

The Honorable Robert S. Lasnik

**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 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 moves for a modest adjustment to the case scheduling order to account for its four-month-late entrance into this case. The current case schedule was entered two months before the Court ordered Plaintiffs to add the State as a party to this litigation, and does not permit the State sufficient time to address Plaintiffs' significant, factually complex allegations. Indeed, under the current schedule, the State's expert report is due in *less than a month*, despite the fact that the State only became a party last month.

1 The current case schedule prejudices the State because it simply does not have sufficient
2 time to retain an expert, complete discovery, and prepare for trial within the current deadlines.
3 Moreover, the prejudice to the State is entirely of the Plaintiffs' making—it was their decision
4 to sue parties who have no ability to provide the relief sought by Plaintiffs and to spend nearly
5 four months refusing to correct their mistake. By contrast, a four-to-six-month extension to the
6 case schedule will not cause prejudice to Plaintiffs or any other party. Under the State's proposed
7 schedule, trial in this matter would conclude more than a year before the next scheduled
8 contested election, giving all parties ample time to implement changes, should the Court order
9 any. Accordingly, the State requests this Court grant its motion and enter a case scheduling order
10 extending all dates to give the State an opportunity to defend itself.

11 II. BACKGROUND

12 Plaintiffs filed their suit five months ago, on January 19, 2022, naming Secretary of State
13 Steven Hobbs, Speaker of the House Laurie Jenkins, and Senate Majority Leader Andy Billig as
14 defendants. Dkt. #1. They did not sue the Redistricting Commission, the entity tasked with
15 adopting and/or modifying redistricting plans, or its Commissioners. *See* Wash. Rev. Code
16 §§ 33.04.090, 120. Nor did they sue the State. The following month (at the latest), the initial
17 defendants explained to Plaintiffs that they were the wrong parties; that they had no meaningful
18 role in the redistricting process and could not provide any of Plaintiffs' requested relief. *See* Dkt.
19 ##37, 40. Nonetheless, Plaintiffs dug in their heels, not only insisting that Speaker Jenkins and
20 Leader Billig were proper defendants (Dkt. #44), but actually *opposing* Secretary Hobbs' motion
21 to join additional parties, including the Redistricting Commission and the State (Dkt. #60).
22 Ultimately, it was not until the Court ordered them to do so (Dkt. #68), that Plaintiffs filed their
23 Amended Complaint, which named the State as a party for the first time. Dkt. # 70. By that time,
24 more than four months had elapsed.

25 The State answered Plaintiffs' Amended Complaint on June 17, 2022. Dkt. #78. That
26 same day, the State wrote to all parties asking if they would agree to request changes to the

1 scheduling order. The State explained that the extension was sought because “that schedule was
 2 entered . . . two months before the State became a Defendant in this lawsuit, and does not reflect
 3 the nearly fourth-month late start the State got in defending against this lawsuit.” Declaration of
 4 Andrew R.W. Hughes in Support of State’s Motion (Hughes Decl.), Ex. A. The State suggested
 5 the parties negotiate “a continuance of four-to-six months . . . to give the State adequate time to
 6 address Plaintiffs’ allegations,” and noted the lack of prejudice to any party since “there will not
 7 be a contested election in either [Legislative District] 15 or [Legislative District] 14 until 2024
 8 at the earliest.” *Id.* On June 21, 2022, Plaintiffs responded, opposing the State’s request, and
 9 countering with a meagre three-week extension. *Id.*¹ This motion follows.

10 III. ARGUMENT

11 A. Legal Standard

12 A court may modify a scheduling order “only for good cause,” Fed. R. Civ. P. 16(b)(4),
 13 and the “decision regarding a continuance is given great deference.” *Danjaq LLC v. Sony Corp.*,
 14 263 F.3d 942, 961 (9th Cir. 2001). The analysis is guided by four factors: “(1) the movant’s
 15 diligence in preparing for the date set for hearing; (2) the likelihood that a continuance will
 16 address the need giving rise to the motion for a continuance; (3) the extent to which a continuance
 17 will inconvenience the court and the opposing party, including its witnesses; and (4) whether the
 18 movant will suffer prejudice if the continuance is denied.” *Johnson v. Young*,
 19 3:14-CV-00178RCJVPC, 2016 WL 923094, at *1 (D. Nev. Mar. 10, 2016) (citing *United States*
 20 *v. Flynt*, 756 F.2d 1352, 1359 (9th Cir. 1985)); *see also Janis v. Ashcroft*, 94 F. App’x 564, 566
 21 (9th Cir. 2004).

