UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUSAN SOTO PALMER, et al., Plaintiffs, v. STEVEN HOBBS, in his official capacity as Secretary of State of Washington; et al., Defendants.	Case No. 3:22-cv-05035-RSL PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO INTERVENE The Honorable Robert S. Lasnik NOTE ON MOTION CALENDAR: April 15, 2022

INTRODUCTION

Plaintiffs respectfully submit this response in opposition to the Motion to Intervene filed by Jose Trevino, Ismael G. Campos, and State Representative Alex Ybarra ("Movants"), Dkt. # 57. Movants have not shown that they are entitled to intervene as of right or permissively. They fail to establish any significantly protectable interest that may be impaired absent their intervention; the existing parties can adequately represent their asserted interests; and their motion is not timely. Their participation as parties will lead to undue delay and prejudice to Plaintiffs and raises potential conflicts. As a result, Movants' motion should be denied.

BACKGROUND

A. Pleadings

On January 19, 2022, Plaintiffs filed their complaint challenging the legislative redistricting plan drawn by the Washington Redistricting Commission ("Commission") and approved by the Washington Legislature ("Enacted Plan"). *See* Compl. Their complaint alleges that Legislative District 15 ("LD 15") was drawn to create the façade of a Latino opportunity district but in fact dilutes Latino voting power in violation of Section 2 of the federal Voting Rights

Act (VRA). *Id.* To remedy this violation, Plaintiffs seek a declaration that LD 15 in the Enacted Plan violates Section 2, an injunction enjoining the state from conducting elections under that plan, and an order for a valid plan that does not violate Section 2. *Id.*, Prayer for Relief. The complaint names as defendants Secretary of State Steven Hobbs, House Speaker Laurie Jinkins, and Senate Majority Leader Andrew Billig. *Id.* at ¶¶ 59-60.

Defendant Hobbs answered Plaintiffs' complaint on February 16. Dkt. # 34. Defendants Jinkins and Billig filed a motion to dismiss on February 23, which has been fully briefed. Dkt. # 37, 44, 47. On February 25, Defendant Hobbs notified the Court of a letter he sent to the Commission dated February 22, communicating his intent to "take no position whether the [Enacted Plan] complies with the Voting Rights Act" and encouraging the Commission to intervene in this suit. Dkt. # 40. The Commission held a vote on March 7 declining to do so. *See* Washington State Redistricting Commission, March 7th Special Business Meeting, at 15:58 (Mar. 7, 2022), https://tvw.org/video/washington-state-redistricting-commission-2022031203/?eventID=2022031203. Three days later, Defendant Hobbs filed an amended answer, Dkt. # 42, and on March 24, moved to join the Commission and the State of Washington as necessary parties, which has been fully briefed. Dkt. # 53, 60, 63.

B. Motion for Preliminary Injunction

Plaintiffs filed their motion for preliminary injunction on February 25, 2022. Dkt. # 38. Plaintiffs' motion presented substantial evidence—thirty exhibits in all, including expert analysis, declarations, deposition testimony, documentary evidence, and Census statistics—showing a strong likelihood of success on the merits of their claim that the enacted LD 15 has the result of diluting Latino voting strength in violation of Section 2. *Id.* at 6-20. Plaintiffs also demonstrated that without preliminary relief, Latino voters in the Yakima Valley region, including Plaintiffs, will suffer irreparable harm, and that the balance of equities and public interest favor an immediate remedy pending final resolution of the case. *Id.* at 20-23.

In response, Defendants Jinkins and Billig argued that they have no ability to provide Plaintiffs with their requested relief but urged the Court to "strictly hold Plaintiffs to their burden to establish their entitlement to relief under applicable legal standards," which they recounted at length. Dkt. # 49 at 2-3. Defendant Hobbs took no position on the merits, Dkt. # 50 at 7-8.

