

The Honorable Robert S. Lasnik

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**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’ OPPOSITION TO
MOTION TO INTERVENE OF
SENATOR NIKKI TORRES**

I. INTRODUCTION

The Court should deny Sen. Nikki Torres’s eleventh-hour motion for permissive intervention. Intervenor-Defendants’ appeal to the Ninth Circuit divests this Court of jurisdiction over her motion. Even if this Court had jurisdiction, the motion is both untimely and prejudicial. Furthermore, Sen. Torres lacks standing, and her asserted interests are adequately represented by Intervenor-Defendants. Lastly, Sen. Torres’s motion does not comply with the Federal Rules of Civil Procedure 24(c). As such, permissive intervention should be denied.

II. STATEMENT OF FACTS

1
2 Plaintiffs filed this suit in January 2022 challenging Legislative District 15 (LD 15) and
3 moved for a preliminary injunction in March of 2022. *See* Dkt. # 1, 38. In both filings, Plaintiffs
4 asked the Court to enjoin LD 15 and adopt a remedial district in its place that would remedy the
5 Section 2 violation. *Id.* The parties engaged in extensive fact and expert discovery. During this
6 time, on November 8, 2022, Sen. Torres was elected to serve as State Senator for LD 15. Dkt. #253
7 at 2. On November 23, 2022, Sen. Torres responded to a subpoena served by Plaintiffs. Ex. 1. The
8 suit went to trial in June 2023, and the Court rendered its decision in August 2023 ruling in
9 Plaintiffs’ favor. Dkt. # 218. On September 8, 2023, Intervenor-Defendants filed notice of appeal,
10 Dkt. # 222, and in November 2023, they filed a petition for a writ of certiorari before judgment
11 before the U.S. Supreme Court. Dkt. # 231. On December 22, 2023, with the remedial process well
12 under way in this Court, Sen. Torres filed a motion requesting leave to intervene. Dkt. # 253.
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III. ARGUMENT

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16 This Court should deny Sen. Torres’s request for permissive intervention.¹ First, following
17 the filing of an appeal by the Intervenor-Defendants, this Court no longer has jurisdiction to grant
18 intervention. Regardless, the criteria for permissive intervention are not met as the request is
19 untimely, Sen. Torres lacks standing in *any* capacity, and her interests are adequately represented
20 by Intervenor-Defendants.
21

A. The District Court Lacks Jurisdiction Over the Motion to Intervene.

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23 This Court lacks jurisdiction over Sen. Torres’ motion to intervene. The filing of a notice
24 of appeal divests the district court of jurisdiction to entertain motions to intervene. *See Byrant v.*

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26 _____
¹ Sen. Torres does not argue that she can intervene as of right under Rule 24(a) and has waived that argument.

1 *Crum & Forster Specialty Ins. Co.*, 502 Fed. Appx. 670, 671 (9th Cir. 2012) (“[Party’s] subsequent
2 notice of appeal divested the district court of its jurisdiction; the district court thus lacked
3 jurisdiction to entertain appellants’ motion to intervene.”); *Apple Inc. v. Samsung Elecs. Co.*, No.
4 11-CV-01846-LHK, 2014 WL 12812431, at *1 (N.D. Cal. July 29, 2014) (“The Court finds that
5 it lacks jurisdiction to entertain the Motion to Intervene, as this case is currently on appeal to the
6 Federal Circuit.”); *see also Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) (“[W]e join the
7 majority of our sister circuits and hold that an effective notice of appeal divests a district court of
8 jurisdiction to entertain an intervention motion.”).

9
10 Intervenor-Defendants filed their notice of appeal on September 8, 2023. Dkt. # 222. Four
11 months later, Sen. Torres filed her motion to intervene. The notice of appeal therefore divests this
12 Court of jurisdiction to entertain Sen. Torres’s motion, and it must be denied. *See Turtle Mountain*
13 *Band of Chippewa Indians, et al., v. Howe*, No. 3:22-CV-22, 2023 WL 8602898, at *3 (D.N.D.
14 Dec. 12, 2023) (denying the North Dakota Legislative Assembly’s motion to intervene during the
15 remedial process for lack of jurisdiction after filing of a notice of appeal); *Milliner v. Mut. Sec.,*
16 *Inc.*, No. 15-CV-03354-DMR, 2019 WL 5067012, at *4 (N.D. Cal. Oct. 9, 2019).

