UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

New Hampshire Youth Movement,

Plaintiff,

v.

David M. Scanlan, in his official capacity as New Hampshire Secretary of State,

Defendant.

Case No. 1:24-cv-00291-SE-TSM

EXPEDITED TREATMENT REQUESTED

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PLAINTIFF'S MOTION FOR SCHEDULING CONFERENCE

Pursuant to Federal Rule of Civil Procedure 16 and Local Rule 16.1, Plaintiff moves for the Court to hold a preliminary pretrial scheduling conference as soon as practicable. In accordance with Local Rule 7.1(c), Plaintiff sought Defendant's concurrence in the relief requested. Defendant opposes this motion.

For weeks, Plaintiff has attempted in good faith to negotiate a discovery plan and trial schedule with Defendant, as is required by Federal Rule of Civil Procedure 26(f) and Local Rule 26.1, but Defendant has refused. Most recently, at the parties' Rule 26(f) conference, held on January 21, 2025, Plaintiff provided its detailed proposal and requested that Defendant—at the very least—provide a counterproposal so that progress toward agreement could be made or, alternatively, competing proposals could be presented to the Court for decision. For the sake of simplicity, Plaintiff even suggested that Defendant propose a plan that mirrors the one he has already agreed to in the later-filed case challenging the same law at issue here, *see Coalition for Open Democracy v. Formella*, No. 1:24-cv-00312 (D.N.H.), ECF No. 33—*i.e.*, the case the Clerk of this Court recently noted "may be consolidated" with this one, *see* Notice, ECF No. 35 at 1.

But, after Plaintiff accommodated an additional three days for Defendant to further consider his position on scheduling in this case, Defendant informed Plaintiff via email at 6:11 p.m. on Friday, January 24, that he would *neither make nor entertain any proposal at all* because, in his view, a discovery plan is "premature" in light of his pending motion to dismiss and the Clerk's notice of potential consolidation with the *Coalition for Open Democracy* case. Defendant maintained that position even after Plaintiff reminded Defendant of his obligations under Rule 26(f)(2) to work to "develop a proposed discovery plan" and "attempt[] in good faith to agree on the proposed discovery plan."

The Federal Rules of Civil Procedure do not permit Defendant to unilaterally determine that no discovery plan or scheduling order is warranted, regardless of whether Defendant believes it is premature or disagrees with Plaintiff's initial proposal. *Evans v. Yum Brands, Inc.*, 326 F. Supp. 2d 214, 226 (D.N.H. 2004). To the contrary, Rule 26(f)(2) requires Defendant to work with Plaintiff in "good faith" to "develop a proposed discovery plan" and submit a report outlining the "parties' views and proposals" on the matters identified in Rule 26(f)(3). These obligations are mandatory so that the Court may timely enter an appropriate scheduling order—which is already overdue in this case, *see* Fed. R. Civ. P. 16(b)(2)—and there is no applicable exception, *see* Fed. R. Civ. P. 26(f)(1); *see also Evans*, 326 F. Supp. 2d at 226 (explaining that a "defendant's confidence that it will prevail on a dispositive motion" does not render discovery premature, ordering Defendant to comply with Rule 26(f)). Defendant's refusal to propose any discovery plan at all is particularly inexplicable here, given his stipulation to a discovery plan in the *Coalition for Open Democracy* case, where he filed a motion to dismiss very similar to the one he filed in this case, and which is subject to the same notice of potential consolidation as this case.

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Rule 16(a) provides that the Court may hold a pretrial scheduling conference "for such purposes as . . . establishing early and continuing control so that the case will not be protracted because of lack of management" and "expediting disposition of the action." And Local Rule 16.1(a) specifically calls for such a conference in *all* cases in which a discovery plan proposed by the parties has not been approved. Here, given that Defendant has unequivocally refused to negotiate a discovery plan as Rule 26(f) requires, there is no prospect that any plan can be adopted absent a scheduling conference, much less adopted in the timely manner that the Rules mandate.

Expedited consideration by the Court is particularly warranted at this juncture given that Defendant's repeated delay tactics, which Plaintiff has countenanced in good faith for weeks in hopes of reaching a solution, have already pushed this time-sensitive case well beyond the deadline set forth in the Rules for entry of a scheduling order. *See* Fed. R. Civ. P. 16(b)(2) ("[U]nless the judge finds good cause for delay, the judge must issue [the scheduling order] within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared."); *see also* Pl.'s Opp. to Def.'s Mot. to Extend Time to Reply to Pl.'s Opp. to Mot. to Dismiss, ECF No. 27 at 1 (explaining that "[d]elay is a problem in this case" given that it is "essential that the case be litigated on a schedule that will allow final relief to be entered sufficiently in advance of the 2026 primary and general elections" (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006))). Any further delay plainly prejudices Plaintiff's ability to timely and effectively prosecute its case.[1]

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[1] An immediate conference would also be beneficial because the Court may wish to address specific "disagreements over the scope or scheduling of discovery" to prevent further wasteful motions practice. *Evans*, 326 F. Supp. 2d at 226; *see* Fed. R. Civ. P. 16(a)(3). For example, Defendant has advised Plaintiff that he is "of the mind" that interrogatories and requests for production of documents, the first sets of which Plaintiff served on January 24, are "premature" for the same reason he has refused to propose or consider any discovery plan, while Plaintiff

For the Court's consideration, Plaintiff has attached its Proposed Discovery Plan as Exhibit A, the contents of which are materially identical to the proposal Plaintiff shared with Defendant at the January 25 Rule 26(f) conference. As set forth in more detail in the Plan, Plaintiff maintains that the identified dates and discovery limits are appropriate and consistent with the needs of this case, and Plaintiff is "prepared to discuss" any and all items addressed in the plan, which the Court must consider in issuing a scheduling order. Local Rule 16.1(b).

For all these reasons, the Court should grant Plaintiff's motion and set a preliminary pretrial scheduling conference as soon as practicable.

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Dated: January 27, 2025

Respectfully submitted,

/s/ Steven J. Dutton

Steven J. Dutton, NH Bar No. 17101
Connor W. Harding, NH Bar No. 276438
McLANE MIDDLETON, P.A.
900 Elm Street Manchester,
New Hampshire 03101
Telephone: (603) 628-1377
steven.dutton@mclane.com
connor.harding@mclane.com

David R. Fox*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4490
dfox@elias.law

maintains that—consistent with Rule 26(d)—such requests are timely. *See Carll v. McClain Indus., Inc.*, No. 00-CV-233-M, 2001 WL 716128, at *4 (D.N.H. June 12, 2001) (noting that a plaintiff is only precluded from serving discovery prior to the parties' Rule 26(f) conference); *see also, e.g.*, *AFT Michigan v. Project Veritas*, 294 F. Supp. 3d 693, 694 (E.D. Mich. 2018) (explaining that "after [the Rule 26(f)] conference, discovery is expected to commence" and that "[i]t is also well established that the filing of a motion to dismiss does not automatically warrant a stay of discovery") (collecting cases).

Tyler L. Bishop*
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
(206) 656-0177
tbishop@elias.law

Counsel for Plaintiff

** Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 27th day of January 2025 on all parties of record via the Court's electronic filing system.

/s/ Steven J. Dutton

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