The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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' RESPONSE TO STATE OF WASHINGTON'S MOTION FOR INQUIRY CONCERNING POTENTIAL CONFLICTS OF INTEREST

NOTE FOR MOTION CALENDAR: March 3, 2023

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INTRODUCTION

The issues raised in the State's motion merit serious inquiry. Like the State, Plaintiffs take no position on whether disqualification of counsel for Intervenors in this case and/or Mr. Benancio Garcia in the *Garcia* matter is required. These are questions for the Court to resolve. Plaintiffs instead write in response to raise two important points relevant to these requested inquiries.

First, the potential conflicts at issue among the clients of Mr. Stokesbary and attorneys at Holtzman Vogel are directly traceable to the efforts of Commissioner Paul Graves to conjure up nonmeritorious and conflicting legal claims to frustrate and delay this proceeding. Testimony from Mr. Garcia's recent deposition and newly produced documents reveal that Commissioner Graves recruited not only counsel for the *Garcia* case but also Mr. Garcia himself to be the plaintiff in a

lawsuit challenging the constitutionality of a district that Commissioner Graves drew. The Commissioner's stated goal in coordinating these efforts was to forestall relief in this case. Mr. Graves also testified he does not think the map is an unconstitutional racial gerrymander; yet he found it appropriate—as an attorney—to coordinate the filing of a federal lawsuit he believed to be meritless in order to interfere with a separate ongoing federal proceeding.

Second, given that the conflicts in question arise from an effort to disrupt Plaintiffs' claim for relief, Plaintiffs respectfully request that neither the requested inquiries nor their outcomes result in any further delay or disruption to the case management schedule. As this Court and both Defendants have acknowledged, any further delay of trial risks denying Plaintiffs a fair shot at relief in the 2024 election.

If this Court concludes that Intervenors will need to find new counsel due to insurmountable conflicts of interest, the Court should neither offer nor entertain a stay of these proceedings. Intervenors were allowed only *permissive* intervention in this suit because they lack any significant protectable interest in the claims at issue. Since joining the suit as parties, they have made at least three attempts to delay trial, twice by unsuccessfully seeking a stay of proceedings and once by attempting to raise a counterclaim at the eleventh hour *challenging* the configuration of LD 15 they were also *defending*. Should Intervenors need to seek new counsel as a result of this inquiry, the Court should either permit Intervenors to secure counsel within the limits of the existing schedule or exercise its discretion to dismiss Intervenors from the lawsuit.

Likewise, if the Court finds that Mr. Garcia must seek new counsel in his case, the Court should resist any calls for delay of trial in this matter. Mr. Garcia's racial gerrymandering claim depends on and could be rendered moot by the outcome of Plaintiffs' VRA claims. Rather than delay trial in both cases, the most just and efficient course would be to put Mr. Garcia's case in abeyance pending resolution of this case.

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At bottom, Plaintiffs ask that the Court not allow the investigation and resolution of issues raised in the State's motion to achieve the very delay Commissioner Graves and counsel for Intervenors/Mr. Garcia have sought throughout this litigation.

ARGUMENT

I. Commissioner Graves recruited Mr. Stokesbary, Holtzman Vogel, and Mr. Garcia to forestall Latino voters' claims for relief under the VRA.

The State's inquiry motion recounts most—but not all—of the "[t]roubling testimony" regarding the conflict of interest between Mr. Garcia and Intervenors, all of whom are represented by Mr. Stokesbary and attorneys at Holtzman Vogel. One glaring omission from the State's account is new evidence shedding light on Commissioner Paul Graves's role in the genesis of this representation scheme. Mr. Garcia's recent deposition testimony and newly produced documents add to the growing body of evidence confirming that the filing of the *Garcia* case, the intervention in this case, and the repeated efforts to delay trial are part of a coordinated effort with Commissioner Graves to prevent compliance with Section 2 of the Voting Rights Act.

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As Plaintiffs have previously shown, Commissioner Graves was working in early March 2022 to secure funding and counsel for legal claims challenging LD 15 (which he drew) as an unconstitutional racial gerrymander, all to "light the fire" and "forestall" relief in this case. Dkt. # 127-3 (Graves Dep.) at 203:16-204:3, 205:8-13. To that end, Commissioner Graves spoke with Mr. Stokesbary, Jason Torchinsky at Holtzman Vogel, and attorneys at Davis Wright Tremaine, LLP[1] about "getting an intervenor or maybe a plaintiff of some kind" to forestall relief in this case.

