

IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, et al.,

Petitioners,

v.

Secretary of State Frank LaRose, et al.,

Respondents.

Case No. 2022-303

Original Action Filed Pursuant to Ohio
Constitution, Article XIX, Section 3(A)

RESPONSE TO MOTION FOR SCHEDULING ORDER

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INTRODUCTION

Twenty days since the Ohio Redistricting Commission (the “Commission”) adopted a congressional district plan (the “Second Plan”) Petitioners finally got around to filing a suit challenging the plan. Petitioners sat on their hands for weeks and now seek a tremendously truncated schedule, despite conceding that it is too late to challenge the Second Plan for the 2022 election, and relief for the 2024 election cycle is over two and a half years away. The Court should instead enter Respondents’ Proposed Schedule, which allows for thorough discovery and due process for all parties. Petitioners’ motion for scheduling order should be denied, and this Court should enter Respondents’ Proposed Schedule.

BACKGROUND

I. The Commission adopts a new plan.

Following this Court’s invalidation of the Congressional Plan passed by the general assembly and signed into law by Governor DeWine on November 20, 2021 (the “First Plan”), the general assembly did not pass a new remedial congressional district plan within the thirty days provided under Section 3 of Article XIX. Thus, that obligation passed to the Commission.

The Commission met on February 24, March 1, and March 2, 2022 to hear public testimony and to discuss adopting a new congressional district plan. The Commission adopted a congressional district plan on March 2. The Second Plan has been fully implemented by the Secretary of State and all eighty-eight county boards of elections for use in the upcoming May 3, 2022 primary election.¹

¹ See e.g., the directive to County Boards of Election issued by Secretary of State LaRose on March 2, 2022. <https://www.ohiosos.gov/media-center/press-releases/2022/2022-03-02b/>

II. Petitioners' procedural hijinks cost time when every day counts in running elections.

Instead of promptly filing a new complaint, Petitioners instead filed a “motion to enforce” the Court’s order against the Commission regarding the First Plan even though the Commission was never a party to that order. As discussed more fully in Respondents’ Response to Petitioners Motions to Enforce in *Adams v. DeWine* and *League of Women Voters of Ohio (“LWVO”) v. Ohio Redistricting Commission*, such a motion was entirely improper. Meanwhile, the March 4, 2022 deadline for congressional candidates to file their petitions under the Second Plan came and went.

Then, just as the ill-timed motions to enforce were ripe for decision by the Court, Petitioners delayed a decision even further by filing a motion to amend its complaint to add the Commission as a party. The motion sought to amend a lawsuit that addressed an entirely different congressional plan, passed by different actors, by different methods, and under a different provision of Article XIX. Importantly, the motion to amend came almost ten days after the passage of the Second Plan, and almost 60 days since the final judgment in that action. Petitioners created a procedural circus that cost this Court and the people of Ohio valuable time. Recognizing this, the Court denied the motions to amend. *See* 03/18/2022 Case Announcements #3, 2022-Ohio-871.

Despite already having a complaint prepared from their Motion to Amend, Petitioners waited an additional eleven days to file the instant action. We are now 40 days away from Ohio’s May 3 Primary election. But while the voting actually *ends* on May 3, it begins much earlier. Particularly, overseas ballots can begin to be mailed now, but must be done so no later than twelve days from today, thanks to an agreement reached between Secretary of State LaRose and the federal authorities with the help of the general assembly. It is highly unlikely another extension will be given. With these reasons in mind, Petitioners rightly conclude that it is too late for a new

Congressional plan to be implemented for the 2022 election cycle and instead seek to “effectuate[] change... starting with the 2024 election cycle” (Mot. at 3).

But, Petitioners continue to engage in procedural gamesmanship in their motion for scheduling order. First, Petitioners allow less than a week to respond to a Complaint that Respondents have yet to properly be served with. Next, Petitioners propose that all evidence be submitted to this Court in less than three weeks. This hardly allows for any fact discovery, much less any discovery into expert reports and methods. In fact, Petitioners offer a longer time to brief this matter than to gather evidence. This is absurd on its face, especially when Petitioners acknowledge that the changes they seek to implement are for an election cycle more than 2 years away.²