In reply, Plaintiffs countered that they had sued all the state officials necessary for the Court to afford all requested relief, including a preliminary injunction to avoid irreparable harm to Plaintiffs and other Latino voters in the Yakima Valley region. Dkt. # 54 at 6-7. Plaintiffs requested that the Court order Defendant Hobbs to administer a new proposed legislative redistricting plan that would remedy the harm to Latino voters in the Yakima Valley while respecting neutral traditional redistricting criteria. *Id.* at 9-10. Plaintiffs demonstrated that their Proposed Plan would maintain equal population, have no impact on plan compactness, split fewer precincts, and have minimal impact on neighboring districts. *Id.* Plaintiffs further argued that their Proposed Plan could be administered without altering any election deadlines even if ordered after March 28. *Id.* at 11.

Plaintiffs' preliminary injunction motion was fully briefed as of March 25. Oral argument on the motion has been scheduled for April 12, 2022. Dkt. # 58.

C. Case Schedule and Discovery

Upon reviewing the parties' joint Rule 26(f) report and discovery plan submitted on March 10, the Court ordered a case schedule, and set expert report deadlines, the close of discovery, and a trial date. Dkt. # 46. The Court also set April 13 as the deadline for joining additional parties. *Id.* Discovery is now well underway. The parties exchanged Rule 26(a)(1) initial disclosures on March 3. Plaintiffs have served requests for production on Defendants and have served (or attempted to serve) Rule 45 subpoenas for documents on the four Commissioners and twelve legislators who were likely involved in the redistricting process based on public records, including Rep. Stokesbary, counsel for Movants.

D. *Garcia v. Hobbs* and Proposed Intervention

On March 15, Benancio Garcia III, an alleged current resident of the enacted LD 15, filed a separate lawsuit against Secretary Hobbs challenging the Enacted Plan's LD 15 as a racial gerrymander in violation of the Equal Protection Clause. *See Garcia v. Hobbs*, No. 3:22-cv-5152, Dkt. # 1 ¶¶ 72-75. Mr. Garcia seeks a declaration that the enacted LD 15 violates the Equal Protection Clause, an injunction enjoining Defendant Hobbs from enforcing the enacted LD 15, and an order requiring use of a valid plan. *Id.* ¶ 77. Mr. Garcia's attorney in that case is Rep. Stokesbary, counsel for Movants here.[1]

Two weeks later, on March 29, Rep. Stokesbary filed the instant motion on behalf of Jose Trevino, Ismael G. Campos, and Rep. Alex Ybarra. Dkt. # 57 ("Mot."). Unlike Rep. Stokesbary's client in *Garcia* who is challenging LD 15 as an unconstitutional racial gerrymander, here his clients apparently seek to defend it as lawful. *Id.* at 1; *see also* Dkt. # 57-1. Movants assert that Mr. Trevino is a Latino registered voter and a resident of Granger in the enacted LD 15; Mr. Campos is a Latino registered voter and a resident of Kennewick in the enacted LD 8; and Rep. Ybarra is a Latino registered voter and a resident of Quincy in the enacted LD 13. Mot. at 2-3. Rep. Ybarra is LD 13's incumbent state house representative and a candidate in the enacted LD 13. *Id.* Movants seek to intervene as of right and permissively under Federal Rule of Procedure 24.

ARGUMENT

I. Movants Are Not Entitled to Intervention as of Right Under Rule 24(a).

To intervene as of right under Rule 24(a), the movant must satisfy a four-part test: "(1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to . . . the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action." *Cooper v.*

[1] Counsel for Defendants Jinkins and Billig filed a notice of related case on March 18, notifying the parties and this Court of the *Garcia* case. Dkt. #48.

Newsom, 13 F.4th 857, 864 (9th Cir. 2021) (citing *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc)). The four elements "often are very interrelated and the ultimate conclusion reached . . . may reflect that relationship." *Id.* at 865 (quoting Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1908 (3d ed. 2020 update)). But the movant "bears the burden of showing that all requirements for intervention have been met." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). Failure to satisfy any one element is fatal to the movant's request. *See Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

Here, Movants do not satisfy any element.

