

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

**REPLY IN SUPPORT OF SUSAN SOTO PALMER, FAVIOLA LOPEZ,
ALBERTO MACIAS, HELIODORA MORFIN, AND CATY PADILLA'S
MOTION FOR LEAVE TO INTERVENE AS APPELLEES AND FILE A
MOTION TO DISMISS OR AFFIRM**

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ARGUMENT

Susan Soto Palmer, Faviola Lopez, Alberto Macias, Heliadora Morfin, and Caty Padilla (“*Soto Palmer* Plaintiffs”) respectfully seek to intervene as appellees because they have a direct and substantial interest in this matter that no other party before the Court can adequately represent. Their motion is timely given the case’s unusual circumstances and neither calls for nor necessitates any delay in this Court’s consideration. Intervention is warranted in this case. Mr. Benancio Garcia’s arguments to the contrary fall flat.

1. Intervention in appellate proceedings is not novel. Appellate courts, this Court included, have permitted intervention, and *Soto Palmer* Plaintiffs meet the necessary standard. *See Soto Palmer, et al.* Mot. for Leave to Intervene at 5–9; *see also, e.g., BNSF Ry. Co. v. Equal Emp. Opportunity Comm'n*, 140 S. Ct. 109 (2019) (mem) (granting motion to intervene as respondent at certiorari stage for individual who had not been a party below but had interests at stake); *N.B. D. v. Kentucky Cabinet for Health & Fam. Servs.*, 140 S. Ct. 860 (2020) (mem) (granting intervention where movant was not a party below but whose interests were no longer protected at certiorari stage); *Gonzales v. Oregon*, 546 U.S. 807 (2005) (granting motion to intervene of state residents with interest in law under review); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103-04 (10th Cir. 2005) (permitting intervention on appeal where “neither of the [existing] parties w[ould] raise or adequately address” issue potentially harmful for movant and court would be “aided by the presence of an interested party like [movant]”); *Smoke v. Norton*, 252 F.3d 468,

471 (D.C. Cir. 2001) (granting post-judgement intervention where inadequacy of representation only became evident on appeal); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (“[T]he policies underlying intervention may be applicable in appellate courts.”).

The most fundamental question in permitting intervention is whether the movant has a protectable interest at stake and whether disposition of an action in their absence may, as a practical matter, impair or impede their ability to protect that interest. *See Soto Palmer, et al. Mot. for Leave to Intervene* at 5–9. On this most fundamental question, Mr. Garcia admitted that his case imminently threatens *Soto Palmer* Plaintiffs’ concrete interest. Mr. Garcia says that “[t]his appeal can (and should) affect the proceedings in the [*Soto Palmer*] related case, even *to the detriment of their Section 2 district court win.*” Br. of Appellant Opposing Mot. of Proposed Intervenor (“Appellant Br.”) at 1 (emphasis added). Mr. Garcia puzzlingly argues, however, that intervention should not be granted because his case “concerns different law and facts.” *Id.* at 2. This is demonstrably untrue and contrary to the position that Mr. Garcia took in the trial court.

In the *Soto Palmer* case in the district court, counsel for Mr. Garcia acknowledged that the *Soto Palmer* and *Garcia* claims have a one-way relationship of dependency—that is, “resolution of the claim in *Garcia* **necessarily turns on the claims in** [*Soto Palmer*].” Intervenor-Defs.’ Opposition to Pls.’ Mot. to Bifurcate and Transfer, Strike, and/or Dismiss Intervenor’s Cross-cl. at 3, *Soto Palmer v. Hobbs*,

No. 3:22-cv-05035 (W.D. Wash. Nov. 18, 2022), ECF No. 109 (“Int.-Defs.’ Opp. Br.”) (emphasis added). That is because a legislative district is not an unconstitutional racial gerrymander if the VRA requires its race-conscious drawing. *See Allen v. Milligan*, 599 U.S. 1, 41 (2023); Intervenor-Defs.’ Am. Answer and Cross-cl. at 34, *Soto Palmer v. Hobbs*, No. 3:22-cv-05035 (W.D. Wash. Nov. 2, 2022), ECF No. 103 (admitting same). The legal questions at issue in the first-filed *Soto Palmer* case—whether the *Gingles* preconditions are present and whether the VRA requires a Latino opportunity district in the region—go to the heart of *Garcia*’s racial gerrymandering inquiry, and their resolution was a necessary *predicate* to the resolution of *Garcia*.

