

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

O. John Benisek, et al.

Plaintiffs,

vs.

Linda H. Lamone, et al.,

Defendants.

Case No. 13-cv-3233

Three-Judge Court

JOINT STATUS REPORT

Pursuant to this Court's November 16, 2016 scheduling order, as since amended (*see* Dkts. 108, 173), the parties submit the following status report.

I. WHETHER DISCOVERY HAS BEEN COMPLETED

Discovery is complete, with the exception of the deposition of Plaintiffs' expert, Prof. Michael McDonald, which had to be rescheduled due to illness. The deposition of Prof. McDonald will be completed Monday, June 5, 2017. *See* Dkts. 176, 179.

II. WHETHER ANY MOTIONS ARE PENDING

On May 31, 2017, the Plaintiffs filed a Rule 65(a) Motion for a Preliminary Injunction and to Advance and Consolidate the Trial on the Merits, or, in the Alternative, for Summary Judgment. Dkt. 177 (the "PI Motion"). Defendants intend to oppose the PI Motion and to cross move for summary judgment. The parties have been unable to agree on how the schedule for briefing on the cross-motions should proceed.

A. Plaintiffs' position on schedule

As explained at length in the PI Motion (Dkt. 177, at 30-32), Plaintiffs must obtain an injunction by mid-August, and new map by mid-December, in order to avoid irreparable injury with respect to the upcoming 2018 election.

Plaintiffs filed their second amended complaint (Dkt. 44) on March 3, 2016, shortly after the Supreme Court remanded the case for further proceedings before a three-judge district court. Because the primaries for the 2016 congressional elections had taken place two days earlier (on March 1, 2016), it was by then too late to obtain preliminary injunctive relief for the 2016 election cycle. At the same time, Plaintiffs have repeatedly expressed their view—in both hearings before this Court and discussions with opposing counsel—that they must obtain an injunction by the middle of this summer (with a map by the end of the year) in order to avoid additional irreparable injury in the 2018 election cycle. *See, e.g.*, April 22, 2016 Hrg. Tr. 9:23-10:5 (Dkt. 52); Mar. 6, 2017 Hrg. Tr. 37:4-18 (Dkt. 163). Counsel for the State have not once disputed this assertion.

We have, moreover, repeatedly stated our intention to move for preliminary injunctive relief if the litigation were not otherwise proceeding at a sufficient pace to obtain relief in time for the 2018 election cycle. *Cf.* Dkts. 136, 161, 170 (joint motions for extensions of time in which Plaintiffs have reserved their right to seek injunctive relief without regard for the agreed discovery schedule).¹

Against this backdrop, Plaintiffs respectfully submit that the Court should not entertain any requests for substantial extensions of time beyond the default filing schedule established by this Court's Rule 105.2(a). Doing otherwise would make it nearly impossible to obtain relief by mid-August, threatening precisely the irreparable injury that Plaintiffs seek to forestall in the PI Motion. What is more, because Plaintiffs will endeavor to file their reply-opposition brief in fewer than the 14 days allowed, we

¹ Anticipating that the State might cross-move for summary judgment, Plaintiffs' counsel conferred with counsel for the State by email on May 30, 2017, informing them that unless they were prepared to file their motion by or before May 31, 2017, Plaintiffs would file the initial motion. *See* Local Rule 105.2(c).

propose that the Court establish deadlines using time periods, rather than set calendar dates.

Plaintiffs accordingly propose the following schedule:

- Defendants shall file their opposition to the PI Motion and their cross-motion for summary judgment on **June 21, 2017**. This allows Defendants a full additional week beyond the 14 days allowed by Rule 105.2(a) to accommodate the expert-witness depositions that Defendants' counsel must take on Friday, June 2, 2017 and Monday, June 5, 2017.
- Plaintiffs shall file their reply-opposition memorandum **within 14 days** of the filing of Defendants' opposition-opening memorandum.
- Defendants shall file their reply memorandum **within 14 days** of the filing of Plaintiffs' reply-opposition memorandum.

