IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* v. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]
AKILAH BACY, *et al.*, *Plaintiffs,* v. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § §	Case No. 1:21-cv-00965 [Consolidated Case]

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE BACY PLAINTIFFS' SUPPLEMENTAL COMPLAINT

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INTRODUCTION

Section 2 of the Voting Rights Act already toes the constitutional line by requiring state legislatures to create voting districts that privilege discrete racial groups. The Supreme Court has thus far tolerated the undeniable tension between such race-based lawmaking and the Equal Protection Clause because of Section 2's laudable purpose in redressing historical discrimination. But Plaintiffs' efforts to force the Texas Legislature to privilege a political coalition of Black and Latino voters in Tarrant County has no logical connection to historical race discrimination—at least not without a heavy and legally impermissible presumption that such animus has occurred. The Court should dismiss Plaintiffs' coalition claims because they stretch the text of Section 2 well beyond both its textual and constitutional bounds.

Rather than address these arguments, Plaintiffs try to change the subject in two different ways. Neither has merit.[1] *First*, they insist that it is both too early and too late for Defendants to raise an objection to the Supplemental Complaint's coalition claims: too early because the Fifth Circuit has not yet decided *Petteway v. Galveston County*, 86 F.4th 1146 (5th Cir. 2023) (per curiam), and too late because the motion should have been filed either 14 or 21 days (Plaintiffs are not sure) after the filing of the Supplemental Complaint. That type of whipsaw is what Defendants are seeking to avoid. By filing its motion now, Defendants preserve their arguments and ensure that this Court will have an opportunity to eliminate those claims that are held to be inconsistent with Section 2. Defendants do not object to the Court holding the motion for *Petteway*. The motion is also timely under the rules, and even if it were not, (1) Plaintiffs suffer no prejudice, and (2) the Court can construe the motion as one for judgment on the pleadings—which is unquestionably timely.

Second, Plaintiffs maintain that Defendants' motion is directed at the wrong pleading. Yet only the Supplemental Complaint attacks operative legislation. Any motion directed at the Third Amended Complaint would have been mooted by the enactment of House Bill 1000. Moreover, Plaintiffs' related assertion that Defendants' arguments against coalition claims have nothing to

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[1] Because Plaintiffs decline to engage in the merits of Defendants' arguments, Defendants will not burden the Court by reiterating them here.

do with the Supplemental Complaint makes no sense. Coalition claims are all over the Supplemental Complaint. One of Plaintiffs' principal allegations is that the Texas Legislature should have created an additional coalition district in Tarrant County to ensure that a group of Blacks and Latinos could band together to elect a candidate of their collective choice.

ARGUMENT

I. The Motion is Timely.

Rather than respond to the merits of the Defendants' motion, Plaintiffs challenge its timing with a gathering of arguments Goldilocks could be proud of—that the motion was somehow both too early and too late. Not so. As Defendants made clear in their motion, they filed the motion now to preserve the issue should *Petteway* rule (as it should) that coalition districts are no more consistent with the text of Section 2 than crossover claims. And they did so entirely consistent with the Federal Rules of Civil Procedure, which do not provide a specific deadline to respond to supplemental complaints absent a contrary scheduling order of the Court, which does not exist here.

A. The motion is not too early.

On August 25, 2023, the Parties conferred via Zoom regarding the Court's order to file a joint status report. Dkt. 729. At that conference, Defendants' counsel directly asked when Plaintiffs intended to amend their complaints to address HB 1000. Plaintiffs were not forthcoming about their plans. *See* Dkt. 730, p. 7 ("Additionally, the Plaintiffs have . . . only this evening, informed the State Defendants that one or more of the Plaintiffs['] groups plan to amend their pleadings to address the redistricting plans enacted by the 88th Legislature.").

In March 2024, Plaintiffs belatedly announced their intent to amend or supplement their complaints to address HB 1000. While they specified no timeline, they made clear that all Plaintiffs' groups would revise shortly. To date, however, only two Plaintiffs' groups have revised their complaints. Dkt. 777, 762. Defendants have moved to dismiss both. Dkt. 779, 785.

Plaintiffs fault Defendants (at 3–4) for not waiting until the outcome in *Petteway* before moving

to dismiss Plaintiffs' coalition claims. But *Petteway* may come down any day. Defendants would not object if the Court wishes to stay further consideration of Plaintiffs' coalition claims pending resolution of *Petteway*. What Defendants wish to avoid is an inadvertent forfeiture of this potentially claim-dispositive issue.

