

The Honorable Robert S. Lasnik

**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,

and

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

Intervenor-Defendants.

Case No.: 3:22-cv-5035-RSL

**INTERVENOR-DEFENDANTS’
OPPOSITION TO PLAINTIFFS’
MOTION TO BIFURCATE AND
TRANSFER, STRIKE, AND/OR DISMISS
INTERVENORS’ CROSSCLAIM¹**

INTRODUCTION

Plaintiffs take issue with a Crossclaim that does not concern them and then wrongly accuse Intervenor-Defendants of bad faith with their misguided bifurcation arguments.

Plaintiffs take Intervenor-Defendants’ (“Intervenors”) original statement that Intervenor-Defendants did not plan to raise any new claims “today,” meaning March 29, as evidence of Intervenor-Defendants’ bad faith in bringing the Crossclaim. (Dkt. # 105 at 1; *see* Dkt. # 57 at 11–12.) That sentiment was

¹ Intervenor-Defendants style this brief as “Opposition” to Plaintiffs’ Motion—instead of a response or reply—because the procedural posture of this issue is unclear at the moment. Intervenor-Defendants filed their Amended Answer and Crossclaim in accordance with the Court’s Scheduling Order, but mentioned therein that—should the Court deem it necessary for Intervenor-Defendants to file leave to amend—the pleading be treated as a motion for leave to amend. (Dkt. # 103 at n.1.) It is unclear how the Court is treating the Amended Answer and Crossclaim, and, consequently, it is unclear whether Intervenor-Defendants are responding to Plaintiffs’ Motion or replying to Plaintiffs’ Response to Intervenor-Defendants’ Motion for Leave.

1 expressed in good faith then, and, in similar good faith, Intervenor now recognize that things have
2 changed. Discovery has since shown that Legislative District 15 (“LD 15”) was an unconstitutional
3 racial gerrymander as various deponents, both Commission members and their staff, made it clear
4 that LD 15 was drawn with a +50% Hispanic/Latino CVAP as a target. Intervenor now (1) assert
5 their Crossclaim against Defendants State of Washington and Secretary Hobbs; (2) demand a
6 three-judge panel for Intervenor’s constitutional claim; (3) seek to keep all discovery together for
7 judicial efficiency (which Intervenor and the State have already been doing up to this point in the
8 *Palmer* litigation); and (4) represent that plaintiff in *Garcia v. Hobbs*, No. 3:22-cv-5152 (W.D.
9 Wash.), will dismiss that action should Intervenor’s Crossclaim go forward.²

10 Plaintiffs present this Court with a strawman version of Intervenor’s Amended Answer and
11 Crossclaim. The Motion to Bifurcate and Transfer, Strike, and/or Dismiss (“Motion”) Intervenor’s
12 Crossclaim is a hyperbolic misrepresentation of the Intervenor’s position and is presented without
13 the standing necessary to request much of the relief it seeks. For example, Plaintiffs wrongly state
14 that, “at the eleventh hour, two of the three Intervenor-Defendants . . . no longer seek to defend the
15 [redistricting] plan and have instead amended their Answer to file a crossclaim challenging LD
16 15’s legality.” (Dkt. # 105 at 2.) This oversimplistic explanation misrepresents Intervenor’s
17 position.

18 Intervenor *do* seek to defend the plan against claims that it violated the Voting Rights Act
19 (“VRA”) or that a VRA district is even required in the Yakima Valley. (Dkt. # 103 at 31–32)
20 (providing affirmative defenses to Plaintiffs’ claims that the redistricting plan violates the VRA.)
21 But—as discovery has made clear—the Commission pursued a racial target for LD 15. (Dkt. # 103
22 at 48–51.) Intervenor Ybarra and Trevino, therefore, seek to challenge the constitutionality of the
23 plan on the grounds that it is a racial gerrymander in violation of the Fourteenth Amendment, and
24 Intervenor do so by crossclaiming two parties that are already defendants in this case. Simply put,
25 Intervenor are *defending* the plan against Plaintiffs’ *statutory* challenge but *attacking* the plan on
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27 ² Lead counsel for Intervenor-Defendants is also lead counsel for Plaintiffs in the *Garcia* matter.

1 *constitutional* grounds—*i.e.*, a VRA district is *not* required in the Yakima Valley, however, a new
2 map does need to be redrawn to include a race-neutral LD 15.

3 The distinction between the constitutional and statutory claims is also pertinent to
4 Intervenors’ demand for a three-judge court. Intervenors make this demand only for the
5 constitutional claim, to which they are entitled as a matter of right. *See* 28 U.S.C. § 2284.
6 Intervenors do not demand a three-judge court to hear Plaintiffs’ statutory claims; although, should
7 the Court send all the claims to a three-judge court as a matter of judicial efficiency³, Intervenors
8 would welcome the decision. That said, Intervenors partially agree with Plaintiffs that the claims
9 may be bifurcated, but only for trial purposes. The result is that this Court would hear Plaintiffs’
10 VRA claims, and the three-judge court, which would include this Court as one of its members,
11 would hear Intervenors’ Fourteenth Amendment claim—but that discovery, primarily depositions,
12 would be done together. This process would be made easier by keeping the Intervenors and Cross-
13 Plaintiffs the same.