22 Because of Plaintiffs’ decision to wait four months before adding the State as a defendant,
 23 the State is well behind Plaintiffs in its discovery efforts despite its diligence; a continuance is
 24

25
 26 ¹ Secretary Hobbs did not object to the proposed continuance. *See* Hughes Decl., Ex. A. As of the date of
 this filing, the Intervenor-Defendants have not shared their position.

1 therefore critical to give the State time to engage in discovery, including expert discovery, and
 2 to ensure the State is on equal footing with the other parties in this case.

3 **B. The State’s Late Entry Is Good Cause for Modifying the Case Schedule**

4 Modifying the case schedule is warranted because the State needs a chance to catch up
 5 to the four-month head start every other party got. The need for a continuance is clear: under the
 6 current case schedule, the State has only two months from the time it was made a party until
 7 expert reports were due, only five months to complete all discovery, and only six months to
 8 complete dispositive motions. *See* Dkt. #46 (Minute Order Setting Trial Date and Related Dates).
 9 Plaintiffs, by contrast, have six, nine, and ten months, respectively, without even taking into
 10 account their considerable pre-filing head start. This patent unfairness plainly justifies a
 11 continuance. *See, e.g., AT&T Commc’ns--E., Inc. v. Cent. Puget Sound Reg’l Transit Auth.*,
 12 C07-5186BHS, 2008 WL 2790228, at *7 (W.D. Wash. July 14, 2008) (“Given BNSF’s relatively
 13 recent entry into this case, the Court agrees that a continuance of the trial date and certain pretrial
 14 deadlines is appropriate.”)²; *United States v. Kloehn*, 620 F.3d 1122, 1127 (9th Cir. 2010) (“The
 15 September continuance was requested by Kloehn and granted by the court primarily on the
 16 ground that the government had made substantial changes to the trial indictment, as a result of
 17 which the defense needed extra time to prepare for trial.”); *see also Elvir v. Trinity Marine*
 18 *Products, Inc.*, 327 F.R.D. 532, 547 (M.D. La. 2018), *aff’d*, CV 16-814-SDD-EWD,
 19 2018 WL 4628320 (M.D. La. Sept. 27, 2018) (permitting an amendment to add parties because
 20 “the availability of a continuance . . . cures virtually all potential prejudice”).

21 This unfairness is not random chance—it was directly caused by Plaintiffs’ litigation
 22 tactics. Plaintiffs were on notice at least as far back as February 2022 that they sued the wrong
 23

24 ² In *AT&T*, the movant sought a six-month continuance, but the Court granted only a
 25 three-month continuance because the defendant had shown that a lengthier continuance would
 26 cause significant prejudice by “interfere[ing] with construction of the Sounder commuter rail
 system.” *AT & T Commc’ns*, 2008 WL 2790228, at *7. As explained below, Plaintiffs cannot
 make a similar showing of prejudice here justifying a shorter continuance.

1 parties, and yet they chose not to add the State as a party until the Court ordered them to do so
 2 in May, four months after they filed suit. And now the State—a distinct party from the Secretary
 3 of State, with different counsel, different risks, and different interests—is far behind the other
 4 parties with no hope to catch up absent a continuance.

5 Plaintiffs dispute that good cause exists for a continuance, but their objections make little
 6 sense. First, in an email opposing the State’s request for a stipulated continuance, Plaintiffs’
 7 counsel reasoned that “[w]hen Secretary Hobbs sought to join the State in this case, he stated
 8 that he was not seeking changes to the scheduling order[.]” Hughes Decl., Ex. A. But that is
 9 irrelevant. Secretary Hobbs and the State are separate parties and separately situated for purposes
 10 of this lawsuit; his decision not to seek a continuance in his Motion for Joinder has no bearing
 11 on the State’s ability to do so now.

