

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

WILLIAM WHITFORD, et al.,

Plaintiffs,

v.

No. 15-cv-421-jdp

BEVERLY R. GILL, et al.,

Defendants.

THE WISCONSIN ASSEMBLY
DEMOCRATIC CAMPAIGN COMMITTEE,

Plaintiff,

v.

No. 18-cv-763-jdp

BEVERLY R. GILL, et al.,

Defendants.

***WHITFORD* PLAINTIFFS' AND WISCONSIN ASSEMBLY DEMOCRATIC
CAMPAIGN COMMITTEE'S JOINT BRIEF IN OPPOSITION TO WISCONSIN
STATE ASSEMBLY'S EMERGENCY MOTION TO STAY**

INTRODUCTION

The map at issue in these cases has been in place for every election during the current decennial election cycle save one. Should the Plaintiffs succeed on the merits of their claims, their only hope for relief is to obtain a final decision in time for a remedy to be in place for the 2020 elections, less than two years away. At a preliminary pretrial conference on October 16, 2018, this Court adopted a schedule, to which the Assembly agreed to be bound, that would preserve the Plaintiffs' opportunity to obtain meaningful relief. *See* dkt. 215. As such, the parties are currently in the midst of finalizing depositions and preparing for trial beginning April 23, 2019. Dkt. 215, at 21:9-10. Post-trial briefing is set to conclude on May 31, 2019, at which time the case will be

submitted to the panel with the hope that a final decision can be issued over the summer and an appeal taken to the Supreme Court early in the next term. *See* dkt. 215, at 24.

On January 4, the Supreme Court announced that it would hear *Rucho v. Common Cause* and *Lamone v. Benisek*, two cases that also involve claims of partisan gerrymandering. *See* Order List, 586 U.S. ___ (Jan. 4, 2019). The Court further announced that both cases would be set for oral argument in March. *Id.* Although a decision in those cases could come any time after oral argument, it is unlikely that the Court will issue an opinion before June.

Defendant-Intervenor the Wisconsin State Assembly has moved this Court to stay these cases until the Supreme Court issues its decisions in *Rucho* and *Lamone*. Given the timeline of the Supreme Court decision and the remaining tasks to be completed in these cases, the requested stay would likely push a decision by this Court out at least six months, until the end of this year. Absent extraordinary circumstances, this timeline would preclude any Supreme Court appeal during the 2019-2020 term and would therefore render it nearly impossible for Plaintiffs to obtain relief prior to the 2020 elections. This Court should not countenance the Assembly's attempt to run out the clock on the 2011 gerrymander. The motion for a stay should be denied.

ARGUMENT

This Court should deny the Wisconsin State Assembly's motion to stay these cases pending a decision by the Supreme Court in *Rucho v. Common Cause* and *Lamone v. Benisek*. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In deciding whether to stay an action pending the outcome of a similar case, courts must “weigh competing interests and maintain an even balance.” *Id.* at 255. “Benefit and hardship will be set off, one against the other, and upon an ascertainment

of the balance the court will exercise a discretionary judgment in the exercise of its power.” *Radio Corp. of Am. v. Igoe*, 217 F.2d 218, 220 (7th Cir. 1954) (citing *Landis*, 299 U.S. at 259). “This approach protects the substantial rights of the parties while permitting the district court to manage its time effectively.” *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 686 (7th Cir. 1987).

A stay is unnecessary here because the Court has already weighed the competing interests at stake and adopted a schedule that promotes judicial efficiency, minimizes any potential prejudice to Defendants, and preserves Plaintiffs’ opportunity to obtain relief. During the pretrial conference, both the Defendants and the Assembly raised the question of whether a decision in *Rucho* would impact the scheduling in these cases. Recognizing the “very unusual situation in which we find ourselves,” the Court determined that a forthcoming decision can have “no impact on what we’re doing until we see [it],” because “we don’t have the luxury of waiting for the decision before we decide how to schedule this case.” Dkt. 215, at 11:13-14, 12:21-23. As such, the Court adopted a schedule that would ensure these cases could proceed in a timely fashion, while minimizing the potential for wasted time or duplicative effort. *See, e.g.*, dkt. 215, at 11:10-17 (“[W]e fully intend to resolve this matter as expeditiously as we can. We’re not starting over from scratch. . . . [W]e fully intend to get this resolved by next summer so that we can have it to the Supreme Court so that the Supreme Court can do what it will with the case in the 2019 to 2020 term.”).

