**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

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| ROLAND GUTIERREZ; SARAH ECKHARDT; and the TEJANO DEMOCRATS,<br><br>*Plaintiffs*,<br><br>v.<br><br>GREG ABBOTT, Governor of the State of Texas sued in his official capacity; and, JOSE A. ESPARZA, Deputy Secretary of State of Texas and acting Secretary of State of Texas sued in his official capacity.<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO.<br>1:21-CV- 00769- RP-JES-JVB<br>Complaint for Declaratory Judgment and Injunctive Relief |

PLAINTIFFS' RESPONSE TO DEFENDANTS' OPPOSED MOTION TO CONSOLIDATE

Plaintiffs hereby file their response to Defendants' motion to consolidate the instant suit with another case filed in the El Paso Division. In this case, Plaintiffs challenge the Texas House of Representatives ("State House") and Senate redistricting maps used in the 2020 elections; in the El Paso case, the plaintiffs challenge the Texas State House, Senate, congressional, and State Board of Education ("SBOE") redistricting maps passed by the Legislature in the most recent special session. Despite Defendants' assertions that both cases substantially overlap and should be consolidated before this Court, each case involves distinct issues that require their respective courts to analyze entirely different proof in support of the parties' respective, independent claims.

Because consolidation would neither increase efficiency nor conserve resources, Plaintiffs request that the Court deny Defendants' motion.

## I. BACKGROUND

Plaintiffs brought this case on September 1, 2021. Dkt. 1. Plaintiffs' suit advances two claims: first, in light of new Census data, the Texas House and Senate redistricting maps used in the 2020 elections violate the U.S. Constitution because they are malapportioned; and second, that the Texas Legislature lacks authority under the Texas Constitution to pass new redistricting maps until its next regular session in January 2023.[1] Plaintiffs request that, until the next regular session, this Court draw maps for the 2022 election cycle for the Texas House and Senate. Dkt. 1 at ¶ 46.

Plaintiffs in the El Paso case (the "*LULAC* Plaintiffs") filed suit challenging the new statewide redistricting plans enacted by the Texas Legislature on October 15 and 16, 2021. The *LULAC* Plaintiffs allege that the newly adopted maps discriminate against Latino voters in violation of the U.S. Constitution and the Voting Rights Act. The *LULAC* Plaintiffs further allege malapportionment claims against the 2020 redistricting plans. The *LULAC* Plaintiffs ask their court to ensure that any new redistricting plans provide Latino voters an equal opportunity to elect their preferred candidates.

## II. ARGUMENT

### A. The First-to-File Rule Does Not Apply to the Cases at Issue Because The Cases Do Not Substantially Overlap.

[1] Article III, Section 28 of the Texas Constitution states that the Legislature "shall, at its first *regular* session after the publication of each United States decennial census, apportion the state into senatorial and representative districts." The U.S. Secretary of Commerce did not publish the 2020 Census until August 12, 2021—after the completion of the Legislature's 87th Regular Session. Defendant Abbott then called a third *special* session to address redistricting—including the Texas House and Senate maps—after publication of that data.

Because these two cases are not related, Defendants are wrong in their assertion that the first-to-file rule allows this Court to determine whether both cases should be consolidated. The first-to-file rule is a discretionary doctrine that courts may apply only "when related cases are pending before two federal courts." *Green Tree Servicing, L.L.C. v. Clayton*, 689 F. App'x 363, 367 (5th Cir. 2017) (quoting *Int'l Fid. Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d 671, 677 (5th Cir. 2011). When the rule applies, the court in which the first action was filed "may decide 'whether the second suit filed must be dismissed, stayed or . . . consolidated.'" *Heritage All. v. Am. Pol'y Roundtable*, No. 1:18 Civ. 939 (RP), 2019 WL 3305609, at *3 (W.D. Tex. July 23, 2019) (quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999)).

"To determine whether the rule applies, the crucial inquiry is one of substantial overlap." *Hart v. Donostia LLC*, 290 F. Supp. 3d 627, 630 (W.D. Tex. 2018) (quotation omitted). Substantial overlap exists where "'the core issue' in each case is the same and" where "much of the proof adduced . . . would likely be identical." *Heritage*, 2019 WL 3305609, at *2 (quoting *Sweet Little Mexico*, 665 F.3d at 678). Although cases need not be identical for the first-to-file rule to apply, they "should be more than merely related." *Sirius Comp. Sols., Inc. v. Sparks*, 138 F. Supp. 3d 821, 827 (W.D. Tex. 2015) (quotation omitted). Application of the rule must "align with the rule's underlying policies, which ultimately relate to efficiency and conservation of judicial resources." *Hart*, 290 F. Supp. 3d at 632–33.

