

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

Texas League of United Latin American	§	
Citizens, et al.,	§	
	§	
Plaintiffs,	§	
v.	§	Civil Action No. 5:19-cv-0074-FB
	§	[Lead Case]
	§	
David Whitley, et al.,	§	
	§	
Defendants,	§	

AND

Julieta Garibay, et al.	§	
	§	
Plaintiffs,	§	
v.	§	Civil Action No. 5:19-cv-00159-FB
	§	[Consolidated Case]
	§	
Whitley, et al.,	§	
	§	
Defendants,	§	

AND

MOVE Texas Civic Fund, et al.,	§	
	§	
Plaintiffs,	§	
v.	§	Civil Action No. 5-19-cv-00171-FB
	§	[Consolidated Case]
	§	
Whitley, et al.,	§	
	§	
Defendants,	§	

**PLAINTIFFS’ MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT**

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiffs Julieta Garibay, *et al.* (“Plaintiffs”) respectfully move the Court for leave to file a Third Amended Complaint, a

copy of which is attached hereto as Exhibit A. The proposed amended complaint adds an additional organizational plaintiff and an individual plaintiff, both of whom are and will be harmed by Defendants' actions. The additional organizational plaintiff has members who meet the description of individuals whose names appear on the list of suspected voters issued by the Secretary of State. Therefore, this motion to amend is not filed for purposes of delay or in bad faith. The proposed Third Amended Complaint maintains the same causes of action and prayer for relief as the Second Amended Complaint. As such, the amendment is not futile and Defendants will not be prejudiced by the amendment. Plaintiffs, therefore, respectfully request that their Motion be granted.

### **BACKGROUND**

On January 25, 2019, the Texas Secretary of State's office released Election Advisory No. 2019-02 ("the Advisory") to all voter registrars in Texas.<sup>1</sup> The Advisory stated that the Secretary of State's office, beginning the following day, would provide to Texas counties actionable information about "individuals who provided documentation to [the Department of Public Safety (DPS)] showing that the person is not a citizen of the United States during the process of obtaining or acquiring a Texas Driver License or Personal Identification Card from DPS." *Id.* The Texas Secretary of State further instructed the registrars to use the information about the purported non-U.S. citizens to investigate those voters, including by sending a Notice of Examination requiring the voters to provide documents to prove their U.S. citizenship. *Id.* The Texas Secretary of State's office also published a news release on January 25, 2019 announcing that Secretary of State David Whitley "issued an advisory to county voter registrars regarding voter registration list maintenance activities, which include identifying any non-U.S.

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<sup>1</sup> Election Advisory No. 2019-02, Texas Secretary of State (January 25, 2019), available at <https://www.sos.state.tx.us/elections/laws/advisory2019-02.shtml> (last accessed Feb. 9, 2019).

citizens registered to vote in the State of Texas.”<sup>2</sup> After the Texas Secretary of State issued the Advisory and press release, the voter purge was widely covered by local and national news outlets.<sup>3</sup>

Since the Texas Secretary of State sent the list of suspected non-U.S. citizen voters to the counties, the Secretary of State has quietly informed the counties that the data is flawed.<sup>4</sup> Despite public calls for him to rescind the list of suspected non-U.S. citizen voters,<sup>5</sup> the Secretary of State has not withdrawn the list of suspect voters; only under compulsion of this Court’s order, the Secretary of State recently advised the counties to refrain from purging voters based on the flawed information. A number of counties acted immediately on the Election Advisory by sending letters to registered voters challenging their U.S. citizenship and notifying them that they have 30 days to provide proof of U.S. citizenship or the county will remove their names from the voter rolls.<sup>6</sup>

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<sup>2</sup> *Secretary Whitley Issues Advisory On Voter Registration List Maintenance Activity*, Texas Secretary of State (Jan. 25, 2019), available at <https://www.sos.texas.gov/about/newsreleases/2019/012519.shtml> (last accessed Jan. 30, 2019).

<sup>3</sup> *See, e.g.*, Liam Stack, *Many Texas Voters Whose Citizenship Was Questioned Are in Fact Citizens*, New York Times (Jan. 29, 2019), available at <https://www.nytimes.com/2019/01/29/us/texas-voter-citizenship-list.html> (accessed Jan.30, 2019); Alexa Ura, *Some Texas voters already are being asked to prove their citizenship after state’s announcement*, The Texas Tribune (Jan. 28, 2019), available at <https://www.texastribune.org/2019/01/28/some-texas-voters-are-already-being-asked-prove-their-citizenship-foll/> (last accessed Feb. 1, 2019).

