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.	§	

FAIR MAPS TEXAS ACTION COMMITTEE, *et al.*,	§	
	§	
Plaintiffs,	§	
V.	§	Case No. 1:21-cv-01038
	§	[Consolidated Case]
GREG ABBOTT, *et al.*,	§	
	§	
Defendants.	§	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FAIR MAPS PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs advocate a model of Voting Rights Act jurisprudence wherein States cannot avoid litigation, and Plaintiffs can reverse engineer a finding of discrimination to support their favored political outcome long after the last legislative vote is tallied. The Supreme Court has soundly rejected that approach. Instead, it has instructed that courts are not to consider claims of partisan gerrymandering because "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they [are] authorized to do so." *Rucho v. Common Cause*, 588 U.S. 684, 705 (2019). And when "assessing a legislature's work" against claims of racial gerrymandering, it has emphatically required courts to "start with [the] presumption that the legislature acted in good faith." *Alexander v. S.C. State Conf. of NAACP*, 144 S. Ct. 1221, 1233 (2024). Even then, members of the Supreme Court have suggested that Section 2 of the VRA toes the constitutional line because it purports to "authorize race-based redistricting" without a temporal limit. *See Allen v. Milligan*, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring); *see also id.* at 78-88 (Thomas, J., dissenting).

Plaintiffs' intentional discrimination claims must be dismissed because, rather than start from a presumption of good faith, they depend on this Court adopting an impermissible presumption of discriminatory animus. Specifically, Plaintiffs ask the Court to presume that because the Legislature did not respond to their own unproven allegations of racial discrimination, the Legislature must have enacted the current maps to perpetuate a pattern racism rather than to comply with a state constitutional requirement that legislative districts be redrawn during the first Regular Session after a decennial census. Tex. Const. art. III, § 28. Plaintiffs' Section 2 claims likewise fail to state a claim. Plaintiffs' atextual reading of Section 2 would deem "established" abridgment of the right to vote on the basis of race, *see* 52 U.S.C. § 10301, whenever a Legislature could have created more districts where white voters were in the minority. Yet the only factors that the majority of such districts would have in common is that they are *not* white and that they tend to vote for a Democrat candidate. Such a claim is nonjusticiable because it is one for partisan gerrymandering in all but name. But even if it were treated as one based on race, it would fall

outside the constitutionally permissible scope of Section 2.

ARGUMENT

I. Plaintiffs' Allegations do not Overcome the Presumption of Good Faith as to the Legislature's Most Recent Enactment.

A key theme throughout Plaintiffs' response (*e.g.*, at 6), is that they expect discovery to demonstrate that the Legislature's failure to adopt the coalition districts they demand reflects discriminatory intent. It is blackletter law, however, that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs' implied assertion that they need discovery to plead a plausible claim rings particularly hollow in this case given that their entire theory of animus is premised on the actions of the 87th Legislature—a topic about which they have now had full discovery. *See e.g.*, Dkt. 325, 595. Plaintiffs' failure to allege that Texas's 88th Legislature acted with discriminatory intent in passing the maps at issue in this lawsuit is fatal to their intentional discrimination claims. Mot. 2–6. Plaintiffs' arguments to the contrary should be rejected.

A. Allegations of historical discrimination do not—standing alone—state a claim of intentional discrimination.

Defendants do not dispute that Plaintiffs may use "circumstantial proof," Reps. at 9, to demonstrate intentional discrimination. *See Abbott v. Perez*, 585 U.S. 579, 607 (2018). But even allegations about discriminatory intent on behalf of individual members of the *current* Legislature are insufficient to show that the Legislature as a whole acted with discriminatory animus because "legislators have a duty to exercise their judgment and to represent their constituents." *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 689-90 (2021). The inferences that one can draw from a *past* legislature are even weaker due to changing personnel and shifting political dynamics reflected in or caused by the election itself. For this reason (among others), under *Perez*, "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." 585 U.S. at 603.