17
18 **B. Even if this Court Has Jurisdiction, the Criteria for Permissive Intervention**
19 **Cannot Be Met.**

20 Even if it were the case that this Court has jurisdiction over the intervention motion, the
21 request for permissive intervention should be denied. The request is untimely. Sen. Torres lacks
22 standing in both her personal and official capacity to intervene. Intervenor-Defendants (who are
23 represented by the exact same counsel as Sen. Torres) adequately represent her interest.

24 To permissively intervene, the movant must show that: “(1) it shares a common question
25 of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent
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1 basis for jurisdiction over the applicant’s claims.” *Cooper v. Newsom*, 13 F.4th 857, 868 (9th Cir.
2 2021) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998)). If a trial court determines
3 that these threshold requirements for permissive intervention are met, then it may consider other
4 factors including the “nature and extent of intervenors’ interest” and “whether the intervenor’s
5 interests are represented by other parties.” *Spangler v. Pasadena City Bd. of Educ.*, 552 F. 2d 1326,
6 1329 (9th Cir. 1977). Even if these threshold requirements are met, however, a court has discretion
7 to deny permissive intervention if it would cause undue delay or unfair prejudice to the existing
8 parties. *Newsom*, 13 F. 4th at 868. Though Sen. Torres seeks to address the same facts as the
9 existing action, the threshold requirement of timeliness is not met. Furthermore, she fails to
10 demonstrate success on the other factors the Court should consider.
11

12 **i. Sen. Torres’s Motion is Untimely.**

13 Sen. Torres’s request to intervene is untimely. Courts weigh three factors in determining
14 whether a motion to intervene is timely: “(1) the stage of the proceeding at which an applicant
15 seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.”
16 *Cal. Dep’t of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119
17 (9th Cir. 2002). Courts utilize stricter standards of timeliness for permissive intervention than
18 intervention as a matter of right. *LULAC v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997).
19

20 The untimeliness of Sen. Torres’s intervention request is axiomatic—she seeks to intervene
21 after final judgment, over a year after learning of this suit, and at the tail end of the remedial
22 process. In the Ninth Circuit, timeliness for intervention is based on the “date that the applicant
23 should have been aware that its interests would no longer be adequately represented by one of the
24 existing parties.” *Pac. Coast Fed’n of Fishermen’s Associations v. Gutierrez*, No.
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1 106CV00245OWWGS, 2008 WL 4104257, at *5 (E.D. Cal. Sept. 2, 2008). Although Sen.
2 Torres claims she only now realized that her district position could be in jeopardy, this claim is
3 unconvincing.² This suit is focused entirely on the composition of LD 15, with multiple filings
4 indicating that a change of the district boundaries would be a necessary remedy in the event of
5 Plaintiffs’ success on the merits. Furthermore, Sen. Torres was subpoenaed as a witness in this
6 matter during the discovery process and responded with the requested materials *after* being elected
7 to represent LD 15 and was thus aware of this suit for at least a year. Since the filing of pre-trial
8 briefing, and at least since August, it has been clear that the State of Washington would not
9 continue to defend the Enacted Plan. Sen. Torres claims that she did not appreciate the effects the
10 remedial process could have on LD 15 until reviewing the proposed maps on December 1, 2023.
11 Dkt. # 253 at 5. But in her October 12, 2023, email to her colleagues (which her lawyers have
12 submitted as an attachment to a filing on behalf of their other clients), Sen. Torres stated that “[t]he
13 judge has ordered the boundaries of the district, which I represent, to be redrawn.” Dkt. # 252-1 at
14 1. She went on to discuss “[m]aps submitted by plaintiffs,” and the predicted actions of a “court-
15 appointed special master.” *Id.* at 3. These are not the writings of someone who only became aware
16 of the possible effects of this suit seven weeks later. Despite specific awareness for months that
17 the boundaries of her district may be redrawn and awareness of potential remedial district
18 boundaries from maps submitted to this Court by Plaintiffs prior, Sen. Torres chose not to intervene
19 until December 22, 2023.³ There is no explanation for this delay.
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24 ² As stated *infra*, Sen. Torres’ interests are adequately represented by an existing party.

