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 et al.,

Proposed Intervenor-Defendants.

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

PROPOSED INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF MOTION TO INTERVENE

NOTE ON MOTION CALENDAR
April 15, 2022

INTRODUCTION

Plaintiffs have attempted to carefully construct a case with no adversary. After the bipartisan Washington Redistricting Commission unanimously adopted a redistricting plan, Plaintiffs sued three elected officials from one political party to redraw a legislative district in a manner certain to elect candidates from that same party. Plaintiffs opposed a motion to join the agency which caused the alleged harm (*see* Dkt. # 60) and now oppose this motion by Proposed Intervenor-Defendants ("Intervenors") to intervene (*see* Dkt. # 64). Plaintiffs' efforts to be the sole presenters of evidence and legal arguments not only offends Washington's strong bipartisan redistricting tradition, it also "offend[s] traditional notions of fair play and substantial justice."

Stokesbary PLLC
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 486-0795

Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (discussing personal jurisdiction, not intervention). The Court should grant Intervenors' motion to ensure full adversarial presentation of the issues, absent which "a diligent judge may overlook relevant facts or legal arguments in even a straightforward case." *Davis v. Ayala*, 576 U.S. 257, 293 (2015) (Sotomayor, J., dissenting).

ARGUMENT

I. Rule 24(a) Clearly Permits Intervention as of Right

Intervenors are entitled to intervene as a matter of right in this case, because, as discussed in their Motion to Intervene (Dkt. # 57) and summarized below, their motion is timely, they have a significantly protectable interest related to this case, which may be impaired by a disposition of this case, and they are not adequately represented by the existing parties. *See, e.g.*, *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020).

A. Intervenors' application is timely

Intervenors' application is timely, and none of Plaintiffs' arguments otherwise are relevant. First, Plaintiffs claim intervention is untimely because they submitted a "redistricting plan to the Court as a preliminary remedy," the Court "scheduled oral argument on Plaintiffs' motion [for preliminary injunction] for April 12," and "[t]he parties have long since conferred and filed a joint 26(f) report and discovery plan." (Dkt. # 64 at 10.) But Intervenors sought consent from Plaintiffs to intervene *before* a remedial plan was submitted, filed their motion *before* the preliminary injunction hearing was scheduled or announced, and already indicated that they were not seeking changes to the Court's current scheduling order. Thus, the Court should ignore these arguments.

Plaintiffs further claim that Intervenors "would bog down the case and present no fuller a presentation of relevant issues." But wouldn't the Court quickly dismiss redundant or irrelevant issues, not get bogged down by them? More importantly, the potential that "additional parties and arguments might make resolution of [a] case more difficult . . . is a poor reason to deny intervention," whereas the possibility intervenors "might raise new, legitimate arguments is a reason to grant intervention, not deny it." *W. Watersheds Project v. Haaland*, 22 F.4th 828, 839 (9th Cir. 2022) (citing *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 857 (9th Cir. 2016)).

Stokesbary PLLC
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 486-0795

Lastly, Plaintiffs allege they would be "substantially prejudiced" if intervention is granted, but "the only prejudice that is relevant under this factor is that which flows from a prospective intervenor's failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented—and not from the fact that including another party in the case might make resolution more difficult." *Smith*, 830 F.3d at 857 (cleaned up). Plaintiffs' main example—their motion for preliminary injunction—is now moot since the Court has ruled on it (*see* Dkt. # 66), and their other examples involve alleged prejudice from intervention at any stage, not any prejudice that would flow from Intervenor's failure to intervene earlier.[1]

Thus, intervention is timely because it comes at an early stage, with the motion filed one week after Intervenors became aware that their interests would not be adequately protected by the existing parties, and intervention will neither delay the proceedings nor prejudice the other parties.

B. Intervenors have significantly protectable interests

Intervenors have significantly protectable interests related to the subject matter of this case, despite Plaintiffs' claims to the contrary. First, Plaintiffs argue the Fourteenth Amendment rights of Intervenors are somehow not protectible. But the Supreme Court has emphasized that certain applications of section 2 of the Voting Rights Act ("VRA") *do* raise constitutional concerns. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018); *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009).