Hunter v. Underwood, 471 U.S. 222 (1985) is not to the contrary because it does not address whether inferences can be drawn about the intent of one Legislature based on the actions of a prior Legislature. Indeed, *Perez* itself explained that *Hunter* addressed the "very different situation" of what to do with a law that was originally adopted by a body "avowedly dedicated to the establishment of white supremacy" and that had never been readopted by an intervening body. *Perez*, 585 U.S. at 604. As a result, even if they could be considered some form of circumstantial evidence about the current legislature, Plaintiffs' allegations about a predecessor assembly do "not nudge[] their claims across the line from conceivable to plausible," and "their complaint must be dismissed." *Twombly*, 550 U.S. at 570

B. All of Plaintiffs' allegations are leveled at the 87th rather than the 88th Legislature.

Plaintiffs' endeavor (at 5) to bridge the gap between allegations about the 87th Legislature and their burden to show the intent of the 88th by alleging that the 88th Legislature "adopted in full" the 87th Legislature's "history and rationale for House Plan 2316 and Senate Plan 2168." (quoting Dkt. 777 ¶ 20). But Plaintiffs' only assertion of discriminatory intent against the 88th Legislature amounts to nothing more than this: the 88th Legislature, in exercising its own independent judgment on whether to adopt House and Senate redistricting plans, knew of and acknowledged the work of the previous legislature, and included portions of the record from the 87th Legislature's deliberations into the House and Senate Journals of the 88th Legislature. Dkt. 777 ¶¶ 8, 13 & n.3.

That the Senate (but not the House) unanimously voted to include a statement to this effect alongside its version of the journal addendum, *see id.* at ¶ 8, is apropos of nothing. The statement reads: "The remarks from the previous Senate session are germane to the consideration of S.B. 375 and provide a more thorough explanation of the rationale for adopting the districts contained in the original redistricting plan." S.J. of Tex., 88th Leg., R.S. A-1 (2023), *available at* https://tinyurl.com/yc4bwxkf. Although fact discovery has long since closed regarding the intent of the 87th Senate, Plaintiffs tellingly do not point to any "remarks from the previous senate" showing

discriminatory intent. Regardless, to label a record "germane" is merely to describe it as "relevant" or "pertinent." *Germane*, Black's Law Dictionary (11th ed. 2019). It is far from an endorsement of anything—let alone everything—contained in the record. *Cf. Humane Soc'y v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988) ("It remains only to note that in thus characterizing the germaneness requirement as mandating mere pertinence between litigation subject and organizational purpose, we join a number of other courts which, without any detailed analysis of prong two, have declared it undemanding.").

Plaintiffs also point (at 5) to their allegation that the 88th Legislature "fail[ed] to ameliorate the known harm in" the 87th Legislature's plans. (quoting Dkt. 777 ¶ 20). Plaintiffs appear to be referring to opposition statements presented to the 88th Legislature relating concerns about specific districts. Response Br. at 6 (citing Dkt. 777 ¶¶ 9, 15). But in *Perez*, the plaintiffs asked the Court to infer animus on the part of the 2013 Legislature because it "'willfully ignored those who pointed out deficiencies'" in their plan, 585 U.S. at 611, and failed to change course in response to problems "that the D.C. court identified in denying preclearance," *id.* at 612. The Court refused to do so because of direct and circumstantial evidence of an alternative explanation for why the Legislature did not accede to those objections: The 2013 Legislature was trying to bring ongoing litigation about its districting plans "to an end as expeditiously as possible." *Id.* at 608. Here, there is similarly an alternative explanation: The 88th Legislature sought to avoid violating the Texas Constitution by failing to create state legislative districts during the first regular session following the decennial census. *See* Dkt. 777 ¶ 5.

Plaintiffs insist (at 6) that "alternative explanations" cannot be considered at the pleading stage. But the supplemental complaint itself acknowledges that the 88th Legislature's actions were prompted by "[t]wo Texas lawmakers" who "brought action in state court, contending that the passage of state legislative plans in a *special* session violated Article 3, Section 28 of the Texas Constitution." Dkt. 777 ¶ 5. *Cf. Twombly*, 550 U.S. at 568 (noting that "the complaint itself" alleged facts undermining the plausibility of the plaintiffs' claims). This allegation provides an explanation for the 88th Legislature's actions that is equally (if not more) plausible than Plaintiffs'.