Likewise, the *Soto Palmer* and *Garcia* claims involve overlapping factual inquiries. For example, the compelling interest prong of a racial gerrymandering claim, like a Section 2 claim, calls for a court to consider the evidence of racially polarized voting and minority community compactness. *Cooper v. Harris*, 581 U.S. 285, 301–02 (2017). Counsel for Mr. Garcia conceded below that “both claims [] largely consist of the same evidence,” and as such, much of the fact-finding in *Garcia* and *Soto Palmer* happened in tandem. Int.-Defs.’ Opp. Br. at 3 n.3. And ultimately, over the objection of *Soto Palmer* plaintiffs due to delay, the *Soto Palmer* court pushed back the *Soto Palmer* trial to align with *Garcia*, so the overlapping facts and evidence could be heard at the same time. *See Soto Palmer, et al. Mot. for Leave to Intervene* at 3–4, 8. There is no genuine question that *Soto Palmer* Plaintiffs’ and *Garcia* share

common questions of law and fact and that *Soto Palmer* Plaintiffs have a substantial interest in *Garcia*'s resolution.

Moreover, Mr. Garcia has asked this Court to stay *Soto Palmer* pending resolution of *Garcia*. Jurisdictional Statement at 3.¹ This attempt to forestall relief in *Soto Palmer* follows a pattern. Evidence below demonstrated that the *Garcia* lawsuit was filed with design to frustrate the enforcement of the federal Voting Rights Act. Remarkably, Commissioner Paul Graves—who was primarily responsible for drawing LD15—coordinated the funding and filing (including recruiting Mr. Garcia and legal counsel) of a racial gerrymandering challenge to a district ***he drew and voted to approve***. Despite admitting that he does not think LD15 is a racial gerrymander, he testified that he “lit the fire” starting the *Garcia* matter solely to frustrate resolution of the *Soto Palmer* Plaintiffs’ Section 2 claims. Dep. of Paul Graves, *Soto Palmer v. Hobbs*, No. 3:22-cv-05035 (W.D. Wash. Jan. 10, 2023), ECF No. 127-3 at 287:4-6, 203:16-204:3, 205:8-13. The *Garcia* case’s failure to frustrate the *Soto Palmer* resolution at the trial court is the driving force behind this appeal, and directly implicates *Soto Palmer* Plaintiffs’ interests.

2. Intervention on appeal is not untimely under the circumstances. Intervention at the trial court level was neither necessary nor prudent to protect *Soto Palmer* Plaintiffs’ interests in securing a VRA remedy, because all parties agreed that the *Soto Palmer* Plaintiffs’ suit would be decided first. See Stipulated Motion to

¹ Indeed, Mr. Garcia’s counsel has asked both the district court and this Court to stay *Soto Palmer* as a related case. See Jurisdictional Statement at 3 n.3. These requests belie Mr. Garcia’s new claim that the cases are so different as to not warrant intervention.

Modify Scheduling Order and Extend Trial Dates at 6, *Garcia v. Hobbs*, No. 3:22-cv-5152 (W.D. Wash. Aug. 22, 2022), ECF No. 26 (*Garcia* parties requesting a scheduling order “extending all case dates to approximately one month after the corresponding dates in *Soto Palmer*”); Order Denying Request for Leave to Amend and Continuing Trial Date at 5, *Soto Palmer v. Hobbs*, No. 3:22-cv-05035 (W.D. Wash. Jan. 20, 2023), ECF No. 136 (order stating the Section 2 claim would be decided first and *then* the Court would consider the constitutional claim in *Garcia*). And, as noted above, proceedings in the two cases, including discovery, pretrial deadlines, and trial, otherwise occurred in tandem. *Soto Palmer* Plaintiffs—having no apparent conflict with Mr. Garcia’s ultimate end (injunctive relief against LD15), no constitutional claim of their own, and with an earlier scheduled trial date for much of the case’s progression—had no need to intervene in *Garcia*.

But now, *for the first time on appeal*, Mr. Garcia asks to invalidate not only LD15 but also *any* remedial district drawn pursuant to the district court’s order to comply with the Voting Rights Act. Jurisdictional Statement at 27–31. This is relief beyond what Mr. Garcia pled in his complaint, relief that now diverges from and directly threatens the interest of *Soto Palmer* Plaintiffs in securing a lawful remedy for the VRA violation in time for the 2024 election.² Mr. Garcia and his counsel, also counsel to the defeated *Soto Palmer* Intervenor-Defendants, cannot now prevent *Soto Palmer* Plaintiffs from protecting their own case’s liability decision and remedial

² In his brief opposing *Soto Palmer* Plaintiffs’ intervention, Appellant concedes the limited legal scope of his original claim: “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.” Br. of Appellant Opposing Mot. of Proposed Interveners at 3. Appellant now seeks to exceed that scope on appeal.

process by attacking them in a case in which *Soto Palmer* Plaintiffs are not a party—and opposing their attempt to become one.³ *Soto Palmer* Plaintiffs’ motion to intervene to combat novel arguments raised in the appeal—and to prevent corresponding new impacts of the case on *Soto Palmer* Plaintiffs—is timely.

