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

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

STATE DEFENDANTS' STATUS REPORT

Almost two years ago, the Court vacated the trial setting in this case. ECF 569. Today, Plaintiffs ask the Court for just 120 days to prepare for a trial "at the end of this year." ECF 798, p. 3. Even if the Court were to grant Plaintiffs' request today, the marathon trial this case requires would begin on November 24, 2024—the Monday before Thanksgiving, less than three weeks after the largest election to take place under the districting plans at issue in this case, and less than 60 days before the inauguration that follows.

State Defendants agree with Plaintiffs that restarting the litigation will require a scheduling order. But legal, factual, and practical developments over the intervening years will complicate the remaining litigation to a degree elided or ignored by Plaintiffs' Status Report. ECF 798. Additionally, the Parties' conference regarding their respective status reports reveals substantial ambiguity regarding the amount of work necessary to prepare for trial. *See* Ex. 1.

State Defendants want to try this case expediently, efficiently, and only once. Plaintiffs' proposal renders such a trial impossible for at least nine reasons. Plaintiffs' proposal is as unrealistic as it is unfair. State Defendants propose a more measured approach of setting some deadlines now, and scheduling a trial date only when the Court and the Parties have more information.

A. Nine Reasons the Parties Cannot Try This Case 120 Days Hence

First: Plaintiffs make the bizarre demand to try this case before discovery disputes they have contested *for years* could possibly resolve. While Plaintiffs correctly catalogue the motions on which the Court has ruled, they note only by footnote that many of those issues are currently on appeal—just as they were in 2022 when the Court vacated the first trial date. *See* ECF 566, p. 2 and n.5; ECF 467 and 479.

The Court issued its ruling on legislators' assertion of the legislative privilege on July 25, 2022. ECF 467. The legislators appealed the next day. ECF 479. The Fifth Circuit administratively stayed the order on July 27, 2022. *See* Order, *LULAC v. Patrick*, No. 22-50662 (5th Cir. July 27, 2022), ECF 30-2. Following *LULAC Texas v. Hughes*, 68 F.4th 228 (5th Cir. 2023), the Fifth Circuit vacated its stay order and remanded to this Court on July 18, 2023. *See* Unpublished Order, *LULAC v. Patrick*, No. 22-50662 (5th Cir. July 18, 2023), ECF 107-1. This Court then ruled on the legislative privilege issues on December 21, 2023. ECF 746. LULAC Plaintiffs appealed that order sixty days later, on February 20, 2024. ECF 755.

In other words, the very legislative privilege appeal that was a driving force in vacating the trial date in August of 2022 is in a procedurally identical place in July of 2024. That appeal has yet to be briefed, is not set for argument, and will not be resolved until long after Plaintiffs' proposed trial date. *See LULAC v. Abbott*, 24-50128 (5th Cir. July 18, 2024) (setting deadline for opening brief). Even if no party seeks an extension to the current briefing schedule of the appeal, briefing would not conclude until approximately the middle of Plaintiffs' proposed trial.

Nor is the legislative privilege appeal the only outstanding discovery issue. In addition to the legislative privilege appeal, Plaintiffs have appealed this Court's order regarding Adam Kincaid. *See* ECF 782, 784. The Kincaid appeal has been consolidated with the legislative privilege appeal and is no closer to resolution. *See LULAC v. Abbott*, 24-50128 (5th Cir.). There is also the third-party subpoena matter currently stayed before Judge Chun in the Western District of Washington. *See Jetton v. United States*, 2:22-cv-1203-JHC (W.D. Wash.), ECF 3, 19.

Plaintiffs must choose between litigating their discovery disputes to conclusion and setting an early trial. A trial with unresolved evidentiary issues leaves State Defendants—the only parties potentially liable for attorneys' fees—vulnerable to the necessity of a second trial and all the attendant waste of judicial and party resources that would entail. Plaintiffs' footnote reads as if only they undertake risk by trying this case prior to resolution of their own discovery disputes. That is flatly incorrect, and their promise of "a brief supplemental hearing" is belied by the scope both of this case and of the unresolved disputes.

Second: In 2023, the Texas Legislature passed new legislation re-adopting the House and Senate districting maps first passed in 2021. The necessity of amended or supplemental complaints to address the current legislation, and concomitant motions practice, requires more litigation time and effort than Plaintiffs acknowledge.

The Texas Legislature's 2023 re-adoption of the House and Senate maps first passed in 2021 requires that Plaintiffs supplement or amend their complaints to address the legislation currently in effect. State Defendants raised this issue in August 2023, already nearly 90 days after *sine die*, when the Parties conferred in response to the Court's order to file a joint status report. ECF 729. Plaintiffs declined to say whether or when they intended to amend their complaints during that conference and only indicated their intent to amend their complaints just before the joint status report was due. ECF 730 ("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…The Plaintiffs' e-mail, however, failed to apprise the State Defendants which of the Plaintiffs groups intend to submit amended complaints, how many of the Plaintiffs groups intend to do so, and when the State Defendants and this Court should expect the new filings. Amendment of the Plaintiffs' pleadings may restart motion practice; [and] rulings on outstanding discovery motions may restart appellate proceedings or additional discovery…."). Since then, 381 days have passed.

