No. 23-467

In The Supreme Court of the United States

BENANCIO GARCIA III,

Appellant,

v.

STEVEN HOBBS, ET AL.,

Appellees.

On Appeal from the United States District Court
for the Western District of Washington

BRIEF OF APPELLANT OPPOSING MOTION OF PROPOSED INTERVENORS FOR LEAVE TO INTERVENE AS APPELLEES AND FILE A MOTION TO DISMISS OR AFFIRM

JASON B. TORCHINSKY
Counsel of Record
PHILLIP M. GORDON
ANDREW PARDUE
CALEB ACKER
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

DALLIN B. HOLT
BRENNAN A. R. BOWEN
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
Esplanade Tower IV
2575 East Camelback Road
Suite 860
Phoenix, AZ 85016
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

ANDREW R. STOKESBARY
CHALMERS, ADAMS, BACKER
& KAUFMAN, LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
(206) 207-3920 (telephone)
dstokesbary@chalmersadams.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

INTRODUCTION

The *Soto Palmer* Proposed Intervenors get one thing (and to be sure, only one thing) right. This appeal can (and should) affect the proceedings in their related case, even to the detriment of their Section 2 district court win. That potential, however, is not enough, particularly when intervention would serve no purpose other than complicating and slowing down a time-sensitive case. Because (1) there is no such thing as a right to intervene in proceedings before this Court, (2) the *Soto Palmer* Plaintiffs could have (and should have) intervened long ago, while this case was percolating through the district court,[1] and (3) the State of Washington intends to make the same arguments that the *Soto Palmer* Plaintiffs proposed (i.e., that this case is indeed moot), intervention is not warranted. The Court should therefore deny the Motion.[2]

ARGUMENT

Soto Palmer Plaintiffs, as Proposed Intervenors, stake their motion on the theory that they have a "direct and substantial interest in the preservation of the judgment that they won in the *Soto Palmer* case invalidating case invalidating LD 15 as a violation of Section 2 and ordering a remedial district that complies with the VRA." Mot. to Intervene of Soto Palmer et al., at 2. Pursuant to that interest, Proposed Intervenors apparently claim a "direct and substantial interest in preserving the

[1] When other parties sought to intervene in *Soto Palmer* at the district court just two months after the initial complaint was filed, Proposed Intervenors asserted the motion was "not timely." See *Soto Palmer* ECF No. 64 at 1. It is ironic that Proposed Intervenors are now attempting to intervene in this case twenty months after the original complaint was filed.

[2] Appellants would not oppose Proposed Intervenors filing a Brief of Amicus Curiae.

lower court's order declaring Mr. Garcia's claim moot following the *Soto Palmer* judgment because they have an interest in defending the favorable judgment they obtained." *Id.*, at 5. They seek both mandatory and permissive intervention based on that theory.

In other words, Proposed Intervenors wish to intervene to argue that Appellant Garcia's claim is moot to preserve the *Soto Palmer* judgment. This dooms their Motion. The State has made clear that it intends to do the very same thing, making intervention unnecessary and wasteful.

As Proposed Intervenors recognize, this Court's rules do not contemplate intervention, which means that it considers such requests through lens of Fed. R. Civ. P. 24(a)(2). *Int'l Union* v. *Scofield*, 382 U. S. 205, 216 n.10 (1965); see also *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010 (2022) ("No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed.").

The absence of authority in this area leaves ambiguous whether, or how, "the right of non-parties . . . to move for appellate intervention" even exists. See *Cameron*, 142 S. Ct., at 1010. The Court in *Cameron* treated the motion for appellate intervention in that case as permissive, *id.*, at 1011, and that seems to be the natural blueprint at this point in the federal appellate system—at least until this Court gives further guidance as to whether appellate intervention should be treated as mandatory or permissive.

Mr. Garcia's appeal simply concerns different law and facts. Yes, permissive intervention might be warranted if Proposed Intervenors have a claim or defense

that shares a common question of law or fact with the main action (Mr. Garcia's). See Fed. R. Civ. P. 24(b)(1)(B). But Mr. Garcia brings a racial gerrymander claim under the Fourteenth Amendment, whereas Ms. Soto Palmer brings a Section 2 claim asking for more racial gerrymandering. Given the distinct claims, the facts underlying each claim are accordingly categorically distinct. A racial gerrymander claim focuses on whether there was a racial gerrymander—that is, whether the Commission (in this case) in fact had a racial target in LD 15. The Section 2 claim of dilution-in-effect, therefore, shares no common question of fact.[3] The experts at trial were for the Section 2 claim; the testimony about the Commissioners' racial target and subjective opinions about the need for a VRA district in the Yakima Valley were about the racial gerrymander claim. Appellant has made it clear that these cases are related; they both necessarily concern LD-15's legality. But that does not automatically mean that Proposed Intervenors should have a say in this particular appeal.

