the State for not reaching out to them sooner regarding the issue
 4 of expert reports, *id.* at 6–7, counsel for the State reached out to counsel for the other parties on
 5 June 17, 2022—less than one month after appearing in the case—when it became apparent that
 6 the State likely could not meet the expert-report deadline and that the current discovery cutoff
 7 date would likely foreclose the State’s ability to get follow-up discovery. *See* Dkt. # 80-1 at 4.
 8 Thereafter, the State expeditiously filed its motion to modify the case schedule as soon as it
 9 became clear that the parties likely would not agree on a proposed modified case schedule. The
 10 State also noted the motion for the Court’s consideration before the expert report deadline
 11 expired.

12 In an effort to shift blame onto the State, Plaintiffs ignore the reality that the State finds
 13 itself in this current predicament because it got a four-month late start in this case due to
 14 Plaintiffs’ litigation tactics. Plaintiffs intentionally chose not to sue the State when it initiated
 15 this action—and indeed, opposed the State’s joinder. *See* Dkt. # 60 (Pls.’ Opp’n Joinder). It was
 16 only after this Court ordered Plaintiffs to join the State that it did so. *See* Dkt. # 68 (Joinder
 17 Order), Dkt. # 70 (Pls.’ Am. Compl.). And by that time, the State had lost months of time to
 18 interview and retain experts. Because, as explained above, the State cannot meet the current
 19 expert-report deadline notwithstanding its diligence (and likely will not be able get follow-up
 20 discovery after it receives responses to its first set of discovery requests absent modification²),
 21 good cause exists to modify the case schedule. *See Doe v. Trump*, 329 F.R.D. 262, 272 (W.D.
 22 Wash. 2018) (“Good cause exists when the deadline in the scheduling order ‘cannot reasonably
 23 be met despite the diligence of the party seeking the extension.’” (quoting *Johnson v. Mammoth*
 24 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992))); *United States v. Mejia*, 69 F.3d 309, 315
 25 (9th Cir. 1995) (focusing on the appellant’s need for the requested continuance, and finding

26 ² The deadlines that follow the discovery cutoff date would necessarily need to be adjusted as well.

1 diligence where “[t]he need for a continuance was not due to [the appellant]’s lack of diligence,
2 but rather to the fact that the government’s two key witnesses were on vacation”).

3 ***The Need for the Continuance and the State’s Prejudice.*** Plaintiffs next argue that the
4 State cannot show that a continuance will serve a useful purpose and that the State will not be
5 prejudiced without one. *See* Dkt. # 81 at 7. But, as the State previously established, it needs a
6 modification to the case schedule so it can retain a testifying expert, have sufficient time to obtain
7 iterative discovery, and catch up to the other parties in this case. The State would be severely
8 prejudiced without the extension and cannot mount a defense without a testifying expert. In an
9 attempt to sidestep these issues, Plaintiffs instead focus their arguments on simply blaming the
10 State for being unable to the case deadlines set for the original parties. But these objections
11 fall short.

12 Plaintiffs contend that a continuance is not justified because the Attorney General’s
13 Office had notice of the lawsuit on January 19, 2022. Dkt. # 81 at 7. While it is true that attorneys
14 with the Attorney General’s Office have represented multiple defendants throughout this
15 litigation, *See* Dkt. # 81 at p. 7, this is because it is required by statute. *See* Wash Rev. Code
16 §§ 43.10.030(3) (the attorney general shall “[d]efend all actions and proceedings against any
17 state officer or employee acting in his or her official capacity, in any of the courts of this state
18 or the United States[.]”); 43.10.040 (“[t]he attorney general shall also represent the state and all
19 officials, departments, boards, commissions and agencies of the state in the courts . . .”);
20 43.10.045 (“the attorney general shall represent the legislature” until notified that the legislature
21 will retain counsel of its own choosing). The State, however, is a distinct party from the Secretary
22 of State (as well as from Speaker Jenkins and Majority Leader Billig), with different counsel,
23 different obligations, and different interests.

