

The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

SUSAN SOTO PALMER, et. al.,

Case No.: 3:22-cv-05035-RSL

*Plaintiffs,*

v.

Judge: Robert S. Lasnik

STEVEN HOBBS, et. al.,

**PLAINTIFFS’ BRIEF IN  
RESPONSE TO REQUEST FOR  
THREE-JUDGE COURT**

*Defendants,*

and

NOTE FOR MOTION

JOSE TREVINO, ISMAEL CAMPOS,  
and ALEX YBARRA,

CALENDAR: November 18, 2022

*Intervenor-Defendants.*

**INTRODUCTION**

Plaintiffs ask this Court to refrain from ruling on the Request for Three-Judge Court in response to Defendant-Intervenors’ Amended Answer. *See* Dkt. # 103. The decision to assign a three-judge court is dependent on the resolution of Plaintiffs’ Motion to Bifurcate and Transfer, Strike, and/or Dismiss Intervenor-Defendants’ Crossclaim. *See* Dkt. # 105.

**ARGUMENT**

Plaintiffs respectfully request that the Court not rule upon Intervenor-Defendants’ request for a three-judge court until the issues raised in Plaintiffs’ Motion to Bifurcate and Transfer, Strike, and/or Dismiss Intervenor-Defendants’ Crossclaim, which is noted for November 25, 2022, are

1 considered and decided.<sup>1</sup> *See* Exhibit 1 (Plaintiffs’ Motion to Bifurcate). The resolution of  
2 Plaintiffs’ Motion, including whether this Court strikes or dismisses Intervenor’s crossclaim,  
3 directly impacts whether a three-judge panel is necessary in this case.<sup>2</sup> Here, Intervenor-  
4 Defendants’ crossclaim invokes Section 2284 for their constitutional claim, while Plaintiffs’  
5 claims are strictly statutory claims under Section 2 of the Voting Rights Act of 1965, 52 U.S.C. §  
6 10301 (“VRA”). Such statutory VRA claims must be heard by an ordinary single-judge district  
7 court, not a three-judge district court. *See Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1354 (N.D.  
8 Ala. 2019) (“A claim solely alleging a Section 2 violation falls outside a plain reading of § 2284.”).  
9 Instead of the Court possibly assigning this case to a three-judge court only for it to revert back, it  
10 would be in the interest of judicial economy to hold this request until Plaintiffs’ Motion has been  
11 heard and an Answer filed in response to Intervenor-Defendants’ crossclaim. This prevents the  
12 Court from expending time and resources on transferring this case to a three-judge court only for  
13 the jurisdiction of the Court to later be declared invalid and transferred back.  
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### 16 CONCLUSION

17 For the foregoing reasons, Plaintiffs respectfully request that the Court not make a ruling  
18 on Intervenor-Defendants’ request for a three-judge court until after Plaintiffs’ Motion to Bifurcate  
19 and Transfer, Strike, and/or Dismiss Intervenor-Defendants Crossclaim has been considered and  
20 decided.  
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23 <sup>1</sup> Plaintiffs sought a stipulation from all parties to have their Motion to Bifurcate noted for  
24 November 18, 2022, along with the request for a three-judge court, to respect judicial economy.  
25 Intervenor-Defendants were opposed to such a request. Therefore, Plaintiffs filed their Motion to  
26 Bifurcate and noted in accordance with Local Rule 7(d)(3).

<sup>2</sup> Given the relation between Intervenor’s request and Plaintiffs’ Motion to Bifurcate, Plaintiffs  
incorporate and rely on the arguments made in their Motion, *See* Ex. 1, in response to  
Intervenor’s request.

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Dated: November 14, 2022

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**CERTIFICATE OF SERVICE**

I certify that all counsel of record were served a copy of the foregoing this 14th day of November, 2022 via the Court’s CM/ECF system.