[1] Commissioner Graves, Commissioner Fain, and the Washington State Republican Party had retained Davis Wright Tremaine during the redistricting process to "prepare a memorandum concerning the Voting Rights Act's application to proposed districts in and around Yakima, and such similar work as the parties direct." Dkt. # 113-2. This memorandum, though rife with legal errors and devoid of any factual analysis, led Commissioner Graves to draw a bare Latino CVAP-majority district in the Yakima area—a strategy he thought would insulate it from a Section 2 lawsuit. Dkt. # 113 at 3. It is unclear what role, if any, attorneys from Davis Wright Tremaine continued to play in *Garcia* or the *Soto Palmer* intervention.

Id. at 200:22-201:7, 203:16-204:13, 204:17-22. In early March 2022, Commissioner Graves also worked to secure funding by, for example, connecting the Davis Wright Tremaine attorneys with Adam Kincaid at the National Republican Redistricting Trust to potentially "serve as a financing vehicle for this work." Dkt. # 113-2 at 3. This email was forwarded to Mr. Stokesbary on March 7, who then filed *Garcia* on March 15 and a motion to intervene in this case on March 27, 2022. *Id.* at 2.

Mr. Garcia's deposition and recently produced documents now show that Commissioner Graves not only coordinated the funding, representation, and filing of the *Garcia* lawsuit ***but also recruited Mr. Garcia as its sole plaintiff***. Text messages recently produced by Commissioner Graves and Mr. Garcia show that the two were introduced via group text by a mutual connection, Maia Espinoza, on March 1, 2022—at precisely the time when Commissioner Graves was lining up other preconditions for a legal claim. Ex. 1 (Palmer_Graves_000599). In making the introduction, Ms. Esponiza noted that she had informed Commissioner Graves of Mr. Garcia's "interest in the Voting Rights lawsuit issue in Yakima." *Id.* Commissioner Graves made plans to speak with Mr. Garcia that same day. *Id.*; *see also* Ex. 2 (Garcia Dep.) at 27:3-6, 28:24-29:2.

At his deposition, when asked about what was discussed that day, Mr. Garcia testified, "I could say we agreed that -- that the redistricting seemed to be racial gerrymandering." Ex. 2 at 27:7-9. Mr. Garcia went on to confirm twice his impression that he and Commissioner Graves agreed that LD 15 was an unconstitutional racial gerrymander. *Id.* at 28:8-21 and 52:23-53:3 ("Q. But [Commissioner Graves] had a conversation with you, and you took away from it that he was sympathetic to what you were expressing, that you thought there was a problem that District 15 was a racial gerrymander; is that -- am I understanding that correctly? A. Yes.").

On March 2, Commissioner Graves texted Mr. Garcia to let him know that his contact information had been sent to the attorneys at Davis Wright Tremaine. Ex. 3 at 1 (Garcia_Graves Texts Chronological). When Mr. Garcia expressed worry about "mak[ing] a mistake with all [he

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had] going on," Commissioner Graves responded, "Don't worry—I won't let you." *Id.* at 2. The next day, Commissioner Graves texted Mr. Garcia again, this time to see if he had yet spoken "with people at the Republican National Hispanic assembly," stating that "[i]t would be terrific if it could serve as a plaintiff as well." *Id.* at 3. On March 4, Commissioner Graves put Mr. Garcia on an email chain with the attorneys from Davis Wright Tremaine who were "working on the redistricting lawsuit," noting that Mr. Garcia was "excited about being involved." Ex. 4 (Palmer_Graves_000597).[2]

Substantial evidence therefore places Commissioner Graves at the center of a coordinated effort—with Mr. Stokesbary and attorneys at Holzman Vogel, among others—to file nonmeritorious and conflicting legal claims so as to frustrate Latino community members' ability to prosecute their VRA claims and secure an opportunity district in the Yakima Valley.

II. Consideration and resolution of the State's motion should not—and need not—delay a trial on Plaintiffs' VRA claims.

Given that the matters raised by the State's motion stem from concerted efforts to disrupt this proceeding, neither these inquiries nor their outcomes should reward those efforts with a delay of trial.

