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

ARKANSAS UNITED and L. MIREYA REITH

Plaintiffs,

v.

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas, SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, JAMES SHARP, and J. HARMON SMITH, in their official capacities as members of the Arkansas State Board of Election Commissioners, and RENEE OELSCHLAEGER, BILL ACKERMAN, MAX DEITCHLER, and JENNIFER PRICE in their official capacities as members of the Washington County Election Commission, RUSSELL ANZALONE, ROBBYN TUMEY, and HARLAN STEE in their official capacities as members of the Benton County Election Commission, and DAVID DAMRON, LUIS ANDRADE, LEE WEBB, in their capacities as members of the Sebastian County Election Commission, and MEGHAN HASSLER in her capacity as Election Coordinator for the Sebastian County Election Commission

Defendants.

Case No. 5:20-cv-05193-TLB

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND COMPLAINT TO ADD ALTERNATIVE CLAIM FOR RELIEF UNDER 42 U.S.C. § 1983

Defendants' Response ignores two critical facts. First, following judgment, and while this case was on appeal, the Eighth Circuit held that there is no private right of action to enforce Section 2 of the Voting Rights Act, but "[p]rivate plaintiffs can sue under statutes like 42 U.S.C. § 1983, where appropriate[.]" *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204, 1213 (8th Cir. 2023). Second, Plaintiffs moved to amend their

Complaint not to secure relief from an adverse judgment, but in response to the Eighth Circuit's ruling in *Arkansas NAACP*.

For these reasons, Plaintiffs properly moved to amend under Fed. R. Civ. P. 15 (a)(2) and Defendants' reliance on Fed. R. Civ. P. 59(e) or Rule 60(b) is misplaced. Plaintiffs' motion to amend the Complaint is timely and serves the interests both of conserving the resources of the Court of Appeals as well as preserving the finality of judgment in the district court.

ARGUMENT

I. Neither Fed. R. Civ. P. 59(e) nor Rule 60(b) Govern Plaintiffs' Motion.

Defendants cite no case in which a court analyzed a motion to amend a complaint under Fed. R. Civ. P. 59(e) or Rule 60(b) following judgment in favor of Plaintiffs.

Where, as here, Plaintiffs do not seek relief from a judgment or order (Rule 60(b)) and do not seek to alter or amend the judgment (59(e)), Rule 15(a)(2) provides the appropriate standard. *See, e.g. In re Patriot Nat'l, Inc. Sec. Litig.*, No. 17 CIV. 1866 (ER), 2021 WL 3418615, at *4 (S.D.N.Y. Aug. 5, 2021) (explaining where "the [proposed amended complaint] would not disturb any judgments that have already been entered in this case[,] the motion is properly analyzed under Rule 15(a), not Rule 60(b)."). Under Rule 15(a)(2), "[t]he court should freely give leave when justice so requires." And because the Court granted judgment in favor of Plaintiffs, here there are no "interests of finality [that] dictate that leave to amend should be less freely available after a final order has been entered." *See U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823 (8th Cir. 2009).

Defendants wrongly assert that Plaintiffs rely on Rule 15 because Plaintiffs "recogniz[e] that Rules 59(e) and 60(b) could afford them no relief at this point." Defendants' Response, Dkt. 216 ("Response") at 2. On the contrary, Plaintiffs point to Rule 15 because that is the applicable

rule. Defendants also misread Plaintiffs' motion by claiming that Plaintiffs "concede that 'this Court lacks authority to grant Plaintiffs' motion to amend the complaint[.]'" Response at 2 (citing Doc. 214 at 2). As Plaintiffs explained in their motion, the reason this Court lacks authority to grant the motion to amend is because this case is pending on appeal. *See* Fed. R. Civ. P. 62.1 (a) ("If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.").