A turn to the intervention-as-a-right standard may elucidate the futility of intervention. For the reasons above, there's no such right at this Court. But the standard shows why Proposed Intervenors should not be permitted to intervene. Under Federal Rule of Civil Procedure 24(a), interested persons may intervene as of right where, "[o]n [a] timely motion" the intervenor "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's

[3] This would, perhaps, be a different question had the district court in *Soto Palmer* issued that decision based on *Soto Palmer* Plaintiffs' intentional discrimination claim under Section 2 made at trial, and defended by the State at trial. That claim, however, found no purchase with the district court below and therefore is not at issue in any of the ongoing appellate proceedings.

ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

Proposed Intervenors already have existing adequate representation of their asserted interest. Proposed Intervenors are clear: their putative legal interest is the preservation of the *Soto Palmer* judgment. Here, the State shares that interest explicitly; it asked for that very outcome of *Soto Palmer* in pretrial briefing. So if there were a legal interest in the *Soto Palmer* judgment at play in this appeal, the State is already attempting to protect that judgment in *Garcia*. The State has certainly implied that it plans to file a motion to dismiss or affirm in the *Garcia* appeal, presumably defending the *Garcia* decision on mootness grounds. Mot. to Extend Time to File Mot. to Dismiss or Affirm of Appellee State of Washington. The Proposed Intervenors have now said the same. Mot. to Intervene of Soto Palmer et al., at 2. ("Intervention . . . would provide this Court with the benefit of participation by the parties whose favorable judgment rendered Mr. Garcia's claim moot and who have the greatest interest in the preservation of that judgment.").

It may well be true that Proposed Intervenors (*Soto Palmer* Plaintiffs) and Appellees (State and Secretary) possibly will be at odds in remedial proceedings in *Soto Palmer*, but they are not at odds in *Garcia*, the case in which *Soto Palmer* Plaintiffs wish to intervene. The question is whether the State will protect that supposed interest in *this* appeal, not *Soto Palmer*. And there is no daylight between the Appellees and Proposed Intervenors in *Garcia*. Until the State tells this Court that it does not plan to defend the *Soto Palmer* judgment via the *Garcia* appeal, intervention by *Soto Palmer* Plaintiffs is pointless.

Finally, this motion is wildly untimely. Proposed Intervenors had the opportunity to intervene in this case almost two years ago, when the initial *Garcia* complaint was filed, and then again nearly a year ago, when district court ordered a joint trial for *Garcia* and *Soto Palmer*. They chose not to. Now, they argue that, because the *Soto Palmer* judgment in their favor is being attacked, their motion is timely because the judgment was not entered or appealed until recently. This seems to imply surprise at their favorable result. Surely Proposed Intervenors knew last year that the intertwined issues in these appeals could result in the present situation, where the result in this appeal could affect a favorable judgment for them in *Soto Palmer*. This was a foreseeable procedural posture last year. The motion is untimely.[4]

CONCLUSION

For these reasons, Appellant respectfully requests that this Court deny the motion for leave to intervene as unnecessary considering the State's position in this litigation and untimely considering the opportunities to have done so in the proceedings below.

---

[4] In the *Soto Palmer* case below, Appellants (Intervenor-Defendants below) attempted to combine the claims of the *Garcia* and *Soto Palmer* matters in one case by attempting to assert the same claims in *Garcia* as cross-claims in *Soto Palmer*. See *Soto Palmer* ECF No. 103. In order to facilitate the dual track cases of *Soto Palmer* and *Garcia*, the State supported the attempt to combine all claims in one case. See *Soto Palmer* ECF No. 110 (combining all claims in one case "will be more efficient for all parties involved."). Proposed Intervenors (*Soto Palmer* Plaintiffs below) ardently opposed combining the *Garcia* and *Soto Palmer* cases. See *Soto Palmer* ECF Nos. 105 and 113. Proposed Intervenors had many opportunities to bring the *Garcia* and *Soto Palmer* matters under one roof—and not only did they fail to attempt to join the claims below, they actively opposed any attempt to do so. Proposed Intervenors should thus be estopped from claiming a right to intervene in the Garcia matter at the eleventh hour.

Appellant consents to Proposed Intervenors' participation as amici curiae in this appeal.

November 14, 2023

Respectfully submitted,

/s/ JASON B. TORCHINSKY
Counsel of Record
PHILLIP M. GORDON
ANDREW PARDUE
CALEB ACKER
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

DALLIN B. HOLT
BRENNAN A. R. BOWEN
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
Esplanade Tower IV
2575 East Camelback Road,
Suite 860
Phoenix, AZ 85016
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

ANDREW R. STOKESBARY
CHALMERS, ADAMS, BACKER &
KAUFMAN, LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
(206) 207-3920 (telephone)
dstokesbary@chalmersadams.com

Counsel for Appellant