Delay would be extremely prejudicial to Plaintiffs and risk irreparable deprivation of their right to an undiluted vote in the 2024 elections. *See League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is

[2] Plaintiffs note that Exs. 1 and 4 were not included in Commissioner Graves's initial subpoena productions. These documents were only produced after Plaintiffs alerted his counsel that such communications with Mr. Garcia were very likely withheld. The Commissioner's counsel was "unsure why these [communications] were not produced as part of [his] last production other than that they were excluded through an inadvertent mistake." Ex. 5 (2-22-23 Email from Aaron Millstein). As it stands, Commissioner Graves's production remains incomplete because Mr. Garcia has since produced even more text messages with Commissioner Graves that the Commissioner has yet to produce. *See, e.g.*, Ex. 3.

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done[.]"). This Court recognized as much in denying Intervenor's repeated attempts to stay these proceedings, noting that "this case . . . must be decided well ahead of the next election cycle if plaintiffs are to obtain timely relief." Dkt. # 136 at 3-4. Likewise, in dismissing Intervenors' crossclaim, the Court reasoned that introducing "complicating factors" at this late stage "would likely prevent the resolution of plaintiffs' claim in time for the 2024 election cycle [and] cause prejudice to the non-moving parties." *Id.* at 4-5.

For similar reasons, the Court should not allow this episode caused by counsel representing non-essential parties (and a non-party) to disrupt the schedule here, which both Defendants and the Court have agreed is necessary to effectuate the fair administration of justice. *See id.*; Dkt. # 130 (Defendant State of Washington opposing renewed stay motion and agreeing that delay of trial to June risks insufficient time to develop, approve, and implement a remedial plan before the 2024 election); Dkt. # 112 (Defendant Hobbs requesting no alteration to case schedule to ensure adequate time for a decision, appellate review, and implementation of remedy).

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Furthermore, no outcome of this investigation *requires* a delay of trial. Whether the inquiries lead this Court to disqualify counsel for Intervenors in this case and/or the plaintiff in *Garcia*, this Court should maintain the current case schedule.

If the Court concludes that counsel for Intervenors can no longer participate in this case due to a conflict with a current or former client, then the Court may, within its discretion, permit Intervenors to diligently seek new counsel conditioned on no further delay or disruption to the case schedule. *See FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1030 (E.D. Cal. 2002) ("The decision to modify a scheduling order is within the broad discretion of the district court."). Given that discovery is essentially concluded, the time that remains before trial is more than sufficient for new counsel to prepare.

Alternatively, the Court could—and should—use its inherent power to manage the proceeding by dismissing Intervenors from the lawsuit. *See Olivia v. Sullivan*, 958 F.2d 272, 273

1 (9th Cir. 1992) ("District courts have inherent power to control their dockets and may impose
2 sanctions, *including dismissal*, in the exercise of that discretion.") (emphasis added). Intervenors
3 were not granted party status as of right because this Court concluded that they "lack a significant
4 protectable interest in the litigation" and fail to "identif[y] any direct or concrete injury that has
5 befallen or is likely to befall them if plaintiffs' Section 2 claim is successful." Dkt. # 69 at 5, 10.
6 In other words, Mssrs. Trevino, Campos, and Ybarra have no concrete stake in the outcome, and
7 so their dismissal would do them no concrete harm.

8 Intervenors' dismissal would not leave their general interest in defending this suit
9 unrepresented. The Court's grant of *permissive* intervention was premised on uncertainty at the
10 time as to whether any state actor was going to defend the challenged district. *See id.* at 10 (noting
11 "the absence of other truly adverse parties"). But the State has since been joined as a party, Dkt. #
12 70, and has vigorously defended LD 15 against Plaintiffs' claims. To the extent Intervenors
13 maintain interests in preserving LD 15's current boundaries, defeating Plaintiffs' Section 2 claims,
14 or ensuring a remedial district's compliance with state and federal law, those interests are
15 adequately represented by the State.

