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

RESPONSE TO PLAINTIFFS' MOTION TO EXTEND THE DEADLINE TO FILE A NOTICE OF APPEAL

Plaintiffs request an extension of time to file their notice of appeal, which they concede was due on September 14, 2022. (ECF No. 37 at 2). But the excuses they provide do not meet the good cause standard required by the applicable federal rules. Plaintiffs argue that their desire to evaluate both their appellate prospects and their potential "political" solutions warrant an extension of time. Not so. The law requires more than a desire for strategic delay, and the Court should therefore deny their request for extension.

Federal Rule of Appellate Procedure 4(a)(5) governs motions for extensions of time to file a notice of appeal. Specifically, it states that a district court "may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause." Fed. R. App. P. 4(a)(5). Plaintiffs claim only "good cause." (ECF No. 37 at 2).

"To establish good cause, the movant must [] show that 'the need for an extension is . . . occasioned by something that is not within the control of the movant.'" *Alexander v. Saul*, 5 F.4th

139, 147 (2d Cir. 2021); *Nicholson v. City of Warren*, 467 F.3d 525, 526 (6th Cir. 2006); Fed. R. App. P. 4(a)(5) Advisory Committee's Notes to 2002 Amendments ("The good cause standard applies in situations in which there is no fault—excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant."); *see also S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003) (describing the "good cause" standard under Federal Rule of Civil Procedure 16(b) as requiring diligence of the party seeking extension). Moreover, demonstrating good cause "requires a greater showing than 'excusable neglect.'" *Alexander*, 5 F.4th at 147 (citing *In re Kirkland*, 86 F.3d 172, 175 (10th Cir. 1996)).

Neither of Plaintiffs' excuses meet the "good cause" standard. Plaintiffs' first excuse is that an extension is warranted because of their "desire for conducting still more rigorous research regarding the Plaintiffs' appellate prospects." (ECF No. 37 at 2). Besides failing to describe any part of what such "research" would entail, Plaintiffs also fail to explain why they did not perform their research earlier—before filing suit or even in preparation to respond to the motion to dismiss. Nor do they explain why their as yet unrequited desire to conduct additional research is somehow outside of their control. Rather, "researching appealability is within the control of counsel." *U.S. v. Gomez-Gomez*, 643 F.3d 463, 472 (6th Cir. 2011). Pursuant to the Court's Order dismissing the case (ECF No. 35), the only appealable issue is whether Eleventh Amendment immunity bars Plaintiffs' claims against Defendant State Bar of Texas. That simple and singular issue was disposed of by the Court in its three-page order, and Plaintiffs' desire, or even ability, to research their appellate prospects on that one issue is fully within their control. Accordingly, Plaintiffs' first excuse does not meet the "good cause" standard. *See, e.g.*, *Gomez-Gomez*, 643 F.3d at 472 ("good cause" not satisfied where the movant "failed to indicate to the district court why the additional

research could not have been completed within the normal time to appeal"); *Ewald v. Royal Norwegian Embassy*, 2012 WL 12895051, at *4 (D. Minn. Nov. 21, 2012) ("good cause" not satisfied where the movant did not demonstrate that the alleged necessary research was "demanding or time-consuming"); *Kleem v. I.N.S.*, 479 U.S. 1308, 1308 (1986) ("good cause" not satisfied where "counsel [gave] no reason for his request other than his desire for additional time to research constitutional issues"—the Court reasoned that "[t]he same reason could be adduced in virtually all cases").

Plaintiffs' second excuse regarding their desire to evaluate a "political" solution is similarly meritless. Plaintiffs have not explained why they did not or could not explore those political avenues within the statutorily prescribed time limit. In fact, Plaintiffs have not explained why an additional 30 days to file their notice of appeal would affect whether or not they choose to "pursu[e] [their] goals politically." (ECF No. 37 at 2). Plaintiffs are simply asking the Court to extend their time to file because it would be strategically beneficial for them, but that is not "good cause." *See Kirkland*, 86 F.3d at 176 (finding that delay for "strategic reasons" does not constitute "good cause" because "good cause" requires, at bottom, "meticulous efforts to comply with the [relevant] rule"). Instead, "good cause" requires showing that "forces beyond the control of the [potential] appellant" prevented timely filing a notice of appeal. *Nicholson*, 467 F.3d at 526. Plaintiffs make no such showing here, and their request should be denied.

Finally, the cases Plaintiffs cite in support of their position are inapposite.[1] All three deal with the "excusable neglect" standard and are therefore inapplicable to Plaintiffs' own statement that they seek an extension only "on the grounds of good cause." (ECF No. 37 at 2). *See Alexander*,

[1] Plaintiffs cite *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004); *Zipperer v. Sch. Bd. of Seminole Cnty.*, 111 F.3d 847, 849–50 (11th Cir. 1997); and *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

5 F.4th at 147 (quoting Fed. R. App. P. 4(a)(5) Advisory Committee's Notes to 2002 Amendments) (holding that the "good cause" and "excusable neglect" standards are "not interchangeable").

In any case, Plaintiffs fail under the "excusable neglect" standard as well. Excusable neglect denotes a situation involving "inadvertence, mistake, or carelessness" on the part of the movant. *Pioneer Inv. Servs. Co.*, 507 U.S. at 388. Plaintiffs admit to no such fault here. And that makes sense because Plaintiffs' request, filed on September 14, 2022, admits that there was nothing stopping them from filing a notice of appeal beyond their own strategic discretion.

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Extend the Deadline to File a Notice of Appeal.

Dated: October 5, 2022

Respectfully submitted,

/s/ Patrick W. Mizell

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CERTIFICATE OF SERVICE

I certify that on October 5, 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: October 5, 2022

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