24 Plaintiffs also cast blame upon the State for not voluntarily intervening in this lawsuit.
25 Dkt. # 81 at 8. But they conveniently ignore that Plaintiffs are in control of who to sue and
26 strategically decided not to sue the State, the Redistricting Commission, or its Commissioners.

1 Instead, they sued individual legislators who simply do not “have the power to provide the relief
 2 plaintiffs request.” Dkt. # 66 at 4; *see id.* at 4–5 (explaining that “the Commission would be the
 3 appropriate recipient” of an order directing that redistricting plans be redrawn). And in fact, they
 4 actually *opposed* Secretary Hobbs’s motion to join the State as a defendant. Dkt. # 60. Plaintiffs’
 5 litigation strategies and decisions caused the State’s late entry into this case.

6 Plaintiffs also contend that the State should be able defend the case within the existing
 7 schedule because it should have been aware of an earlier report created by Dr. Barretto, as well
 8 as the declarations submitted by Dr. Barretto and Dr. Collingwood at the preliminary injunction
 9 stage in this action. Dkt. # 81 at 8. But the implication that the State should have put the cart
 10 before the horse by retaining an expert *prior* to becoming a defendant in this lawsuit is absurd.³

11 ***Finally***, Plaintiffs make two other points separate from the *Flynt* factors that merit a
 12 response. First, their contention that they have been “more than willing to work with the State to
 13 adjust case management deadlines” rings hollow. Dkt. # 81 at 2. While Plaintiffs offered to
 14 extend the State’s expert report deadline by approximately three weeks (from July 13, 2022 to
 15 August 3, 2022), and now suggest an alternative one-month extension of all deadlines, Dkt. # 81
 16 at 9, Plaintiffs’ proposals are incommensurate with the *four-month delay* the State has had in this
 17 case. And neither proposed schedule provides the State with sufficient time to produce an
 18 expert report.

19 Second, Plaintiffs cite the Court’s scheduling order to say “this Court has stated that the
 20 scheduling order should not be modified for the entry of new parties into this suit.” Dkt. # 81
 21 at 2 (citing Dkt. # 46). But the Court’s Minute Order Setting Trial Dates and Related Dates
 22 declares no such thing. Instead, it explicitly states that the Court will change the dates in the
 23 scheduling order “upon good cause shown.” Dkt. # 46 at 2; *see also* Fed. R. Civ. P. 16(b)(4).

24 _____
 25 ³ The State has, as Plaintiffs note, requested and received some information about Dr. Collingwood’s
 26 declarations, specifically the block assignment file and shapefile for Plaintiffs’ proposed remedial plan. See Dkt.
 # 81 at 8 n.1. To assist the State’s evaluation of Plaintiffs’ claims, the State also requested the underlying data and
 methodology for Dr. Collingwood’s performance analysis conclusion and figure, *see* Dkt. # 38-25 at 5, but to date
 has not received the underling information.

1 The Court also explained that it set the dates after reviewing the joint status report and discovery
2 plan submitted by Plaintiffs, Defendant Hobbs, and then-Defendants Jenkins and Billig. Dkt.
3 # 46 at p. 2; *see* Dkt. # 43 (Rule 26(f) report). But, of course, the State was not yet made a party,
4 so it could not offer its position on the timing of expert other pretrial disclosures and discovery.

5 **III. CONCLUSION**

6 The State is diligently working to meet the current deadlines but, because of its late
7 joinder, will be unable to meet the current expert-report deadline and likely will not be able to
8 engage in follow-up discovery unless the current case schedule is modified. Accordingly, the
9 State respectfully requests that this Court grant its motion and modify the scheduling order.

10 DATED this 8th day of July 2022.

11 ROBERT W. FERGUSON
12 Attorney General

13 *s/ Cristina Sepe*
14 ANDREW R.W. HUGHES, WSBA No. 49515
15 CRISTINA SEPE, WSBA No. 53609
16 Assistant Attorneys General
17 andrew.hughes@atg.wa.gov
18 cristina.sepe@atg.wa.gov
19 *Attorneys for Defendant State of Washington*

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 8th day of July 2022, at Tacoma, Washington.

s/ Cristina Sepe
CRISTINA SEPE, WSBA No. 53609
Assistant Attorney General

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26