The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUSAN SOTO PALMER, et. al.,

Plaintiffs,

v.

STEVEN HOBBS, et. al.,

Defendants,

and

JOSE TREVINO, ISMAEL CAMPOS, and ALEX YBARRA,

Intervenor-Defendants.

Case No.: 3:22-cv-05035-RSL

Judge: Robert S. Lasnik

PLAINTIFFS' OPPOSITION TO DEFENDANT STATE OF WASHINGTON'S MOTION TO MODIFY SCHEDULING ORDER AND EXTEND TRIAL DATE

INTRODUCTION

This Court should deny Defendant State of Washington's motion to modify the Court's scheduling order and extend the trial date. The State's proposed extension of four to six months will drastically impact voters in the Yakima Valley Region. Such an extension will prejudice Plaintiffs, delay any remedial changes to the legislative map, and stall implementation of a remedial district likely beyond the 2024 election cycle.

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With the trial date still over a half a year away, the State has time to complete discovery, retain an expert, and prepare for trial despite an assertion that not enough time exists. Plaintiffs have been more than willing to work with the State to adjust case management deadlines. To ensure a fair shot at relief before the 2024 election, however, Plaintiffs oppose moving the trial date set by the Court. Indeed, this Court has stated that the scheduling order should not be modified for the entry of new parties into this suit. *See* Dkt. # 46. Thus, Plaintiffs oppose any modification to the scheduling order that would delay trial. If this Court grants a continuance, Plaintiffs request that it not be for more than one month.

BACKGROUND

On January 19, 2022, Plaintiffs filed their complaint challenging the legislative redistricting plan drawn by the Washington Redistricting Commission and approved by the Legislature. *See* Compl. Plaintiffs allege that Legislative District 15 was drawn to create the façade of a Latino opportunity district that in fact dilutes Latino voting power in violation of Section 2 of the federal Voting Rights Act ("VRA"). *Id.* ¶¶ 34, 273-83. To remedy this violation, Plaintiffs seek declaratory and injunctive relief, including a declaration that the state's legislative redistricting plan violates Section 2. *Id.*, Prayer for Relief, ¶¶ (a)-(b).

Plaintiffs sued Secretary of State Steven Hobbs, who implements the state's redistricting plans, and legislative leaders Laurie Jinkins and Andrew Billing, in their respective official capacities as Speaker of the House and Senate Majority Leader. The legislative leaders were dismissed from the suit on April 13. Dkt. # 66. On February 25, 2022, Plaintiffs filed their Motion for Preliminary Injunction, Dkt. # 38, and the Court heard oral arguments on April 12, 2022.

On March 24, 2022, Defendant Hobbs filed a Motion for Joinder asking this Court to add the State of Washington and the Redistricting Commission as parties. Dkt. # 53. In seeking joinder, Defendant Hobbs argued that the State of Washington is a proper party because the VRA validly abrogated state sovereign immunity, *id.* at 5, and further stated that the Secretary was "not seeking

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changes to the dates established in the Court's Minute Order Setting Trial Dates and Related Dates (Dkt. # 46)," *id.* at 7.

On May 6, 2022, this Court ordered joinder of the State of Washington. Dkt. # 68. The Court affirmed that Secretary Hobbs was a proper party, *id.* at 2, and also found the State of Washington to be a proper party due to "this unique procedural junction in the redistricting process," *id.* at 5. The Court ordered Plaintiffs to add the State of Washington as a defendant and made no changes to the scheduling order. *Id.* Shortly thereafter, the Court permitted intervention of Jose Treviño, et al. ("Defendant-Intervenors") explicitly stating that "[t]he case management deadlines established at Dkt. # 46 remain unchanged." Dkt. # 69 at 10.