Especially when combined with the strong presumption of good faith, that precludes Plaintiffs' allegations of discriminatory intent from crossing the line from possibility to plausibility. *Twombly*, 550 U.S. at 557. As the Supreme Court reiterated just a few weeks ago, courts must "draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions." *Alexander*, 144 S. Ct. at 1236.

Moreover, Plaintiffs' allegations regarding opposition statements would fail even if Plaintiffs had not pled themselves out of court. Plaintiffs may not state a claim by stacking inference upon inference or alleging conduct that is consistent with both discrimination and lawful behavior. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Without some indication of the strength of the oppositions' objections, which Plaintiffs' allegations do not supply, Plaintiffs' inference of discriminatory animus remains only conceivable rather than plausible. *Id.* at 683; *cf. Guerra v. Castillo*, 82 F.4th 278, 285 (5th Cir. 2023) ("When confronted with a qualified-immunity defense at the pleadings stage, the plaintiff must plead 'facts which, if proved, would defeat [the] claim of immunity.'" (alteration in original)).

II. The Voting Rights Act Protects the Ability of a Minority, not a Coalition of Minorities, to Elect its Preferred Candidate.

The Fair Maps Plaintiffs' supplemental complaint should be dismissed for the separate reason that it relies on multi-racial coalitions, which are not protected by Section 2 of the VRA. As Judge Higginbotham explained over thirty years ago, the Fifth Circuit's decision in *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), which allowed such claims, was a "disturbing reading of a uniquely important statute" supported by "no authority" and "no reasoning." 849 F.2d 943, 944–45 (5th Cir. 1988) (per curiam) (Higginbotham, J., dissenting from denial of rehearing). In doing so it transformed "the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004).

Shortly after *Campos* issued, Judge Jones aptly observed that "[a]ccording to customary legal analysis, there should be no need to discuss the minority coalition theory of vote dilution

because the text of the Voting Rights Act does not support it." *LULAC v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc) (Jones, J., concurring). Section 2 "speaks only of a 'class of citizens' and 'a protected class.'" *Id.* at 894 (quoting 42 U.S.C. § 1973(b)). "Had Congress chosen to explicitly protect minority coalitions it could have done so . . . in terms of protected *classes* of citizens. It did not." *Id.* In *Nixon v. Kent County*, 76 F.3d at 1381, 1386 (6th Cir. 1996) (en banc), the en banc Sixth Circuit bluntly agreed, stating: "Even the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually." *Id.*

Statutory context is likewise incompatible with coalition claims. Subsection (a) protects "the right of any citizen of the United States to vote" against abridgment "on account of race or color" or language minority status. 52 U.S.C. § 10301(a); *id.* § 10303(f)(2). The Act thus "protects a citizen's right to vote from infringement because of, or 'on account of,' that *individual's* race or color or membership in a protected language minority." *Nixon*, 76 F.3d at 1386. Any reading of subsection (b) that establishes a violation where such discrimination cannot be inferred is therefore suspect as a textual matter. *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring) (explaining that "[c]ontext . . . includes common sense"). Plaintiffs make a number of procedural and substantive objections. None has merit.

A. This is an appropriate time to raise an objection to Plaintiffs' coalition claims.

To start, the Fair Maps Plaintiffs assert this is not an appropriate time for Defendants to raise this objection for two reasons. Not so. *First*, they fault Defendants (at 3) for not waiting until the outcome in *Petteway* before moving to dismiss Plaintiffs' coalition claims. Yet while the Fair Maps' Plaintiffs insist Defendants have brought their motion too early, the Abuabara Plaintiffs insist that they have brought it too late. Dkt. 789 at 2. As Defendants explained in their opening motion, these Rule 12b(6) arguments are presented at this time "because oral argument was held in *Petteway v. Galveston Cnty.*, 86 F.4th 1146 (5th Cir. 2023), on May 15, and an opinion may issue while this motion is pending." Mot. 7 n.1. Defendants would not object, however, if the Court

wishes to stay further consideration of Plaintiffs' coalition claims pending resolution of *Petteway*.