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# **Exhibit 1**

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

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’ MOTION TO  
BIFURCATE AND TRANSFER,  
STRIKE, AND/OR DISMISS  
INTERVENORS’  
CROSSCLAIM**

NOTE FOR MOTION  
CALENDAR: November 25, 2022

**INTRODUCTION**

Over seven months ago, Intervenor sought to intervene in this case as *defendants* contending that Secretary Hobbs—then the sole defendant—would not adequately defend Legislative District 15 (“LD 15”) against Plaintiffs’ claims under Section 2 of the Voting Rights Act (“VRA”).<sup>1</sup> At the time, they explained that they “do [not] seek to change . . . the Court’s current scheduling order”<sup>2</sup> and “are not raising any new claims in any of their pleadings or motions filed today.” Dkt. # 57 at 11-12. The Court denied intervention-as-of-right but granted permissive intervention. Two weeks prior, their counsel, Andrew R. Stokesbary, had filed a separate lawsuit

<sup>1</sup> Since that time, the Court ordered the joinder of the State as a Defendant.  
<sup>2</sup> Since that time, Intervenor filed a motion to stay Plaintiffs’ case, which this Court denied.

1 on behalf of another individual challenging LD 15 as an unconstitutional racial gerrymander. *See*  
2 *Garcia v. Hobbs*, No. 3:22-cv-5152 (W.D. Wash.). That suit was assigned to a three-judge district  
3 court pursuant to 28 U.S.C. § 2284, which applies to the narrow circumstances in which a  
4 constitutional challenge to a congressional or statewide redistricting plan is alleged. Cases tried  
5 before a three-judge district court have direct appeals to the Supreme Court, whose appellate  
6 jurisdiction is mandatory not discretionary. *This case*, however, has proceeded for nearly eleven  
7 months before a single-judge Court because it involves only statutory challenges under the VRA.  
8 Such challenges are not subject to § 2284’s narrow jurisdictional rule. Any appeal from this  
9 Court’s decision would be to the Ninth Circuit, and Supreme Court review would be discretionary.  
10

11 Now, at the eleventh hour, two of the three Intervenor-Defendants (Messrs. Ybarra and  
12 Trevino) no longer seek to defend the plan and have instead amended their Answer to file a  
13 crossclaim challenging LD 15’s legality. That crossclaim alleges that LD 15 is an unconstitutional  
14 racial gerrymander—the precise claim that Intervenor’s counsel has already filed on behalf of  
15 another plaintiff in the *Garcia* case. Yet rather than join the *Garcia* action already pending,  
16 Intervenor’s seek to upend this proceeding eleven months after it was filed and just as discovery is  
17 about to close.  
18

19 This Court has—and should exercise—the discretion to manage its docket by bifurcating  
20 Intervenor’s crossclaim pursuant to Fed. R. Civ. P. 42(b) and transferring and consolidating it with  
21 the *Garcia* case pursuant to 28 U.S.C. § 1404 and Local Civil Rule 42. Alternatively, the Court  
22 should strike or dismiss Intervenor’s crossclaim. Moreover, because the racial gerrymandering  
23 claim necessarily depends upon the resolution of Plaintiffs’ VRA claim, and because courts must  
24 not address constitutional claims if it is unnecessary to do so, the *Garcia* Court should hold the  
25 racial gerrymandering challenges in abeyance pending the resolution of Plaintiffs’ VRA claim. It  
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1 does not make sense for the parties or the Court to expend time and resources on a claim that will  
 2 likely become moot before trial.

### 3 ARGUMENT

#### 4 **I. The Court should bifurcate Intervenors’ crossclaim and transfer it to be consolidated** 5 **with the *Garcia* case.**

6 The Court should bifurcate Intervenors’ crossclaim and transfer it to be consolidated with  
 7 the *Garcia* case. Under Federal Rule 42(b), “[f]or convenience, to avoid prejudice, or to expedite  
 8 and economize, the court may order a separate trial of one or more separate issues, claims,  
 9 crossclaims, or third-party claims.” “Rule 42(b) . . . confers broad discretion upon the district court  
 10 to bifurcate a trial, thereby deferring costly and possibly unnecessary proceedings pending  
 11 resolution of potentially dispositive preliminary issues.” *Zivkovic v. S. Calif. Edison Co.*, 302 F.3d  
 12 1080, 1088 (9th Cir. 2002). Moreover, under 28 U.S.C. § 1404(b), the Court may effect an intra-  
 13 district transfer of a case “in the discretion of the court.” Upon transfer, the Court has the power  
 14 to consolidate matters pursuant to Local Civil Rule 42.  
 15