B. The motion is not too late.

At the same time, Plaintiffs insist (at 4–7) that Defendants' motion is too late. But the agreement on which Plaintiffs purport to rely does not exist. Neither the parties nor the rules set a deadline. And even if that were not so, the Court can (and should) deem the motion timely for two separate reasons.

1. The parties did not reach an agreement on a dispositive-motions deadline.

To start, Plaintiffs are incorrect that the parties agreed to a two-week deadline on any motion to dismiss. In March, Defendants conferred with the Bacy Plaintiffs regarding an answer date, largely due to the expectation that the State would shortly need to respond to seven additional supplemental or amended complaints. In that conference, counsel for Defendants made clear that Defendants had not decided whether to file a motion to dismiss. Mr. Fox's assertion to the contrary is, respectfully, incorrect. Counsel for Bacy Plaintiffs stated that a 30-day deadline for an answer made sense but preferred a 14-day deadline for a motion to dismiss.[2] That Plaintiffs contemplated different deadlines as between answer and motion to dismiss undermines Plaintiffs' assertion that an agreement as to an answer deadline constituted an agreement as to a motion to dismiss deadline. Because Defendants had reached no decision on whether to file a motion to dismiss, the parties reached no agreement on a date for filing one. As shown below, the Court need not resolve this factual disagreement, but if it does, it should resolve it in favor of Defendants.

[2] The undersigned counsel considers his Rule 11-bound duty of candor to the court to be sufficient for purposes of such factual assertions (and would have accepted Mr. Fox's in like manner, the Parties' factual disagreement notwithstanding). To the extent the Court finds it necessary, the undersigned counsel will happily attest to these same facts under oath.

2. Rule 15(d) does not establish a dispositive-motion deadline for supplemental pleadings.

Nor is Defendants' motion late by operation of law. Federal Rule of Civil Procedure 15(d) governs supplemental pleadings. The Rule sets no timeline for responding and leaves such timing to the Court's discretion, stating only that the "court may order that the opposing party plead to the supplemental pleading within a specified time." Fed. R. Civ. P. 15(d). The Court never so ordered. Indeed, there has been no applicable scheduling order in over a year. Tellingly, Plaintiffs do not definitively say otherwise. To the contrary, Plaintiffs concede (at 6) that the Court's order allowing supplementation sets no deadline, and further concede the deadline "was arguably unclear." Dead certain that a deadline must nonetheless have passed, they propose (at 5–6) importing any of several deadlines from elsewhere. They are, however, uncertain as to which of these transplanted deadlines, exactly, should apply. Their uncertainty results from a refusal to apply two basic interpretive canons.

First, Plaintiffs disregard the principle that courts eschew surplusage. *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 294 (5th Cir. 2020) (en banc) (quoting *Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011)). After all, trial courts—indeed, any court—has broad discretion to manage its own docket by deviating from scheduling defaults. *See In re Deepwater Horizon*, 988 F.3d 192, 197 (5th Cir. 2021) (per curiam). As a result, if one of the deadlines that Plaintiffs seek to import from other rules applied, there would be no need for Rule 15(d) to specifically state that the court "may order" a different deadline. Plaintiffs' view should thus be rejected as inconsistent with the "cardinal principle of statutory construction"—equally applicable in other legal instruments—"that [courts] must 'give effect, if possible, to every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche,* 348 U.S. 528, 538–539 (1955)); *see also* Fed. R. Civ. P. 16; *Hodges v. United States*, 597 F.2d 1014, 1018 (5th Cir. 1979).

Second, Plaintiffs' reading of Rule 15(d) also violates the canon of *expressio unius est exlusio alterius*: courts "generally presume[]" that, where rule-setting authority "includes particular

language in one section of a statute but omits it in another section of the same Act," that authority "acts intentionally and purposely in the disparate inclusion or exclusion." *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015) (Smith, J.), *aff'd by an equally divided court*, 579 U.S. 547 (2016). Rules 12(b) and 15(a) set deadlines; but Rule 15(d) sets none, and instead leaves setting a supplemental pleading response deadline to the Court. The Court set no such deadline, and the parties never agreed to one. As a result, the motion is timely.