To date, only two of the nine Plaintiffs groups have done so. The United States says it will not amend, LULAC plaintiffs say they will soon, Brooks Plaintiffs and NAACP Plaintiffs say they

will only *after* entry of a scheduling order, and State Defendants have been unable to wrest a timetable from MALC, Fischer, or Intervenor Plaintiffs. Ex. 1. As the Court knows, these supplemental or amended complaints may be subject to Rule 12 motions, but at a minimum will require updated answers. Additionally, at least one Plaintiffs group has indicated it will amend, rather than supplement, its complaint so that the group may not only address HB 1000 but also substitute new individual plaintiffs to replace some who can no longer pursue their claims.

"A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3; *see also Berryhill v. Rich Plan of Pensacola*, 578 F.2d 1092, 1101 (5th Cir. 1978) ("Every lawsuit begins with a written complaint."). Plaintiffs' proposal of a 120-day runway to trial where State Defendants do not even have operative complaints—and do not know when to expect them—is unserious. If the Fair Maps and Abuabara supplemental complaints are any indication, the Parties should fairly anticipate motions to dismiss in response to any amended or supplemental complaints, as well as any additional answers necessary following that briefing. Plaintiffs account for none of the additional time necessary to devote to such motions practice, much less the strain on resources such work would require if undertaken amidst new discovery piled atop trial preparation.

Third: Discovery in this case—even if limited to "updating" work done in preparation for the previous trial date—will be substantial, particularly for State Defendants. Updating discovery responses in this case requires considerably more work by State Defendants, who have responded to requests from nine Plaintiffs groups, than for any single Plaintiffs group. Likewise, Plaintiffs have designated over 20 experts compared to State Defendants' two. Moreover, Plaintiffs acknowledge they will designate new experts, and at least some additional fact witnesses. Their refusal or inability to provide the specifics of such discovery counsels against scheduling an early trial.

Plaintiffs' description of "limited fact discovery and depositions of newly disclosed witnesses, witnesses likely to testify on newly disclosed subjects, and witnesses implicated by newly disclosed documents" provides none of the detail necessary to make reasonable scheduling calculations. Discovery for the maps passed in 2021 required over ninety depositions, most of which occurred over approximately sixty days in the summer of 2022. State Defendants certainly

cannot countenance a similarly profligate use of resources for the passage of the 2023 maps, yet Plaintiffs will not say what they plan. Perhaps the most useful data point in this regard is LULAC's issuance of dozens of litigation hold letters for the 2023 legislative session. Plaintiffs have sought no discovery regarding passage of the 2023 maps or subsequent election results; the Court should not allow them to put the screws to State Defendants by ordering an unnecessarily tight—indeed, unrealistic—window for as of yet untold fact discovery that could have begun over a year ago.

The updating of expert reports, and subsequent responses to those reports, and subsequent depositions of those experts, are enough to fill 120 days even if the parties did little else. And State Defendants must undertake—by far—the most work to complete this task because they are a single group responding to the nearly two dozen expert reports filed by nine plaintiffs groups.

These challenges are only compounded by Plaintiffs' admission that they must now designate brand new experts. State Defendants do not know the number, identity, or opinions of these experts. The submission of new experts, new reports, and new opinions overlayed on the previous testimony and reports of previous witnesses makes remaining expert discovery in this case more complicated and time intensive, not less.

The history of discovery in this case provides no assurance that nine Plaintiffs groups and a host of third parties will be able to complete discovery swiftly. As Plaintiffs point out, there remain several outstanding discovery issues that predate the last trial date. Even under the previous scheduling order, the tight scheduling necessitated considerable discovery by the Parties after the discovery period had closed. ECF 566 at 10 ("Although the discovery period theoretically ended weeks ago, significant discovery is still occurring by agreement.").

To be clear, State Defendants do not advocate simply re-opening all discovery. Limited discovery is indeed appropriate. But in light of how little the Plaintiffs know or are willing to say about how much more discovery they intend to seek or provide, rushing to trial is imprudent.