Second, Plaintiffs invoke (at 9) the law-of-the-case doctrine. But that doctrine establishes that "an issue of law decided on appeal may not be reexamined by the district court on remand or by the appellate court on a subsequent appeal." *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (punctuation omitted). It "does *not* operate to prevent a district court from reconsidering prior rulings." *Zarnow v. City of Wichita Falls,* 614 F.3d 161, 171 (5th Cir. 2010) (emphasis added). "A court has the power to revisit prior decisions of its own . . . in any circumstance." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Certainly it should do so here if the Fifth Circuit decides to overrule *Campos* and hold that coalition claims are not cognizable under Section 2 of the VRA.

B. The plain text and context of Section 2(b) cannot support coalition claims.

None of Plaintiffs' laundry list of seven substantive responses is any more meritorious. *First*, Plaintiffs respond (at 11) to Defendants' textual argument by asserting that "what binds affected voters in the 'class'" is not the defined categories of subsection (a), but "the common fact that their voting rights have been diluted on account of race." That is circular. Subsection (a) forbids "denial or abridgment of the right of any citizen of the United States to vote on account of race or color or" language minority status. 52 U.S.C. § 10301(a); *id.* § 10303(f)(2). But in lieu of an intent requirement, subsection (b) deems "established" a violation of subsection (a) when members of "a class of citizens protected by subsection (a)" are unable to elect their candidate of choice. 52 U.S.C § 10301(b). So, according to Plaintiffs, unlawful discrimination is established if a plaintiff can prove that members of a protected class are unable to elect their candidate of choice. But the plaintiff proves membership in a protected class by establishing unlawful discrimination.

This reading of the statute also takes Section 2 out of its larger context because failure to create a coalition district does *not* support an inference of invidious discrimination of the type targeted by Section 2. "Where an election district could be drawn in which minority voters form a majority but such a district is not drawn . . . denial of the opportunity to elect a candidate of choice

is a present and discernible wrong that is not subject to the high degree of speculation and prediction." *Bartlett v. Strickland*, 556 U.S. 1, 18–19 (2009) (plurality opinion). It is a "special wrong" for a politically cohesive minority group with "50 percent or more of the voting population" not to be put into a single district. *Id.* at 19. By contrast, if a minority group cannot make up 50 percent of the voting population in any district, then absent "allegations of intentional and wrongful conduct" all that can be said of that protected group is that it has "the same opportunity to elect their candidate as any other political group with the same relative voting strength." *Id.* at 20. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

"A group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition," *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing en banc), and the most likely explanation for the failure of a political minority (as opposed to a racial minority) to win elections is politics, not racism. As Judge Higginbotham explained decades ago, coalition claims "risk[] that ephemeral political alliances having little or no necessary connection to discrimination will be confused with cohesive political units joined by a common disability of chronic bigotry." *LULAC v. Midland ISD*, 812 F.2d 1495, 1504 (5th Cir. 1997) (Higginbotham, J., dissenting); *accord Clements*, 999 F.2d at 896 (Jones, J., concurring) (warning that "the remedy afforded to the coalition may easily cross the line from protecting minorities against racial discrimination to the prohibited, and possibly unconstitutional, goal of mandating proportional representation"); *see also Bartlett*, 556 U.S. at 14–15.

Second, Plaintiffs' frequent recourse (at 8–10) to legislative history is not valid. Even if "clear legislative history can 'illuminate ambiguous text,'" "'ambiguous legislative history'" may not be used to "'muddy clear statutory language.'" *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011)).

Third, though Plaintiffs are correct (at 15) that *Bartlett* expressly reserves the question of whether coalition claims are cognizable under Section 2, 556 U.S. at 13–14, the plurality's reasons for rejecting crossover claims apply equally to coalition claims. The plurality explained, for

example, that when members of a protected class form less than a majority, though they must "join other voters—*including other racial minorities*, or whites, or both," they have the same opportunity as everyone else "to reach a majority and elect their preferred candidate." *Id.* at 14 (emphasis added). The plurality also favorably cited the Fourth Circuit's decision in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), for the proposition that "[r]ecognizing a § 2 claim" when a particular minority group's voters "cannot . . . elect [their preferred] candidate based on their own votes and without assistance from others" would "grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance'"—which is a "special protection" that has nothing to do with Section 2. *Id.* at 14-15 (quoting *Hall*, 385 F.3d at 431).