Although the State has been a party in this case since May 13, the State only contacted Plaintiffs regarding case schedule modifications on June 17. *See* Dkt. # 80-1. Although Plaintiffs noted they did not believe a four to six-month continuance necessary, they indicated that they were open to discussing changes to the expert discovery deadlines within the framework of the existing case management schedule. Plaintiffs proposed the following new expert deadlines: keeping the Plaintiffs' expert reports due July 13, 2022, Defendant's expert report due August 3, 2022, and an expert-specific discovery deadline for September 20, 2022. *Id.* The State did not consider Plaintiffs' proposal and instead filed a motion with this court. *Id.*

LEGAL STANDARD

Case management deadlines for pre-trial and trial procedures established by the court "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). In deciding whether to grant a motion to continue, courts in the Ninth Circuit consider the factors set out in *United States v. Flynt*: "(1) the 'diligence' of the party seeking the continuance; (2) whether granting the continuance would serve any useful purpose; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the potential prejudice." *State Farm Fire & Cas. Co. v. Willison*, 833 F. Supp. 2d 1200, 1211 (D. Haw. 2011)

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(citing *United States v. Flynt,* 756 F.2d 1352, 1358-59 (9th Cir. 1985)). Local Civil Rule 16(b)(6) further provides that "[m]ere failure to complete discovery within the time allowed does not constitute good cause for an extension or continuance." W.D. Wash. Civ. R. 16.

ARGUMENT

I. Plaintiffs Would be Severely Prejudiced by a Continuance.

The third *Flynt* factor, the extent of inconvenience to the court and the non-moving party, counsels strongly against a continuance. Delaying trial by four to six months would not only inconvenience Plaintiffs and possibly the Court, but severely prejudice Plaintiffs' ability to secure a remedy before the 2024 election should they prevail.

As this Court is aware, the *Purcell* principle instructs district courts to avoid ordering changes to election laws, including redistricting plans, "in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzales*, 549 U.S. 1 (2006)). "How close to an election is too close may depend in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects. Changes that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement." *Id.* at 881 n.1. Courts must also consider the risk of voter confusion and the potential for judicial procedures like appellate or *en banc* review to cause further delay. *Purcell,* 549 U.S. at 4-5. *Purcell* considerations guided this Court's decision not to order preliminary relief four months before the 2022 primary election, Dkt. # 66 at 5-10, and will pose a barrier to relief as the 2024 election draws near. Perhaps for this reason, the Court scheduled trial in January 2023, likely allowing enough time to develop a remedial map and implement a new plan before the 2024 election. Dkt. # 46.

Delaying the trial date would prejudice Plaintiffs' ability to secure relief for the 2024 election because it would leave too little time for post-trial proceedings to conclude before the *Purcell* considerations come back into play. The Court will first need time to consider the evidence

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and rule on the merits. Then, if Plaintiffs win, the remedial process will begin. In VRA Section 2 lawsuits, this process can take several months, involving expert reports, opportunities for map proposals, and multiple rounds of hearings and briefing about such proposals and expert reports. As this Court has indicated, if it "finds that the existing plan violates Section 2, the political apparatus of the state gets 'the first cut at drawing a new map.'" Dkt. # 68 at 3 (quoting *Singleton v. Merrill,* No. 2:21-cv-1291-AMM, 2022 WL 265001, *19 (N.D. Al. Jan. 24, 2022)). Courts give states between several weeks to several *months* to ascertain and convene their map-drawing apparatus and propose a new statewide remedial plan. *See, e.g.*, *Covington v. State*, 267 F. Supp. 3d 664, 668 (M.D.N.C. 2017) (finding a deadline of five weeks for the North Carolina legislature to enact remedial district warranted); *Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) (ordering the Texas legislature to develop remedial plans within seven months before remedial hearings would be held on the "status" of the redistricting efforts); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 557 (E.D. Va. 2016) (ordering a court-drawn map after the Virginia General Assembly failed to act within its three-months deadline). If the State proposes a plan, Plaintiffs would get an opportunity to provide briefing with any objections or feedback about the proposed remedial plan, as well as possible expert analysis or alternative proposals, adding at least a few weeks or a month, and the Court would need time to consider the briefing and expert materials and reach a decision. Should the State fail to propose an appropriate remedy, the Court may also order a remedial plan drawn by a special master, which would also take additional time. *See Favors v. Cuomo*, 11-CV-5632 RR GEL, 2012 WL 928223, at *2, n.8 (E.D.N.Y. Mar. 19, 2012) (suggesting at least two months are needed for court-drawn statewide redistricting plans).

The time needed for the remedial process described above is separate from any appellate review a party may seek, which would further prolong implementation of a new legislative district map. Any appeals by Defendants could concern the merits and/or the remedy, and in either

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circumstance, this Court may need to schedule further proceedings on remand. All things considered, a four- to six-month continuance would push the process of determining a final remedial plan well into late 2023 and almost certainly into 2024.

