

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

OHIO A. PHILIP RANDOLPH INSTITUTE, <i>et al.</i>	:	
	:	
Plaintiffs,	:	Case No. 1:18-cv-357
	:	
v.	:	Judge Timothy S. Black
	:	Judge Karen Nelson Moore
GOVERNOR JOHN R. KASICH, et al.	:	Judge Michael H. Watson
	:	
Defendant.	:	

DEFENDANTS' POSITION STATEMENT

MIKE DEWINE
Ohio Attorney General

STEVEN T. VOIGT (0092879)*
Principal Assistant Attorney General
**Lead and Trial Counsel*
NICOLE M. KOPPITCH (0082129)
Senior Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872 | Fax: 614-728-7592
steven.voigt@ohioattorneygeneral.gov
nicole.koppitch@ohioattorneygeneral.gov

Counsel for Defendants

DEFENDANTS' POSITION STATEMENT:

**Request to Briefly to Extend Defendants' Response Time Until After
Forthcoming Supreme Court Rulings in *Gill* and *Benisek*; Opposition to
Plaintiffs' Request for Expedited Discovery**

On May 23, 2018, Plaintiffs served a forty-two page Complaint against Ohio's Governor and Secretary of State, as well as the Speaker Pro Tempore of the Ohio House of Representatives and the President of the Ohio Senate ("Defendants"). Plaintiffs' Complaint challenges Ohio's current United States congressional districting plan—a plan that has been in effect for 6 ½ years and used in four congressional election cycles, without any challenges. Plaintiffs now ask this Court to permanently enjoin the Defendants from using the plan for the remaining two congressional election cycles.¹

Defendants request a modest extension to respond to the Complaint pending the Supreme Court's forthcoming decisions in *Gill v. Whitford* (U.S.S.C. Case No. 16-1161) and *Benisek v. Lamone* (17-333), decisions very likely to establish the legal backdrop for this case. Those opinions are expected by the end of this term, this month; therefore Defendants request an extension until the earlier of two weeks after those decisions issue or July 13, 2018. Discovery would start thereafter as ordinarily directed by Civ.R. 26. Plaintiffs propose expedited discovery prior to the decisions, purportedly to have "a final map in place in time for the 2020 congressional elections." Plaintiffs propose serving Defendants with written discovery by mid-June, with responses due in mid-July, but have not provided Defendants with the specific topics of this discovery.²

¹ Plaintiffs acknowledge that a recent amendment to the Ohio Constitution will make changes to the re-districting process following the next census and beginning with the 2022 election cycle. *See*, Compl. at ¶ 39, fn. 1. Plaintiffs do not appear to challenge that plan.

² To the extent Plaintiffs believe expedited discovery is necessary after the *Gill* and *Benisek* decisions, Defendants would propose revisiting this issue at that time when the parties have a better understanding of the legal landscape and scope of appropriate discovery.

A. The decisions in *Gill* and *Benisek* will directly affect the course of this litigation.

Gill, filed in 2015, involves a constitutional challenge to Wisconsin's state legislative district plan that was adopted in 2012. Similarly, *Benisek*, filed in 2013, involves a challenge to Maryland's 2011 congressional districting plan. Either of these Supreme Court cases could end this litigation by determining such challenges are nonjusticiable: At the very least, they are likely to shape the scope of the claims, defenses, and discovery. Judicial economy and preservation of resources strongly counsel waiting a few weeks to assess the opinions produced by those cases before proceeding here. All observers expect those decisions to issue yet this month, and for any added comfort Defendants do not propose an extension of beyond July 13. Plaintiffs' waited seven years to challenge Ohio's districting plan, the State should be permitted a couple weeks to assess Supreme Court cases directly on point.

B. Plaintiffs cannot demonstrate good cause for expedited discovery.

Rule 26 of the Federal Rules of Civil Procedure governs discovery. Rule 26(d) provides, in pertinent part: "Except ... when authorized under these rules or by order or agreement of the parties a party may not seek discovery ... before the parties have conferred as required by Rule 26(f)." Expedited discovery, though permitted under the rule, "is generally seen as the exception and not the norm." *Skylink Ltd. v. UniTek Global Servs.*, 2014 U.S. Dist. LEXIS 2503, at *6 (N.D. Ohio) citing *St. Louis Group, Inc. v. Metals and Additives Corp., Inc.*, 275 F.R.D. 236, 240 (S.D. Tex. 2011). Ohio's district courts have applied a good cause standard for permitting expedited discovery. See e.g. *Arista Records, LLC v. Doe*, 2007 U.S. Dist. LEXIS 97283, at *7 (S.D. Ohio) ("[E]xpedited discovery is appropriate upon a showing of good cause."). The party seeking expedited discovery bears the burden of demonstrating good cause. *Best v. Mobile Streams, Inc.*, 2012 U.S. Dist. LEXIS 170342, at * 2 (S.D. Ohio).

Courts consider several factors in determining if good cause exists: (1) the danger that the information sought will be lost or destroyed, (2) whether the discovery would substantially contribute to moving the case forward, and (3) the scope of the information sought. *Barrette Outdoor Living, Inc. v. Doe*, 2016 U.S. Dist. LEXIS 52919, at *4 (N.D. Ohio) citing *Voltage Pictures, LLC v. Does 1-43*, 2013 U.S. Dist. LEXIS 63764, 2013 (N.D. Ohio); *see also Best* at *4-5 (No good cause where there was no evidence that information would be destroyed and identity of John Does was unnecessary in order to advance litigation); *Skylink Ltd.* at *6 (Expedited discovery denied where there was no allegation that records were being destroyed or that the information would not be available at a future date; information requested related to the merits of the case and appeared to be an effort to “circumvent the normal litigation process.”)

Plaintiffs cannot show good cause for expedited discovery. Discovery is not needed at this juncture to substantially progress this case. There are no motions for injunctive relief or jurisdictional motions pending that require responsive discovery. *See e.g. Lemkin v. Bell's Precision Grinding*, 2009 U.S. Dist. LEXIS 126739 (S.D. Ohio). Plaintiffs have not alleged that any of the information they seek is at risk of being lost or destroyed. *Best* at *3. Nor have they alleged that they will suffer irreparable harm prior to the ordinary course of discovery or that they will suffer any prejudice.

Plaintiffs have had nearly seven years to prepare this case. That they now claim to need expedited discovery to prepare their case for resolution by 2020 is an issue of their own making and should not shift burdens to Defendants. Plaintiff's request is merely an effort to “circumvent the normal litigation process” (*Skylink* at *6), not good cause. Plaintiffs' request should be denied.

Respectfully submitted,

MIKE DEWINE
Ohio Attorney General

/s/ Nicole M. Koppitch

STEVEN T. VOIGT (0092879)*

Principal Assistant Attorney General

**Lead and Trial Counsel*

NICOLE M. KOPPITCH (0082129)

Senior Assistant Attorney General

Constitutional Offices Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

Tel: 614-466-2872 | Fax: 614-728-7592

steven.voigt@ohioattorneygeneral.gov

nicole.koppitch@ohioattorneygeneral.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2018, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

s/ Nicole M. Koppitch

NICOLE M. KOPPITCH (0082129)
Senior Assistant Attorney General