B. Defendants' position on scheduling

For the reasons that follow, the Defendants request 30 days to file their response to the Plaintiffs' motion for preliminary injunction and, in the alternative, summary judgment, and to file Defendants' cross-motion for summary judgment.

The Plaintiffs initially filed their First Amendment challenge to Maryland's 2011 congressional redistricting plan in November 2013, a full year after the first election under the plan took place. At no time prior to the district court's dismissal of the Plaintiffs' complaint did the Plaintiffs seek preliminary injunctive relief to enjoin the State from enforcing the Plan during the 2014 midterm congressional election. After the case was remanded from the Supreme Court, the Plaintiffs filed their second amended complaint in March 2016. The Plaintiffs did not seek preliminary injunctive relief at that time or reasonably thereafter, and the 2016 election proceeded accordingly. Now, over a year later and following an extensive discovery period, the Plaintiffs have sought a preliminary injunction grounded on their contention that if they do not receive relief within three months (and nearly six years after the Plan went into effect)

they will suffer irreparable injury. The Plaintiffs make this claim despite having allowed three congressional elections to occur under the Plan before seeking any preliminary injunctive relief.

Plaintiffs have now filed a motion styled a preliminary injunction while seeking dispositive relief under Federal Rules of Civil Procedure 56 and 65(a). The Plaintiffs' motion benefits from a nearly complete evidentiary record, which they have made full use of by referencing 55 exhibits in their 36-page memorandum. The Plaintiffs seek to benefit further from their unilateral decision to file a dispositive motion without having met and conferred with Defendants, as required under Local Rule 105(2)(c).² They do so by opposing Defendants' reasonable request of a two-week and two-day extension of time for response; a response that must encompass an opposition to Plaintiffs' motion for preliminary injunction, opposition to Plaintiffs' motion for summary judgment, and Defendants' cross-motion for summary judgment. This request is more than reasonable given the nature of the relief sought by the Plaintiffs, the voluminous summary judgment record, and that any alleged prejudice that the Plaintiffs claim they will suffer from the additional briefing time is the result of their own delay.

Defendants respectfully request the following proposed briefing schedule:

- Defendants shall file their opposition to the Plaintiffs' motion for preliminary injunction and, in the alternative, summary judgment and Defendants' cross-motion for summary judgment on **June 30, 2017**. This allows Defendants the four weeks they have consistently requested for preparing their summary judgment brief plus two additional days to accommodate the expert-witness

² Plaintiffs' counsel requested to meet and confer with Defendants' counsel concerning cross-moving for summary judgment, and Defendants' counsel proposed times to meet and confer on this topic later that same day or the following morning. Plaintiffs' counsel then requested to meet and confer concerning the filing of this status report. With no explanation, however, Plaintiffs' counsel filed their motion for summary judgment prior to any meet and confer session.

depositions that Defendants' counsel must take on Friday, June 2, 2017 and Monday, June 5, 2017.

- Plaintiffs shall file their reply-opposition memorandum **within 14 days** of the filing of Defendants' opposition-opening memorandum.
- Defendants shall file their reply memorandum **within 14 days** of the filing of Plaintiffs' reply-opposition memorandum.

C. Length of memoranda

The parties agree to the following length limits for the briefing moving forward: Defendants' opposition-opening memorandum and Plaintiffs' reply-opposition memorandum each shall be 55 pages or less. Defendants' reply memorandum shall be 20 pages or less.

III. WHETHER ANY PARTY INTENDS TO FILE A DISPOSITIVE PRETRIAL MOTION

Plaintiffs have filed a Rule 65(a) Motion for a Preliminary Injunction and to Advance and Consolidate the Trial on the Merits, or, in the Alternative, for Summary Judgment. *See* Dkt. 177. Plaintiffs do not intend to file any other dispositive pretrial motions. Defendants intend to file a cross-motion for summary judgment.