14 A bifurcation of discovery, however, does not make sense. Maintaining a consolidated
15 discovery for the statutory and constitutional claims—both of which involve the State of
16 Washington and Secretary Hobbs—will make discovery easier, more efficient, and less expensive.
17 It will also not affect Plaintiffs because they are not Cross-Defendants. Indeed, it will require no
18 alteration of the Court’s current Scheduling Order. Plaintiffs also acknowledge that “the racial
19 gerrymandering claim necessarily depends upon the resolution of Plaintiffs’ VRA claim.” (Dkt. #
20 105 at 2.) It is nonsensical to maintain two separate cases—this case and *Garcia*—when resolution
21 of the claim in *Garcia* necessarily turns on the claims in this case.⁴

22 Intervenors oppose Plaintiffs’ request to transfer Intervenors’ Crossclaim to *Garcia*. First,
23 Plaintiffs lack standing to make this request because they are not Cross-Defendants. The
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25 ³ Assuming the three-judge court would include this Court, in the interest of judicial efficiency, the three-judge panel
26 could hear the case as a whole, as both claims will largely consist of the same evidence, and then separate opinions
could be issued for the statutory and constitutional claims, respectively.

27 ⁴ That said, the Supreme Court has never affirmatively held that compliance with the Voting Rights Act is sufficient
to meet strict scrutiny, only that it is “assumed” to do so. *Wis. Legislature v. Wis. Elections Comm’n*, 142 S. Ct. 1245,
1248 (oer curiam) (“We have assumed that complying with the VRA is a compelling interest.”).

1 Crossclaim is not against them but rather the State of Washington and Secretary of State Steve
 2 Hobbs. Plaintiffs also lack standing to request that the Court strike or dismiss Intervenor's
 3 Crossclaim for the same reason. Second, Intervenor's counsel represents that *Garcia* will be
 4 voluntarily dismissed once it is clear that this Court will allow Intervenor's Fourteenth Amendment
 5 Crossclaim to proceed in this case.

6 For all these reasons, the Court should deny Plaintiffs' Motion and allow Cross-Plaintiffs'
 7 Crossclaim to proceed.⁵

8 ARGUMENT

9 I. The Court May Bifurcate Intervenor's Crossclaim for Trial, Not for 10 Discovery.

11 Partial bifurcation may⁶ be warranted. This Court may handle Plaintiffs' VRA claims
 12 through trial, but a three-judge court must hear Intervenor's Fourteenth Amendment claim at trial.
 13 However, the discovery phase need not be bifurcated. Rule 42 provides that "[f]or convenience, to
 14 avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more
 15 separate issues, claims, crossclaims, or third-party claims." Fed. R. Civ. P. 42(b).

16 It is more efficient to keep Intervenor as the racial gerrymander plaintiffs in this case
 17 instead of entertaining the various requests that Plaintiffs make (without standing). No new
 18 discovery needs to occur, other than that which would occur in the ordinary course of Plaintiffs'
 19 claims. No new parties need to be added. Instead, the process would be streamlined: All discovery
 20 would be handled by this Court for the common nucleus of the constitutional and statutory claims.
 21 Both claims concern LD 15 and its history and, therefore, should continue together until the trial
 22 phase, when the three-judge panel would hear the constitutional claim. On the other hand, full
 23 bifurcation or transfer would result in new discovery, additional expense, and delay.

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 26 ⁵ Intervenor notes that Plaintiffs' instant Motion is only against Intervenor's Crossclaim and not its Amended Answer
 27 to Plaintiffs' Amended Complaint. *See* (Dkt. # 105).

⁶ *See supra* n.3.

1 Here, again, Intervenor act only in good faith. Intervenor’s proposal to keep *Palmer*
2 together through discovery is intended to make the process more streamlined for all parties and
3 the Court.

4 **II. Plaintiffs Lack Standing to Move to Transfer Intervenor’s Crossclaim to**
5 ***Garcia* or to Move Alternatively to Strike or Dismiss Intervenor’s Crossclaim.**

