The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**

SUSAN SOTO PALMER, et. al.,

*Plaintiffs*,

v.

STEVEN HOBBS, et. al.,

*Defendants*,

and

JOSE TREVINO, ISMAEL CAMPOS, and ALEX YBARRA,

*Intervenor-Defendants*.

Case No.: 3:22-cv-05035-RSL

Judge: Robert S. Lasnik

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO BIFURCATE AND TRANSFER, STRIKE, AND/OR DISMISS INTERVENORS' CROSSCLAIM**

NOTE FOR MOTION CALENDAR: November 25, 2022



## INTRODUCTION

This Court should grant Plaintiffs' Motion to Bifurcate and Transfer, Strike and/or Dismiss Intervenors-Defendants' Crossclaim. Intervenor-Defendants' crossclaim is 1) duplicative of a claim that Intervenor-Defendants' lead counsel already brought in *Garcia et al. v. Hobbs*, 2) jurisdictionally interferes with these Plaintiffs' Section 2 Voting Rights Act (VRA) claim, and 3) if Intervenor-Defendants' crossclaim should survive at all, it should be transferred and consolidated with the *Garcia* case. Finally, when considering how to handle Intervenor-Defendants' crossclaim the Court should consider that recently discovered evidence demonstrates that counsel for the Garcia Plaintiffs, the Intervenor-Defendants, and at least one member of the Washington Redistricting Commission have been coordinating legal machinations since at least

before the *Garcia* suit was filed with design to frustrate the enforcement of the federal Voting Rights Act. Remarkably, Commissioner Paul Graves coordinated the funding and filing of the racial gerrymandering legal challenge against the plan ***he drew.*** The purpose of that challenge is certainly not to protect Latino voting rights. Rather, the goal is to *worsen* the cracking of the Yakima area Latino voters beyond the dilutive district Commissioner Graves drew. As Plaintiffs will prove at trial in this case, the effort led by Commissioner Graves was an intentional and concerted effort to dilute the voting strength of Yakima area Latino voters. His coordinated effort to interfere with Plaintiffs' Section 2 case by filing a competitor lawsuit purporting to challenge the constitutionality of ***his own conduct*** underscores that discriminatory intent. The Court should not permit this bad faith behavior to interfere with the adjudication of this case.



## ARGUMENT

Intervenor-Defendants' crossclaim should be dismissed and/or bifurcated and transferred.

### I. Intervenor-Defendants, the *Garcia* Plaintiffs, and Washington Redistricting Commissioner Paul Graves are coordinating to frustrate this enforcement action under the Voting Rights Act.

Recent document production reveals that Intervenor-Defendants, lead counsel for the Garcia Plaintiffs Drew Stokesbary, and Washington Redistricting Commissioner Paul Graves have been coordinating litigation strategies since at least March 4, 2022. *See* Exhibit 1. Although Commissioner Graves and others have been less than diligent in producing ESI, bits and pieces from produced communications reveal that the filing of the *Garcia* case, the subsequent effort to intervene in this case, and then the effort to file a crossclaim in this case are part of coordinated efforts with Commission Graves to prevent compliance with Section 2 of the Voting Rights Act. At his November 21, 2022 deposition, Washington Redistricting Commissioner Joseph "Joe" Fain was examined with two exhibits which show that Commissioner Fain, Commissioner Graves, the

Washington State Republican Party, Adam Kincaid at the National Republican Redistricting Trust, and Counsel Andrew Stokesbary have been working together to craft a legal case *against the version of district 15 that they drew and voted to approve*.

First, there is a retainer agreement showing Commissioners Fain and Graves, along with the Washington State Republican Party, hired the law firm of Davis Wright Tremaine, LLP in November 2021 to "prepare a memorandum concerning the Voting Rights Act's application to proposed districts in and around Yakima, and such other similar work as the parties direct." *See* Exhibit 2. After receiving the memo, which contained no factual or statistical analysis of voting patterns in the Yakima Valley and was rife with legal errors, Commissioners Fain and Graves worked diligently to prevent the drawing of an effective district for Latinos and in fact themselves pushed to ensure that the 15th Legislative District was made up of a bare majority of Latino citizens of voting age (CVAP) but still would not elect a Latino candidate or choice. *See* Expert Report of Dr. Henry Flores, Dkt. 104. Email communications from Commissioner Graves and staffers for the Commission, as well as testimony from staffers and Commissioner Pinero Walkinshaw, further demonstrate that Graves intentionally pushed to have district 15 over 50% Latino CVAP, but Republican performing, to further his litigation interests.