Plaintiffs next suggest that Intervenors Campos and Ybarra lack an interest "because neither individual even resides in the district being challenged here." (Dkt. # 64 at 6.) But Plaintiffs challenge the Enacted Plan "across multiple state legislative districts" (Dkt. # 1 at 39) and have already sought implementation of a redistricting plan that redraws multiple neighboring districts (*see* Dkt. # 54 at 9). So Intervenors do have an interest in whether and how such remedial plans are drawn. *See, e.g.*, 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1908, at 285 (2d ed. 1986) ("[I]n cases challenging various statutory schemes . . . courts have recognized the interests of those who are governed by those schemes are sufficient to support intervention.").

[1] *Even if* Plaintiffs are correct (they are not) that Intervenors should have known they would not be adequately represented by present Defendants in late February, Plaintiffs still do not allege any prejudice from this extra month.

Moreover, three individual *Plaintiffs* reside in Legislative District 14 (*see* Dkt. # 1 at 9), so if only residents of Legislative District 15 have an interest in this case, then those Plaintiffs lack standing. Lastly, Washington law gives "any registered voter" a legal right to "file a petition with the [state] supreme court challenging the [redistricting] plan." Wash. Rev. Code § 44.05.131. If voters have a right to challenge a districting plan, then it is axiomatic that they have a right to defend the plan.

Plaintiffs also offer the strawman argument that "no individual voter or legislator is entitled to any one configuration of their district." But Intervenor (and State Representative) Ybarra never claimed this, only that he has an "interest in knowing which voters will be included in his district." (Dkt. # 57 at 6.) This interest formed part of the basis for the Court's denial of Plaintiffs' motion for preliminary injunction (*see* Dkt. # 66 at 9) as well as the Sixth Circuit's recent reversal of a district court's denial of a group of Congressmen's motion to intervene in their state's redistricting litigation, *see League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018) ("[T]he contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent in the legislature.")

Finally, Plaintiffs suggest that Intervenors' interest in avoiding election chaos or delay isn't protectible because it is shared by an existing defendant and is unrelated to Plaintiffs' claims. But if the test were whether intervenors had a *distinct* interest, then the requirement to show inadequate representation would be unnecessary, because an existing party would practically never represent an interest they do not have. And this interest is so related to Plaintiffs' claims that it also formed part of the Court's basis for denying Plaintiffs' preliminary injunction. (*See* Dkt. # 66 at 6.)

Therefore, Intervenors clearly have multiple protectible interests related to this case.

C. Intervenors' interests will be impaired absent intervention

Next, the absence of Intervenors from this case "may impair [their] rights as a practical matter." *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002) (cleaned up).

Plaintiffs make a variety of unpersuasive arguments that Intervenors' interests somehow won't be impaired if they are not made parties to this case. For example, they claim "intervention at the merits stage of these proceedings is at best premature" but also insist that intervention is

Stokesbary PLLC
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 486-0795

already untimely. (Dkt. # 64 at 8, 10-11.) They suggest Intervenors wait until *after* resolution of this case to bring their own claims (*id.* at 8) despite previously arguing "[s]tate actions infringing on voting rights constitute irreparable injury" (Dkt. # 38 at 20). And they contend Intervenors' interest in ensuring that any new redistricting plan follows state and federal law would be "advanced" by the very lawsuit Intervenors seek to defeat. (Dkt. # 64 at 7-8.)

Clearly, Intervenors' interests will be impaired if this litigation goes forward without them.

D. Intervenors' interests will not be adequately represented

Lastly, Intervenors' interests will not be adequately protected by the present parties, and none of Plaintiffs' arguments otherwise are persuasive. Plaintiffs try to shift the presumption of this element by insisting that Intervenors "have the same ultimate objective as Defendants in this suit." (Dkt. # 64 at 9.) But Defendant Hobbs' objective is to ensure the orderly conduct of elections, not to contest the merits of Plaintiffs' claims. Intervenors, on the other hand, do not believe section 2 of the VRA applies and they aim to dismiss the Plaintiffs' claim or defeat it on the merits.

Plaintiffs also colorfully suggest that "many of the arguments Movants claim to offer are outlandish" (*id.*), but all of Intervenors' jurisdictional arguments advanced so far are grounded in a careful application of caselaw and canons of statutory construction and have found support across the federal judiciary.[2] Even if this Court is ultimately not persuaded by these arguments, they are no more "outlandish" than the accomplished Article III jurists who *have* found them persuasive.

It is clear Intervenors will not be adequately represented by any of the existing parties because they wish to contest the merits of Plaintiffs' claim, but the remaining Defendant does not.