A. Movants Fail to Establish a Significantly Protectable Interest in the Subject of This Action.

To intervene as of right, the movant must establish a significantly protectable interest in the claims at issue in the litigation. An interest is "significantly protectable" if it is "protected by law and there is a relationship between the legally protected interest and plaintiff's claims." *Alisal*, 370 F.3d at 919. Relevant to the showing is whether "the injunctive relief sought by plaintiffs will have direct, immediate, and harmful effects upon a third-party's legally protectable interest." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (internal quotation marks omitted). None of Movants' asserted interests satisfy this test.

First, Mr. Trevino and Mr. Campos cannot justify intervention in this case based on a generalized interest in avoiding an alleged racial gerrymander under the Equal Protection Clause. *See* Mot. at 6. Plaintiffs' claim here is that LD 15 violates Section 2 of the VRA, which is assessed under the multi-pronged test established in *Gingles v. Thornburg*, 478 U.S. 30 (1986) and requires *no* analysis of the Fourteenth Amendment's racial gerrymandering doctrine to prove liability. Nor would the Fourteenth Amendment be implicated in fashioning a remedy should Plaintiffs prevail. Movants parrot a single line in *Abbott v. Perez*, 38 S. Ct. 3205, 2314 (2018), wholly removed from its context to suggest otherwise, but to no avail. In *Perez*, the Court recognized that states may face "competing hazards of liability" in attempting to comply with Section 2 of the VRA, *absent a*

court finding of liability, because the Equal Protection Clause limits consideration of race in redistricting while the VRA demands it. There is no question that a finding of Section 2 liability by this Court would justify a remedial district that takes race into account in order to comply with the VRA. *Id.* (citing *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). Further, Plaintiffs have already shown that a state legislative district in the Yakima Valley area can be drawn that complies with traditional redistricting criteria. Dkt. # 54 at 9-10. Movants here make no racial gerrymandering claim against LD 15 or any district, nor any claim, cross-claim, or counterclaim that they have been subject to a racial classification, and thus their mere invocation of their equal protection rights in the abstract is not a "significantly protectable interest" supporting intervention.

Second, the interests of Mr. Campos and Rep. Ybarra in ensuring any districts' "compliance with state and federal law" are even further removed from this suit because neither individual even resides in the district being challenged here, LD 15. Movants allege that Mr. Campos lives in neighboring LD 8 but offer no basis for the assertion that he would necessarily be drawn into any remedial district. *See United States v. Hays*, 515 U.S. 737, 744-45 (explaining that a voter who "resides in a racially gerrymandered district . . . has been denied equal treatment" but voters who do "not live in such a district . . . do[] not suffer those special harms"). Nor do they explain what harms he would suffer were he to end up in a different district upon a finding of a violation of the VRA in this case. Likewise, Rep. Ybarra lives in neighboring LD 13, in Quincy, which he admits "is unlikely to be drawn into a Yakima Valley-centered district," Mot. at 3, and which is not being challenged in this case.[2]

[2] For these reasons, Rep. Ybarra and likely Mr. Campos also would not have standing to appeal any remedial version of LD 15 drawn to comply with the VRA in this case. Federal courts require intervenors who are seeking appellate review to meet Article III standing requirements, "just as [they] must be met by persons appearing in courts of first instance." *See, e.g.*, *Arizonans for Official English v. Arizona,* 520 U.S. 43, 64 (1997); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). No Movant claims any particular district has been racially gerrymandered, and neither Mr. Campos or Rep. Ybarra lives in the enacted LD 15 nor appears to live in Plaintiffs' proposed LD 14, Dkt. # 54-1 (Pls.' Proposed Plan). *See, e.g.*, *Hays*, 515 U.S. at 745 (holding that "absent specific evidence" showing that an out-of-district voter has been personally subjected to a racial classification in the map, that person "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve" and would not have Article III standing).