IV. TRIAL

A. Plaintiffs' position on trial

Unless the Court is inclined to grant summary judgment without a hearing, Plaintiffs submit that trial should proceed as expeditiously as possible to avoid further irreparable injury. *See* Dkt. 177, at 34-35. To that end, Plaintiffs respectfully suggest that the Court adopt the following accelerated schedule:

- Plaintiffs serve a draft Pre-Trial Order on Defendants on June 30, 2017
- Submission of Pre-Trial Order on July 12, 2017
- Pre-trial Conference on July 19, 2017
- First day of trial on July 24, 2017

Plaintiffs are mindful that our proposed trial schedule overlaps with the final two briefs on the PI Motion and the State's cross-motion for summary judgment. While we acknowledge that the overlap is inconvenient, it is not avoidable without inflicting irreparable injury on Plaintiffs. What is more, the added burden will fall harder on Plaintiffs themselves (who will at the time be writing their 55-page reply-opposition brief) than on Defendants (who will be writing only their 20-page reply brief).

Plaintiffs anticipate that no more than 4 days of testimony will be necessary. We remain hopeful that less will be needed as the parties negotiate further stipulations in the Pre-Trial Order. The Plaintiffs further propose that oral argument (if any) on the dispositive motions be held at the conclusion of the presentation of evidence, with 30 minutes per side.

B. Defendants' position on trial

Defendants continue to believe that this matter is appropriate for resolution on summary judgment. Alternatively, if the preliminary injunction motion is entertained prior to consideration of summary judgment, it is capable of resolution without an evidentiary hearing. Defendants therefore believe that it is premature to set trial preparation or trial dates. However, Defendants do not object to the setting of a trial date and appropriate pre-trial deadlines as soon as practicable after the resolution of the pending and contemplated dispositive motions and anticipate working cooperatively with Plaintiffs' counsel to set an expeditious schedule at the appropriate time.

Further, the Plaintiffs' proposed schedules overlaps the time in which the parties will be briefing dispositive motions and filing pre-trial memoranda. This compressed schedule highly prejudices the Defendants and does not allow adequate time to prepare for a trial on the merits. Accordingly, if this Court is inclined to set a trial schedule,

Defendants respectfully request that no pre-trial deadlines are set before the end of the deadlines for filings related to the parties' preliminary injunction and summary judgment motions.³

V. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

The parties do not believe that this case can be settled or that referral to a mediator would be fruitful.

VI. OTHER MATTERS THAT SHOULD BE BROUGHT TO THE COURT'S ATTENTION

Because Plaintiffs' PI Motion must be heard and determined by the full Court (*see* 28 U.S.C. § 2284(b)(3)), which will have to decide whether and when to hold a hearing or trial, Plaintiffs respectfully request that all of the scheduling issues raised in this joint status report be decided by the full Court so as to avoid any conflicts or delay.

The Defendants have no objection to Judge Bredar continuing to set the schedule for the proceedings moving forward.

For the plaintiffs

/s/ Michael B. Kimberly

Michael B. Kimberly, Bar No. 19086
mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
phughes@mayerbrown.com
Stephen M. Medlock, *pro hac vice*
smedlock@mayerbrown.com
E. Brantley Webb, *pro hac vice*
bwebb@mayerbrown.com
Micah D. Stein, *pro hac vice*
mstein@mayerbrown.com
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3000 (office)
(202) 263-3300 (facsimile)

For the defendants

/s/ Jennifer L. Katz

(signed by Michael B. Kimberly
with permission of Jennifer L. Katz)
Jennifer L. Katz, Bar No. 28973
jkatz@oag.state.md.us
Sarah W. Rice, Bar No. 29113
srice@oag.state.md.us
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7005 (office)
(410) 576-6955 (facsimile)

³ Due to pre-planned family vacations, Defendants' counsel are not available during the weeks beginning August 14 and August 21.