No. 23A862

In the Supreme Court of the United States

JOSE TREVINO, ISMAEL G. CAMPOS, AND STATE REPRESENTATIVE ALEX YBARRA,

Applicants,

v.

SUSAN SOTO PALMER, *et al.*,

Respondents.

Response of Susan Soto Palmer, et al., in Opposition to Emergency Application for a Stay of Judgment and Injunction

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INTRODUCTION

The Court should deny Applicants' ("Intervenors") request for a stay. Intervenors are three individuals whom the district court allowed to permissively intervene as defendants. After over a year of litigation and an extensive bench trial, the district court found that Washington's legislative districts in the Yakima Valley cracked Latino communities and resulted in vote dilution in violation of Section 2 of the Voting Rights Act ("VRA"). And, following a robust remedial process, the district court imposed a remedial map after the State declined to do so. Neither the Secretary of State nor the State of Washington—defendants below—has appealed either the district court's liability or remedial rulings. Only Intervenors have. But they lack standing to do so—indeed, they do not even *assert* that they have standing to challenge the district court's liability determination and injunction against the enacted map. Yet they nevertheless seek a stay of it, based upon their allegations that the remedial map is a racial gerrymander.

Much is wrong with this leap. First, Intervenors never alleged in the district court that any of the potential remedial maps—including the one ultimately selected by the district court—were unconstitutional racial gerrymanders. Intervenors cannot raise on appeal a fact-bound constitutional claim they failed to raise in the district court. Second, the record shows that the remedial map was drawn without consideration of racial data, foreclosing Intervenors' newfound argument (and likely explaining why they did not raise the claim in the district court). Third, Intervenors cannot bootstrap standing of a waived, foreclosed claim in an effort to seek a stay of

a different order and injunction or to attempt to raise arguments that only the State could conceivably raise regarding the remedial map.

Intervenors lack standing to appeal and thus lack standing to seek a stay. This Court has no subject matter jurisdiction to grant their request. But their arguments are in any event meritless. The Court should deny the requested stay.

STATEMENT OF THE CASE

On August 10, 2023, after a year and half of litigation and a four-day trial, the district court found that Washington's 15th Legislative District (LD15) violated Section 2 of the Voting Rights Act. ADD-32.[1] The district court found that the enacted boundaries of LD15, "in combination with the social, economic, and historical conditions in the Yakima Valley region," resulted in an unequal opportunity for Latino voters in the area. *Id*. The court conducted a "detailed evaluation" of the *Gingles* and Senate factors, finding that the pervasive racially polarized voting in the Yakima Valley consistently led to Latino candidates of choice being defeated. ADD-28. The court provided an opportunity for Washington's Redistricting Commission, which drew the enacted map, to be reconstituted to redraw the district, and also established a parallel remedial process to ensure that a new map would be adopted by the Secretary of State's March 25, 2024, deadline. PL-ADD 182-84.

Intervenors—three individuals who were granted permissive intervention in the district court—filed a notice of appeal a month later, on September 8, 2023. ADD-

[1] Citations to the *Soto Palmer v. Hobbs* district court docket that appear in Intervenors' Addendum are cited as "ADD." Citations to additional documents included in Plaintiffs' Addendum are cited as "PL-ADD." Citations to Intervenors' Application for a Stay are cited as "App."

45. Secretary Hobbs and the State of Washington—the defendants below—did not appeal. On November 3, 2023, Intervenors filed a petition for certiorari before judgment with the Supreme Court, seeking to bypass the Ninth Circuit's appellate review. *See* Petition for Certiorari Before Judgment, *Trevino v. Soto Palmer*, No. 23-484 (Nov. 3, 2023). On December 5, 2023—four months after the district court issued its decision and injunction, three months after their Ninth Circuit appeal was docketed, and one month after asking this Court to bypass the Ninth Circuit—Intervenors filed a motion with the Ninth Circuit to stay the district court's injunction and remedial proceedings. *See* Mot. to Stay Injunction and Lower Court Proceedings, *Susan Palmer, et al. v. Jose Trevino, et al.*, No. 23-35595 (9th Cir. Dec. 5, 2023), Dkt. 34-1.