3. No prejudice would result from consideration of Defendants' motion.

In all events, Plaintiffs' own delay in supplementing their pleading—316 days following *sine die* of the 88th Texas Legislature—precludes prejudice resulting from any putative delay in filing the motion to dismiss. There is no trial setting in this case; indeed, the same discovery issues whose appeal resulted in the Court's vacating the previous trial setting are on appeal anew. Dkt. 755. Defendants offered to agree to extend the response deadline for the motion to dismiss until after the Fifth Circuit decision in *Pettaway v. Galveston County*, but Plaintiffs declined. Plaintiffs cannot demonstrate prejudice for the additional reason that the Court could construe Defendants' 12(b) arguments as a 12(c) motion, which is inarguably timely. *See* Fed. R. Civ. P. 12(c) (requiring such motions to be filed "early enough not to delay trial"); *see Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) (per curiam) (holding "the district court did not err when it construed the defendants' motion as one for judgment on the pleadings"). That is particularly so given that the motion raised argument with jurisdictional implications under the political-questions doctrine, which can be raised at any time, including by the Court itself.

II. The Motion Addresses the Appropriate Pleading.

Plaintiffs are also wrong to contend (at 5) that the "real target" of Defendants' motion to dismiss is Plaintiffs' Third Amended Complaint rather than their Supplemental Complaint, or to insist (at 2) that Defendants' coalition-claim arguments have "nothing to do with the actual allegations contained" in the Plaintiffs' Supplemental Complaint. Again, this is so for two separate reasons—both of which Plaintiffs admit.

First, as Plaintiffs' Supplemental Complaint acknowledges, the Third Amended Complaint's allegations are leveled at Texas House Bill 1, the implementing legislation for the state House map used in the 2022 election cycle. Dkt. 765 ¶ 3. But House Bill 1 is no longer operative. *Id.* at ¶ 4. Any live dispute now centers on the "current operative state House map," House Bill 1000. *Id.* Indeed, the entire purpose of Plaintiffs' Supplemental Complaint is (presumably) to avoid a mootness issue by updating Plaintiffs' allegations to refer to the extant law. *See id.* at ¶ 10 (alleging that "[a]ll allegations relating to the deficiencies in House Bill 1 in Plaintiffs' Third Amended Complaint . . . apply equally to the substantively identical House Bill 1000"). That is why the Supplemental Complaint's prayer for relief asks for an order enjoining use of the House districts drawn in House Bill 1000 rather that House Bill 1. *Id.* at ¶ c. Defendants appropriately moved for dismissal of the Supplemental Complaint and its effort to dismantle House Bill 1000 rather than the Third Amended Complaint and its effort to dismantle House Bill 1 because any controversy surrounding House Bill 1 is moot.

Second, far from showing Defendants' arguments to be irrelevant to Plaintiffs' claims, Plaintiffs acknowledge just a few pages later (at 8) that "in Tarrant County . . . the Bacy Plaintiffs' claims depend on a coalition district." In fact, references to these coalition claims are all over the Supplemental Complaint. *See id.* at ¶ 14 (alleging that "Latino and Black Texans in Tarrant County are sufficiently numerous and geographically compact to constitute a majority of eligible voters in one additional House district, for a total of five such districts in that county"); *id.* at ¶ 16 (alleging that "under Section 2 of the Voting Rights Act, the Texas legislature was required (a) to create an additional district in Tarrant County in which Black and Latino Texans together have a reasonable opportunity to elect their candidates of choice"); *id.* at ¶ 17 (alleging that "Black and Latino voters in Tarrant County . . . are politically cohesive, and elections in the state reveal a clear pattern of racially polarized voting that allows the bloc of white voters usually to defeat minority-preferred candidates"); *id.* at ¶ b.i. (requesting a court order adopting a redistricting plan that includes an "additional district in Tarrant County in which Black and Latino voters have a reasonable opportunity to elect their candidates of choice").

* * *

Defendants' motion is timely and properly addresses the coalition claims contained in Plaintiffs' Supplemental Complaint. Plaintiffs' response accomplishes nothing but to affirmatively waive "discussion of what the proper framework for evaluating coalition-district claims might be in the absence of controlling precedent." Resp. at 4. *Cf. Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 474 (5th Cir. 2020) (en banc) (Smith, J.) (observing that courts cannot—and should not—"make a party's argument for it in the first place," especially when that party affirmatively declines to address an argument invoked by another litigant).

CONCLUSION

Defendants respectfully move for dismissal of the Bacy Plaintiffs' Supplemental Complaint.

Date: July 11, 2024

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CERTIFICATE OF CONFERENCE

I hereby certify that on July 11, 2024, I conferred with all counsel by email, and none were opposed to this motion.

/s/ Ryan G. Kercher
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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on July 11, 2024, and that all counsel of record were served by CM/ECF.

/s/ Ryan G. Kercher
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