Furthermore, once a final plan is determined and approved, implementing the plan will, as this Court has found, "take[] time and expertise." Dkt. # 66 at 6. County election officials and the Secretary of State will have to draw and approve new precinct boundaries. *Id.* at 6-7. According to the Secretary of State and his declarants at the preliminary injunction stage, establishing new precincts is at minimum a five-week process for one county. *Id.* at 8; *see also* Dkt. # 50 at 3-7. The State will also need time to educate election officials, voters, and candidates about the new district boundaries and changes to affected districts. The current trial date provides the Court with time to hold trial, decide the issue on the merits, and if necessary, complete the remedial process with time for appellate review and sufficient time to implement a new map before the 2024 election cycle. The State's proposed four- to six-month delay—which is anything but "modest"—would severely prejudice Plaintiffs by jeopardizing their access to timely relief.

Finally, in addition to prejudicing Plaintiffs, the State's proposed continuance would interfere with binding commitments in May, June, and July of 2023. Several of Plaintiffs' counsel have scheduled trials during this period that would directly conflict with the proposed continuance. As such, the third *Flynt* factor does not support a continuance.

II. The State Has Not Been Diligent in Preparing for Its Defense.

The first *Flynt* factor, the moving party's diligence, also fails to justify a continuance. The State's chief concern with the current schedule is the upcoming expert disclosure and discovery deadlines. But the State has failed to meaningfully explain the steps it has taken to meet these deadlines, beyond generalized assertions of having "done factual and legal research," "reached out to Plaintiffs' counsel," and "research[ed] potential experts." *See* Dkt. # 80-1 (Decl. of Andrew Hughes) at ¶¶ 3-6.

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With respect to the expert report deadline, the State was aware of its obligations under the current case schedule for at least seven weeks before it filed this Motion—i.e., at least since the Court ordered the State's joinder on May 13. Yet, at the time of filing the Motion, the State had only "recently" been in contact with potential experts. *Id.* at ¶ 6. The State also noticed this Motion for July 8, a mere five days before expert reports are due. Waiting to begin contacting potential experts and then requesting a continuance a mere three weeks before the expert report deadline does not equate to diligence.

Further, although the State attempts to cast Plaintiffs as the party unwilling to negotiate, *see* Mot. at 6, that narrative is pure fiction. When Defendants asked to delay trial by four to six months, Plaintiffs expressed an openness to discuss and accommodate the case deadlines of greatest concern and offered a counter-proposal as a starting point. Dkt. 80-1 at 3. The State declined to confer further and "filed this motion as quickly as it could." Mot. at 6. At the very least, to avoid prejudice to Plaintiffs, the existing case management deadlines could be extended or moved to accommodate any of the State's issues or lack of diligence, while keeping the trial date the same.

III. The State Has Not Demonstrated That a Continuance Will Serve a Useful Purpose or That It Will Be Prejudiced Without One.

The State has also failed to demonstrate the second and fourth *Flynt* factors, that a continuance will serve a useful purpose and that the State will suffer prejudice without one. The State offers two reasons for its requested continuance: first, its relatively late entry into the case, and second, its alleged inability to conduct expert and fact discovery within the framework of the current case schedule.

First, the State's suggestion that its later entry in the case is enough to show good cause for a continuance is mistaken. Mot. at 4-6. The Attorney General's office, which serves as counsel for the State, had notice of this lawsuit since the Complaint was filed on January 19, 2022, and attorneys from the same office representing the State's constitutional officers have been litigating

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this case since that time. The State's lack of preparedness and diligence stemming from its late entry has nothing to do with Plaintiffs' choice of defendants. As is typical in cases challenging the validity of state laws in federal court, Plaintiffs "sue[d] the individual state officials most responsible for enforcing [the legislative redistricting plan] and [sought] injunctive or declaratory relief against them." *See Berger v. N. Carolina State Conf. of the NAACP*, No. 21-248, 2022 WL 2251306, at *3 (U.S. June 23, 2022). If the State had any interest in joining the litigation before Secretary Hobbs moved for its joinder, then it could have acted on those interests by intervening in the suit. *See id.* at *3-4 (confirming the right of duly authorized state agents to intervene to defend state law).