Further, Commissioner Graves was directly involved in coordinating the funding and filing of the *Garcia* case, which challenges the district *he drew* and that *he demanded* meet a precise 50.02% Latino CVAP—a strategy he thought would insulate it from liability in a Section 2 lawsuit. After Plaintiffs filed that lawsuit, Commissioner Graves went to work to stand up a competing legal challenge with the aim of undermining Latino voting strength even further. Commissioner Graves, on March 4, 2022 wrote, "Rob and David are lawyers at Davis Wright Tremaine here in Seattle, getting up to speed on the redistricting litigation. Adam runs the National Republican

redistricting trust, and it's [sic] foundation, the Fair Lines America Foundation, which I believe can serve as a financing vehicle for this work. I'll let you three connect." Exhibit 1. Intervenor-Defendants and *Garcia* Counsel State Representative Stokesbary was then forwarded the email by Robert McGuire of Davis Wright Tremaine on March 7, 2022. Just eight days after Commissioner Graves connects these lawyers with Mr. Stokesbary, on March 15, the *Garcia* case was filed, which complains that the commission's map unlawfully considered race when it drew a 50% majority Latino district. But the complaint leaves out that Graves, working with these lawyers, intentionally worked to ensure the commission map included a Latino CVAP over 50% in the 15th district so that he and his legal team could leverage that fact in filing Shaw claims like they filed with strawmen Plaintiffs in the *Garcia* case and then with the Intervenors in this case. *See id.* This conduct is intentional discrimination, not racial gerrymandering.

In their attempt to bring the duplicative and coordinated claim in this case, Intervenor-Defendants make the same argument as made by the coordinated *Garcia* Plaintiffs: "[d]iscovery has since shown that Legislative District 15 ("LD 15") was an unconstitutional racial gerrymander."[1] These claims too rely on the 50% CVAP district that Commission Graves included to setup their Shaw claim, and the Intervenor-Defendants too are represented by Mr. Stokesbary.



[1] This claim is peculiar—Mr. Stokesbary claims that he only now knows of the information needed to file the crossclaim despite filing the exact same claim in *Garcia* prior to discovery.

Given these facts, the Court should not allow the Intervenor-Defendants to obstruct the orderly administration and trial of this case.

## II. Plaintiffs' Section 2 VRA Claim Must Be Disposed of Before Any Constitutional Claims

In their opposition, Intervenor-Defendants acknowledge that the resolution of their crossclaim is dependent on Plaintiffs' VRA claims and bifurcation may be warranted. *See* Dkt. # 109 at 3-4. If Plaintiffs prevail on their VRA claim, Intervenor-Defendants' crossclaim and the *Garcia* plaintiff's claim will become moot. Indeed, a review of Plaintiffs' expert reports (detailing the presence of the *Gingles* factors, the totality of circumstances, and the intentional discrimination that pervaded the adoption of LD 15) illustrates that it is *likely* that their Section 2 claims will indeed prove dispositive. *See* Dkt. # 104 (expert reports of Dr. Collingwood, Dr. Estrada, and Dr. Flores).



The evidentiary burden in a Section 2 VRA case differs from that of a racial gerrymandering claim. Under Section 2, a party must demonstrate that minority voting strength is being diluted and that the political process is "not equally open to participation by [a racial minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court identified three necessary preconditions ("the *Gingles* preconditions") for a claim of vote dilution under Section 2: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. The Supreme Court has directed courts to consider the non-exhaustive list of factors

found in the Senate Report on the 1982 amendments to the Voting Rights Act in determining whether, under the totality of the circumstances, the challenged electoral device results in a violation of Section 2. The Senate Factors include: (1) the history of official voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which members of the minority group bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.



Conversely, under a claim for racial gerrymandering, a party "must show that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district'" without a compelling justification (such as compliance with the VRA). *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015). The standard articulated by the Supreme Court is that a plaintiff must show that the legislature or line drawers subordinated traditional redistricting principals, such as ignoring "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,' *ibid*., incumbency protection, and political affiliation." *Id.* at 273. As such, a racial gerrymandering claim does not require any statistical or quantitative evidence that is essential in a Section 2 case. Further, the principle of constitutional avoidance would nevertheless counsel against the Court adjudicating the racial gerrymandering claim when the lawfulness of LD 15 can be decided on the statutory

grounds raised by Plaintiffs. *See Lyng v. Nw. Indian Cemetery Protect Ass'n*, 485 U.S. 439, 445 (1988). When circumstances meet the *Gingles* test, map drawers are not just permitted to consider race in constructing the map, *they are obligated to do so*. Stated another way, a map drawn cognizant of race in order to meet the requirements of Section 2 of the Voting Rights Act is not in violation of the *Shaw* series of cases.