Third, Rep. Ybarra's asserted interest "in knowing which voters will be included in his district," Mot. at 6, is neither legally protectable nor relevant to Plaintiffs' claims. Washington must redistrict after each decennial census in accordance with federal law (including Section 2), so LD 13's boundaries and mix of voters are necessarily in flux this election cycle. *See, e.g.*, U.S. Const. art. I, § 2; 52 U.S.C. § 10301. To the extent Rep. Ybarra is concerned that a preliminary injunction may necessitate a change to LD 13 this year, that concern is not legally protectable; no individual voter or legislator is entitled to any one configuration of their district. Furthermore, Rep. Ybarra will have notice of any such change before his candidacy filing deadline, as Plaintiffs have not sought to stay any 2022 primary election deadlines. *See* Dkt. # 54 at 12.

Fourth, Movants assert a passing interest in "orderly, well-run elections that avoid chaos or delay," but they fail to carry their burden of showing how this interest is legally protectable, especially since the Secretary of State is already a Defendant, or how this interest is related to any of Plaintiffs' claims. In sum, Movants fail to demonstrate any significantly protectable interest at all supporting intervention in this case.

B. Movants Have Failed to Establish an Impairment Absent Their Intervention.

Even if Movants' interests were significantly protectable, they have not carried their burden of proving they may be impaired. To show impairment, the movant must show that resolution of Plaintiffs' claims absent their intervention "may as a practical matter impair or impede their ability to safeguard their protectable interest." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 862 (9th Cir. 2016). In the Ninth Circuit, "[e]ven if this lawsuit would *affect* the proposed intervenors' interests, their interests might not be *impaired* if they have 'other means' to protect them." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) (quoting *Alisal*, 370 F.3d at 921).

Here, if the Court were to grant Plaintiffs' requested relief—by declaring the enacted LD 15 a violation of Section 2, enjoining its use in future elections, and ordering adoption of a new

district that does not violate federal law—it would not impair Movants' ability to safeguard their asserted interests. Indeed, insofar as Movants seek districts that comply with "federal law," Mot. at 7, a remedial district that corrects a Section 2 violation would *advance* that interest. As a practical matter, it is unclear how Movants' absence will impair their pursuit of "orderly, well-run elections that avoid chaos or delay," Mot. at 6, given that Secretary of State Hobbs is party to this action and has vigorously guarded his shared interest in ensuring the 2022 elections proceed smoothly and on schedule. *See* Dkt. # 50 at 11.

Movants' absence from the suit will not harm their generalized "Fourteenth Amendment interests" either. Mot. at 7. To the extent Movants want to ensure that any remedial map resulting from this case is not a racial gerrymander, intervention at the merits stage of these proceedings is at best premature. Such a remote interest would only ripen upon the state's adoption of the "specific" remedial district that Movants allege subjects them to a racial classification. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262-63 (2015) ("We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*.") (emphasis in original). If Movants believe that the *enacted* LD 15 a racial gerrymander, then the claims brought by their own attorney in *Garcia v. Hobbs* offer "other means" to advance their interests. *Lockyer*, 450 F.3d at 442. And to the extent Movants think they may want to challenge some district that is not yet in place, not only is such a claim premature, but nothing stops them from doing so after resolution of this case. Movants fail to establish impairment of their interests absent their intervention.

