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.	Civil Action Lead Case No.: 3:21-CV-00259-DCG-JES-JVB
ROSALINDA RAMOS ABUABARA, et al., Plaintiffs, v. JANE NELSON, et al., Defendants.	Consolidated Case No.: 1:21-CV-00965-DCG-JES-JVB

RESPONSE IN OPPOSITION TO MOTION TO DISMISS ABUABARA PLAINTIFFS' SUPPLEMENTAL COMPLAINT

Plaintiffs in case no. 1:21-cv-00965 (the "Abuabara Plaintiffs") file this response in opposition to Defendants' Motion to Dismiss Abuabara Plaintiffs' Supplemental Complaint, ECF No. 785 ("Mot.").

INTRODUCTION

The motion to dismiss is utterly improper. It makes a single argument about multi-racial coalition districts that the Court has already rejected in these cases and that Defendants admit is barred by controlling precedent, in the speculative hope that the precedent may soon be overruled by the *en banc* Fifth Circuit. But rather than wait to see what the Fifth Circuit actually does, and bring a procedurally proper motion then, Defendants inexplicably filed their motion now, accompanied by 15 pages of irrelevant argument about a question that is before the Fifth Circuit, not this Court. If the Fifth Circuit does what Defendants hope, then Defendants can bring a new, procedurally appropriate motion then, based on whatever rule the Fifth Circuit adopts. But for now, the Court must follow the precedent as it stands and deny the motion.

Defendants' motion is also plagued with other, independently fatal, problems. For example, although framed as a motion to dismiss the Abuabara Plaintiffs' Supplemental Complaint, the motion never cites that complaint, and its sole argument has nothing to do with the actual allegations contained in that complaint. With one narrow exception, the Abuabara Plaintiffs' actual allegations do not rely on multi-racial coalition districts—yet those districts are the sole target of Defendants' arguments in the motion to dismiss. The motion instead appears to be an untimely attack on the Third Amended Complaint, which Defendants answered more than 18 months ago. And even with regard to the Supplemental Complaint, the motion is untimely. Defendants did not file the motion until 56 days after the Supplemental Complaint was served, long after any plausible deadline to respond, and in breach of the parties' express agreement that Defendants could take

longer to respond to the Supplemental Complaint provided they filed an answer, not a motion to dismiss.

For all of those reasons, the Court should deny the motion.

ARGUMENT

I. Fifth Circuit precedent requires denial of Defendants' motion.

Defendants' motion makes a single argument: that Section 2 vote dilution claims must be brought on behalf of a single race or ethnicity, not a coalition of races or ethnicities. Defendants already made this argument two-and-a-half years ago in these consolidated cases, *see, e.g.*, Defs.' Mot. to Dismiss Brooks Pls.' Claims at 4–7, ECF No. 43, and the Court already rejected it, Mem. Op. & Order at 3–4, ECF No. 144. Nothing has changed since then. Defendants admit that Fifth Circuit precedent bars the Court from accepting their argument, and they concede that this Court "is bound by" that precedent. *See* Mot. at 2 n.1; *see also Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) ("There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 863–64 (5th Cir. 1993) (en banc) (declining to "revisit" whether "different racial or ethnic minority groups, usually blacks and Hispanics, may combine to form a single minority group within the meaning of the Voting Rights Act").

Defendants evidently hope that the *en banc* Fifth Circuit will soon overrule *Campos*. But that is pure speculation on their part. Unless and until it happens, there is no possible basis for the Court to grant Defendants' motion. Defendants' hope-based motion is therefore premature.[1] And

[1] Defendants try to justify their motion with the circular argument that they "include their arguments regarding coalition districts" because "an opinion may issue" overruling *Campos* "while this motion is pending." Mot. at 2 n.1. That explanation was copied wholesale from

even if the Fifth Circuit does at some point overrule or modify *Campos*, it will almost certainly do so in a reasoned opinion that will itself establish whatever the new framework to govern Section 2 cases is to be. Defendants' 15 pages of musings on the merits of coalition-district claims under Section 2 are therefore entirely gratuitous. As Defendants admit, existing Fifth Circuit precedent currently controls this Court's approach to that question, and if that precedent is modified *by the Fifth Circuit*, then the Fifth Circuit's new precedent will control. The Abuabara Plaintiffs therefore will not burden the Court with a discussion of what the proper framework for evaluating coalition-district claims might be in the absence of controlling precedent—a question that is not now before this Court and that likely never will be.