Defendants are not aided by cherry-picking language from inapposite cases. *In re SuperValu, Inc.* does not help Defendants because there the district court concluded that futility and undue delay compelled denial of leave to amend. 925 F.3d 955, 961 (8th Cir. 2019) ("The district court denied plaintiffs' motion, reasoning that futility and undue delay compelled denial of leave to amend under Rule 15(a)(2)."). The opposite is true here, where Plaintiffs seek to amend in order to add 42 U.S.C. 1983 to a viable legal claim under the Voting Rights Act; Defendants do not argue that amendment in this case would be futile.[1]

Defendants' reliance on *Cervantes v. Fowler Foods, Inc., U.S. ex rel. Roop v. Hypoguard USA,* and *Mask of Ka-Nefer-Nefer* is similarly unavailing because all three of these cases involved

[1] Even if *In re SuperValu, Inc.* were relevant here, and it is not, Defendants omit critical language from their discussion of the case. In *In re SuperValu, Inc.*, the Eighth Circuit considered whether Plaintiffs could amend their complaint after it was *dismissed* by the district court. Defendants ignore that language in their Response. *Compare* Response at 2 ("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'") (citation omitted) *with In re SuperValu, Inc.*, 925 F.3d 955, 961 (8th Cir. 2019) ("We have repeatedly explained that '[a] motion for leave to amend *after dismissal* is subject to different considerations than a motion prior to dismissal.' Leave to amend should be granted liberally under Rule 15 prior to dismissal. After judgment has been entered, district courts may not ignore the considerations of Rule 15, but 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.'" (internal citation omitted) (emphasis added).

a motion for leave to amend a complaint after a dismissal for failure to state a claim. *Cervantes v. Fowler Foods, Inc.*, No. 3:20-CV-00237 JM, 2020 WL 5750433, at *1 (E.D. Ark. Sept. 25, 2020); *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d at 821–22[2]; and *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 738–39 (8th Cir. 2014). Even under these circumstances, however, the Eighth Circuit has emphasized that a district court "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits[]." *Hypoguard USA, Inc.*, 559 F.3d at 824.[3]

II. Plaintiffs' Motion to Amend Complaint is Timely

Defendants concede, as they must, that it was not until November 20, 2023 that the Eighth Circuit ruled "there is no private right of action to enforce Section 2 of the Voting Rights Act." Response at 4 (citing *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionmen*t, 86 F.4th 1204 (8th Cir. 2023)). Defendants also concede that the Eighth Circuit's ruling occurred more than one year after this Court's final judgment and Defendants' subsequent appeal. *See id.*; *see also* Dkt. 181 (Defendants' notice of appeal dated September 8, 2022).

[2] Defendants again selectively omit important language, this time from their quote of *U.S. ex rel. Roop v. Hypoguard USA*, Inc., 559 F.3d 818 (8th Cir. 2009). *Compare* Response at 2 ("'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)") with *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009) ("From this survey of prior case law, we conclude that district courts in this circuit have considerable discretion to deny a post-judgment motion for leave to amend because such motions are disfavored, *but may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits*, particularly when a fraud complaint has been dismissed for failure to comply with the pleading requirements of Rule 9(b).") (emphasis added).

[3] Ultimately, in *Hypoguard USA* the Eighth Circuit affirmed the district court's denial of the motion to amend because post-judgment the plaintiff sought to raise a new claim. *United States ex rel. Roop v. Hypoguard USA, Inc.,* 559 F.3d at 825. Here, Plaintiffs do not attempt to raise an entirely new claim against Defendants post-judgment. Instead, Plaintiffs timely seek to amend their complaint following the Eighth Circuit's ruling to add an alternative form of relief.

Prior to the Eighth Circuit's unprecedented ruling, there was no question that private plaintiffs had brought suit under Section 2 of the Voting Rights Act and federal courts had entertained those actions. *Arkansas State Conference NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1218–19 (8th Cir. 2023) (Smith, J., dissenting and collecting cases). Five months before the Eighth Circuit's decision in *Arkansas NAACP*, the U.S. Supreme Court ruled in favor of private plaintiffs who filed suit under Section 2 of the Voting Rights Act. *See Allen v. Milligan*, 599 U.S. 1 (2023).