II. Rule 24(b) Clearly Permits Permissive Intervention

The Court also has ample grounds to grant permissive intervention under Fed. R. Civ. P. 24(b). As noted elsewhere, intervention is especially warranted in this case since the sole remaining Defendant "takes no position on the merits of Plaintiffs' claims." (Dkt. # 40 at 1-2.)

[2] Justices Thomas and Gorsuch agreed that VRA § 2 "does not apply to redistricting." *Abbott v. Perez*, 138 S. Ct. at 2335 (Thomas, J., concurring). Five Fifth Circuit judges agreed that 28 U.S.C. § 2284(a) applies to *statutory* legislative redistricting cases. *See Thomas v. Reeves*, 961 F.3d 800, 810-27 (5th Cir. 2020) (6-5) (Willett, J., concurring). And a district court agreed VRA § 2 lacks a private right of action. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 4:21-cv-01239-LPR (E.D. Ark. Feb. 17, 2022), *appeal docketed*, No. 22-1395 (8th Cir. filed Feb. 23, 2022).

Stokesbary PLLC
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 486-0795

A. The "independent grounds for jurisdiction" requirement is inapplicable

Plaintiffs do not dispute Intervenors' argument that the independent jurisdictional grounds requirement for permissive intervention does not apply in this instance.

B. The Motion to Intervene is timely

For the same reasons explained above in Part I.A with respect to intervention as of right, Intervenors' motion is also sufficiently timely for permissive intervention to be granted, and Plaintiffs' arguments otherwise are just as unpersuasive.

C. Intervenors raise common questions of law or fact with this case

Plaintiffs do not dispute that Intervenors' claims and defenses "share[] a common question of law or fact" with this case. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).

D. Intervention will not cause undue delay or prejudice

Finally, courts "must consider whether [permissive] intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Plaintiffs argue intervention "risks undue delay and will unfairly prejudice Plaintiffs." They once again contradictorily assert that Intervenors will add nothing beyond a "basic denial of Plaintiffs' Section 2 claim" yet will also "draw resources and attention" away from the Court. (Dkt. # 64 at 11-12.). If Intervenors' arguments are "basic," they could hardly delay the proceedings. Conversely (and as noted in Part I.A above), "the likelihood that additional parties and arguments might make resolution of [a] case more difficult . . . is a poor reason to deny intervention," whereas the prospect that an intervenor "might raise new, legitimate arguments is a reason to grant intervention, not deny it." *W. Watersheds Project*, 22 F.4th at 839.

Between the arguments already provided and the Court's recent ruling on the preliminary injunction, there is no discernable prejudice or delay that would result in granting intervention.

E. Plaintiffs' remaining insinuations should be ignored

Plaintiffs conclude with a series of arguments that are, at best, irrelevant. (*See* Dkt. # 64 at 12.) Intervenors' attorney is a member of the Washington House of Representatives, but he has not represented himself as such to this Court, to avoid the appearance of impropriety or prejudice

Stokesbary PLLC
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 486-0795

to the proceedings. And while Intervenors share counsel with the plaintiff in *Garcia v. Hobbs*, No. 3:22-cv-5152 (W.D. Wash. filed March 15, 2022) (challenging Legislative District 15 under the Fourteenth Amendment), there is no conflict to argue that a district is an unconstitutional racial gerrymander under the Equal Protection Clause but is not also covered by section 2 of the VRA.

Most dangerously, however, Plaintiffs argue Intervenors' counsel's status as a "witness" in this case makes his presence as counsel inappropriate. But the complaint in *Garcia v. Hobbs* was filed on March 15 and this Motion to Intervene was filed on March 29. The subpoena duces tecum—which still has not been served at the time of this reply—is evidently dated April 1. It would set a chilling precedent if a party could defeat a motion to intervene by simply serving a subpoena on intervenors' counsel *after the motion to intervene was filed*.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court enter an order granting their Motion to Intervene in this action as expeditiously as possible.

DATED this 15th day of April, 2022.

Respectfully submitted,

s/ Andrew R. Stokesbary

Andrew R. Stokesbary, WSBA #46097
STOKESBARY PLLC
1003 Main Street, Suite 5
Sumner, WA 98390
T: (206) 486-0795
dstokesbary@stokesbarypllc.com

Counsel for Proposed 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 15th day of April, 2022.

Respectfully submitted,

s/ Andrew R. Stokesbary
Andrew R. Stokesbary, WSBA #46097

Counsel for Proposed Intervenor-Defendants

Stokesbary PLLC
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 486-0795