Nos. 22-2918, 23-1154

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS UNITED, et al.,
Plaintiffs-Appellees,

v.

JOHN THURSTON, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Arkansas
No. 5:20-CV-5193 (Hon. Timothy L. Brooks)

Opposition to Plaintiffs' Motion to Stay Pending Indicative Ruling

In the three-and-a-half years since Plaintiffs brought this case, Plaintiffs never attempted to raise any claim under Section 1983. Instead, Plaintiffs opted to pursue claims directly under the Voting Rights Act and indeed used the fact that they had not pursued claims under Section 1983 to defeat arguments by some of the defendants below. And Plaintiffs' strategy seemed to work. The district court granted them summary judgment, including rejecting Defendants' continuous argument that Section 208 of the Voting Rights Act doesn't provide a private right of action. But they now realize that was a mistake because it's unmistakably clear that—just as Defendants have argued since the inception of this case—Section 208 doesn't confer a private right of action.

So they ask this Court to stay these proceedings—which have been pending for more than two years—for a do-over. This Court should deny that motion and decline to stay these proceedings so that Plaintiffs can attempt to plead a claim they tactically decided not to pursue.

I. Plaintiffs deliberately declined to sue under Section 1983.

Plaintiffs' complaint didn't assert a cause of action under section 1983. *See* R. Doc. 2. That was a deliberate, tactical choice, and they shouldn't be given a do-over just because they now realize that was a mistake.

Defendants moved to dismiss Plaintiffs' original complaint on the grounds that Section 208 doesn't provide a private right of action. *See* R. Doc. 63 at 10 ("Section 208 . . . does not provide private parties with a cause of action."). Yet Plaintiffs decided not to alter course and attempt to sue under Section 1983 when they subsequently amended their complaint. And Defendants renewed that argument in response to Plaintiffs' amended complaint. *See* Entry ID No. 5386520 (R. Doc. 211 (citing R. Doc. 87 at 10 ("Section 208 . . . does not provide private parties with a cause of action."))). And even when the parties "agree[d]" thereafter that Plaintiffs could have up to "90 days" following the February 29, 2021, case-management hearing to further "amend[] [their] pleadings," Plaintiffs didn't attempt to add a Section 1983 cause of action. R. Doc. 101 at 6 (Joint Rule 26(f) Re-

port); *see* R. Doc. 103 (February 29, 2021, case-management hearing text-only minute entry). Instead, they plowed forward—seeking summary judgment on their VRA claim.

Then, almost a year later and while the parties cross-motions for summary judgment were pending below, on February 17, 2022, another district court in Arkansas held that there is no private right of action to enforce comparable language in Section 2. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 911 (E.D. Ark. 2022). Plaintiffs did nothing in response, and six months later, the district court granted their motion for summary judgment. *See* R. Docs. 168, 169 (August 19, 2022 opinion and judgment).

Defendants appealed, and their opening brief argued, once again, that there is no private right of action to enforce Section 208. *See* Appellants' Br., No. 22-2918, Entry ID No. 5229102, at 35-39. And Plaintiffs—more than a year ago—agreed that "[t]his appeal raises the question of whether Section 208 of the Voting Rights Act is privately enforceable" and that this "is similar to the question squarely presented in" the then pending appeal in "*Arkansas State Conference NAACP*." Joint Motion to Hold Appeal in Abeyance, No. 22-1918, Entry ID No. 5239587, at 1. Thus, this Court agreed to hold this case in abeyance pending the outcome of that case. But critically Plaintiffs made no claim that they should be

allowed to return to the district court to amend their complaint—regardless of the outcome of that case.

This Court then decided *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), and concluded there is no private right of action to enforce Section 2. This Court then lifted the abeyance and ordered the parties to continue briefing this case. Plaintiffs didn't object to that course of action until just days before Defendants were scheduled to file a brief, when they suddenly changed positions and filed a motion asking this Court to stay this appeal so that they can seek "an indicative ruling" from the district court about whether it would allow them a do-over. Entry ID No. 5386520 at 13 (Ex. A, R. Doc. 211 at 4).