<sup>4</sup> *See, e.g.*, Morgan Gstalter, *More than 300 people on Texas voter list of potential noncitizens are citizens: report*, The Hill (Feb. 1, 2019), <https://thehill.com/homenews/state-watch/428005-more-than-300-people-on-local-texas-voter-list-of-potential-noncitizens> (last accessed Feb. 9, 2019); Guillermo Contreras and Dylan McGuinness, *State hedges on claim that 100,000 Texas voters aren’t citizens, faces federal lawsuit*, San Antonio Express-News (Jan. 29, 2019), [https://www.expressnews.com/news/local/article/LULAC-sues-Texas-over-witch-hunt-move-to-13570848.php?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=MySA\\_Daily\\_eEdition](https://www.expressnews.com/news/local/article/LULAC-sues-Texas-over-witch-hunt-move-to-13570848.php?utm_source=newsletter&utm_medium=email&utm_campaign=MySA_Daily_eEdition) (last accessed Feb. 9, 2019); James Barragán, Julieta Chiquillo, and Robert T. Garrett, *Some names in list of 98,000 potential non-citizen voters included ‘in error,’ county officials say, citing state*, Dallas News powered by the Dallas-Morning News (January 29, 2019), <https://www.dallasnews.com/news/elections/2019/01/29/list-98000-potential-non-citizen-voters-may-overstated-texas-secretary-state-tells-counties> (last accessed Feb. 9, 2019).

<sup>5</sup> Carlos Sanchez, *Former Texas Secretary of State Believes Inaccurate Voting List Should Be Rescinded*, Texas Monthly (Jan. 31, 2019), available at <https://www.texasmonthly.com/politics/former-texas-secretary-of-state-believes-inaccurate-voting-list-should-be-rescinded/> (last accessed Feb. 9, 2019).

<sup>6</sup> *See, e.g.*, LouAnna Campbell, *Smith County elections office looking into 297 possible non-U.S. citizens registered to vote*, Tyler Morning Telegraph (Jan. 29, 2019), available at [https://tylerpaper.com/lifestyle/family/smith-county-elections-office-looking-into-possible-non-u-s/article\\_f9f05224-23db-11e9-afd9-13f3df5be3b5.html](https://tylerpaper.com/lifestyle/family/smith-county-elections-office-looking-into-possible-non-u-s/article_f9f05224-23db-11e9-afd9-13f3df5be3b5.html) (last accessed Feb. 8, 2019).

On February 2, 2019, Plaintiffs filed this action in the U.S. District Court for the Southern District of Texas on behalf of voters who were singled out for investigation and removal from the voter rolls by the Texas Secretary of State. *Garibay, et al. v. Whitley, et al.*, No. 2:19-cv-00040 (S.D. Tex.) ECF 1.<sup>7</sup> Plaintiffs also included three plaintiff organizations whose mission and resources are affected by defendants' actions. *Id.*

On February 7, 2019, the Texas Secretary of State testified before the Texas Senate during his confirmation hearing and refused to say that he would withdraw his list of suspected non-U.S. citizen voters despite the fact that there are U.S. citizens on the list.<sup>8</sup> He also confirmed that the voters on his list are still under investigation: “[t]his maintenance activity is on-going . . . the counties don’t have a timeline when they are completing this maintenance activity . . . we are working with them every day on it.”<sup>9</sup> On February 10, 2019, Plaintiffs amended their complaint to add new factual developments in the case and additional individual and organizational plaintiffs affected by defendants' actions, as well as additional defendants who are county officials. *Id.* ECF 4. On February 20, 2019, Plaintiffs moved to file a Second Amended Complaint to add factual developments that occurred after the First Amended Complaint was filed, to add defendant counties that have sent purge letters to voters, and to add additional individual plaintiffs who are on the list of suspected voters issued by the Secretary of State. *Texas League of United Latin American Citizens, et al. v. Whitley, et al.*, No. 5:19-cv-00074-FB, ECF 63. The Court granted Plaintiffs' request to amend on February 28, 2019. *Id.* ECF 65, 66.

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<sup>7</sup> This case was transferred to the U.S. District Court for the Western District of Texas on February 19, 2019. *Id.* at ECF 15.