Defendants cannot establish that the two cases are even related—much less that they substantially overlap. Critically, the "core issues" in the two cases "are not the same." *Sweet Little Mexico*, 665 F.3d at 678. In the case pending before this Court, Plaintiffs challenge Texas's 2020 House and Senate redistricting maps, and allege that those maps are unconstitutionally

malapportioned in light of the 2020 Census. Plaintiffs also argue that the Texas Legislature is barred from enacting new maps before its next regular session in 2023. By contrast, the *LULAC* Plaintiffs challenge Texas's *newly adopted* redistricting maps, and allege that the new maps discriminate against Latino voters. The only shared claim is malapportionment of the 2020 State House and Senate redistricting plans.

Defendants' attempts to manufacture any more similarities between the two cases are without merit.

First, Defendants assert that because Plaintiffs in both cases include Latinos, the parties are substantially similar. Defs' Brief at 3 ("these two redistricting cases . . . involve similar plaintiffs"); *see also id.* at 1 and 6. There is no legal support for the argument that people of the same race are the same or even similar people.

Second, Defendants characterize both complaints as "challeng[ing] . . . the validity of the new maps." Defs' Brief, Dkt. 20 at 1. That characterization is false. Plaintiffs filed the case pending in this Court a week *before* the Governor even called the Legislature into special session for redistricting, and Plaintiffs' complaint nowhere addresses the newly-enacted maps plans. *See* Dkt. 1 ¶ 28. The case pending before this Court challenges only malapportionment in the 2020 redistricting plans and argues that the Texas Legislature lacks the authority to enact redistricting legislation during a special session, whenever the Governor might call such a session. By contrast, the *LULAC* Plaintiffs challenge the newly-enacted redistricting maps as racially discriminatory. Thus, although suits both seek injunctive and declaratory relief, the substance of the legal claims in the two cases, and the requested remedies, are distinct.

Third, "the 'proof adduced' in the two cases would not be identical." Plaintiffs here

advance claims that turn largely on undisputed facts, including the 2020 Census population residing within the redistricting plans used in the 2020 elections. On the other hand, the *LULAC* Plaintiffs' case will undoubtedly involve contested issues of fact related to the effect of the newly adopted redistricting plans on Latino voters' opportunity to elect their candidates of choice, including the demographic composition of the newly adopted redistricting plans (and Plaintiffs' proposed alternatives), racially polarized voting and the Senate Factors. *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986).

Because there is no overlap among the plaintiffs or anticipated evidence in the two cases, Defendants have failed to show that both cases substantially overlap.

Even when the first-to-file rule does not require complete overlap between two suits, courts require at least *some* overlap on the core issues. Even *some* overlap is absent here. *See Sweet Little Mexico*, 665 F.3d at 678-79; *see also Jones v. Xerox Com. Sols., LLC*, No. 13 Civ. 650 (NFA), 2013 WL 324957, at *3 (S.D. Tex. June 26, 2013) (declining to apply the first-to-file rule to two FLSA suits because each raised independent claims with "facts and legal issues" that "are distinct" from the other); *Rooster Prod. Int'l, Inc. v. Custom Leathercraft Mfg. Co.*, No. 04 Civ. 864 (XR), 2005 WL 357657, at *2 (W.D. Tex. February 1, 2005) (declining to apply the rule where first suit alleged patent infringement of four patents and second suit alleged different causes of actions based on a different product). The rule still requires consideration of factors such as "the extent of overlap, the likelihood of conflict, [and] the comparative advantage and the interest of each forum in resolving the dispute." *Sweet Little Mexico*, 665 F.3d at 678. There is *no* overlap between the core issues here. And although overlap in parties may, in part, justify application of the first-to-file rule, only Defendants are the same here. These cases involve different plaintiffs challenging different maps based on different underlying legal theories that rely on entirely

different sources of evidence.

Defendants are also incorrect in asserting that the first-to-file rule applies because without consolidation there is a risk of "two separate sets of court-drawn maps." *See* Dkt. 20 at 7. First, the lack of commonality between the challenged maps in the two cases warrants denial of consolidation. The *LULAC* Plaintiffs challenge two sets of maps not at issue here—*i.e.*, the congressional and SBOE maps -- and thus there cannot be any conflict in remedies. Second, as Defendants fail to note, the *LULAC* Plaintiffs first seek that the El Paso court set a deadline for Texas authorities to enact a constitutional redistricting plan; the *LULAC* Plaintiffs request that the court draw maps only if Texas authorities fail to do so by then. *See LULAC* Plaintiffs' Complaint, Dkt. 20-1 ¶ 115(e)–(f).