ARGUMENT

I. Petitioners’ Motion Must be Denied Based on Laches.

Petitioners’ procedural maneuverings are unreasonable, especially given the extraordinary scheduling order they seek under these circumstances. Petitioners could have filed a new suit the day after the Second Plan was filed, or certainly in the time it took Petitioners to prepare their “Motion to Enforce.” Instead, for whatever reason, possibly to avoid additional discovery into what has now become obvious – their experts’ flawed and conflicting methodology, Petitioners first filed their specious motion to enforce a court order against a non-party, and then days later

² Petitioners troublingly state that they have proposed this expedited schedule to “ensure that **this** court” (emphasis added) “determines the constitutional validity of the Revised Plan.” Petitioners go further stating that to “defer to a Court in a different year would hardly serve the interests of judicial economy.” Petitioners concern about the makeup of this Court in future years is not only unwarranted, but offensive. Supreme Court Justices have a constitutional duty to uphold the Ohio and Federal Constitutions to the best of their ability—regardless of political affiliation. If any “Revised Plan” is unconstitutional, it should be held so by this Court, regardless of any future political makeup of the Court. It is the Court’s job to rise above the political fray. To suggest otherwise raises untenable questions about the legitimacy of the Court and future decisions.

moved to amend their complaint in a case where final judgment had been issued two months earlier. Eleven days after Petitioners filed their motion to amend and four days since the Court denied the same, Petitioners now get around to filing a new suit—twenty days since the adoption of the Second Plan.

This Court has “consistently required relators in election cases to act with the utmost diligence.” *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 19. “Laches may bar an action for relief in an election-related matter if the persons seeking this relief fail to act with the requisite diligence.” *Smith v. Scioto Cty. Bd. of Elections*, 123 Ohio St.3d 467, 2009-Ohio-5866, 918 N.E.2d 131, ¶ 11. *See also State ex rel. Demaline v. Cuyahoga Cty. Bd. of Elections*, 2000-Ohio-108, 90 Ohio St.3d 523, 526–527, 740 N.E.2d 242, *citing State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 2000-Ohio 295, 88 Ohio St.3d 187, 189, 724 N.E.2d 775 (holding that laches barred relators’ mandamus action seeking to revise ballot language for proposed ordinance) (“[W]e have held that a delay as brief as **nine days** can preclude our consideration of the merits of an expedited election case.”) (emphasis added); *State ex rel. Newell v. Tuscarawas Cty. Bd. of Elections*, 2001-Ohio-1806, 93 Ohio St. 3d 592, 595, 757 N.E.2d 1135, 1138 (holding that laches barred writ of prohibition seeking to prevent county board of elections and secretary of state from submitting proposed repeal of levies for school district) (“He waited twenty days after the petitions were filed on August 21 to file his September 10 protest, and he then waited another fourteen days following the board's September 27 decision to file this action for extraordinary relief.”)

Furthermore, the elements of laches are met here. “The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.”

Blankenship v. Blackwell, 2004-Ohio-5596, ¶ 19, 103 Ohio St. 3d 567, 571, 817 N.E.2d 382, 386.

Petitioners knew they intended to challenge the Second Plan in some form. Indeed, the *LWVO* Petitioners, who are the same petitioners here, filed their “Motion to Enforce” five days after the Second Plan was adopted. Rather than file a new lawsuit immediately and proceed as expeditiously as the Court would permit, Petitioners waited twenty days to file this action and engaged in procedural gamesmanship in the meantime.

There is no excuse for such a delay. Petitioners have had ample time to prepare a complaint, as shown by the fact that *LWVO* Petitioners filed a proposed amended complaint on March 11. Moreover, Petitioners’ motion to enforce was accompanied by at least two expert reports, so it is clear they had the evidence prepared well in advance of filing the motions to amend the complaint. Accordingly, laches is a sufficient basis to deny the motion for the untenable scheduling order sought by Petitioners and allow this case to proceed, if at all, on a normal pace while allowing the Second Plan to be used in the 2022 election.

II. The Expedited Discovery Sought by Petitioners Prejudices Respondents and Demonstrates that the Court Should Allow an Adequate and Vigorous Adversarial Process Rather than a Shotgun Hearing Process.

Petitioners expedited schedule is unwarranted. At a minimum a quick schedule involving briefing and possible rulings by the court on the Second Plan will confuse voters who may believe that a new congressional plan may be implemented this year even though Petitioners do not seek that relief. The Court should decline to create that unnecessary confusion when there is no need to do so and, to the contrary, a proper adversarial process is warranted.