12 Next, Plaintiffs justify their refusal by noting that “when the Court granted the joinder
 13 and intervention motions on May 6, Judge Lasnik specifically stated that ‘the case management
 14 deadlines established at Dkt. #46 remain unchanged.’” *Id.* (quoting Dkt. #69 (Order Granting
 15 Motion to Intervene)). But at that point, no party sought to continue those deadlines, and there
 16 was thus no basis for the Court to do so.

17 Lastly, Plaintiffs asserted that “[e]xtending [the] trial date would prejudice Plaintiffs.”
 18 *Id.* But they made no effort to explain how. Nor does there appear to be any basis for their bare
 19 assertion. Indeed, even with a six-month continuance, trial will conclude in July 2023, more than
 20 a full year before the next scheduled legislative primary elections in August 2024.³ This is more
 21 than enough time to implement any relief awarded by this Court. Indeed, it is *three times* as long
 22 as the four months they previously argued was sufficient to “implement[] new districts” in time
 23 for the August 2022 primary election. Dkt. #38 at 3 (Motion for Preliminary Injunction). Their

24
 25 ³ Each candidate for Legislative District 15 (and neighboring Legislative District 14) is
 26 running unopposed in the 2022 general election, so there will not be a contested legislative
 election in either district until August 2024 at the earliest. See “Candidates Who Have Filed,”
VoteWA, <https://voter.votewa.gov/CandidateList.aspx?e=876&c=> (last accessed June 22, 2022).

1 claims of prejudice are thus not only unsupported, they are directly contrary to Plaintiffs' own
2 arguments.

3 As alluded to above, any minimal prejudice to Plaintiffs is of their own making. They
4 chose to sue the wrong parties. Then, instead of fixing the problem once it was pointed out to
5 them, they instead fought to keep the wrong parties in the case and opposed joining the State.
6 Thus, even if Plaintiffs could credibly argue prejudice from a modest continuance, this is no
7 basis for denying the State the continuance necessary to level the playing field.

8 A review of the four *Flynt* factors confirms that a continuance is appropriate here.

9 **1. The State has been diligent since it was served last month**

10 The first *Flynt* factor, the movant's diligence, supports a continuance. The State was served
11 with the Amended Complaint just over one month ago on May 13, 2022. In that time, the State
12 carefully reviewed and answered Plaintiffs' 41-page Amended Complaint. Dkt. #78. The State
13 has done considerable factual and legal research to understand and begin to evaluate Plaintiffs'
14 claims. Hughes Decl., ¶ 4. The State has reached out to Plaintiffs' counsel numerous times to
15 obtain more information about their claims, including document discovery from the Redistricting
16 Commission that Plaintiffs apparently received some time ago via subpoena but did not produce
17 to the State. *Id.* at ¶ 5. And the State has been in contact with multiple potential experts, but it
18 has not yet been able to retain one, in part because the experts contacted by the State are unable
19 to begin work until July at the earliest. *Id.* at ¶ 6.

20 Despite this diligence, Plaintiffs' four-month delay in joining the State has resulted in the
21 State simply not having enough time to meet critical deadlines under the operative case schedule.
22 Accordingly, immediately upon filing its Answer, the State approached Plaintiffs to negotiate a
23 stipulated continuance. *Id.*, Ex. A. And as soon as Plaintiffs made clear they were unwilling to
24 negotiate a reasonable continuance, the State filed this motion as quickly as it could. On these
25 facts, there is no dispute that the State has been diligent.
26