3. Neither the State of Washington nor Secretary Hobbs can adequately protect *Soto Palmer* Plaintiffs’ interest in this matter. Secretary Hobbs takes “no position” on the claims asserted and remedy sought in either this case or *Soto Palmer*. Closing Statement of Def. Steve Hobbs at 1, 3, *Garcia v. Hobbs*, No. 3:22-cv-5152 (W.D. Wash. July 12, 2023), ECF No.77. And while neither *Soto Palmer* Plaintiffs nor Appellant can know for certain the plans and prospective arguments of the State of Washington,⁴ what *is* known is that *Soto Palmer* Plaintiffs and the State of Washington have separate and distinct interests. Unlike *Soto Palmer* Plaintiffs, the State will not suffer an abridgment of its right to vote should Mr. Garcia succeed in delaying the *Soto Palmer* remedy via this case. Moreover, the State has no interest

³ Mr. Garcia’s reference to *Soto Palmer* Plaintiffs’ opposition to the proposed crossclaim by Intervenor-Defendants is misplaced. Mr. Garcia never sought to intervene in the *Soto Palmer* case. Rather, *counsel* for Mr. Garcia and *Soto Palmer* Intervenor-Defendants announced—*without Mr. Garcia’s consent*—that they would dismiss Mr. Garcia’s case in exchange for *Soto Palmer* Intervenor-Defendants being permitted to make an untimely crossclaim. Def. State of Washington’s Mot. for Inquiry Concerning Potential Conflicts of Interest at 5, *Soto Palmer v. Hobbs*, No. 3:22-cv-05035 (W.D. Wash. Feb. 14, 2023), ECF 150. But Intervenor-Defendants in *Soto Palmer* had no protectable interest, stated they did not want LD15 to change, and, as the district court ultimately found, permitting their untimely crossclaim “would likely prevent the resolution of plaintiffs’ claims in time for the 2024 election cycle.” Order Denying Request for Leave to Amend at 4–5, *Soto Palmer v. Hobbs*, No. 3:22-cv-05035 (W.D. Wash. Jan. 20, 2023), ECF 136. *Soto Palmer* Plaintiffs, therefore, reasonably opposed their attempt to add a crossclaim.

⁴ Mr. Garcia states that “[t]he 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.” Appellant Br. at 4 (emphasis added). Implication and presumption are not guarantees, and do not bar *Soto Palmer* Plaintiffs’ intervention here.

in making arguments specifically related to the underlying purpose of the *Garcia* case and action of State actors to frustrate resolution of the *Soto Palmer* matter in which the State of Washington is an opposing party.

4. *Soto Palmer* Plaintiffs' intervention will not have the effect of "complicating and slowing down a time-sensitive case." Appellant Br. at 1. *Soto Palmer* Plaintiffs seek no delay and are prepared to submit their motion to affirm or deny on the schedule ordered by the Court. The accusation also reeks of irony because *Mr. Garcia's* attorneys are, in fact, seeking to delay relief in *Soto Palmer*. *Soto Palmer* Plaintiffs should be permitted to intervene to stop this direct attack on the judgment and outcome in their case.

CONCLUSION

For the foregoing reasons, this Court should grant the *Soto Palmer* Plaintiffs leave to intervene as appellees and file a motion to dismiss or affirm.

Dated: November 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark P. Gaber, hereby certify that I am a member of the Bar of this Court and that I have, this 20th day of November, 2023, caused an original and 10 copies of the foregoing Reply Brief in Support of Susan Soto Palmer, Faviola Lopez, Alberto Macias, Heliodora Morfin, and Caty Padilla's Motion to Intervene as Appellees and File a Motion to Dismiss or Affirm to be sent via Next Day Service to the U.S. Supreme Court, and 1 copy to be sent via Next Day Service and e-mail to the following parties listed below.

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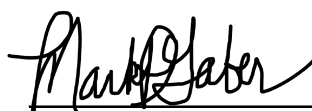
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A handwritten signature in black ink, appearing to read "Mark P. Gaber". The signature is written in a cursive style and is positioned above a horizontal line.

Mark P. Gaber

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