Third, given the distinct legal questions at issue in both cases, Defendants have failed to show that "the outcome of one" case is "necessarily dispositive of the other," *see Hart*, 290 F. Supp. 3d at 631; *see also Sweet Little Mexico Corp.*, 665 F.3d at 678, or at least that there is a "substantial likelihood of conflicting rulings," *Bukalew v. Celanese, Ltd.*, No. 05 Civ. 315 (SBK), 2005 WL 2266619, at *3 (S.D. Tex. Sept. 16, 2005). Rather, Defendants have asserted merely that a potential conflict could result, without describing the conflict or providing any support as to the likelihood of any such conflict. Most important, where courts have concluded that there was a sufficient likelihood of conflict meriting application of the first-to-file rule, they reached that conclusion based on a conflict on the rulings on the merits—not on a potential remedy. *See Save Power Ltd.*, 121 F.3d at 951; *see also Gonzalez v. Unitedhealth Grp., Inc.*, No. 19 Civ. 700 (ADA), 2020 WL 2992174, at *3 (W.D. Tex. June 3, 2020); *RadiaDyne, L.L.C. v. Plyzen, Inc.*, No. 11 Civ. 4589 (NFA), 2012 WL 626216, at *2 (S.D. Tex. Feb. 24, 2012). Given the differences between the legal issues in both cases, Defendants fail to establish any remote possibility of conflicting

rulings on the merits of those issues.

Finally, in their argument concerning consolidation, Defendants assert that this Court would be a more convenient forum given the location of the majority of the parties and their counsel, but that factor does not overcome the lack of overlap between both suits. Thus, on balance, the principles of efficiency and conservation of judicial foreclose application of the first-to-file rule. *See Hart*, 290 F. Supp. 3d at 632–33.

**B. Defendants fail to establish that this Court should consolidate the cases in dispute.**

A court may consolidate cases only if the actions "involve a common question of law or fact." Fed. R. Civ. P. 42(a). Only "[i]f that threshold requirement is met" does consolidation "become[] an issue of judicial discretion." *RTIC Drinkware, LLC v. YETI Coolers, LLC*, No. 1:16-cv-907-RP, 2017 WL 5244173, at *2 (W.D. Tex. Jan. 18, 2017). As demonstrated below, none of the factors used by courts to evaluate the appropriateness of consolidation weigh in favor of consolidation here.

*1. The actions do not involve common questions of law or fact*

Defendants fail to satisfy the threshold requirement that both cases share common questions of law and fact. Courts in this Circuit have noted that the analysis under this requirement is similar to the analysis regarding whether there is substantial overlap under the first-to-file rule. *See Jones*, 2013 WL 324957, at *3; *Rooster Prod. Int'l, Inc. v. Custom Leathercraft Mfg. Co.*, No. 04 Civ. 864 (XR), 2005 WL 357657, at *2 (W.D. Tex. Feb. 1, 2005); *see also Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 917 (5th Cir. 1997). Even where two suits raise "similar factual and legal issues," cases fail to satisfy this requirement where, as here, "the questions arising in each case are not the same and necessarily can be resolved differently" in each suit. *RTIC Drinkware*,

*LLC v. YETI Coolers, LLC*, No. 1:16-cv-907, 2017 WL 5244173, at *2 (W.D. Tex. Jan. 18, 2017).

Both cases lack common questions of law or fact for the same reasons that they lack substantial overlap for the purposes of the first-to-file rule. *See supra*, Section III.A. At bottom, Plaintiffs in the case pending before this Court challenge the substance of the *2020* Texas House and Senate maps and challenge whether the Legislature can enact new maps—regardless of their substance—during a special session. By contrast, *LULAC* Plaintiffs challenge discrimination in *new* Texas and Senate maps. Moreover, unlike Plaintiffs here, *LULAC* Plaintiffs challenge the congressional and SBOE maps. Defendants' argument that the Court should consolidate both cases because, essentially, they involve redistricting ignores the fact that "the specific claims asserted in each action are different." *See RTIC*, 2017 WL 5244173, at *2; *see also Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3171958, at *3 (S.D. Tex. July 26, 2021) (concluding that two suits, both involving immigration law, lacked a common issue of law and fact because one dealt with detention and the other dealt with removal). In light of the differences between these two cases, Defendants have failed to make the threshold showing that a common question of law and fact exists, and thus consolidation under Rule 42 is not appropriate.