#### 16 **A. Bifurcation is necessary to avoid serious jurisdictional questions and prejudice** 17 **to Plaintiffs.**

18 Bifurcation is necessary to avoid serious jurisdictional questions about whether it is  
 19 permissible for a three-judge court to adjudicate Plaintiffs’ statutory VRA claim based solely upon  
 20 a *different party’s* crossclaim asserted after the action has already commenced. Section 2284  
 21 provides that “[a] district court of three judges shall be convened . . . when an action is filed  
 22 challenging the constitutionality of the apportionment of congressional districts or the  
 23 apportionment of any statewide legislative body.” 28 U.S.C. § 2284(a). Section 2284’s limit on  
 24 the convening of three-judge courts is jurisdictional. Statutes “delineating the classes of cases . . .  
 25 falling within a court’s adjudicatory authority” serve as limits on federal court’s “subject-matter  
 26



1 jurisdiction.” *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *see also Bowles v. Russell*, 551 U.S.  
2 205, 212 (2007) (“Within constitutional bounds, Congress decides what cases the federal courts  
3 have jurisdiction to consider.”). By specifying which cases a three-judge court *must* hear, the  
4 statute likewise defines which cases it may *not* hear. Thus, outside the narrow category of  
5 constitutional challenges to congressional or legislative plans, “there is no . . . jurisdiction” to  
6 convene a three-judge court to hear a case. *Wilson v. Gooding*, 431 F.2d 855, 858 (5th Cir. 1970);  
7 *see also Castanon v. United States*, 444 F. Supp. 3d 118, 128 (D.D.C. 2020) (referring to § 2284  
8 as the three-judge court’s “statutory grant”).

10 Section 2284 is strictly construed to avoid the drain on judicial resources and the  
11 extraordinary complication of aligning three federal judges’ schedules to adjudicate a case. “The  
12 three-judge district court is . . . an extraordinary court and technical requirements to its jurisdiction  
13 are to be strictly construed.” *Jehovah’s Witnesses in State of Wash. v. King Cty. Hosp.*, 278 F.  
14 Supp. 488, 493 (W.D. Wash. 1967), *aff’d*, 390 U.S. 598 (1968); *see also Sands v. Wainwright*, 491  
15 F.2d 417, 421 (5th Cir. 1973) (noting that the three-judge court requirement is ““a serious drain  
16 upon the federal judicial system”” and must “be narrowly construed” (quoting *Phillips v. United*  
17 *States*, 312 U.S. 246, 250 (1941))); *Nixon v. Richey*, 513 F.2d 430, 446 (D.C. Cir. 1975)  
18 (explaining that three-judge court must be convened “only and strictly as Congress has  
19 prescribed”).

22 Most courts to consider the issue have recognized that statutory VRA challenges to  
23 redistricting plans must be heard by an ordinary single-judge district court and not a three-judge  
24 district court. *See, e.g., Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1354 (N.D. Ala. 2019) (“A  
25 claim solely alleging a Section 2 violation falls outside a plain reading of § 2284.”); *Johnson v.*  
26 *Ardoin*, No. 18-625-SDD-EWD, 2019 WL 2329319, at \*3 (M.D. La. May 31, 2019) (“[Section

1 2284] applies only when the constitutionality of apportionment is being challenged.”); *Ariz.*  
 2 *Minority Coalition for Fair Redistricting v. Ariz. Independent Redistricting Comm’n*, 366 F. Supp.  
 3 2d 887, 894-95 (D. Ariz. 2005) (rejecting request for three-judge court because “Plaintiffs’  
 4 challenge [to] the 2002 Plan under § 2 of the VRA is statutory, not constitutional”). It is true that  
 5 when a *plaintiff* raises both statutory and constitutional challenges, a properly convened three-  
 6 judge court may “exercise a brand of supplemental jurisdiction” over the statutory claims, *see*,  
 7 *e.g.*, *Castanon*, 444 F. Supp. 3d at 128, but that is different from situations in which a different  
 8 party seeks to convert the original plaintiffs’ statutory claim into a proceeding heard by a three-  
 9 judge court.<sup>3</sup>