Even if the Court had not already rejected further delay, the hardships substantially outweigh any potential benefits of staying these cases. A stay would almost certainly delay the proceedings beyond the point at which Plaintiffs can obtain any meaningful relief for the 2020 elections, ensuring that the unconstitutional 2011 gerrymander remains in place for the entire decennial cycle. This injury is further compounded because the Assembly elected in 2020 will

conduct the 2021 redistricting process, providing an opportunity to extend the constitutional violations of the 2011 map through the next decennial cycle. This harm is both severe and irreparable. In contrast, delaying until the Supreme Court rules in *Rucho* and *Lamone* would have only a minimal effect on promoting the interests of judicial economy and preventing prejudice to the Defendants.¹

Granting a stay would preclude these cases from being heard in the next Supreme Court term and would therefore deny Plaintiffs any chance at obtaining relief. As counsel for the Assembly noted during the preliminary pretrial conference, “the most important thing ultimately is for the Court to have enough time to resolve the issues and issue a decision” such that “a jurisdictional statement is filed by October 1st or so,” and these cases can be heard during the next Supreme Court term. Dkt. 215, at 24:15-20. Assuming the Supreme Court does not rule on *Rucho* and *Lamone* before the end of June, that leaves only three months between the lifting of a stay and the drop deadline acknowledged by the Assembly for filing a jurisdictional statement. Three months is simply not enough time to finish the tasks necessary to complete this Court’s review of the cases, much less get them before the Supreme Court.² Even under the current, compressed schedule those tasks are expected to take six months, not including the time

¹ Though the Assembly purportedly seeks to promote judicial economy, its actions since intervening contradict its asserted intentions. *See, e.g.*, dkt. 225 (Defendant-Intervenor’s Motion to Dismiss, asking this Court to relitigate several years of case history in this action). This Court has already expended substantial time and effort ensuring that these cases proceed in a fair and efficient manner. It hardly promotes judicial efficiency to ask the Court to reconsider its scheduling order simply because the Supreme Court took precisely the actions already anticipated when the schedule was set. This is particularly true given counsels repeated assurances to this Court that the Assembly would abide by the schedule set during the pretrial conference. *See* dkt. 215, at 19:4-7 (stating that should the Assembly’s motion be granted, “[it] would take the schedule as it is established”); *id.* at 23:17-18 (stating that with regard to the proposed pre-trial schedule, “Thank you, Your Honor. Yes, we would be prepared to meet that”); *id.* at 24:14-15 (agreeing to the post-trial briefing schedule); *id.* at 19:11 (noting with regard to the potential for asking for a stay pending *Rucho* that “we’re happy to accommodate this Court’s schedule”).

² Once the stay is lifted, the parties would need to re-schedule and complete the fact and expert discovery necessary to be prepared for trial; this Court would need to re-schedule and hold a four-day trial; the parties would need to file what will likely be “very substantial [post-trial] briefs on the merits;” and only then would this Court be able to issue a decision. Dkt. 215, at 14:18-20. *See also, id.* at 13:5, 13:23-25.

necessary to prepare and file a jurisdictional statement at the Supreme Court.³ Indeed, if this Court grants the Assembly's request for a stay, there is simply no reasonable scenario under which these cases could be ripe for review by the Supreme Court next term.

Tellingly, the Assembly does not address the impact a stay would have on Plaintiffs' claims. It offers no explanation for how a stay would still allow this Court "enough time to resolve the issues and issue a decision" such that "a jurisdictional statement is filed by October 1st" and the cases are heard by the Supreme Court in the next term. Dkt. 215, at 24:15-19. Absent such a showing, the Assembly cannot reasonably suggest that its request for a stay is motivated by anything more than a desire to preserve the unconstitutional 2011 gerrymander through the end of the decennial cycle. Given this blatant attempt at gamesmanship, and the severe hardship it would impose on Plaintiffs, the Court should deny the stay.

