IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

ARKANSAS UNITED, et al., **PLAINTIFFS,**

v. **No. 5:20CV05193 TLB**

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas, et al.,

DEFENDANTS.

OPPOSITION TO MOTION TO AMEND COMPLAINT

In the three-and-a-half years since Plaintiffs brought this long-concluded action, Plaintiffs never asserted any claim under Section 1983. Instead, Plaintiffs deliberately stuck with the Voting Rights Act and used the fact that they had not pursued Section 1983 claims to defeat arguments by the Benton and Sebastian County Defendants. Plaintiffs' strategy seemed to work, and they won summary judgment. The Eighth Circuit stayed that order and merits briefing on the appeal commenced. Now, years on, Plaintiffs worry about the viability of their VRA claims and ask this Court for a post-final judgment do-over. So they asked the Eighth Circuit to stay Defendants' appeal of their summary judgment victory while they asked this Court to indicate whether it'd give them a do-over. Unsurprisingly, given this Court lacks the jurisdiction to do what Plaintiffs ask, the Eighth Circuit summarily denied that request.

Yet Plaintiffs persist. And they now return once more to this Court, reupping—if in a slightly different procedural way—their request for a do-over. Consistent with the Eighth Circuit's order in this case, this Court should deny that request.

I. Plaintiffs state the wrong legal standard and concede that they couldn't meet the proper one.

Despite recognizing that this case has progressed far beyond the pleading and summary-judgment stages to briefing on appeal, *see* Doc. 214 at 2, Plaintiffs wrongly assume, without

argument, that Rule 15's liberal pleading standard still applies. Thus, they move for leave to amend their complaint only "[p]ursuant to Federal Rule of Civil Procedure 15(a)(2)." *Id.* at 1. But "[a] motion for leave to amend" after a "decision [intended] to be a final, appealable order" is "subject to different considerations." *In re SuperValu, Inc.*, 925 F.3d 955, 961 (8th Cir. 2019); *see Cervantes v. Fowler Foods, Inc.*, No. 3:20-CV-00237 JM, 2020 WL 5750433, at *2 (E.D. Ark. Sept. 25, 2020) ("When a plaintiff seeks leave to amend his complaint after judgment has been entered, 'the right to amend under Fed. R. Civ. P. 15(a) terminates.'" (quoting *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997))).

That's because, unlike motions filed earlier in the proceedings, "post-judgment motions for leave to amend . . . are disfavored," *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009), and the "interests of finality dictate that leave to amend should be less freely available after a final order has been entered." *Id.* at 823. "After judgment has been entered, . . . leave to amend a pleading will be granted only 'if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief.'" *In re SuperValu, Inc.*, 925 F.3d at 961 (quoting *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014)). Plaintiffs can't, and haven't even tried to, meet those "stringent standards." *Id.*

Plaintiffs concede that "this Court lacks authority to grant Plaintiffs' motion to amend the complaint," Doc. 214 at 2, thus recognizing that Rules 59(e) and 60(b) could afford them no relief at this point. *Cf.* Fed. R. App. P. 4(A)(4)(A), (B)(i) (district court may dispose of only a Rule 59 or 60 motion filed "within the time allowed" before a notice of appeal becomes effective). And the Eighth Circuit's order denying their request to stay the appeal so that this Court could consider doing what it lacks jurisdiction to do underscores as much. Indeed, Plaintiffs affirmatively deny any entitlement to such "extraordinary relief," *Mask of Ka-Nefer-*

Nefer, 752 F.3d at 743 (quoting *United States v. Young*, 806 F.2d 805, 806 (8th Cir.1986)), claiming they "*do not* seek relief from a judgment or order (Rule 60(b)) and *do not* seek to alter or amend the judgment (59(e))." Doc. 215 at 4 (emphases added). Plaintiffs can't meet the proper standard; this Court lacks jurisdiction to do what they request; and the Court should deny their motion.

II. Plaintiffs' motion to amend is untimely.

Plaintiffs' motion is untimely because it's too late for Plaintiffs to change tactics by bringing an entirely new cause of action that they deliberately chose not to pursue.

A. It's too late for Plaintiffs to change tactics.

Plaintiffs' complaint didn't assert a Section 1983 claim. *See* Doc. 2. That was a deliberate choice. Plaintiffs elected not to add a Section 1983 claim when they amended their complaint, *see* Doc. 79, even though Defendants' brief in support of their motion to dismiss had already argued that the Voting Rights Act doesn't create a private right of action. *See* Doc. 63 at 10 ("Section 208 . . . does not provide private parties with a cause of action."). Plaintiffs further "agree[d] that 90 days" following the February 29, 2021 case-management hearing would be "sufficient time for . . . amending pleadings." Doc. 101 at 6 (Joint Rule 26(f) Report); *see* Doc. 103 (February 29, 2021, case-management hearing text-only minute entry). Yet Plaintiffs chose to pursue summary judgment without seeking leave to add Section 1983.

Almost a year later, on February 17, 2022, while cross-motions for summary judgment were pending, a federal district court in Arkansas held that the Voting Rights Act doesn't create a private right of action to enforce Section 2 claims. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 911 (E.D. Ark. 2022). That decision was issued six months before this Court ruled on summary judgment. *See Ark. State Conf. NAACP*, 586 F. Supp. 3d

893 (signed Feb. 17, 2022); Docs. 168, 169 (August 19, 2022, opinion and judgment). Plaintiffs again elected not to seek leave to add a Section 1983 claim to their complaint.

