

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ROBERT S. BENNETT, NACHAEL
FOSTER, ANDREW BAYLEY, and others
similarly situated,

Plaintiffs,

v.

STATE BAR OF TEXAS,

Defendant.

Civil Action No. 4:21-cv-02829

**DEFENDANT STATE BAR OF TEXAS’ RESPONSE TO PLAINTIFFS’
MOTION FOR AN EXTENSION OF TIME TO RESPOND TO DEFENDANT’S
MOTIONS TO DISMISS OR TO TRANSFER**

On January 24, 2022, Defendant State Bar of Texas filed motions to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (ECF No. 12), or, in the alternative, to transfer this case to the U.S. District Court for the Western District of Texas, Austin Division, under 28 U.S.C. § 1404(a) (ECF No. 13). Defendant’s motion to dismiss argues that Defendant is entitled to sovereign immunity and does not qualify as a “person” subject to suit under 42 U.S.C. § 1983. Alternatively, Defendant requested transfer of this action—including the issues raised in Defendant’s motion to dismiss—to the Western District, which has overseen the litigation on which Plaintiffs’ complaint relies. *See McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *petitions for cert. filed*, No. 21-800 (U.S. Nov. 24, 2021), *and* No. 21-974 (U.S. Dec. 30, 2021).

Under this Court’s Local Rule 7.4 and the Court’s Procedures and Practices Section B.5(e), Plaintiffs are required to file any responses to Defendant’s motions “within twenty-one (21) days”—i.e., by February 14, 2022. On February 7, fourteen days after Defendant filed its motions, Plaintiffs filed a “Motion for an Extension to Respond to the Defendants’ Pending Motions to

Transfer and/or Dismiss” (“Extension Motion”) (ECF No. 15).¹ Plaintiffs request that the Court extend the February 14 response deadline to an indeterminate date “no sooner than” one month after *both* (1) the date the U.S. Supreme Court rules on the pending certiorari petitions in *McDonald*, and (2) Defendant shows that it has complied with any applicable state procurement requirements. *See* Extension Motion ¶ 14. In effect, Plaintiffs have requested a response deadline of no sooner than early May 2022.²

Plaintiffs’ Extension Motion should be denied. As an initial matter, the Court should strike Plaintiffs’ motion because, as Plaintiffs’ “Certificate of Conference” states, Plaintiffs did not confer with Defendant before filing the motion, in violation of the Local Rules. Extension Motion 5; *see* Local Civil R. 7.1(D); Court Procedures and Practices B.5(c). In any event, Plaintiffs have failed to show that “good cause” exists to extend their response deadline as requested, and indeed, there is none. Fed. R. Civ. P. 6(b)(1)(A).

Plaintiffs essentially ask the Court to hold this action in abeyance pending the resolution of the *McDonald* certiorari petitions, asserting that Plaintiffs’ counsel should have an opportunity to read the briefs in those cases before responding, and that the outcome of those proceedings “is potentially very helpful to the Court’s analysis.” Extension Motion ¶¶ 7-9. But the certiorari-stage proceedings in *McDonald* have no bearing on Defendant’s motions here. Those proceedings

¹ Plaintiffs have filed their Extension Motion on the docket as an “Opposed RESPONSE in Opposition” to Defendant’s motions to dismiss or to transfer. However, Plaintiffs’ Extension Motion is not, in name or substance, a response to either of Defendant’s motions, and it also requests *affirmative* relief. Defendant thus files this brief in response to Plaintiffs’ affirmative request for an extension of time to respond, not as a reply brief in support of either Defendant’s motion to dismiss or motion to transfer.

² The *McDonald* plaintiffs’ brief in opposition to the defendants’ conditional cross-petition for a writ of certiorari is due by February 28, 2022. *See* U.S. Supreme Court Docket No. 21-974, <https://bit.ly/3JYLAeQ>. As such, it is unlikely that the Supreme Court will consider the *McDonald* certiorari petitions before the Court’s April 1, 2022 Conference. *See* S. Ct. R. 15.5, 15.7.

are plainly irrelevant to Defendant’s motion to transfer, and Plaintiffs make no meaningful effort to contend otherwise. The *McDonald* certiorari-stage proceedings are also immaterial to the central issue raised in Defendant’s motion to dismiss—i.e., the Bar’s claim of sovereign immunity. As Defendant explained in its motion, while the *McDonald* plaintiffs filed suit against the members of the Texas State Bar Board of Directors in their official capacities, Plaintiffs here have not done so, and the only defendant properly in this case is the Texas State Bar itself. *See* Mot. to Dismiss 9 & n.4 (Jan. 24, 2022), ECF No. 12; *cf. McDonald v. Sorrels*, No. 1:19-cv-219-LY, 2020 WL 3261061, at *3 (W.D. Tex. May 29, 2020), *vacated in part sub nom. McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). The Court thus lacks subject-matter jurisdiction over this action because the Texas State Bar is entitled to sovereign immunity under binding Fifth Circuit precedent, and Plaintiffs have also failed to state a claim under 42 U.S.C. § 1983 because the Texas State Bar is not a “person” subject to suit under § 1983. *See generally* Mot. to Dismiss. Because those issues are not in dispute in *McDonald*, the outcomes of the pending certiorari petitions (even if granted by the Supreme Court) would have no effect on this Court’s analysis of them.

Although Defendant is amenable to a short extension—especially in light of Plaintiffs’ statements that they and their counsel have recently suffered illnesses (Extension Motion ¶ 12)—there is no good cause for the indefinite extension that Plaintiffs have requested. The Court should therefore deny Plaintiffs’ motion and order Plaintiffs to expeditiously respond to Defendant’s pending motions.

Dated: February 10, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 10, 2022, I electronically filed the foregoing response with the Clerk of the Court for the U.S. District Court for the Southern District of Texas by using the Court's CM/ECF system, which will send notification of such filing to the following:

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Dated: February 10, 2022

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CIVIL ACTION NO. 4:21-CV-02829

ORDER

It is hereby ordered that Plaintiffs' Motion for an Extension to Respond to the Defendants' Pending Motions to Transfer and/or Dismiss is DENIED. It is further ordered that Plaintiffs shall file any responses to Defendant's pending Motion to Dismiss and Motion to Transfer by or on [DATE].

It is so ORDERED.

Date

The Honorable Alfred H. Bennett
United States District Judge