1 **2. A continuance will give the State a chance to defend itself**

2 The second *Flynt* factor, “the likelihood that a continuance will address the need giving rise
3 to the motion for a continuance,” sharply favors the State’s request. Under the current case
4 schedule, it will be effectively impossible for the State to meet critical deadlines. Most
5 pressingly, researching and retaining experts, and having those experts conduct analyses and
6 prepare credible, quality expert reports takes months. There is just no way the State can do this
7 in the less-than-three weeks remaining under the current deadlines, or even in the six weeks of
8 Plaintiffs’ counter-proposal. Hughes Decl., Ex. A. The limited remaining time in the discovery
9 period also largely forecloses the State from taking iterative discovery. So rather than obtaining
10 initial discovery, having an opportunity to review it, and then being able to take follow-up
11 discovery based on what it learns, the current case schedule essentially gives the State one or at
12 best two rounds of discovery, with limited opportunity for follow-up. A continuance, however,
13 will give the State the time it needs—and that Plaintiffs have already had—to take discovery,
14 engage experts, and prepare this case for trial.

15 **3. A modest continuance, sought well in advance of the scheduled trial date,
16 will cause little if any inconvenience**

17 The third *Flynt* factor, “the extent to which a continuance will inconvenience the court and
18 the opposing party, including its witnesses,” also supports a continuance. As explained above,
19 Plaintiffs will not experience any meaningful prejudice from a modest continuance. And with
20 the scheduled trial date still months out, neither the parties nor the Court have (presumably)
21 made travel plans or other binding commitments that would be upset if the trial date were moved.
22 And to the extent anyone has, the State is more than willing to be flexible about specific dates.

23 **4. The State will be severely prejudiced without a continuance**

24 “[T]he focus of [the] prejudice inquiry is the ‘extent to which the aggrieved party’s right to
25 present his defense has been affected.’” *Kloehn*, 620 F.3d at 1128 (quoting *United States v.*
26 *Mejia*, 69 F.3d 309, 318 n.11 (9th Cir. 1995)). Here, for all the reasons explained in detail above,

1 the State will be severely prejudiced in its right to present defenses if it is not given adequate
2 time to prepare those defenses. *See Johnson*, 2016 WL 923094, at *2 (granting a continuance
3 where the current case schedule caused a party “to suffer prejudice because of inadequate time
4 to prepare”). To ameliorate this prejudice, and to give the State the same opportunity Plaintiffs
5 have to prepare their case, a continuance is appropriate.

6 **IV. CONCLUSION**

7 The State respectfully requests that this Court grant its motion and enter a new scheduling
8 order extending dates by four-to-six months.

9 DATED this 24th day of June, 2022.

10 ROBERT W. FERGUSON
11 Attorney General

12 *s/ Andrew R.W. Hughes*

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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 24th day of June 2022, at Seattle, Washington.

s/ Andrew R.W. Hughes

ANDREW R.W. HUGHES, WSBA No. 49515
Assistant Attorney General

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NO. 3:22-cv-5035-RSL

ORDER GRANTING
DEFENDANT STATE OF
WASHINGTON'S MOTION TO
MODIFY SCHEDULING ORDER
AND EXTEND TRIAL DATE
AND RELATED DATES
[PROPOSED]

NOTED: JULY 8, 2022

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 **GRANTED**.

1 It is further ORDERED that the following deadlines shall apply to this case:

EVENT	DATE
Trial Date	Court's first availability on or after July 10, 2023
Deadline for amended pleadings	November 10, 2022
Report from expert witnesses under FRCP 26(a)(2) due	January 13, 2023
Discovery completed by	March 10, 2023
All motions related to discovery must be noted on the motion calendar no later than the Friday before discovery closes pursuant to LCR 7(d) or LCR 37(a)(2)	
Settlement conference held no later than	March 24, 2023
All dispositive motions must be filed by and noted on the motion calendar no later than the fourth Friday thereafter (see LCR 7(d)(3))	April 7, 2023
All motions in limine must be filed by and noted on the motion calendar no earlier than the second Friday thereafter. Replies will be accepted	June 9, 2023
Agreed pretrial order due	June 28, 2023
Pretrial conference to be scheduled by the Court	
Trial briefs and trial exhibits due	June 30, 2023

19 IT IS SO ORDERED.

20 DATED this ___ day of _____ 2022.

21 s/ _____
 22 The Honorable Robert S. Lasnik

1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General

4 *s/Andrew R.W. Hughes*

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s/ Andrew R.W. Hughes

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Assistant Attorney General

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