25 ³ Her lawyers of course, have been aware of this suit and its potential impacts since at least March
26 2022. *See* Dkt. # 57 (Intervenor-Defendants seeking intervention based on possible “new or significantly redrawn” version of LD 15).

1 Allowing Sen. Torres to intervene now risks undue delay and prejudice to Plaintiffs. Sen.
 2 Torres's intervention only seeks to present the same arguments proffered by Intervenor-
 3 Defendants. Sen. Torres cannot explain what she will add to the remedial phase, other than an
 4 incorrect and unsupported claim that she is entitled to preserve the current boundaries of her
 5 district.⁴ Rather, her intervention seeks to only attack a remedial plan and adds nothing to these
 6 proceedings other than delay and prejudice. *See United States v. Alisal Water Corp.*, 370 F.3d 915,
 7 922 (9th Cir. 2004) (Intervention "merely to attack or thwart a remedy rather than participate in
 8 the future administration of the remedy is disfavored.") (citing *United States v. Oregon*, 913 F.2d
 9 576, 588 (9th Cir.1990)). Permissive intervention must be denied on this basis alone.

11 **ii. Sen. Torres Does Not Have Standing in Either Her Personal or Official**
 12 **Capacity.**

13 Sen. Torres lacks standing to permissively intervene in either her official capacity or
 14 personal capacity. Under the *Spangler* factors, a court may consider an intervenor's standing in
 15 deciding whether to permit intervention. *See Spangler*, 552 F.2d at 1329. If a proposed intervenor's
 16 expressed interest in the litigation requires the intervenor to have standing, then standing is
 17 required for intervention. *See Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011).

18 Sen. Torres must demonstrate standing because her expressed interest is in the boundary
 19 composition of the LD 15. She is unable to do so, however, because she asserts only a generalized
 20 interest in keeping the boundaries the same. She does not make any claim, cross-claim, or
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 23 ⁴ In her Motion to Intervene, Sen. Torres states that she "does not raise any new claims or
 24 defenses." Dkt. #253 at 3. In fact, Sen. Torres's Proposed Response to Plaintiffs' Remedial Plans
 25 raises *no* claims or defenses and does not include a *single* case citation to support her entirely fact-
 26 based argument that some proposed remedial plans might make her reelection more difficult. The
 proposed filing's lack of any legal claim or defense means it does not meet the requirement of Fed.
 R. Civ. P. 24(c). Sen. Torres's duplicative list of political critiques is better suited for an amicus
 brief and does not entitle her to become a party to this case.

1 counterclaim related to the redrawing of districts due to a Section 2 VRA violation and is therefore
2 unable to show a particular and concrete harm. Dkt. #253 at 3. Furthermore, Sen. Torres’s official
3 role as a legislator does not grant her any legal right to the composition of any district. *See City of*
4 *Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) (“A [legislator] suffers no
5 cognizable injury, in a due process sense or otherwise, when the boundaries of his district are
6 adjusted by reapportionment ... a representative has no like interest in representing any particular
7 constituency.”); *Corman v. Torres*, 287 F. Supp. 3d 558, 569-70 (M.D. Pa. 2018); *Toth v.*
8 *Chapman*, No. 1:22-CV-00208, 2022 WL 821175, at *10 (M.D. Pa. Mar. 16, 2022). Interest in the
9 boundaries of a district lie with the voters, not the representatives. *Klutznick*, 503 F. Supp at 672.
10