In this moment in time, under present binding precedent, Defendants' motion is foreclosed by *Campos*. It should be denied on that basis. If, at some point in the future, the Fifth Circuit rules as Defendants hope, Defendants can file a new motion then, and the parties can—and would be entitled to an opportunity to—brief the issues with respect to an actual governing test, rather than under Defendants' presumptuous speculation about what they hope the Fifth Circuit might someday say.

II. Defendants' motion is procedurally improper.

Defendants' motion is also procedurally improper and untimely. It is captioned as a motion to dismiss the Abuabara Plaintiffs' Supplemental Complaint, ECF No. 765. But it never cites the Supplemental Complaint, and it has nothing to do with the substance of the Supplemental Complaint. The Supplemental Complaint makes no new allegations about coalition districts, and it says nothing at all about the congressional districts that are the overwhelming focus of the

Defendants' filing in the *Fair Maps* case, where they also raised other arguments. *See* Mot. to Dismiss the Fair Maps Pls.' Suppl. Compl. at 7 n.1, ECF No. 779. It makes no sense here, where the precedent-barred coalition-district argument is the only one that Defendants make.

Abuabara Plaintiffs' claims. Rather, the only purpose of the Supplemental Complaint was to update the Abuabara Plaintiffs' allegations regarding Texas House of Representatives districts to reflect the Legislature's re-enactment of those districts in 2023. *See* Abuabara Pls.' Suppl. Compl., ECF No. 765. Thus, even if Defendants' arguments were not barred by controlling precedent, their focus on how coalition districts should be treated provides no reason to dismiss the Supplemental Complaint in particular.

Defendants' real target seems to be the Abuabara Plaintiffs' operative Third Amended Complaint. ECF No. 613. But Defendants filed an Answer to that pleading more than 18 months ago. ECF No. 623. It is now far too late for Defendants to move to dismiss it for failure to state a claim. *See* Fed. R. Civ. P. 12(b) (requiring motions to dismiss to be "made before pleading if a responsive pleading is allowed"). Nothing in Rule 15(d)'s allowance for supplemental pleadings licenses Defendants to unleash a new volley of failure-to-state-a-claim arguments against these long pre-existing claims, just because the Abuabara Plaintiffs filed a supplemental pleading to address a handful of subsequent events. Fed. R. Civ. P. 15(d).

Moreover, even as to the Abuabara Plaintiffs' Supplemental Complaint, Defendants' motion is untimely at best. Defendants filed their motion on June 5, 2024, fifty-six days after the Abuabara Plaintiffs filed their Supplemental Complaint on April 10. *See* Mot.; ECF No. 765 There is no coherent account of the relevant rules of civil procedure that would authorize a filing so late. Rule 12(a)(1)(A)(i) provides that "[u]nless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is . . . within 21 days after being served with the summons and complaint." Fed R. Civ. P. 12(a)(1)(A)(i). Rule 15(a)(3) provides an even shorter deadline for responding to amended pleadings: 14 days. Fed. R. Civ. P. 15(a)(3). As to supplemental pleadings specifically, Rule 15(d) says only that "[t]he court may order that the

opposing party plead to the supplemental pleading within a specified time." Fed. R. Civ. P. 15(d). The Court's order allowing the Abuabara Plaintiffs' Supplemental Complaint, however, said nothing about a responsive pleading. ECF No. 764. As a result, the deadline for Defendants' response was arguably unclear, but to the extent a response was authorized at all, it was due either 14 or 21 days after filing of the Supplemental Complaint.