Even setting aside the hardship imposed on Plaintiffs, the limited benefits of waiting for the forthcoming Supreme Court rulings do not merit a stay. The claims raised in *Rucho* or *Lamone*, though touching on many of the same issues raised in this litigation, are not so similar that a decision in either case would necessarily resolve the claims at issue in the cases at hand. *See, e.g., Common Cause v. Rucho*, Nos. 1:16-cv-1026, 1:16-cv-1164, 2017 WL 3981300 (M.D.N.C. Sept. 8, 2017) (three-judge court). The three-judge court in *Rucho* declined to stay the consolidated cases challenging North Carolina's congressional districts while *Gill v. Whitford* was heard by the Supreme Court, despite "some similarities" between the claims at issue. *Id.* at *4. In particular, *Rucho* involves both "a distinct framework for assessing partisan gerrymandering claims under the First Amendment," and claims under the Constitution which

³ Given that the Supreme Court will not hear *Rucho* and *Lamone* until March, it is unlikely that a decision will be issued until the end of the term. Even granting the Assembly benefit of an unlikely scenario, a decision as early as May 1, 2019 would still leave only five months for the cases to be decided in this Court and for the parties to seek review by October 1, 2019.

are applicable only to congressional elections. *Id.* at *5. Thus, the panel found that a Supreme Court ruling in *Gill* would not resolve all of the claims raised in *Rucho*. *Id.* at *6.

The same logic applies here – the Supreme Court could rule on the alternative claims or frameworks put forward in *Rucho* and *Lamone*⁴ without providing this Court any additional guidance as to how to resolve the claims at issue in the instant cases. *Id.*; *see also, e.g., Ga. State Conference of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1283 (N.D. Ga. 2017) (declining a stay pending the Supreme Court’s ruling in *Gill* because “[t]he Supreme Court’s jurisprudence on partisan gerrymandering teaches us that the Court could rule in a variety of ways”). As previous courts have concluded, it makes little sense to risk foreclosing Plaintiffs’ claims entirely by “waiting for a decision that may not ultimately affect” the outcome of this litigation. *Id.*; *see also, Rucho*, 2017 WL 3981300, at *6. Instead, the more prudent course would be for this Court to proceed with hearing the parties’ evidence and legal arguments on the current schedule but to withhold judgment until the Supreme Court rules in *Rucho* and *Lamone*. Even if the Court requires additional briefing in light of those decisions, there is a much greater chance that briefing can be accomplished on an expedited schedule that would preserve the Plaintiffs’ ability to obtain relief.

Moreover, there is no reason to suspect that the factual and legal disputes still to be resolved in this matter will suddenly become irrelevant once the Supreme Court releases its rulings in *Rucho* and *Lamone*. This is particularly true with regard to discovery and proceedings related to the standing of the individual Plaintiffs, given that the Supreme Court has already announced the relevant standard. Because this Court will have to consider these issues regardless of the decisions in *Rucho* and *Lamone*, it is hardly a waste of judicial time and resources to do so now, particularly

⁴ *Lamone* presents yet another distinct framework for analyzing partisan gerrymandering claims under the First Amendment.

when it may be the only way to ensure Plaintiffs are not denied relief should their claims be successful. *See Rucho*, 2017 WL 3981300 at *6 (finding that conducting further proceedings was “unlikely . . . to amount to an ‘unnecessar[y]’ expense of time and resources, as the evidence and arguments presented by the parties will be necessary to resolve this case, regardless of the disposition of *Whitford*”) (alteration in original).

Finally, the mere possibility that the Supreme Court could rule that partisan gerrymandering claims are nonjusticiable is not a sufficient reason to stay these cases. The Supreme Court had the opportunity to close the door on partisan gerrymandering claims in *Gill* and it declined to do so. 138 S. Ct. 1916, 1929 (2018). Nor did the Court dismiss the case when it found the original plaintiffs had failed to demonstrate standing. *Id.* at 1934. This Court should not now do what the Supreme Court twice declined to do, and effectively dismiss Plaintiffs’ claims before the underlying legal issues are finally resolved. The Assembly’s Motion should be denied.

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