16 The Court also granted permissive intervention based on Intervenors' representations that
17 they "do [not] seek to change . . . the Court's scheduling order" and "are not raising any new claims
18 in any of their pleadings or motions filed today." Dkt. # 57 at 11-12. These assurances have proven
19 hollow. Intervenors have *twice* sought to stay the proceedings pending the Supreme Court's
20 decision in *Merrill v. Milligan*, which every party opposed and this Court denied. They also
21 unsuccessfully sought to delay by filing a crossclaim alleging that LD 15 is an unconstitutional
22 racial gerrymander—the same claim Intervenors' counsel filed on behalf of a different plaintiff in
23 *Garcia* and in direct contradiction with Intervenors' stated desire to *defend* LD 15 and see the map
24 remain unchanged.[3] Intervenors' motions have only multiplied the volume of briefing while doing
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26 [3] Mr. Ybarra specifically testified that LD 15 was not a racial gerrymander. Dkt. # 127-1 at 121:8-10. This should have immediately prompted his counsel to withdraw the request to file a crossclaim

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1 nothing to develop the record or encourage the just and equitable adjudication of the claims at
2 issue. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 947-48 (9th Cir. 1976) (affirming
3 dismissal of EEOC as intervenor-plaintiff where EEOC lacked any interest distinct from other
4 plaintiffs and the agency's failed to deliver on assurances that its presence would not "delay or
5 prejudice the adjudication of the rights of the original parties but rather would materially aid in
6 expeditious determination of the issues and in the management of the litigation").

7 If the Court concludes that counsel for the *Garcia* plaintiff must be disqualified due to a
8 conflict with a current or former client, Mr. Garcia's search for new counsel would have no legal
9 bearing on the schedule in this case. *Garcia* involves a different claim before a different Cpourt
10 subject to different jurisdictional and appellate rules. The *Garcia* suit was assigned to a three-judge
11 district court under 28 U.S.C. § 2284, which applies narrowly to claims alleging a constitutional
12 challenge to a congressional or statewide redistricting plan. Cases tried before a three-judge district
13 court can only be appealed directly to the Supreme Court, whose appellate jurisdiction is
14 mandatory, not discretionary. 28 U.S.C. § 1253. Courts of Appeals have no jurisdiction to review
15 the decisions of three-judge district courts. *Bogue v. Faircloth*, 441 F.2d 623, 623 (5th Cir. 1971).
16 This case, on the other hand, is properly heard before a single-judge Court because it involves only
17 statutory challenges under the VRA, which fall outside of § 2284's narrow jurisdictional scope.
18 Any appeal taken from this Court's decision must be heard by the Ninth Circuit, and Supreme
19 Court review would be discretionary. Although this Court recently ordered a consolidated trial
20 with simultaneous decisions to allow appeals to "proceed together," Dkt. # 136 at 5, the appeals
21 of *Garcia* and *Soto Palmer* would necessarily proceed on separate tracks: *Garcia* would have to
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23 on his behalf, and save the Court and the other parties the time and expense associated with the January 13, 2023 hearing. Instead—remarkably—Intervenors' counsel submitted a filing asking
24 the Court to *strike from the docket* their clients' sworn testimony disavowing the legal claim they
25 sought to advance and allow them nevertheless to file that claim in federal court on behalf of their clients. Dkt. # 132; *see also* 28 U.S.C. § 1927 ("Any attorney . . . who so multiplies the proceedings
26 in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

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go straight to the Supreme Court on direct mandatory review, while *Soto Palmer* would have to go to the Ninth Circuit.

Thus, should Mr. Garcia require time to retain new counsel, the most prudent and efficient course would be to hold *Garcia* in abeyance pending the disposition of Plaintiffs' VRA claims on the existing schedule. Adjudication of Plaintiffs' VRA claim is a necessary predicate to resolve Mr. Garcia's racial gerrymandering claim. As Intervenors acknowledge in their Amended Answer, Dkt. # 103 at 34, a legislative district is not an unconstitutional racial gerrymander if the VRA requires its race-conscious drawing. If Plaintiffs prevail on their VRA claim, Mr. Garcia's claim will become moot. The district he challenges will cease to exist, and the predicate of his claim—that Section 2 does not require a Latino opportunity district in the Yakima area—will have been rejected. Given the likelihood that Mr. Garcia's claim will become moot upon adjudication of this case, the *Garcia* matter should be placed in abeyance pending resolution of this case to avoid the need for the parties and the Court to expend resources that could prove unnecessary. At the very least, a delay in the *Garcia* case should not lead to a delay in this case.

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CONCLUSION

Plaintiffs respectfully request that neither the requested inquiries into potential ethical violations nor their outcomes result in any further delay or disruption to the case management schedule.

Dated: February 27, 2023

By: /s/ Edwardo Morfin

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CERTIFICATE OF SERVICE

I certify that all counsel of record were served a copy of the foregoing this 27th day of February, 2023 via the Court's CM/ECF system.

/s/ Mark Gaber

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