This Court ruled in 2021 that the Voting Rights Act "explicitly creates a private right of action to enforce the VRA[.]" Dkt. 102 at 16-17. In September 2022, the Court granted Plaintiffs' motion for summary judgment in part, explaining that "a right of action exists for private parties to enforce the VRA's various sections." Dkt. 179 at 22 n. 12.

In recognition of the related nature of the two cases, the Eighth Circuit stayed appellate proceedings in this case pending its decision in *Arkansas NAACP*. Now that the Eighth Circuit has announced its ruling, amending the complaint is the appropriate course of action. *Arkansas NAACP*, 91 F.4th 967, 972 (8th Cir. 2024) (Colloton and Kelly, J.J., dissenting) ("The proper disposition of the plaintiffs' appeal, therefore, is to reverse the dismissal and remand for further proceedings. . . The plaintiffs would have an opportunity to amend their complaint to add an alternative claim for relief under 42 U.S.C. § 1983.").

III. The Decision in *Arkansas NAACP* Justifies Granting Plaintiffs' Motion

Defendants' Response finds no support in *Arkansas NAACP*. Response at 6-7. This case is procedurally different from *Arkansas NAACP* in which "[t]he first time the plaintiffs mentioned § 1983 was in a footnote in their opening brief [on appeal]." *Arkansas NAACP*, 91 F.4th 967, 968

(8th Cir. 2024) (Stras and Gruender, J.J., concurring). Here, Plaintiffs timely seek to amend their complaint in the district court and in light of the Eighth Circuit's ruling.

IV. Granting Plaintiffs' Motion Conserves Judicial Resources

Defendants argue that amending the complaint to add 42 U.S.C. 1983 would prejudice "Defendants" but do not identify any harm to the State. Response at 6-7. Similarly, Defendants' reliance on cases involving waiver, forfeiture and estoppel is misplaced. *Id.*[4]

Defendants also argue that granting Plaintiffs' motion would rewind this case back to the very beginning. Response at 7. However, Plaintiffs' proposed amended complaint makes only one change: adding an alternative claim for relief under 42 U.S.C. § 1983. The purpose of the proposed amendment is to conserve judicial resources on appeal and facilitate resolution of the claims on the merits.

Finally, despite Defendants' claimed mind-reading abilities, the Eighth Circuit's order denying Plaintiffs' motion to stay the appeal pending this Court's ruling on Plaintiffs' motion for indicative ruling does not "underscore" or make "crystal clear" any of Defendants' failed arguments. Response at 2, 5. On May 8, 2024, the Eighth Circuit issued a one-sentence order – "The motion to stay is denied." *Arkansas United, et al v. John Thurston, et al.*, No. 23-1154, Order (May 8, 2024). Nothing in this order indicates, as Defendants suggest, that Plaintiffs' motion to amend their complaint should be denied.

[4] State Defendants err when they assert that the Court denied the county motions to dismiss because Plaintiffs omitted 42 U.S.C. 1983 from their complaint. On the contrary, in denying the county motions to dismiss and concluding the counties were proper defendants, this Court relied on a case in which Plaintiffs pleaded claims under 42 U.S.C. 1983. *See* Dkt. 102 (citing *281 Care Committee v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011)). Whether or not Plaintiffs pleaded 42 U.S.C. 1983, the Court would have denied the county motions to dismiss based on the authority cited in its order.

CONCLUSION

For the foregoing reasons, and the arguments set forth in Plaintiffs' Motion, Plaintiffs respectfully request that the Court grant their Motion to Amend Complaint to add Alternative Claim for Relief Under 42 U.S.C. § 1983.

Dated: June 4, 2024

Respectfully submitted,

/s/ Nina Perales
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that June 4, 2024, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system. I also certify that there are no non-CM/ECF participants to this action.

/s/ Nina Perales
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