11 Empaneling a three-judge district court for this entire case because of Intervenors’ belated  
 12 crossclaim would prejudice Plaintiffs because it would inject uncertainty as to the three-judge  
 13 district court’s jurisdiction to adjudicate their case. Should Plaintiffs prevail and the State appeal,  
 14 the Supreme Court might determine that a three-judge district court lacked jurisdiction to decide  
 15 Plaintiffs’ VRA claim, requiring the case to be vacated and adjudicated anew. *See, e.g.*, *Allen v.*  
 16 *State Bd. of Elections*, 393 U.S. 544, 560 (1969) (holding that Supreme Court has “jurisdiction  
 17 over an appeal brought directly from the three-judge court of only if the three-judge court was  
 18 properly convened”). This would jeopardize the ability of Plaintiffs to attain relief in time for the  
 19 2024 election. Plaintiffs should not be forced to shoulder the risk that their case has been decided  
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22 <sup>3</sup> Plaintiffs are aware of one three-judge district court that has, over the plaintiffs’ objection,  
 23 consolidated a case raising only statutory redistricting challenges with other cases raising  
 24 constitutional challenges. *See LULAC v. Abbott*, No. 21-CV-00259-DCG-JES-JVB (W.D. Tex.  
 25 2021). But other courts have declined to consolidate such cases, citing jurisdictional limitations.  
 26 *See, e.g., Caster v. Merrill*, No. 2:21-cv-1536-AMM, 2022 WL 264819, at \*1 (N.D. Ala. Jan. 24,  
 2022) (noting that case raising statutory claims remained before single judge while constitutional  
 claim cases were before three-judge court), *probable juris. noted, cert. granted before judgment,*  
*and stayed pending appeal on other grounds, Merrill v. Milligan*, 142 S. Ct. 879 (U.S. 2022).

1 by a Court lacking jurisdiction to do so because of the procedural gamesmanship of Intervenor—  
 2 who have repeatedly sought to delay this case.

3 This case is already set for trial, and it is unlikely that two new federal judges will have  
 4 Plaintiffs’ trial date available on their calendars. Plaintiffs’ trial date has already slipped five  
 5 months and because the Supreme Court’s *Purcell* principle requires changes to district lines well  
 6 in advance of elections, further delay should be avoided.

7  
 8 Intervenor’s crossclaim raises substantial jurisdictional questions casting doubt on a three-  
 9 judge court’s ability to adjudicate Plaintiffs’ case. This potentially jeopardize the effectiveness of  
 10 any relief Intervenor may attain. As it risks delay to the resolution of Plaintiffs’ suit, Intervenor’s  
 11 crossclaim should be bifurcated.

12 **B. Bifurcation is warranted for judicial economy and in accord with the**  
 13 **constitutional avoidance principle.**

14 Bifurcation is warranted for judicial economy and in accord with the constitutional  
 15 avoidance principle. Plaintiffs have asserted a statutory VRA violation (both a results-only claim  
 16 and an intentional discrimination claim) while Intervenor and the *Garcia* plaintiffs have raised  
 17 constitutional challenges to LD 15. For two reasons it makes sense for the convenience of the  
 18 parties and the Court to bifurcate the claims.

19  
 20 First, resolution of Plaintiffs’ VRA claim is a necessary predicate to Intervenor’s and the  
 21 *Garcia* plaintiff’s racial gerrymandering claim. As Intervenor themselves acknowledge in their  
 22 crossclaim allegations, a legislative district is not an unconstitutional racial gerrymander if the  
 23 VRA requires its race-conscious drawing. Am. Answer Crossclaim ¶ 18. If Plaintiffs prevail on  
 24 their VRA claim, Intervenor’s crossclaim and the *Garcia* plaintiff’s claim will become moot. Not  
 25 only will the district they have challenged cease to exist, but the predicate of their constitutional  
 26

1 claim—that Section 2 does not require a Latino opportunity district in the Yakima area, *see id.* ¶  
2 26—will have been rejected by the Court. There will be no cognizable racial gerrymandering claim  
3 available against either the enjoined version of LD 15 in effect now or the remedial district ordered  
4 to remedy Plaintiffs’ VRA claim. Plaintiffs’ VRA claim is thus precisely the type of “potentially  
5 dispositive preliminary issue[]” that warrants bifurcation of Intervenors’ crossclaim. *Zivkovic*, 302  
6 F.3d at 1088. There is no point in the parties or the Court expending time and resources litigating  
7 the racial gerrymandering claim when Plaintiffs’ Section 2 claim will potentially prove dispositive.  
8 Indeed, a review of Plaintiffs’ expert reports (detailing the presence of the *Gingles* factors, the  
9 totality of circumstances, and the intentional discrimination that pervaded the adoption of LD 15)  
10 illustrates that it is *likely* that their Section 2 claims will indeed prove dispositive. *See* Dkt. # 104  
11 (expert reports of Dr. Collingwood, Dr. Estrada, and Dr. Flores).