Defendants' motion is also contrary to the parties' discussion and agreement, which reflected a mutual understanding that the above-described deadlines applied under the default rules. Shortly after the Abuabara Plaintiffs filed their Supplemental Complaint, the parties conferred over Defendants' deadline to file a responsive pleading. *See* Ex. A, Decl. of David R. Fox ("Fox Decl."). On a telephone call on April 15, counsel reached an agreement: Defendants could take additional time to file an answer to the Supplemental Complaint, rather than complying with the 14-day deadline in Rule 15(a)(3) or the 21-day deadline in Rule 12(a)(1)(A)(i). Fox Decl. ¶ 2. But the Abuabara Plaintiffs' counsel emphasized that this agreement applied *only* to an answer, and that, if the Defendants wanted to file a motion to dismiss, they should file it within Rule 15(a)(3)'s 14-day deadline so that it could be adjudicated promptly. *Id*. Defendants' counsel confirmed that they planned to file an answer. *Id.* The Abuabara Plaintiffs heard nothing further on the matter until 51 days later, when Defendants abruptly violated their agreement by filing an untimely motion to dismiss. *Id.* ¶ 3. When the Abuabara Plaintiff's counsel objected that this filing violated the parties' agreement, Defendants' counsel implausibly responded that the discussion was "cabined to answer dates," *id.* ¶ 4; *id.* at Ex. 1, ignoring the parties' explicit agreement that Defendants could take additional time to respond *precisely because* they planned to file an answer, not a motion, as well as the fact that the deadlines to file an answer and a motion to dismiss are the

same under Rule 12(b). Defendants' breach of that agreement leaves them with no agreed-upon extension, and renders their motion untimely under either Rule 15(a)(3) or Rule 12(a)(1)(A)(i).

III. Defendants' motion ignores the Abuabara Plaintiffs' actual allegations.

Finally, and independent of all of that, Defendants' motion also fails to in any way justify the relief that Defendants seek: dismissal of the Abuabara Plaintiffs' entire "Section 2 claim." Mot. at 15. Defendants never discuss the Abuabara Plaintiffs' actual allegations, so they offer no explanation for how Defendants' precedent-barred arguments about coalition districts would apply to the actual claims that the Abuabara Plaintiffs have brought. Defendants just assume, without explanation or citation, that the Abuabara Plaintiffs' "Section 2 claim relies on such coalitions." *Id.* With one narrow exception, Defendants are wrong.

The Abuabara Plaintiffs' operative complaint challenges congressional districts along the U.S.–Mexico Border, in Dallas and Tarrant Counties, and in Harris County. *See* ECF No. 613. With respect to each of those regions, the operative complaint alleges—and shows, with maps—that additional, *majority Latino* citizen-voting-age population congressional districts could be drawn. *See id.* ¶¶ 96–98, 105–06, 117–18, 125–26, 132, 141, 149, 158, 170, 178. The Abuabara Plaintiffs also allege alternative, coalition demonstrative districts in two instances, *see id.* ¶¶ 139–40, 165–66, but their claims do not depend on them. Thus, even if Defendants were right about coalition districts, their arguments would provide no basis for dismissing any of the Abuabara Plaintiffs' challenges to Texas's current congressional map—Count I of the operative Third Amended Complaint, *id.* ¶¶ 248–57 .

That leaves the Abuabara Plaintiffs' challenges to the Texas House map (Count II in the Third Amended Complaint), where the Abuabara Plaintiffs challenge districts in Harris and Tarrant Counties. In Harris County, the operative complaint alleges and shows that an additional majority-Latino voting-eligible House district could be drawn. *See id.* ¶ 206; *id.* at Ex. 4. It is only

in Tarrant County that the Abuabara Plaintiffs' claims depend on a coalition district: there, and only there, their claim turns on the allegation that an additional majority Black and Latino House district could be drawn. *Id.* ¶ 193.

Thus, even if the Court were to disregard the controlling *Campos* and *LULAC* decisions, and even if it were then to reach the merits of Defendants' procedurally improper and untimely motion to dismiss, Defendants' motion would still provide no possible basis for dismissing the vast majority of the Abuabara Plaintiffs' claims. At most, it would implicate the Abuabara Plaintiffs' challenge to a single Texas House district, in Tarrant County. For that reason as well, the Court must deny Defendants' motion.

CONCLUSION

For the forgoing reasons, the Court should deny Defendants' Motion to Dismiss the Abuabara Plaintiffs' Supplemental Complaint.

Dated: June 20, 2024

Respectfully submitted,

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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 June 20, 2024, and that all counsel of record were served by CM/ECF.

/s/ David R. Fox