Petitioners also file a myriad of evidence from various experts that conflicts with each other and sometimes the experts even conflict with themselves. Petitioners’ case relies exclusively on paid expert testimony. But none of the Petitioners’ experts have been subject to discovery or cross

examination. And Petitioners' own evidence to date demonstrates that it is unreliable and needs to be subjected to a vigorous adversarial process.

Consider the evidence that has been submitted by Dr. Imai and Dr. Chen for the first congressional plan. The Court has been relying on this evidence but it is now clear that it is both conflicting and contradictory. The evidence presented by these experts conflicts with each other and Dr. Imai's evidence even conflicts with itself. See Huffman and Cupp Response to *Neiman* Petitioners' Motion for Scheduling Order at pp. 6-9 (2022-298). None of these contradictions have been able to be vetted properly because there has not yet been fulsome discovery. There is now an opportunity to conduct that discovery and ensure the Court has accurate information when ruling on the Second Plan.

This also raises questions of due process under the Fourteenth Amendment of the United States Constitution. The Due Process Clause of the Fourteenth Amendment to the Constitution states that no State shall "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend XIV, § 1. The Federal Constitution's 14th Amendment Due Process Clause "imposes on the **States** the standards necessary to ensure that judicial proceedings are fundamentally fair," *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981), requiring that litigants receive "notice and opportunity for hearing appropriate to the nature of the case," *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). (emphasis added). Undoubtedly, this Clause's protections of procedural fairness apply to state courts. See *Reich v. Collins*, 513 U.S. 106, 110–14; *Bouie v. City of Columbia*, 378 U.S. 347, 354–55 (1964); *Saunders, v. Shaw*, 244 U.S. 317, 319–20 (1917)

The Supreme Court of the United States has repeatedly recognized that a state supreme court cannot give "retroactive effect" to an "unforeseeable" decision, if the application of that

decision would deny “a litigant a [fair] hearing.” *Bowie*, 378 U.S. at 354–55; *Reich*, 513 U.S. at 110–14; *Saunders*, 244 U.S. at 319–20. Respondents here are simply asking for a full and fair opportunity to put on their own evidence, which can only be achieved through a meaningful discovery period that includes time to take meaningful discovery on Petitioners’ experts. Anything less will lead to testimony fraught with unintended human error due to a compressed time frame. The Court should not be forced to rely upon untested, and error ridden reports and testimony.³ To that end, Respondents propose the following schedule:

Event	Deadline
Respondents Response to Complaint	21 days from Service
Discovery Opens	April 4, 2022 (or day scheduling order is entered, whichever is later);
Petitioners Expert Reports Due ⁴	May 4, 2022
Respondents Rebuttal Expert Reports Due ⁴	June 17, 2022
Petitioners Reply Expert Reports Due ⁴	July 1, 2022
Deadline to File Evidence with the Court	September 30, 2022
Petitioners’ Merit Brief	October 21, 2022
Respondents Merit Brief	November 11, 2022
Petitioners Reply Brief	November 18, 2022

The Court has the time and the ability to order a robust discovery period that allows for a true adversarial process and puts all the facts before the Court. This is the process the Court and all Ohioans deserve.

³ A fuller discovery period with cross-examination of experts and well-thought out reports also benefits the Court and the parties in any remedial stage. Should the Court find that the Second Plan is unconstitutional, which it is not, the more robust discovery and evidence allows for the Court to pinpoint specific areas of concern with specificity that can more easily be adjusted in a remedial phase. This would significantly improve the likelihood that a third plan, should it prove necessary, complies with the Court’s order and the Constitution.

⁴ Expert reports must be accompanied by **all** supporting data. This includes but is not limited to any code for the base algorithm(s), the algorithm(s) used to create any simulated plans, backup data, and for each simulated map: the equivalent code, shapefile, or BAF file with data to the block or precinct level, to create copies of each simulated map.

CONCLUSION

For the foregoing reasons, Respondents request that Petitioners' Motion for a Scheduling Order be denied or modified to impose the reasonable discovery schedule proposed above that will permit adjudication of the constitutionality of the Second Plan without further disrupting the 2022 election.

Respectfully submitted this the 24th day of March, 2022.

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