*2. Regardless of the threshold requirement, discretionary factors strongly disfavor consolidation*

a. <u>The actions are filed in the same district, but different divisions</u>

Although both sets of plaintiffs in these cases filed complaints in the Western District of Texas, the cases are pending in different divisions and courts still retain broad discretion in considering whether to consolidate. *Texas*, 2021 WL 3171958, at *2. Where two cases are pending in distant divisions, courts have concluded that this factor is neutral to consolidation. *Id*. (finding that factor was neutral where one case was pending in the Victoria Division and the other was pending in the Galveston Division, or "some 170 miles away"). Here, *LULAC* Plaintiffs' suit

is pending in the El Paso Division -- approximately 575 miles from the Austin Division. As such, "this factor weighs neither in favor of nor against consolidation." *Id.*

b. The actions do not involve similar plaintiffs

Although Defendants here and in the *LULAC* case are the same, there is no overlap among Plaintiffs or Plaintiffs' counsel. Defendants fail to cite any authority holding that organizational plaintiffs are similar because their members are the same race or because their members seek fair elections. Dkt. 20 at 11. Indeed, the cases cited by Defendants found similarity based on an overlap of parties. *See Samataro v. Keller Williams Realty, Inc.*, No. 1:21-cv-76-RP, 2021 WL 3596303, at *2–3 (W.D. Tex. Apr. 27, 2021) (consolidating cases that had the same defendants and same plaintiffs' counsel); *Raymond v. Invest Props.*, LLC, No. SA-20-CV-00965-FB, 2021 WL 725819, at *2–3 (W.D. Tex. Feb. 17, 2021) (consolidating cases that featured the same defendants and same plaintiff).

The lack of any overlap among Plaintiffs is a more important consideration than the similarity among Defendants. *See Texas*, 2021 WL 3171958, at *2 (denying consolidation where each case had different plaintiffs and different counsel). Accordingly, the lack of any overlap in these cases between the plaintiffs as well as the plaintiffs' counsel weighs against consolidation.

c. The actions will not result in inconsistent adjudications

Courts also weigh "the risk of inconsistent adjudications of common factual or legal questions if the matters are tried separately." *Samataro*, 2021 WL 3596303, at 2. As discussed, the cases share few common factual or legal questions. *See supra*, Section III.B.1. Accordingly, there is little risk of inconsistent adjudications. *See RTIC*, 2017 WL 5244173, at *3. Defendants argue, in a conclusory fashion, that both cases will include similar discovery that may result in

inconsistent rulings, but Defendants fail to show how the discovery would be similar and why there is a likelihood of inconsistent rulings (for example on the issue of malapportionment of the 2020 redistricting plans, which Defendants cannot dispute). *See supra*, Section III.A. Thus, this factor does not favor consolidation.

d. Consolidation does not conserve judicial resources and risks confusion

The issues in each case are for the most part distinct and rely on different sources of evidence; accordingly, the actions will not draw from the same witnesses or sources of discovery, will not involve similar legal briefing, and will turn on distinct issues of law and fact. *See supra*, Section III.A and IV.B.1; *see also RTIC*, 2017 WL 5244173, at *3. As a result, consolidation will not promote judicial economy. *See Dryshod Int'l, LLC v. Haas Outdoors, Inc.*, No. 18 Civ. 596 (RP), 2019 WL 5149860, at *2 (W.D. Tex. Jan. 18, 2019). In fact, "consolidation would lead to one significantly more complex case" rather than two cases with few overlapping issues of law and fact, thereby leading to confusion of the issues in each case. *See RTIC*, 2017 WL 5244173, at *3. Indeed, where, as here, two cases involve "different plaintiffs . . . bringing different causes of action" with "differing factual predicates" "while represented by different counsel," courts in this Circuit have concluded "that consolidation would more likely increase cost and delay, rather than avoid it," and consolidation therefore would be improper. *Klick v. Cenikor Found.*, No. 19 Civ. 1583 (CE), 2019 WL 6912704, at *1 (S.D. Tex. Dec. 18, 2019). Thus, this factor does not favor consolidation.

e. The two Actions Have Different Procedural Postures

Consolidation is also improper here because the cases have different procedural postures. *See RTIC*, 2017 WL 5244173, at *1–3. *Compare Texas*, 2021 WL 3171958, at *2 (different

procedural posture of one case, where parties had fully briefed a motion for preliminary injunction, foreclosed consolidation) *with Arnold & Co., LLC v. David K. Young Consulting, LLC*, No. SA-13-CV-00146-DAE, 2013 WL 1411773, at *2 (W.D. Tex. Apr. 8, 2013) (consolidating cases filed a month apart where no dispositive motions were pending and little discovery had occurred).

Unlike the *LULAC* Plaintiffs who filed suit a week ago on October 18, 2021, Plaintiffs in this case filed suit nearly two months ago on September 1, 2021. In that time, Plaintiffs and Defendants have filed and fully briefed motions for preliminary injunction (Dkt. 10, 14, 17) and to dismiss (Dkt. 12, 15, 19). The different procedural postures of these two cases make consolidation inefficient and prejudicial to Plaintiffs and *LULAC* Plaintiffs.

## IV. CONCLUSION

Because Defendants fail to establish that the cases in dispute substantially overlap and that consolidation would increase efficiency and conserve resources, Plaintiffs respectfully request that the Court deny Defendants' motion.

DATED: October 25, 2021

Respectfully,

By: /s/ *Martin Golando*

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