UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, *et al*.,

Plaintiffs – Appellees,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,

Defendants – Appellees,

and

JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA,

Intervenor-Defendants – Appellants.

Nos. 23-35595 & 24-1602

D.C. No. 3:22-cv-05035-RSL
U.S. District Court for Western Washington, Seattle Division

REPLY IN SUPPORT OF MOTION TO INTERVENE ON APPEAL OF SENATOR NIKKI TORRES

REPLY

Appellees get one thing right: This case prominently features a "procedural runaround." Pls.' Opp.1. Lobbing that accusation at Senator Torres, however, is pure projection. Plaintiffs, along with the State, are attempting ensure Washington's maps remain rewritten, harming Senator Torres, in a way that is entirely unreviewable and that leaves Senator Torres with no avenue to defend her own interests. Those interests are substantial here: the district court expressly drew a remedial map with the specific intent of creating a district in which Senator Torres would lose.

To evade this Court's appellate review, Plaintiffs and the State have resorted to a collusive "procedural runaround": the Attorney General's strategic surrender on behalf of the State and his acquiescence to a map that just so happens to make sweeping changes—altering thirteen of forty-nine districts to "cure" a violation found in a single district—that benefit the Attorney General's political party. In doing so, the district court adopted a "remedy" that no one—not Intervenors, Plaintiffs, or the State—has *ever* found a precedent for: purporting to cure vote dilution with more dilution. Specifically, although the alleged violation of the Voting Rights Act was *dilution* of Hispanic voting strength, the district court's remedy was to *reduce* the Hispanic citizen voting-age population from 52.6% to 50.2%. D. Ct. Dkt. 251 at 70. No federal court has ever previously done something so bizarre.

This sweep of the district court's changes to the State's legislative maps is also a quintessential abuse of discretion. The Supreme Court in *Upham v. Seamon* held that a district court exceeded its discretion by redrawing four out of twenty-seven districts to remedy violations in only two districts. 456 U.S. 37, 38, 40 (1982). But here the district court redrew thirteen out of forty-nine districts to remedy a violation found in just one. In doing so, the district court impermissibly made changes that were "more than necessary." *Id.* at 41–42.

Unsurprisingly then, Plaintiffs and the State are eager to insulate their collusive and sweeping changes to the State's legislative districts from this Court's review. The instant oppositions are part of their attempt to do so by keeping Senator Torres—who has obvious cognizable injuries and thus standing to appeal here—out of the case while also maintaining that existing Intervenors lack standing. But that effort is as unavailing as it is unseemly.

Standing and Interest. Plaintiffs and the State now insist that these procedural choices mean that *no individual* has standing to protect his or her interests in this litigation. In their misbegotten view and misreading of *Hollingsworth v. Perry*, 570 U.S. 693, 705–06 (2013), only "state officials" have standing to defend a state law, even when, as here, individuals' interests are at stake. Senator Torres has "standing in [her] own right" and does not seek to "stand in for the State." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953, 1951 (2019). And this Court has

already recognized that legislators have a "significantly protectable interest" in their seat "that is subject to impairment" by being unseated. *Bates v. Jones*, 127 F.3d 870, 873 n.4 (9th Cir. 1997).

Appellees miss the central point of *Bates*. There, the legislators were harmed because they could not run for reelection in their own districts. Senator Torres asserts the very same harm. She cannot, in fact, "run[] for reelection" in LD-15 (Pls.' Opp.13) without incurring significant cognizable costs, as cited in Senator Torres's Motion. See Mot.7-9. But even in a world where *Bates* did not exist, Appellees fail to explain from first principles *why* an incumbent legislator would not have a cognizable interest in avoiding being redistricted out of her own district. That would be like saying that battery victims lack standing to bring tort claims against their batterers. This case presents the political analogue.

Both sets of Appellees, desperate for some sort of precedent suggesting that Senator Torres lacks a protectable interest in/cognizable injury from this litigation, rely on an out-of-circuit district court decision from before the VRA's 1982 amendments: *Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980). True enough, that district court reasoned that elected officials do not suffer a cognizable injury when their district boundaries are adjusted by reapportionment. *Id.* at 672. But *Klutznick* involved the impending decennial reapportionment of the entire state, meaning every legislative representative would see his or her district change based

on the newest decennial census (which was itself the object of the plaintiffs' challenge), meaning that no single legislator would suffer a unique injury—everyone's district would change to some degree (indeed it was constitutionally required that every district change[1]) and no incumbent had been entirely redistricted out of their district (in fact, the scheduled reapportionment had not yet even occurred). That scenario stands in distinct contrast to the fate that the district court's remedial order imposed upon Senator Torres. The remedial order did not change every legislator's district and (even if the decision itself were correct) did not need to remove her from her current district. Moreover, and far more recently, a higher court disagreed with *Klutznick*, holding that "the contours of the maps affect [legislators] directly and substantially by determining which constituents the [legislators] must court for votes and represent in the legislature." *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018). In any case, even the *Klutznick* court noted that a legislator could still "show that some interest has been infringed" by reapportionment. 503 F. Supp at 672. Senator Torres has done so here.