Defendants appealed, and their opening brief argued that that there is no private right of action under the Voting Rights Act. *See* Appellants' Br., *Ark. United v. Thurston*, No. 22-2918, Entry ID No. 5229102, at 35-39. Well over a year ago, Plaintiffs themselves agreed that the "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 *Arkansas State Conference NAACP*." Joint Motion to Hold Appeal in Abeyance, *Ark. United v. Thurston*, No. 22-1918, Entry ID No. 5239587, at 1. But Plaintiffs made no claim that they should be allowed to return to this Court to amend their complaint.

On November 20, 2023, the Eighth Circuit issued its ruling in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), affirming the district court's ruling that there is no private right of action to enforce Section 2 of the Voting Rights Act, and the Plaintiffs did nothing. Even when the Eighth Circuit denied en banc review on January 30, 2024, Plaintiffs sat idle. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 91 F.4th 967 (8th Cir. 2024). Plaintiffs didn't move to amend their complaint until more than three months later—five days after the Eighth Circuit denied their motion to stay briefing pending the filing of a motion for an indicative ruling in this Court. *See* Doc 214 (mot. to amend filed May 13, 2024); Doc. 213 (notice of Eighth Circuit denial of stay).

Plaintiffs themselves concede that their motion must be denied "[b]ecause this case is currently pending on appeal to the Eighth Circuit." Doc. 214 at 2. Indeed, three-and-a-half years after bringing this action—and more than a year and a half after the final judgment and appeal—is simply too late to rewind this case back to the pleading stage. And to the extent that was not

already clear—from Plaintiffs' previous indicative-ruling filings in this Court—the Eighth Circuit's flat denial of Plaintiffs' request for a stay of the appeal makes it crystal clear. Plaintiffs had multiple, repeated opportunities to plead a Section 1983 claim, and Defendants have consistently argued that Section 208 doesn't provide a private right of action. Consequently, Plaintiffs couldn't claim that they were somehow surprised or are unfairly prejudiced by their own decisions. Thus, consistent with the Eighth Circuit's order on Plaintiffs' motion on appeal, the Court should summarily deny Plaintiffs' motion as untimely.

B. It's too late to add an entirely new cause of action.

Plaintiffs devote less than one page to arguing for why the Court should permit them to amend their complaint so long after final judgment and appeal. *See* Doc. 214 at 5. Those two paragraphs fail to justify any amendment. "[A] party is not entitled to amend a complaint without making a showing that such an amendment would be able to save an otherwise meritless claim." *Plymouth Cnty., Iowa v. Merscorp, Inc.*, 774 F.3d 1155, 1160 (8th Cir. 2014). But even though Plaintiffs' claim is meritless, they haven't tried to show that their proposed amendment would save it.

That's because Plaintiffs are really trying to change horses mid-stream. Rather than saving their existing claim, "Plaintiffs seek," in their own words, "to amend their complaint to *add an alternative claim* for relief under 42 U.S.C. § 1983." Doc. 214 at 1 (emphasis added); *see* Doc. 214-2 at 23 (redline of proposed second amended complaint adding the Section 1983 claim Plaintiffs repeatedly declined to add). But that can't succeed because "a post-judgment motion for leave to assert an entirely new claim is untimely." *Hypoguard USA, Inc.*, 559 F.3d at 825. And again, the Eighth Circuit has already held as much in this very case—summarily denying Plaintiffs' motion to stay the appeal of the final judgment so that Plaintiffs could file the very motion at issue here. The Court should deny Plaintiffs' motion.

III. *Arkansas State Conference NAACP* doesn't justify granting Plaintiffs' motion.

Plaintiffs assert that they "seek to amend their complaint in light of the Eighth Circuit's decision in *Arkansas State Conference NAACP v. Arkansas Bd. Of Apportionment*," which affirmed that there is no private right of action to sue under Section 2 of the Voting Rights Act. Doc 214 at 5; *see Ark. State Conf. NAACP*, 86 F.4th 1204. That cannot possibly justify giving Plaintiffs another bite at the apple when Defendants argued all along—consistent with the Eighth Circuit's holding that Section 2 does not provide a private right of action—that Section 208's similar language likewise doesn't provide a private right of action. Indeed, "it 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 (Stras, J., concurring in denial of en banc review). The Court should deny Plaintiffs' motion.

IV. Basic principles of equity preclude Plaintiffs from amending their complaint

The Court should deny Plaintiffs' motion because their decision not to bring a Section 1983 suit 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." Doc. 96 at 4; *id.* ("Defendants mistakenly assert [] that this action is brought pursuant to 42 U.S.C. 1983."); Doc. 95 at 3-4 ("Plaintiffs are not Section 1983 plaintiffs with respect to their Voting Rights Act claim."). This 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." 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 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, 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). The Court should deny Plaintiffs' motion.

V. Granting Plaintiffs' motion would rewind this case back to the very beginning.

Plaintiffs claim they ultimately seek "a limited remand for the purpose of considering Plaintiffs' motion to amend their complaint." Doc. 214 at 2. Plaintiffs apparently want this Court to permit them to file a second amended complaint without allowing Defendants the right to file any responsive pleading, motion, or countervailing argument against their new claim in this Court. That's preposterous, and this Court shouldn't be misled. Plaintiffs are seeking nothing less than to revamp their entire case. Indeed, on 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 any remand wouldn't be "limited" as

Plaintiffs claim. *Id.* 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

The Court should deny Plaintiffs' motion to amend.

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Respectfully,

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