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14 Second, even if resolution of Plaintiffs’ claim were not a necessary predicate determination  
15 to Intervenors’ crossclaim and the *Garcia* plaintiff’s claim, the principle of constitutional  
16 avoidance would nevertheless counsel against the Court adjudicating the racial gerrymandering  
17 claim when the lawfulness of LD 15 can be decided on statutory grounds. *See Lyng v. Nw. Indian*  
18 *Cemetery Protect Ass’n*, 485 U.S. 439, 445 (1988) (“A fundamental and longstanding principle of  
19 judicial restraint requires that courts avoid reaching constitutional questions in advance of the  
20 necessity of deciding them.”); *see also Caster*, 2022 WL 264819, at \*84 (declining to reach racial  
21 gerrymandering claim because of finding that district violates Section 2 of the VRA).

1 This case is a quintessential candidate for bifurcation. Although Plaintiffs are not parties  
 2 to the *Garcia* case, Plaintiffs respectfully note that the most efficient course is to hold that case in  
 3 abeyance pending resolution of this case.<sup>4</sup>

4 **C. Intervenor’s crossclaim should be transferred and consolidated with the**  
 5 ***Garcia* case before that case’s three-judge court.**

6 In addition to bifurcating Intervenor’s crossclaim, that crossclaim should be transferred and  
 7 consolidated with the *Garcia* case pursuant to 28 U.S.C. § 1404(b) and Local Civil Rule 42. Under  
 8 28 U.S.C. § 1404(b), a party may file a motion for an action to be transferred “in the discretion of  
 9 the court, from the division in which pending to any other division in the same district.” Section  
 10 1404 “permits transfers to prevent the waste of time, energy, and money and to protect litigants,  
 11 witnesses, and the public against unnecessary inconvenience and expense.” *Dixon v. Mountain*  
 12 *View Pizza Co.*, No. CV-19-37-GF-BMM, 2019 WL 13218717, at \*1 (D. Mont. Oct. 16, 2019).  
 13 The movant bears the burden to show that the “transferee division provides a more appropriate  
 14 forum,” and “[c]ourts possess broad discretion to transfer cases.” *Id.* If the court determines that  
 15 the plaintiff—or in this case intervenor-defendant raising a crossclaim—“could have brought the  
 16 action in the proposed transferee division,” then “the district court must make an individualized,  
 17 case-specific, analysis of convenience and fairness to the parties and witnesses, and an assessment  
 18 of the interests of justice.” *Id.* at \*2.  
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23 <sup>4</sup> The *Garcia* case is currently scheduled for trial a month after this case. The month prior to trial  
 24 is a busy time for litigants, who are usually racing to meet pretrial deadlines and prepare their case  
 25 for trial. Given the possibility that the *Garcia* matter will become moot as a result of the  
 26 adjudication of this case, it may benefit the parties and the Court for that matter to be placed in  
 abeyance pending the resolution of this case, thus pausing the need for the parties to engage in  
 work that is likely to prove unnecessary.

1 Here, fairness and the interests of justice support transferring Intervenors' crossclaim and  
2 consolidating it, pursuant to LCR 42, with the *Garcia* case. The case involves the same claim, the  
3 same parties, and the same counsel. Indeed given that their lawyer *is the plaintiff's lawyer in the*  
4 *Garcia case*, they could have simply filed an amended complaint adding themselves as plaintiffs  
5 in that case. The fact that they did not do that suggests that their motive was to inject confusion  
6 and disruption to *this* case, and not a genuine need to raise their claim in this matter. Transferring  
7 the crossclaim would avoid injecting uncertainty over whether a three-judge court could even  
8 exercise jurisdiction over this case, would avoid the delay always attendant to three-judge court  
9 proceedings, and would permit the constitutional claims to be separated and held in abeyance  
10 pending the resolution of Plaintiffs' VRA claim—a claim whose resolution is a necessary predicate  
11 for whether the constitutional claim can even proceed.  
12