Fourth, Plaintiffs' assurances (at 16–17) that coalition claims will not be viable unless they can meet the second *Gingles* precondition only highlights that coalition claims are political gerrymandering claims in disguise. A baseline that establishes vote dilution based not on race but on the possibility of a multi-racial political alliance "would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." *Hall*, 385 F.3d at 431. Plaintiffs also ignore that minority groups might vote together in a general election does not prove an identity of political interests within the meaning of the second *Gingles* factor. Different racial groups may prefer different candidates from the same political party, for example. *See e.g.*, Frank Newport, *Race, Ethnicity Split Democratic Vote Patterns*, Gallup (Jan. 31, 2008), http://tinyurl.com/Gallup2008. Thus, minority coalitions increase the risk that "members of one of the minority groups will increase their opportunity to participate in the political process at the expense of members of the other minority group." *Clements*, 986 F.2d at 785 n.43.

As *Bartlett* explained, there is an important "difference between a racial minority group's 'own choice' and the choice made by a coalition." 556 U.S. at 15. Because coalitions subsume the interests of constituent groups, minority coalitions necessarily promote the interests of the coalition above those of any individual minority group. Thus, Section 2 no longer "levels the playing field for all races"; instead, it becomes a tool "that forcibly advances contrived interest-

group coalitions of racial or ethnic minorities," *Clements*, 999 F.2d at 894 (Jones, J., concurring), which has the effect of limiting the influence of individual groups within the coalition.

Fifth, Plaintiffs are wrong (at 18 n.6) that Defendants have failed to adequately press their constitutional avoidance argument. To the contrary, Defendants dedicated five paragraphs to their argument that "[t]o the extent there is any doubt whether § 2 calls for" the protection of coalition districts, this Court should "resolve that doubt by avoiding serious constitutional concerns." *Bartlett*, 556 U.S. at 21. And Defendants' briefing expressly stated that these arguments were offered as reasons to "eschew an interpretation of Section 2 that excludes just one race from its protective sweep." Dkt. 779 at 19. That is far from an "afterthought" which is deemed waived for failure to discuss it "in any depth." *United States v. Scroggins*, 599 F.3d 433, 447 (5th Cir. 2010).

Sixth, Plaintiffs deny (at 19) that coalition claims cut the white population out of Section 2 protections. But if white voters can form part of a coalition, that only confirms that a coalition claim is a partisan gerrymandering claim, which the Supreme Court has declared to be nonjusticiable, *Rucho*, 588 U.S. at 705; a crossover claim, which the Supreme Court has already held to be unconstitutional, *Bartlett*, 556 U.S. at 25–26; a claim for proportional representation by race, which is statutorily impermissible, 52 U.S.C. § 10301(b); or all of the above.

Seventh, Plaintiffs take umbrage (at 19–20) at Defendants' observation that coalition claims benefit members of the coalition at the expense of those who (because of their race) are not admitted to the coalition. They insist (at 20) that coalition claims do not "'benefit' one race of voters to others' exclusion." But this assertion is difficult to square with Plaintiffs' concession (at 19) that the Voting Rights Act imposes a "prophylactic" remedy or the reality that "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 218–19 (2023). It is difficult to imagine groups making common political cause when doing so did not offer some perceived benefit unavailable to outgroups. If Plaintiffs form a beneficial, raced-based coalition, then races excluded from the coalition cannot receive its benefits.

CONCLUSION

Defendants respectfully move for dismissal of the Fair Maps Plaintiffs' second amended complaint.

Date: July 2, 2024

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

I hereby certify that on July 2, 2024, I conferred with all counsel by email, and none were opposed to this motion.

/s/ Ryan G. Kercher
RYAN G. KERCHER

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on July 2, 2024, and that all counsel of record were served by CM/ECF.

/s/ Ryan G. Kercher
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