Plaintiffs also cite to two out-of-circuit cases (also Pennsylvania district courts) following *Klutznick*'s tenuous rule concerning the composition of districts. See *Corman v. Torres*, 287 F. Supp. 3d 558, 569–70 (M.D. Pa. 2018); *Toth v.*

[1] See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's").

Chapman, No. 1:22-cv-208, 2022 U.S. Dist. LEXIS 47108, at *27 (M.D. Pa. Mar. 16, 2022). But again, Senator Torres is specifically asserting a harm from being *removed from her own district*.

What Appellees are saying should not be elided: In their view, individual legislators are not harmed by being intentionally redistricted out of the district they currently represent—indeed, that such incumbents have no personal stake whatsoever in reapportionment that eliminates their electoral prospects in a district that they had recently carried in a landslide. Accepting such a dubious claim would open the door to future redistricting mischief by aggressive partisans, not to mention require this Court to "exhibit a naiveté from which ordinary citizens are free." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted).

Prejudice. Claiming prejudice, the State cries "gamesmanship," Wash. Opp.16, but here again is projection. The prejudice from gamesmanship in this litigation is against individuals who are left without any method to protect their individual interests in this case as a result of the litigatory surrender of the State—rendering the Washington Redistricting Commission fundamentally toothless. But neither set of Appellees has explained how exactly Senator Torres's intervention would result in delay.

In any event, the State's prejudice argument is unavailing because Senator Torres's motion to intervene for purposes of appeal is conclusively "*timely as a matter of law*" because it was "filed within the time within which the named plaintiffs could have taken an appeal." *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997) (emphasis added). Plaintiffs tellingly do not even *attempt* to reconcile their timeliness arguments with *Suburban Propane*—never even acknowledging this Court's *Suburban Propane* decision, let alone attempting to distinguish it.

For its part, the State attempts to answer *Suburban Propane* by implausibly limiting it to the class certification context. But nothing about the language quoted demonstrates this Court's intent to privilege class certification losers above all other would-be intervenors. The Sixth Circuit has thus had little difficulty in ascertaining that this Court adopted a "a per se rule 'that a motion to intervene is always timely under *McDonald* if it is filed within thirty days of final judgment'"—without even hinting at the purported class certification limitation that the State conjures here. *Clarke v. Baptist Mem'l Healthcare Corp.*, 641 F. App'x 520, 524 (6th Cir. 2016) (citation omitted).

In any event, this Court's rule is drawn directly from *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394–95. See *Suburban Propane*, 123 F.3d at 1320. And the Supreme Court has made plain that the rule of *United Airlines* is one of general

applicability. See *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022) (applying rule to intervention by Kentucky Attorney General in case not involving class certification). Indeed, the Supreme Court applied the within-the-time-to-file-an-appeal rule in that non-class certification context, explaining that "[t]he same logic applie[d]" and the Attorney General's attempt to intervene was timely because it was "filed…within the 14-day time limit for petitioning for rehearing en banc," *id.*—just like Senator Torres's motion to intervene was filed within the applicable appellate timetable here.

More generally, were this Court to grant this Motion, the State's inability to pull off its collusive ploy and insulate its machinations from appellate review does not constitute cognizable prejudice to the State. Indeed, the depths of the State's efforts to evade judicial review make plain why intervention is so entirely appropriate here.

Existing Parties. In a footnote, the State kicks up dust on the adequacy factor, confusedly asserting that "Senator Torres cannot seriously contend the existing parties do not adequately represent her interests when she is represented by the same counsel as existing parties." Wash. Opp.20 n.7. But of course, this factor concerns whether the existing *parties*, not lawyers, are not able or willing to protect the interests of the proposed intervenor. See *Cameron*, 142 S. Ct. at 1012. The State seems to be conflating the standards for intervention with an "ineffective assistance

of counsel" theory under the Sixth Amendment. As Senator Torres has noted, the threat that this Court may not reach the merits of this case based solely on the State's decision not to defend its own law became concrete on March 22. DktEntry 18.1, No. 24-1602 at 2. Given Plaintiffs' and the State's position that existing intervenors are *not* proper parties here at all, it is perplexing that Appellees would rely on existing intervenors' vigorously opposed presence in this appeal to defeat Senator Torres's intervention.

CONCLUSION

For these reasons, Senator Torres's Motion to Intervene should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) and Circuit Rule 27-1(1)(d) because this motion contains 1,759 words spanning 8 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font with Microsoft Word.

Dated: April 25, 2024

/s/ Jason Torchinsky
Jason Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will notify all registered counsel.

/s/ Jason Torchinsky
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