13 Moreover, transferring the crossclaim and consolidating it with the *Garcia* case would  
14 adhere to the first-to-file rule. “The first-to-file rule was developed to ‘serve[ ] the purpose of  
15 promoting efficiency well and should not be disregarded lightly.’” *Alltrade, Inc. v. Uniweld Prods.,*  
16 *Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). The rule is one of “federal comity” that “allows a district  
17 court to transfer, stay, or dismiss an action if a case with substantially similar issues and parties  
18 was previously filed in another district court.” *Samson v. United HealthCare Servs., Inc.*, No. C19-  
19 0175JLR, 2020 WL 3971390, at \*3 (W.D. Wash. July 14, 2020). The *Garcia* case was the first  
20 filed, involves the same exact claim, and the same counsel. The first-to-file rule would seem at its  
21 apex when the same lawyer filed the first and the second suits in a patent display of gamesmanship.  
22

23 The Court should bifurcate Intervenors' crossclaim, transfer it and consolidate it with the  
24 *Garcia* case. After doing so, it should hold the *Garcia* proceedings in abeyance pending a decision  
25 in this case on Plaintiffs' VRA claim.  
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1 **II. Alternatively, the Court should strike or dismiss Plaintiffs’ crossclaim.**

2 Alternatively, the Court should strike or dismiss Plaintiffs’ crossclaim. The Court has the  
3 discretion to strike any pleading raising a “redundant” matter. *See* Fed. R. Civ. P. 12(f). The  
4 crossclaim is redundant of the *Garcia* case. Moreover, when a party raises a claim that duplicates  
5 a claim already raises in a different proceeding—as is the case here—the Court has the discretion  
6 to dismiss the claim. *See, e.g., Samson*, 2020 WL 3971390, at \*3. Dismissing the crossclaim would  
7 not prejudice Intervenor because they can seek leave to amend to add themselves as plaintiffs in  
8 the *Garcia* case. Moreover, dismissal is likewise appropriate under Rule 12(b)(1) because  
9 Intervenor have not alleged facts sufficient to support standing to raise a racial gerrymandering  
10 claim.  
11

12 First, Mr. Ybarra does not even reside in LD 15. As the Supreme Court has emphasized,  
13 the injuries caused by an alleged racial gerrymander are “personal” and “include[] being  
14 ‘personally subject to [a] racial classification’ . . . as well as being represented by a legislator who  
15 believes his ‘primary obligation is to represent only the members’ of a particular racial group.”  
16 *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (“*ALBC*”) (quoting *Bush v.*  
17 *Vera*, 517 U.S. 952, 957 (1996) (first bracket added). These injuries “directly threaten a voter who  
18 lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the  
19 State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim.”  
20 *Id.* (emphasis in original). Second, while Mr. Trevino resides in LD 15, the crossclaim does not  
21 allege that he has suffered any racial classification because it contains to no factual allegations  
22 regarding his race or ethnicity. *See* Am. Answer Crossclaim ¶ 32. There is thus no allegation that  
23 he has been subject to an improper racial classification—a necessary predicate for standing.  
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1 The Court may also strike Intervenor’s crossclaim because they filed it as part of an  
2 untimely amended answer without leave of the Court to do so. Rule 15(a) allows a party to amend  
3 a responsive pleading “once as a matter of course within” within “21 days after service of a  
4 responsive pleading.” Fed. R. Civ. P. 15(a)(1)(B). All other amendments require “the opposing  
5 party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). The Local Rules further  
6 contemplate either request of leave or consent by other parties. *See* LCR 15 (“A party who moves  
7 for leave to amend a pleading, or who seeks to amend a pleading by stipulated motion and  
8 order[...]). In assessing whether to grant leave to amend a pleading, a court examines five factors:  
9 “bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the  
10 [party] has previously amended the [pleading].” *See Desertrain v. City of Los Angeles*, 754 F.3d  
11 1147, 1154 (9th Cir. 2014) (citing *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir.2004)); *see*  
12 *also Calmar, Inc. v. Emson Rsch., Inc.*, 850 F. Supp. 861, 864 (C.D. Cal. 1994) (applying factors  
13 to motion for leave to amend answer).