C. Movants' Interests Are Adequately Represented by Existing Parties.

In assessing adequate representation, the Ninth Circuit considers "several factors, including whether [a present party] will undoubtedly make all of the intervenor's arguments, whether [a present party] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." *Prete v. Bradbury*, 438 F.3d 949,

956 (9th Cir. 2006) (citation omitted). When the movant and a current party "have the same ultimate objective," a presumption of adequate representation arises that the movant must rebut with a compelling showing. *Id.*

Movants appear to have the same ultimate objective as Defendants in this suit. Their stated goal (to the extent it reflects their actual goal) is protection of their Fourteenth Amendment "rights not to be assigned 'to a district on the basis of race without sufficient justification.'" Mot. at 8 (quoting *Perez*, 138 S. Ct. at 2314). This goal to avoid a racial gerrymander is neither here nor there as a legal matter, but existing parties share in this ultimate objective. Defendant Hobbs, in speaking of the Enacted Plan, has said that "[e]very citizen . . . , *regardless of race or color*, deserves the opportunity to meaningfully participate in elections." Dkt. # 40-1 (emphasis added). Defendants Jinkins and Billig have likewise asked the Court to "carefully consider Plaintiffs' claims" and urged that "[a]ll parties . . . be aligned to ensure that any redistricting map . . . 'gets it right' under the law." Dkt. # 49 at 3, 19. Thus, although Defendants have declined to take a position on the merits of Plaintiffs' Section 2 claim (so far), they plainly share in Movants' ultimate objective to avoid unjustified use of race in redistricting.[3]

It is admittedly unclear whether Defendants would be willing to make *all* the same arguments as Movants, but many of the arguments Movants claim to offer are outlandish. For example, Movants' proposed answer asserts the affirmative defense that "[Section] 2 of the Voting Rights Act of 1965 does not apply to redistricting," with a citation to the concurrence of a single justice on the U.S. Supreme Court. Dkt. 57-1 at 31. But the U.S. Supreme Court has applied Section 2 to redistricting cases for almost 40 years. *See, e.g.*, *Gingles*, 478 U.S. 30 (1986). Further, the "perspective" Movants seek to offer on the Equal Protection Clause is tenuous at best and not a "necessary element" to a Section 2 claim. *Prete*, 438 F.3d at 956; *see supra* Part I.A. Movants'

[3] Even Plaintiffs are aligned in this goal. The seek a legislative districting plan that corrects a Section 2 violation, not one in which traditional redistricting criteria are "subordinated" to race-based assignment or other racial considerations. *Cooper*, 137 S. Ct. at 1463-64. Plaintiffs' aim for VRA compliance is not merely sufficient but *compelling* justification for considering race in redistricting. *Id.*

offer to provide a "Republican" perspective is also not relevant to assessing a Section 2 claim. Mot. at 9; *see Gingles*, 478 U.S. 63-64. Moreover, Defendants' counsel at the Washington Attorney General's office is certainly capable of defending the suit without Movants' participation.

D. Movants' Motion Is Not Timely.

Timeliness under Rule 24 is a "flexible concept" and a determination left to the court's discretion. *Alisal*, 370 F.3d at 921. In the Ninth Circuit, courts weigh "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Id.* The movant must intervene as soon as they know or have reason to know that their interests could be adversely affected. *United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990). Considering the circumstances of this case, this motion was not timely.

Movants claim that the proceeding is at a "very preliminary stage." Mot. at 4. But like most redistricting matters, this case has progressed significantly since filing. Plaintiffs filed their complaint three months ago, and the parties have fully briefed three motions, including a motion to dismiss and Plaintiffs' motion for preliminary injunction. Plaintiffs have submitted a proposed legislative redistricting plan to the Court as a preliminary remedy, which respects Washington's neutral redistricting criteria while affording Plaintiffs' relief from the unlawful Enacted Map pending final resolution of the merits. The Court has scheduled oral argument on Plaintiffs' motion for April 12. The parties have long since conferred and filed a joint 26(f) report and discovery plan, which the Court considered in ordering a brisk schedule for discovery and trial in January 2023. Pursuant to that schedule, the deadline for joinder of additional parties is April 13, and discovery is well underway. Plaintiffs have submitted discovery requests to all Defendants, members of the Commission, and legislators who had a hand in the redistricting process, including Rep. Stokesbary, counsel for Movants and the plaintiff in *Garcia v. Hobbs*.