11 Sen. Torres cites *Raines v. Byrd*, 521 U.S. 811, 821 (1997), but that case is inapposite.⁵
12 The Court in *Raines* found that the legislators there did not have Article III standing based on their
13 claim of a loss of political power or something they are personally entitled to, such as a salary. *Id.*
14 Here, Sen. Torres is legally allowed to finish her entire elected term and will not lose the right to
15 serve in the Washington Legislature as the Senator for LD 15 until the seat is up for re-election in
16 2026. Senator Torres’s bare assertion that a re-election campaign would be more difficult is
17 insufficient. First, such an assertion is false. At least one of the proposed map options keeps her
18 within the same district and keeps the district leaning politically Republican, while creating a
19 separate Latino opportunity district, which removes any concern that she would be allegedly
20 deprived of her seat. Indeed, Sen. Torres acknowledges that in Plaintiffs’ Remedial Plan 5 she is
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23 ⁵ The citation quoted from *Raines* by Sen. Torres is misleading. The quote is directly referencing
24 *Powell v. McCormack*, 395 U.S. 486, 496 (1997), where a duly elected congressman was not
25 seated to his elected position for the entirety of a congressional term resulting in the total loss of
26 his salary. In that case, the congressman’s challenge to the constitutionality of his exclusion from
Congress was an Article III controversy because he was entitled to his term after meeting all the
constitutional requirements for eligibility and being legally elected.

1 kept within LD 15, and that LD 15 is politically advantageous for her but she is simply unsatisfied
2 by the proposed district's demographic makeup. Dkt. # 253-1 at 4. This is a peculiar objection
3 given her counsel's simultaneous representation of another client challenging the use of race in
4 redistricting. Running in a district that Sen. Torres alleges is not politically advantageous to her is
5 not an injury-in-fact. *See Toth*, 2022 WL 821175, at *10 ("Bashir's assertion that he is harmed by
6 running in his Democratic-leaning district rather than in an at-large election is not an injury-in-
7 fact."). Second, no official is guaranteed reelection (let alone an easy one) or particular district
8 lines. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct., 1945, 1951 (2019) (internal citation
9 omitted). Individual legislators have "no standing unless their own institutional position, as
10 opposed to their position as a member of the body politic, is affected." *Newdow v. United States*
11 *Cong.*, 313 F.3d 495, 499 (9th Cir. 2002).

12
13 Sen. Torres also does not have standing to intervene in her personal capacity, and by failing
14 to raise any such argument, she has waived it. Even if the argument had not been waived, no voter
15 is entitled to any one configuration of their legislative district. She has made no showing of any
16 particularized and concrete injury stemming from the redrawing of districts to cure a Section 2
17 violation. In either her official or personal capacity, Sen. Torres lacks standing to intervene, and
18 her motion should be denied.
19

20 **iii. Sen. Torres's Interests are Already Adequately Represented.**

21 Sen. Torres's interests are adequately represented by Intervenor-Defendants. Courts
22 consider the following factors when deciding whether a present party adequately represents a
23 proposed intervenor's interests: "(1) whether the interest of a present party is such that it will
24 undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is
25 capable and willing to make such arguments; and (3) whether a proposed intervenor would offer
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1 any necessary elements to the proceeding that other parties would neglect.” *Callahan v. Brookdale*
2 *Senior Living Communities, Inc.*, 42 F.4th 1013, 1020 (9th Cir. 2022) (citing *Arakaki v. Cayetano*,
3 324 F. 3d 1078, 1089 (9th Cir. 2003)). When a party and a proposed intervenor share a similar
4 “ultimate objective” there is a presumption of adequacy that can only be rebutted with a
5 “compelling showing” to the contrary. *Arakaki*, 324 F. 3d at 1086 (citing *League of United Latin*
6 *Am. Citizens v. Wilson*, 131 F. 1297, 1305 (9th Cir. 1997)).
7