14  
15  
16 Intervenor’s crossclaim may be stricken for failure to seek or merit leave to amend.  
17 Intervenor filed and served a timely answer to Plaintiff’s amended complaint on May 27, 2022.  
18 Intervenor never amended their answer as a matter of course before the deadline of June 17, 2022,  
19 under Rule 15(a)(2), and should have sought the consent of Plaintiff or moved for leave to file an  
20 amended answer under Rule 15. Intervenor concede in a footnote their failure to move for leave  
21 to amend and indicate that they rely on the Court’s scheduling order allowing amendments until  
22 November 2, 2022. *See* Dkt. # 103 at 2 n.1. The case to which Intervenor cite is from another  
23 district court and was in the context of a particular court’s exercise of discretion to allow parties  
24 to file amended pleadings without leave. *See CollegeNET, Inc. v. XAP Corp.*, No. CV-03-1229-  
25 HU, 2004 WL 1615230, at \*2 (D. Or. July 14, 2004) (“Inasmuch as I allowed defendant’s Amended  
26



1 Answer [...] to stand[...]"). In this case, Intervenor still should have filed a motion for leave to  
2 file an amended answer based on the plain language of Rule 15 and LCR 15 and because the Court  
3 did not allow for such a specific variance from the Federal or Local Rules, as it did for other rules  
4 in its original scheduling order. *See* Dkt. # 46 at 2-3. Intervenor also ignored the common practice  
5 of parties in this District Court, which involves moving for leave to amend a pleading even if  
6 amendment is sought before a court-scheduled deadline for amendments. *See Spearman*  
7 *Corporation Marysville Division v. Boeing Company*, No. C20-13RSM, 2022 WL 507997, at \*1  
8 (W.D. Wash. Feb. 18, 2022) (striking *sua sponte* plaintiffs' amended complaint filed without leave  
9 on the Court's deadline for amended pleadings); *see also Sowa v. Ring & Pinion Serv. Inc.*, No.  
10 221CV00459RAJBAT, 2021 WL 2916667, at \*1 (W.D. Wash. July 12, 2021) (allowing amended  
11 complaint when plaintiffs filed motion for leave to amend after deadline to amend as of right but  
12 before scheduling order was entered).  
13

14  
15 The factors for assessing the propriety of leave to amend weigh against Intervenor if their  
16 answer's footnote is to be treated as seeking leave. *See Desertrain*, 754 F.3d at 1154. As discussed  
17 above, granting leave to add the crossclaim would prejudice Plaintiffs. *See supra*, at 5. Undue  
18 delay weighs against granting leave to amend; Intervenor have known about the alleged basis for  
19 their crossclaim since before filing their motion to intervene and original answer and waited five  
20 months to seek to add the claim. *See Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 767 (9th Cir.  
21 2015) (denying motion for leave to amend for delay and prejudice where party knew of argument  
22 long before motion); *see also Nat'l Prod. Inc. v. Innovative Intelligent Prod. LLC*, No. 2:20-CV-  
23 00428-DGE, 2022 WL 579339, at \*3 (W.D. Wash. Feb. 25, 2022) (delay weighed against movant  
24 where movant "knew or should have known of the facts and theories underlying" defense it sought  
25 to add). Intervenor filed this crossclaim in bad faith considering their repeated statements that  
26

1 they sought not to delay this litigation. *See* Dkt. # 57. Intervenor’s requested amendment is futile  
2 because “there [is] no need to prolong this litigation by permitting” the crossclaim because  
3 Plaintiff’s success would preclude it, as discussed above. *See Nat’l Prod. Inc.*, 2022 WL 579339,  
4 at \*3.

5 Intervenor’s should be denied leave to amend their answer to add a crossclaim.

6 **CONCLUSION**

7  
8 For the foregoing reasons, the Court should bifurcate the crossclaim, transfer it and  
9 consolidate it with the *Garcia* case. The *Garcia* case should then be held in abeyance pending a  
10 decision on Plaintiff’s VRA claim. Alternatively, the Court should strike or dismiss Plaintiff’s  
11 crossclaim.

12  
13 Dated: November 10, 2022

14 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 10th day of November, 2022 via the Court's CM/ECF system.

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