Plaintiffs would be substantially prejudiced should Movant intervene. The prejudice would be especially acute should the intervention cause any delay to the Court's consideration of

Plaintiffs' preliminary injunction motion, particularly given Movants' untimely and improper attempt to file a response. As Plaintiffs explained in opposition to the proposed response, Dkt. # 63, Movants' proposed response violates the local rules and prejudices Plaintiffs, leaving them without meaningful opportunity to respond and delaying the proceeding. Given that Movants have articulated only vague interests in this litigation to defend a district that their attorney is also separately trying to overturn in another lawsuit, their entry at any stage of proceedings would bog down the case and present no fuller a presentation of relevant issues.

Finally, Movants claim to have intervened within one week of learning or having reason to learn that present Defendants would not take a position on Plaintiffs' likelihood of success on the merits. Not so. Defendant Hobbs made his position clear as of his notice filed with the Court on February 25, and Defendants Jinkins and Billig sought dismissal from suit on February 23. Dkt. # 37, 40. If Movants' impetus was a clear indication of Defendants' position on the merits, then this motion comes over *one month*, not one week, thereafter. It comes *three months* after the case was filed. On balance, the Court should find the Motion untimely and deny intervention as of right.

II. Movants Are Not Entitled to Permissive Intervention Under Rule 24(b).

To permissively intervene under Rule 24(b), the movant must prove that "(1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Newsom*, 13 F.4th at 868 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Even if these threshold requirements are met, however, a court has discretion to deny permissive intervention if it would cause undue delay or unfair prejudice to the existing parties. *Id.* The Court should deny Movants permissive intervention for at least three reasons.

First, Movant's request is untimely for the same reasons explained in Part I.D above. *See LULAC v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) ("[T]he timeliness element for permissive intervention is analyzed more strictly than it is for intervention as of right"). Second, as explained

in Part I.D, Movant's intervention risks undue delay and will unfairly prejudice Plaintiffs. This is because Movants cannot explain, and it is difficult to discern, what they will add to this proceeding beyond basic denial of Plaintiffs' Section 2 claim. The issues they propose to pursue in the litigation are irrelevant and will draw resources and attention from the necessary elements of a Section 2 claim. Movants have already sought to disrupt this proceeding by seeking a three-judge court, which the statute makes—as a jurisdictional matter—plainly unavailable in this case. *See* Mot. at 11; 28 U.S.C. § 2284(a) (providing three-judge courts jurisdiction to hear *constitutional* challenges to congressional or statewide apportionment schemes, not cases like this one alleging only *statutory* claims). In addition, Movants' intention to oppose a fully briefed and (by tomorrow) argued preliminary injunction motion would cause undue delay and substantial prejudice to all parties' interest in prompt resolution of the motion.

Finally, the Court in its discretion should consider Movants' unusual counsel relationship and potential conflicts in assessing their motion under Rule 24(a) and (b). Movants' lawyer is Rep. Drew Stokesbary, one of twelve legislators Plaintiffs have subpoenaed who are likely to have had contact with Commissioners or other involvement in the Commission's process. As such, he may likely be a *witness* in this matter, making his presence as counsel inappropriate. Further complicating matters, Rep. Stokesbary represents the plaintiff in a separate case, *Garcia v. Hobbs*, challenging the Commission's enacted LD 15. This atypically close connection between a party seeking to *challenge* LD 15 and Movants' apparent desire here to *defend* it at least raises questions as to whether their participation as intervenors is appropriate. Movants' interests are likely best suited for involvement as amicus curiae, and mandatory and permissive intervention should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Movants' motion for intervention as of right and permissive intervention under Rule 24.

Dated: April 11, 2022

By: */s/ Aseem Mulji*

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CERTIFICATE OF SERVICE

I certify that all counsel of record were served a copy of the foregoing this 11th day of April, 2022 via the Court's CM/ECF system.

/s/ Aseem Mulji