8 At the remedial stage of litigation, the only question is which plan will be put in place to
9 remedy the VRA violation. Intervenor-Defendants have objected to all of Plaintiffs’ proposed
10 plans and offered none of their own. Sen. Torres’s proposed response does the same. They thus
11 share the same ultimate objective: to prevent the implementation of Plaintiffs’ remedial plans
12 and/or prevent any changes to the Enacted Plan. Given their same objectives, Sen. Torres must
13 make a compelling showing that her interests are not adequately represented. She has not done so.
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15 Moreover, Sen. Torres cannot show that Intervenor-Defendants will not make all of Sen.
16 Torres’s proposed arguments. Sen. Torres’s substantive argument in her proposed response is that
17 she will be displaced in Plaintiffs’ Remedial Maps 1-4 and dislikes the demographic makeup of
18 Remedial Map 5. *See* Dkt. # 253-1. While these critiques fail to state a legal claim or defense and
19 lack merit,⁶ the core of that argument is about incumbent displacement. Intervenor-Defendants
20 have already argued both points, and Senator Torres’s status as a legislator in the Yakima Valley
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22 ⁶ For example, when deciding to run for LD 15, it was reported that Sen. Torres moved into LD
23 15 and changed her voter registration to run. *See* Joel Donofrio, *Nikki Torres appears headed to*
24 *state Senate representing 15th District*, Yakima Herald-Republic (Nov. 8, 2022),
25 [https://www.yakimaherald.com/news/local/government/elections/nikki-torres-appears-headed-to-](https://www.yakimaherald.com/news/local/government/elections/nikki-torres-appears-headed-to-state-senate-representing-15th-district/article_20065440-5fec-11ed-9135-cb54431fe288.html)
26 [state-senate-representing-15th-district/article_20065440-5fec-11ed-9135-cb54431fe288.html](https://www.yakimaherald.com/news/local/government/elections/nikki-torres-appears-headed-to-state-senate-representing-15th-district/article_20065440-5fec-11ed-9135-cb54431fe288.html)
 (“Torres began serving on the Pasco City Council in January, but resigned in May after changing
her voter registration address to one north of the Pasco city limits and within the 15th Legislative
District.”).

1 features heavily in their objections to the remedial proposals. *See* Dkt. # 252 at 2-3, 9-10. Because
2 Intervenor-Defendants have already made all of the substantive points of Sen. Torres’s argument,
3 they are plainly capable and willing to make such arguments. This is also unsurprising, given that
4 they share counsel.

5 Fatally, Sen. Torres does not offer any *necessary* perspective in the remedial process not
6 already provided by Intervenor-Defendants. In assessing adequacy of representation, courts look
7 to the substance of the arguments being made even if there are differences among the parties
8 making those arguments. *See Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 955 (9th Cir.
9 2009). There is no substantive difference between Sen. Torres’s response and the Intervenor-
10 Defendants’ response. Sen. Torres’s response is simply framed to showcase her *personal* concerns
11 with incumbent displacement while still highlighting the same incumbent displacement points
12 made by Intervenor-Defendants. *See* Dkt. # 253-1 at 3-5. This is a distinction without a difference.
13 Therefore, there is no substantive difference between Sen. Torres’s and Intervenor-Defendants’
14 arguments that warrant a grant of intervention.
15
16

17 **C. Intervention With Respect to the Merits of the Case is Wholly Inappropriate.**

18 Even if Sen. Torres’s motion for permissive intervention as to the *remedial* phase of this
19 case were appropriate—and it is not—her intervention with respect to the merits is plainly not. It
20 comes far too late, she has offered no explanation why that would be appropriate, and her motion
21 is not accompanied by a pleading as required by Federal Rule 24(c). Sen. Torres’s procedural folly
22 coupled with a meritless response should result in a denial of permissive intervention.
23

24 **IV. CONCLUSION**

25 For the above reasons, Plaintiffs respectfully ask this Court to deny the motion to intervene.
26

1 Dated: January 8, 2024

Respectfully submitted,

2 Edwardo Morfin
3 WSBA No. 47831
4 MORFIN LAW FIRM, PLLC
5 2602 N. Proctor Street, Suite 205
6 Tacoma, WA 98407
Telephone: 509-380-9999