This Court should reject that request because Plaintiffs had multiple, repeated opportunities to plead a Section 1983 cause of action, and Defendants have consistently argued that Section 208 doesn't provide a private right of action. Consequently, Plaintiffs cannot claim that they were somehow surprised or are unfairly prejudiced by their own decisions.

Indeed, recognizing the weakness of the claim that the entirety of the VRA is privately enforceable, other "plaintiffs have invoked § 1983 from the start, beginning with their complaints." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 91 F.4th 967, 968 (8th Cir. 2024) (Stras, J., concurring in denial of rehearing

en banc).[1] Plaintiffs don't get a do-over just because they made a poor tactical decision. *See id.* (concluding in response to similar claim by State Conference plaintiffs that they should be allowed to add a Section 1983 claim, "'whether to . . . stand on the complaint' is 'an ordinary tactical decision,' and plaintiffs are not entitled to a do-over if it turns out badly." (quoting *Anderson Merchandisers, LLC*, 799 F.3d 957, 963, 964 n.3 (8th Cir. 2015)). Plaintiffs' motion should be denied.

II. Plaintiffs haven't argued that an amendment is proper, to say nothing of extraordinary post-appeal relief via an indicative ruling.

Plaintiffs' motion for an indicative ruling filed below asks the district court to rule on whether it would grant a hypothetical, untimely motion to file a second amended complaint that they haven't proffered. So Plaintiffs haven't actually filed any "motion . . . for relief that the [district] court lacks authority to grant." Fed. R. Civ. P. 62.1(a). That too is grounds for denying their stay request.

Moreover, even if Plaintiffs had filed such a motion, "[l]eave to amend" could only "be granted if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief." *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014). And Plaintiffs haven't filed either of those motions, likely because they'd be untimely and because they're not designed

[1] All citations to *Arkansas State Conference NAACP*'s denial of en banc review are to Judge Stras's concurrence.

to relieve a party of the consequences of its tactical decisions years later. *See* Fed. R. Civ. P. 62.1(a) (a motion for relief must be "timely").

A Rule 59(e) motion to alter or amend the judgment "must be filed no later than 28 days after the entry of the judgment," Fed. R. Civ. P. 59(e), and a Rule 60(b) motion must be filed "within a reasonable time," in many cases "no more than a year after the entry of the judgment." Fed. R. Civ. P. 60(c)(1). "When considering good cause for an amended complaint, the diligence of the party seeking the amendment is an important consideration," *Kozlov v. Associated Wholesale Grocers, Inc.*, 818 F.3d 380, 395 (8th Cir. 2016), and Plaintiffs have been anything but diligent here.

Because Plaintiffs haven't filed any appropriate motion below, they haven't asserted any basis for seeking relief from the final judgment that they urged the district court to enter in the first place. "[A] judgment generally will be set aside only to accommodate some new matter that could not have been asserted during the [district court litigation], which means that relief will not be available in many instances in which leave to amend would be granted in the prejudgment situation." 6 Wright & Miller, *Federal Practice & Procedure*, sec. 1489 (3d ed.). Indeed, "after judgment has been entered" the party seeking to "amend its complaint had better provide the district court with a good reason to grant its motion." *Harris v. City of Auburn*, 27 F.3d 1284, 1287 (7th Cir. 1994).

The fact that Plaintiffs' legal theory is untenable wouldn't be sufficient and certainly wouldn't constitute a "substantial issue" under Rule 62.1. Denying leave to amend the complaint to change the theory of Plaintiffs' case after judgment has been entered *against* them wouldn't be an abuse of discretion, *see Hawks v. J.P. Morgan Chase Bank*, 591 F.3d 1043, 1050 (8th Cir. 2010), and there's all the more reason to deny it when (as here) that judgment *favored* them. *See Freeman v. Cont'l Gin Co.*, 381 F.2d 459, 469-70 (5th Cir. 1967) ("A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim."). The interests of judicial economy and preserving the parties' resources, as well as the "strong interest in preserving the finality of judgments," *Henderson v. Kibbe,* 431 U.S. 145, 154 n.13 (1977), also counsel against granting Plaintiffs such extraordinary relief. Indeed, that's why Plaintiffs have not cited a single case doing what they're asking the district court to do here. That's not what the indicative ruling process is designed to do. *See, e.g., Louisiana v. Becerra*, No. 21-30734, 2022 WL 445159, at *3 (5th Cir. Feb. 14, 2022) (denying prevailing parties' motion for a remand to obtain an indicative ruling on leave to amend to add a new "claim [that] could have been brought at the very beginning of this case").