Fourth: *Alexander v. South Carolina* constitutes a sea change in the evidentiary burden borne by redistricting plaintiffs bringing constitutional claims. 144 S.Ct. 1221 (2024). This change complicates expert discovery, inasmuch as multiple Plaintiffs' expert reports may change

substantially under the new evidentiary regimen. Moreover, after waiting over a year to revise their pleadings, Plaintiffs now rush to try the case in an apparent effort to deprive the Court of the most important available evidence. *Alexander* held that the best redistricting data comes from presidential election years. *Id.* at 1248 ("[T]hat report exhibited another flaw: it used inferior data to measure a district's partisan tilt. While the State used voting data from the 2020 *Presidential election*, Dr. Liu relied on data from the 2018 *gubernatorial primaries*. Data from that gubernatorial primary is less informative because far fewer voters turn out for off-cycle gubernatorial primary elections.") (emphasis original). The Court should not schedule expert disclosures, let alone trial, until after the 2024 Presidential Election data become publicly available.

Additionally, scheduling such a large trial on such short notice raises the likelihood that one of the dozens of parties will seek a continuance. Should a continuance prove necessary, the Parties would have needlessly expended the resources necessary to expedite pre-trial work, and experts would likely need to again update their reports to account for the 2024 Presidential Election data—having already expended the resources necessary to update absent that data—with associated additional responses and depositions. Only State Defendants bear any potential liability for attorneys' fees; Plaintiffs' proposed schedule necessarily multiplies resources necessary to try this case.

Fifth: *Petteway v. Galveston County* may eliminate Plaintiffs' multifarious coalition claims under Section 2 of the Voting Rights Act and dramatically narrow the triable issues in this case. *See* 86 F.4th 1146 (5th Cir. 2023). Plaintiffs' proposed schedule would require thousands of dollars in expert expenses, and hundreds of hours of combined attorney and expert time evaluating coalition claims that the Fifth Circuit may dispose of as a matter of law by year's end. The current limbo of coalition claims counsels scheduling expert disclosures after the *Pettaway* decision—and trial some time thereafter.

Sixth: The duration of trial, the necessity for lengthy post-trial briefing, and the necessity of extensive time for the Court to rule, preclude the possibility that Plaintiffs will obtain any relief by the close of 2024. Plaintiffs also fail to note the considerable conference required among so many

parties regarding so many exhibits, deposition page/line designations, and witnesses. The Parties should not dawdle, but there is simply no need to rush.

The Court is, of course, well experienced with complex litigation, but a recent example provides helpful context for measuring the task of trying this case. In September and October of 2023, the undersigned counsel spent twenty trial days spread across six weeks trying consolidated challenges to S.B. 1 in Judge Rodriguez' San Antonio courtroom. *See LUPE v. Abbott*, 5:21-cv-0844-XR (W.D. Tex.). Many of the plaintiffs in that case are plaintiffs in this case, and they brought an interlaced panoply of claims (First, Fourteenth, and Fifteenth Amendment claims; Voting Rights Act claims; Americans with Disabilities Act claims; Rehabilitation Act claims; and others) against some three dozen provisions of the omnibus bill. S.B. 1 had five plaintiffs groups, this case has nine; S.B. 1 had some 100 depositions, this case has over 90 (so far); S.B. 1 had 9 expert witnesses testify at trial, this case has 25 (so far). The trial of S.B. 1 included 59 witnesses—from the plaintiffs alone—with seven more from the State Defendants, some 850 exhibits and over 4600 pages of trial transcript. By agreement, the S.B. 1 parties filed their proposed conclusions of law and findings of fact 90 days after evidence closed; the pages of their combined post-trial briefing numbered in the thousands. The S.B. 1 parties did not even present closing argument until almost 120 days after the close of evidence.

Plaintiffs would have the Parties undertake preparing substantially more exhibits, testimony, and witnesses for trial than even the S.B. 1 trial required—while the universe of parties, exhibits, testimony, and witnesses is still unknown. Any such trial will be wasteful, disorganized, and incomplete.

Seventh: Plaintiffs also fail to account for valuable summary judgment briefing. While many of the claims in this case may require trial, summary judgment briefing can dramatically reduce the number of claims and parties at issue. Again, S.B. 1 is instructive. There, the United States and State Defendants briefed cross motions on the United States' claims, and agreed the court should resolve those motions rather than forcing the United States to trial. The Court agreed and issued a limited ruling obviating the United States' appearance at trial. The work done on cross motions

meant the United States did not appear at trial, argued no pre-trial motions, called no witnesses, crossed no witnesses, and filed no proposed findings of fact or conclusions of law.

Building in time for summary judgment motions may prove more efficient than skipping them. At a minimum, the Court should forego setting a trial date until it and the Parties are in a better position to determine whether such motions might be necessary or helpful.

Eighth: There are additional scheduling impracticalities implicated by Plaintiffs' proposal. To start, the undersigned lead counsel is scheduled to try a two-week human trafficking case to a Travis County jury beginning on November 6, 2024.