<sup>8</sup> *Senate Committee on Nominations on February 7, 2019*, The Texas Senate Audio/Video Archive – 2019 (timestamp: 2:48:59-2:51:00) (Feb. 7, 2019) available at [http://tlcSENATE.granicus.com/MediaPlayer.php?view\\_id=45&clip\\_id=13804](http://tlcSENATE.granicus.com/MediaPlayer.php?view_id=45&clip_id=13804) (last accessed Feb. 8, 2019).

<sup>9</sup> *Senate Committee on Nominations on February 7, 2019*, The Texas Senate Audio/Video Archive – 2019 (timestamp: 46:03 – 46:15 and 1:32:48-1:33:15) (Feb. 7, 2019) available at [http://tlcSENATE.granicus.com/MediaPlayer.php?view\\_id=45&clip\\_id=13804](http://tlcSENATE.granicus.com/MediaPlayer.php?view_id=45&clip_id=13804) (last accessed Feb. 8, 2019).

On February 27, 2019, this Court issued an order denying Defendants’ motion to dismiss and directing local election officials “not to remove any person from the current voter registration list until authorized by this Court.” *Id.* ECF 61 at 3. The Court further directed the Secretary of State to “tell other counties which are not parties to this litigation, or party counties which will not agree to a pause, not to send any notice of examination letters nor remove voters from registration without prior approval of the Court with a conclusive showing that the person is ineligible to vote” and “to advise and direct local voting officials not to send notice of examination letters nor remove voters from registration without prior approval of the Court.” *Id.*; *see also* Order Regarding Joint Advisory from County Defendants, *Id.* ECF 64.

Since Plaintiffs filed their Second Amended Complaint, the Organization of Chinese Americans-Greater Houston (“OCA-GH”), a local chapter of a national membership-driven organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans, seeks to join the case as a plaintiff. OCA-GH is and will be injured by state officials’ calling into question the voter registration of naturalized citizens in Texas and discouraging naturalized individuals from registering to vote and voting. Additionally, OCA-GH has members who meet the description of individuals whose information appears on the list of suspected voters issued by the Secretary of State.

Since the filing of the Second Amended Complaint, an additional individual voter who is and will be injured by the Advisory seeks to join the case as a plaintiff. Plaintiffs now seek to amend their complaint to add OCA-GH and the additional individual voter as additional plaintiffs.

### **ARGUMENT**

Under Federal Rule of Civil Procedure 15(a)(2), the Court “should freely give leave when justice so requires.” It is well-established that

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment . . . —the leave sought should, as the rules require, be ‘freely given.’

*Foman v. Davis*, 371 U.S. 178, 182 (1962) (internal citation omitted). The decision whether to grant leave to amend a pleading is within the sound discretion of the district court. *Id.*

Here, good cause exists because Plaintiffs seek to address the impact of Defendants’ action on Asian Americans in Texas who are United States citizens and registered voters of Texas. Of the Asian Americans who are eligible to vote (adult United States citizens) in Texas, approximately 73% are naturalized U.S. citizens. *See* Ex. A. The proposed amended complaint seeks to address this significant impact on Asian American U.S. citizens in Texas by adding an organizational plaintiff with impacted members and constituencies. Therefore, the amendment is not futile, and is not being filed for purposes of delay or in bad faith. The proposed amended complaint maintains the same causes of action and prayer for relief as in the Second Amended Complaint. Therefore, the amendment will not prejudice Defendants.

### CONCLUSION

For the reasons identified above, Plaintiffs respectfully request that the Court grant Plaintiffs’ Motion for Leave to File Third Amended Complaint.

Dated: March 4, 2019

Respectfully Submitted,

**MEXICAN AMERICAN LEGAL  
DEFENSE AND EDUCATIONAL FUND**

By: /s/ Nina Perales

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**ASIAN AMERICANS ADVANCING  
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*\*Pro hac vice application forthcoming*

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**CERTIFICATE OF CONFERENCE**

I, the undersigned, hereby certify that, on March 4, 2019, I emailed counsel for defendants and requested their position on the above and foregoing document. No counsel responded with a position on the motion prior to the filing of this motion.

*/s/ Nina Perales*

\_\_\_\_\_  
Nina Perales

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on the 4<sup>h</sup> day of March, 2019, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

*/s/ Nina Perales*

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Nina Perales