Again, Plaintiffs deliberately passed up multiple opportunities to sue under Section 1983 below. "[I]t would [be] backwards to treat the plaintiffs' choice not to add a § 1983 claim as the reason to decide they could." *Ark. State Conf.*

NAACP, 91 F.4th at 968. Rather, this Court should do "what [it] usually do[es]—address the case the parties brought—and consider[] whether the Voting Rights Act allows for private enforcement." *Id.*

III. Basic principles of equity preclude Plaintiffs from adding Section 1983.

Plaintiffs' motion should also be denied because their decision not to bring a Section 1983 suit below accrued to their benefit and Defendants would be prejudiced by allowing Plaintiffs to suddenly change tactics.

First, Plaintiffs deliberately used their choice not to sue under Section 1983 as a sword to defeat the Benton and Sebastian County Defendants' municipal-liability defense at the motion-to-dismiss stage, arguing that "Plaintiffs here do not sue pursuant to Section 1983." R. Doc. 96 at 4; *id.* ("Defendants mistakenly assert [] that this action is brought pursuant to 42 U.S.C. 1983."); R. Doc. 95 at 3-4 ("Plaintiffs are not Section 1983 plaintiffs with respect to their Voting Rights Act claim.").

The district court accepted Plaintiffs' argument and rejected the counties' defense on the basis that the municipal-liability framework is "specific to suits brought pursuant to 42 U.S.C. § 1983 and the 'policy or custom' requirement does not apply to Plaintiffs' claims under the VRA." R. Doc. 102, Order Denying Motion to Dismiss, at 6. Plaintiffs thus benefited from their deliberate choice not to bring this action under Section 1983.

Second, basic principles of equity preclude Plaintiffs from now asserting a litigation position inconsistent with their prior tactical decisions. *See, e.g.*, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (waiver); *United States v. Nunez-Hernandez*, 43 F.4th 857, 859 (8th Cir. 2022) (forfeiture); *United States ex rel. Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 917 (8th Cir. 2001) (estoppel). Defendants would be prejudiced by Plaintiffs' assertion of Section 1983 claims years after summary judgment because Defendants decided to appeal the district court's judgment (and thus, to incur potential liability for attorney's fees) in the absence of such claims.

Plaintiffs can't have their cake and eat it too. But this isn't the first time they've tried to do just that. Plaintiffs also asserted Section 1988 as a basis for attorney's fees below, knowing full well that they hadn't brought an "action or proceeding to enforce a provision of section[] . . . 1983." R. Doc. 174 at 5 (quoting 42 U.S.C. 1988); *see id.* at 12 (relying on Section 1988 for costs). Plaintiffs' motion should be denied.

IV. The remand Plaintiffs seek isn't limited.

Plaintiffs claim they ultimately seek "a limited remand for the purpose of considering Plaintiffs' motion to amend their complaint." R. Doc. 211 at 5. But this Court should not be misled. Plaintiffs are seeking nothing less than to revamp their entire case. Indeed, even the most optimistic scenario, if Plaintiffs got what

they wanted, this case would essentially begin from scratch with a new complaint, motion to dismiss, and subsequent filings. So the remand ultimately wouldn't be limited: it'd be a complete do-over. That's not in the interest of judicial economy, and it's unfair to Defendants who spent years arguing what Plaintiffs themselves have only now come to realize.

Conclusion

Plaintiffs seek to abuse the indicative-ruling procedure to get more than a second bite at the apple. Their motion is untimely and unsupported, and regardless of how the district court rules on Plaintiffs' motion below, this Court should deny the motion to stay and proceed with briefing and consideration of this appeal.

Submitted: May 6, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,198 words, excluding the parts exempted by Fed. R. App. P. 32(f).

Pursuant to Fed. R. App. P. 27(d)(1)(E), I also certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Michael A. Cantrell
Michael A. Cantrell

CERTIFICATE OF SERVICE

I certify that on May 6, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Michael A. Cantrell
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