Despite the State's later entry into this suit, it is (and has always been) entirely possible for the State to defend this case within the framework of the case management schedule set by the Court, especially if the expert deadlines are shifted as Plaintiffs have proposed. The State has long had in its possession public reports by Dr. Barreto analyzing the existence of racially polarized voting in the Yakima Valley region, as well as any analysis provided to the 2021 Redistricting Commission regarding racially polarized voting and VRA compliance. The declarations of Dr. Matt Barreto and Dr. Loren Collingwood filed in this case have also been part of the public record since Plaintiffs moved for a preliminary injunction in February. *See* Dkt. # 38-25 (First Collingwood Decl.), 38-26 (Barreto Decl.), 54-2 (Second Collingwood Decl.).[1]

Second, the mere allegation that the State may fail to complete discovery in the time allowed does not constitute good cause for an extension or continuance under the local rules of the Western District of Washington. *See* W.D. Wash. Civ. R. 16. Any minimal prejudice the State may face in marshalling its resources to conduct fact and expert discovery can be addressed by modifying the pre-trial discovery deadlines within the current trial setting. For example, Plaintiffs offered the State the following proposal, which would extend the expert discovery deadline and

[1] Plaintiffs also provided additional information to the attorneys for the State, at their request, about Dr. Collingwood's declarations.

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provides the State with additional time to obtain an expert while avoiding a prejudicial delay in continuing the trial date:

Plaintiffs' Expert Reports	Due July 13, 2022
Defendants' Expert Reports	Due August 3, 2022
Plaintiffs' Rebuttal Reports	Due August 17, 2022
Fact Discovery Cutoff	September 11, 2022
Expert Discovery Cutoff	September 20, 2022
Settlement Conference	September 25, 2022
Dispositive Motions:	October 11, 2022
Motions in Limine:	December 12, 2022
Pretrial Order Due	December 28, 2022
Trial Briefs and Exhibits	January 4, 2022

In sum, the four *Flynt* factors support maintaining the current trial date, which ensures that if Plaintiffs are granted relief, such relief would provide voters and the State sufficient notice and time to implement changes. This Court already denied Plaintiffs relief this year based on *Purcell* considerations, and justice requires Plaintiffs not suffer the same irreparable harm twice. As such, Plaintiffs do not believe that any modification to the trial date is warranted. However, if this Court believes a modification is necessary, Plaintiffs request that it limit any continuance to one month from the scheduled trial date, with corresponding one-month adjustments to deadlines for expert reports, discovery, dispositive motions, and other pre-trial deadlines.

CONCLUSION

For the foregoing reasons, the State of Washington's Motion to Modify Scheduling Order and Extend Trial Date should be denied. If the Court believes a continuance is necessary, Plaintiffs respectfully request that it not exceed one month, with corresponding adjustments to other pre-trial deadlines.

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Dated: July 6, 2022

By: */s/Edwardo Morfin*

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CERTIFICATE OF SERVICE

I certify that all counsel of record were served a copy of the foregoing this 6th day of July, 2022 via the Court's CM/ECF system.

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[PROPOSED] ORDER DENYING DEFENDANT STATE OF WASHINGTON'S MOTION TO MODIFY SCHEDULING ORDER AND EXTEND CASE DEADLINES

This matter came before the Court on Defendant State of Washington's Motion to Modify Scheduling Order and Extend Trial Date and Related Dates. The Court has reviewed the State's Motion, the Opposition filed by the Plaintiffs, the State's Reply, and any supporting papers filed therewith

Based on the foregoing, it is hereby ORDERED that Defendant State of Washington's Motion is DENIED.

In the alternative to a continuance, it is further ordered that the following pre-trial deadlines shall apply to this case:

Plaintiffs' Expert Reports	Due July 13, 2022
Defendants' Expert Reports	Due August 3, 2022

Plaintiffs' Rebuttal Reports	Due August 17, 2022
Fact Discovery Cutoff	September 11, 2022
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Pretrial Order Due	December 28, 2022
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IT IS SO ORDERED.

DATED this ____ day of _____, 2022.

PRESENTED BY:

By: */s/ Edwardo Morfin*

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