Scheduling trial immediately following a major election presents additional challenges for the Office of the Attorney General. State Defendants' counsel here comprises much of the State's election law team tasked with facing the urgent litigation that often arises immediately after (and sometimes during) elections.

Attorney scheduling conflicts aside, Plaintiffs' proposed timeline puts the start of trial at or near Thanksgiving. If the S.B. 1 trial is any gauge, the Court will need to allocate at least four weeks—indeed, State Defendants believe six may be necessary—to try this case. These realities demonstrate that Plaintiffs' proposal is simply unrealistic: three federal judges finding more or less consecutive weeks across the holidays to try a case requiring travel for scores of attorneys and witnesses just when travel is at its most expensive.

Plaintiffs have chosen a poor time to wake up for the additional reason that the 89th Texas Legislature begins in January 2025. This dramatically limits, and perhaps precludes, the availability of many legislative members and staff who are or may become witnesses in this case.

Ninth: Plaintiffs' prolonged inactivity makes their latest insistence on rushing to trial fundamentally inequitable. Plaintiffs' failure to update their pleadings more than a year after the Texas Legislature passed HB 1000 is irreconcilable with their demand for a slapdash trial setting. It is difficult to conceive of Plaintiffs' proposed 120-day schedule as anything other than the railroading of a single group of defendants against the vast resources of nine consolidated Plaintiffs groups whose designated experts alone exceed State Defendants' by a power of 10.

If Plaintiffs cannot supplement their complaints in over a year, the Parties cannot try this case in 120 days. Plaintiffs propose 120 days for:

- Filing new complaints;
- Briefing motions to dismiss;
- Resolution of motions to dismiss;
- Filing new answers;
- Identifying, disclosing, and deposing fact witnesses;
- Identifying, disclosing, responding to, and deposing expert witnesses;
- An unknown amount of document discovery presaged only by voluminous litigation hold letters;
- Resolution of still-pending trial court discovery motions;
- Briefing any new discovery motions;
- Resolution of new discovery motions;
- Resolution of recently-initiated discovery appeals;
- Briefing motions for summary judgment necessary to narrow trial;
- Resolution of motions for summary judgment;
- Identifying, marking, and disclosing thousands of trial exhibits;
- Reviewing, objecting to, and conferring regarding thousands of trial exhibits;
- Conferring regarding witnesses and deposition testimony;
- Briefing motions in limine;
- Resolving motions in limine, testimony and exhibit objections, and any other pre-trial disputes;
- Preparing scores of witnesses to testify;
- Preparing examinations for scores more witnesses; and
- Eating, sleeping, and brushing teeth.

As of today, State Defendants do not know the parties, claims, documents, fact witnesses, experts, or expert opinions in this case.

Every lawsuit begins with a complaint, but State Defendants only have three of nine operative complaints in this case. Plaintiffs demonstrate little interest in providing basic litigation information given that two Plaintiffs groups do not even intend to amend their complaints until after the Court issues a trial date, and yet three others remain silent on this most basic question. A trial setting with so little information is unworkable, but that does not preclude the Parties from making substantive progress in the litigation of this case should Plaintiffs choose to participate.

B. The Path Forward: Graduated Scheduling

If this litigation is to restart, the Court should set the deadlines it has sufficient information to set. Scheduling must start with a pleadings deadline, with time built in for Rule 12 motions and amended answers. The Court could also set a date by which the Parties seeking affirmative relief must provide updated (non-expert) disclosures, and the corresponding date for State Defendants. The Court could also set a date by which any additional fact discovery should close.

The Court could likewise set reasonable limitations on additional fact discovery, such as limiting: (1) the number of written discovery requests; (2) the number of additional fact witnesses Parties may disclose; (3) the number of additional fact witness depositions; and (4) the duration of any proposed re-depositions of non-expert witnesses to two hours.

These tasks are more than enough to keep the Parties busy for some months. That additional time would provide this Court an opportunity to address still-pending trial motions, afford the Fifth Circuit additional time to address the pending appeals in this case and in *Petteway*, and afford the Parties time to evaluate the necessity of any additional appeals.

The Court need not set more speculative dates requiring additional information—such as expert disclosures, which require Presidential Election data and a ruling in *Petteway*; or a trial date, which requires Presidential Election data, and a ruling on both *Petteway* and current (or future) discovery appeals in this case. Alternatively, the Court could set expert disclosures for 60 days following the latter of publication of the Presidential Election data or the *Petteway* ruling. The Court could likewise simply set running 90-day status report deadlines so that the Parties may keep the Court apprised of developments necessary to make further scheduling decisions.

CONCLUSION

State Defendants request the Court enter a graduated scheduling order that allows for the issues described above to resolve while allowing litigation to proceed. State Defendants continue to make themselves available to confer with both Court and Counsel to address how best to facilitate resolution to this case.

Date: July 19, 2024

Respectfully submitted.

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