6 Plaintiffs are not Cross-Defendants. They are Plaintiffs for separate claims and thus only
7 have an interest in the Court’s treatment of their claims. They do not, however, have an interest in
8 Intervenor’s Crossclaim, which is between Intervenor and the State Defendants. Plaintiffs are not
9 a party to Intervenor’s Crossclaim and, thus, cannot give recommendations as to what should
10 happen to it. Plaintiffs may move to dismiss *counterclaims* made against them, but this *crossclaim*
11 has nothing to do with them. Both the constitutional and statutory claims, of course, share a
12 common nucleus of fact—which warrants keeping discovery together—but Plaintiffs have no
13 standing to seek dismissal of a claim between Intervenor and Defendants in which Plaintiffs are
14 not named defendants. *See Mantin v. Broadcast Music, Inc.*, 248 F.2d 530, 531 (9th Cir. 1957)
15 (“[T]he moving defendants, obviously, had no standing to seek dismissal of the action as to the
16 nonmoving defendants.”); *Simon v. Buttercreek II Homeowners Ass’n*, No. CV 21-02198 TJH
17 (AS), 2021 U.S. Dist. LEXIS 251760, at *4–5 (C.D. Cal. Nov. 9, 2021) (“Because Simon’s FDCPA
18 claim was not asserted against Shetty, but against only Buttercreek and S.B.S., Shetty lacks
19 standing to challenge it”); *Rucker v. Ocwen Loan Servicing, LLC*, No. 11cv1242 DMS (BGS),
20 2011 U.S. Dist. LEXIS 99953, at *2 n.1 (S.D. Cal. Sept. 6, 2011) (“Defendant moves to dismiss
21 Plaintiff’s TILA claim, but it is not named as a defendant on that claim. Accordingly, the Court
22 declines to address Defendant’s arguments for dismissal of that claim.”); *Newsom v. Countrywide*
23 *Home Loans, Inc.*, 714 F. Supp. 2d 1000, 1006 (N.D. Cal. 2010) (“Countrywide lacks standing to
24 seek the dismissal of a claim in which it is not named as a defendant.”); *Essex Builders Grp., Inc.*
25 *v. Amerisure Ins. Co.*, 429 F. Supp. 2d 1274, 1291 (M.D. Fla. 2005) (“The Court cannot conceive
26 how [the plaintiff] has standing to seek dismissal of Amerisure’s cross-claim against
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1 OneBeacon.”). Plaintiffs therefore cannot request anything of this Court post-bifurcation, be that
2 maintaining, transfer, striking, or dismissal.

3 In any case, there’s no redundancy here. Intervenors’ counsel reiterates its representation
4 that *Garcia* will be voluntarily dismissed once it is clear that the Court will allow Intervenors’
5 Fourteenth Amendment Crossclaim to proceed.

6 **III. Intervenors’ Filing of Their Amended Answer and Crossclaim Is Consistent**
7 **with the Practice of This Court and District Courts in the Ninth Circuit.**

8 In the event the Court views Intervenors’ Amended Answer as a motion for leave, (Dkt. #
9 103 at 2 n.1) the Court should grant leave. Intervenors relied on the negotiated, Court-approved
10 Scheduling Order in this case, which permitted amendments to pleadings until November 2, 2022.
11 (Dkt. # 93 at 1.) This was proper to do in this Circuit. *See, e.g., CollegeNET, Inc. v. XAP Corp.*,
12 No. CV-03-1229-HU, 2004 U.S. Dist. LEXIS 13983, at *5 (D. Or. July 14, 2004) (“[The court]
13 allowed defendant's Amended Answer and Counterclaims to stand based on interpreting the
14 scheduling order’s express deadline to amend pleadings as obviating the need for a party to move
15 to amend before it could file an amended pleading.”); *Corona v. Athwal Almonds, Inc.*, No. 1:15-
16 cv-01486 LJO SKO, 2016 U.S. Dist. LEXIS 45556, at *4–5 (E.D. Cal. Apr. 4, 2016) (“[I]n the
17 interest of party and judicial economy the Court will construe Defendants’ filing [of its Amended
18 Answer] as a request for leave to amend the answer, and grant this request.”); *Levy v. FCI Lender*
19 *Servs.*, No. 3:18-cv-02725-GPC-WVG, 2019 U.S. Dist. LEXIS 128078, at *6 (S.D. Cal. July 31,
20 2019) (treating a “FAC as a motion for leave to file a FAC with a proposed FAC” where the FAC
21 was filed within the deadline set by the scheduling order).

22 As with every motion and step in this case, Intervenors acted in good faith. There was no
23 gamesmanship here, but rather a good-faith effort to bring a crossclaim based upon new
24 information that arose in discovery—all within the bounds and timeline of the Scheduling Order.
25 Intervenors respectfully ask the Court to recognize the timeliness of Intervenors’ Amended
26 Answer and Crossclaim.

1 Moreover, even if the Court chooses to treat Intervenor’s filing as a motion for leave, it
2 should be granted. Timely, good-faith seeking of leave to amend should be granted with “extreme
3 liberality.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (quoting
4 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)).

5 **CONCLUSION**

6 Intervenor’s ask this Court to convene a three-judge panel for Cross-Plaintiffs’ racial
7 gerrymander crossclaim as mandated by law, while keeping the statutory and constitutional claims
8 together for discovery purposes.

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10 DATED this 18th day of November, 2022.

11 Respectfully submitted,

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Counsel for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 18th day of November, 2022.

Respectfully submitted,

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Counsel for Intervenor-Defendants

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