### III. Consolidation with the *Garcia* Case Is Inappropriate and Would Prejudice Plaintiffs

Consolidation of this case for discovery and trial with the *Garcia* in a single trial is inappropriate and would prejudice Plaintiffs. Plaintiffs have already stated in their Motion, dkt. #105, why a three-judge panel would not be able to hear Plaintiffs' statutory claims. *See id.* at 3-6 ("Empaneling a three-judge district court for this entire case because of Intervenors' belated crossclaim would prejudice Plaintiffs because it would inject uncertainty as to the three-judge district court's jurisdiction to adjudicate their case. Should Plaintiffs prevail and the State appeal, the Supreme Court might determine that a three-judge district court lacked jurisdiction to decide Plaintiffs' VRA claim, requiring the case to be vacated and adjudicated anew. *See, e.g.*, *Allen v. State Bd. of Elections*, 393 U.S. 544, 560 (1969) (holding that Supreme Court has "jurisdiction over an appeal brought directly from the three-judge court of only if the three-judge court was properly convened")."). While the State and Intervenor-Defendants argue that a three-judge court *may* have jurisdiction to hear Plaintiffs claims, the alternative in which such panel lacked jurisdiction would jeopardize the ability of Plaintiffs to attain relief in time for the 2024 election, causing irreparable harm to Plaintiffs, who were already denied relief in 2022. Moreover, Secretary of State Hobbs noted his concern in response to Plaintiffs' motion that "thorny jurisdictional issues," including the "motions practice and interlocutory appeals related to those jurisdictional

issues has the potential to delay trial and implicate the *Purcell* principle…" Dkt. 112 at 2. Thus, Secretary Hobbs urged that the Court "strictly hold Intervenor-Defendants to their representation that their crossclaim 'will require no alteration of the Court's current Scheduling Order.'") *Id*. at 2. (citing Dkt. 109 at 3).

Additionally, the State's proposal to move trial *yet again* to June would interfere with binding commitments in June of 2023.[2] Several of Plaintiffs' counsel have scheduled trials during this period that would directly conflict with the State's proposal. There are also witness availability issues that present challenges in June. Plaintiffs counsel have worked diligently to line up the necessary trial participants while holding off end-of-school year and travel plans until after the scheduled May travel period. It is an unreasonable burden to Plaintiffs to move their trial date again, especially given the duplicative nature of the claim in Intervenor-Defendants' crossclaim and the machinations of Commissioners Graves and Fain, Intervenors' lead counsel Mr. Stokesbary, and the National Republican Redistricting Trust to obstruct this proceeding.

Finally, Intervenor-Defendants fail to respond substantively to Plaintiffs' motion to strike for failure to seek leave to file an amended pleading. Their response recited the same precedent that they cited in their untimely answer from other district courts that does not reflect practice before this Court. Furthermore, the response failed to explain why leave is merited under factors



[2] Plaintiffs fully briefed the issue of unavailability for a June trial in their Opposition to State of Washington's Motion to Modify Scheduling Order in July 2022. *See* Dkt. # 81. The Court has already taken these considerations into account when setting the new trial date for May of 2023.

considered in the Ninth Circuit. *See Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014).[3]

## CONCLUSION

This Court should not reward the Intervenor-Defendants for coordinating to stall out Plaintiffs claims. For the foregoing reasons, the Court should bifurcate the crossclaim, transfer it, and consolidate it with the *Garcia* case. The *Garcia* case should then be held in abeyance pending a decision on Plaintiffs' VRA claim. Alternatively, the Court should strike or dismiss Intervenor-Defendants' crossclaim.

Dated: November 25, 2022

By: */s/ Edwardo Morfin*

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[3] Intervenors contend that Plaintiffs lacked standing to seek dismissal of their suit. But Plaintiffs' dismissal arguments related to Intervenors' standing—a jurisdictional issue this Court is required to consider regardless of whether the Secretary or the State object on that basis.

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**CERTIFICATE OF SERVICE**

I certify that all counsel of record were served a copy of the foregoing this 25th day of November, 2022 via the Court's CM/ECF system.

*/s/ Edwardo Morfin*

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