By: /s/ Mark P. Gaber
Mark P. Gaber*
Simone Leeper*
Aseem Mulji*
Benjamin Phillips*
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
mgaber@campaignlegal.org
sleeper@campaignlegal.org
amulji@campaignlegal.org
bphillips@campaignlegal.org

7 Chad W. Dunn*
8 Sonni Waknin*
9 UCLA VOTING RIGHTS PROJECT
3250 Public Affairs Building
Los Angeles, CA 90095
Telephone: 310-400-6019
10 Chad@uclavrp.org
11 Sonni@uclavrp.org

Annabelle E. Harless*
CAMPAIGN LEGAL CENTER
55 W. Monroe St., Ste. 1925
Chicago, IL 60603
aharless@campaignlegal.org

12 Thomas A. Saenz*
13 Ernest Herrera*
14 Leticia M. Saucedo*
15 Erika Cervantes*
16 MEXICAN AMERICAN LEGAL
17 DEFENSE AND EDUCATIONAL
18 FUND
643 S. Spring St., 11th Fl.
Los Angeles, CA 90014
Telephone: (213) 629-2512
19 tsaenz@maldef.org
eherrera@maldef.org
lsaucedo@maldef.org
ecervantes@maldef.org

Counsel for Plaintiffs
*Admitted pro hac vice

CERTIFICATE OF SERVICE

I certify that all counsel of record were served a copy of the foregoing this 8th day of January 2024, via the Court's CM/ECF system.

/s/ Mark P. Gaber
Mark P. Gaber
Counsel for Plaintiffs

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EXHIBIT 1

November 23, 2022 Subpoena Response
from Sen. Nikki Torres



JASON M. WHALEN
Direct Dial: (253) 327-1701
jason@ledgersquarelaw.com

November 23, 2022

Sent via e mail

Morfin Law Firm, PLLC
Edwardo Morfin
2602 N. Proctor Street, Suite 205
Tacoma, WA 98407
eddie@morfinlawfirm.com

Re: Palmer, et al v. Hobbs, et al, U.S. District Court Case No. 3:22-cv-05035-RSL
Torres Response to Subpoena to Produce Documents

Dear Mr. Morfin:

This firm represents Nikki Torres for the purpose of responding to the Subpoena to Produce Documents, Information, or Objects, dated October 21, 2022, with a response date of November 21, 2022.

This letter and attached documents serve as Ms. Torres' timely response to your Subpoena and document request.

From our conversation with Ms. Torres, any documents responsive to the various requests on Attachment A to the Subpoena have been pulled from her personal phone (no personal computer was used for any communications or document delivery), as follows:

DOCUMENT REQUESTS (By Paragraph, following Attachment A to the Subpoena):

1. See attached.
2. See attached.
3. None.
4. None.
5. Not applicable to Nikki Torres. There are no documents responsive to Item 5, as this refers to communications involving Senator Jim Honeyford and seeks communications related to or mentioning "your" [Honeyford's] retirement from the Senate seat in Legislative District 15. Ms. Torres did not retire; rather she was elected to the Senate seat in Legislative District 15.

Morfin Law Firm, PLLC
Edwardo Morfin
November 23, 2022
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6. None.
7. None.
8. None.
9. None.
10. None.
11. None.
12. None.
13. See attached.

If you have any additional questions, feel free to call me. Otherwise, Ms. Torres will consider this letter and the documents attached as timely and fully responsive to the subject Subpoena.

Thank you.

LEDGER SQUARE LAW, P.S.

Sent without signature to avoid delay

Jason M. Whalen

JMW/jkk
Enclosures

Cc: Bernadette Samson Reyes
Deylin O Thrift-Viveros
Ernest Israel Herrera
Leticia Marie Saucedo
Annabelle Harless
Aseem Mulji
Chad W Dunn
Mark Gaber
Simone Tyler Leeper
Sonni Waknin