On December 21, 2023, a motions panel of the Ninth Circuit issued an order denying Intervenors' motion for a stay, citing Intervenors' failure to satisfy the stay factors set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009). Order Denying Stay, *Susan Palmer, et al. v. Jose Trevino, et al.*, No. 23-35595 (9th Cir. Dec. 21, 2023), Dkt. 45. Intervenors did not seek a stay from this Court. Rather, on January 5, 2024, Intervenors filed a motion to hold their own appeal in abeyance pending the district court's remedial proceedings and their Supreme Court petition, *id.*, Dkt. 48, which the Ninth Circuit granted, *id.*, ADD-47-48. That is, five months after the district court entered an injunction they contend imminently harmed them and necessitated a stay, Intervenors sought to delay resolution of their own appeal. Thereafter, this Court

denied their petition for certiorari before judgment on February 20, 2024. *See Trevino v. Soto Palmer*, No. 23-484.[2]

In the meantime—and following the Ninth Circuit's denial of Intervenors' motion to stay the trial court remedial proceedings—the district court held a robust remedial process. Pursuant to the district court's remedial order, on December 1, 2023, Plaintiffs submitted five maps, each of which would remedy the Section 2 violation. ADD-34; PL-ADD 42-68. As Plaintiffs' expert and map-drawer Dr. Kassra Oskooii explained, he drew the maps to unify the population centers from East Yakima to Pasco and the cities in the Lower Yakima Valley that the district court identified as a community of interest. PL-ADD 45. In doing so, Dr. Oskooii started with the enacted map and then made the changes necessary to achieve this goal while adhering to the redistricting criteria in Washington law, traditional redistricting principles, equal population mandates, and respecting other communities of interest—including the desires of the Yakama Nation. PL-ADD 45-46. Dr. Oskooii removed all racial and political data from view in the redistricting program and considered neither racial data nor political data in drawing the remedial maps. PL-ADD 329-30 (28:3-29:8), 333 (32:12-16), 348 (47:16-21). Nor was he otherwise familiar

[2] The same day, this Court also declined to take jurisdiction in a related case, *Garcia v. Hobbs*, No. 23-467 (2024). That case concerns the appeal in a separate suit filed in the district court two months after Plaintiffs filed this suit, challenging LD15 as a racial gerrymander. Like Plaintiffs, Mr. Garcia sought to invalidate LD15 and have a new valid plan enacted in its place, and following Plaintiffs' win in this case invalidating LD15, *Garcia* was dismissed as moot. *Garcia v. Hobbs*, No. 3:22-cv-05152 (W.D. Wash. Sept. 8, 2023), ECF No. 81. The circumstances surrounding Mr. Garcia's case, however, are unusual. He is represented by the same attorneys as Intervenors here, despite his desire to invalidate the same district Intervenors were trying to maintain.

with the racial or political characteristics of the region's geography. *Id*. No other party submitted maps by the court's deadline. All parties—including Intervenors—stipulated, however, that March 25, 2024 was the "latest date a finalized legislative district map must be transmitted to counties without significantly disrupting the 2024 election cycle." PL-ADD 177.

In response to criticism from Intervenors, on January 5, 2024, Plaintiffs submitted slightly revised versions of their five maps that eliminated nearly all incumbent displacement in the districts surrounding LD14 and LD15. ADD-34; PL-ADD 77-121. The remedial process continued throughout the early months of 2024 with additional briefing and expert reports, the appointment of a special master, oral argument on the district court's preferred map, and an evidentiary hearing on March 8, 2024, at which expert and lay witnesses testified. ADD-33-35. In the lead-up to the evidentiary hearing (nearly three months after the initial deadline), Intervenors submitted an illustrative map. ADD-138-61.

Following the evidentiary hearing, on March 15, 2024, the district court ordered in place Plaintiffs' Map 3B, which remedied the Section 2 violation while respecting the priority of the Washington Redistricting Commission to simultaneously unite the Yakama Nation Indian Reservation with its off-reservation trust lands in Klickitat County near to and along the Washington/Oregon border. PL-ADD-35-37.

On March 18, 2024, Intervenors filed an emergency motion for a stay in the Ninth Circuit, seeking a decision by March 25, 2024—the date the parties stipulated

was the final date by which a map must be in place for the 2024 election to take place. PL-ADD 177. On March 22, 2024, the Ninth Circuit denied the motion for a stay, concluding that Intervenors had failed to satisfy their burden to show standing at this stage of the case, but permitting them to re-urge their standing arguments before the eventual merits panel. Order Denying Stay, *Susan Palmer, et al. v. Jose Trevino, et al.*, No. 24-1602 (9th Cir. Mar. 22, 2024), Dkt. 18.1. On March 25, 2024, the date by which Intervenors stipulated was the deadline for the State to implement a map, Intervenors filed an application for a stay in this Court.

REASONS TO DENY THE STAY

I. Intervenors lack standing to appeal.

Intervenors lack standing to appeal this case. To establish standing, a litigant must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations omitted). "[S]tanding 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (internal citation omitted); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) ("As the [Supreme] Court has repeatedly recognized, to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing") (internal citation omitted). This ensures that "the decision to seek review . . . is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62

(1986) (internal citation omitted).

This appeal is such a vehicle. In granting Intervenors only permissive intervention, the district court expressly found that "intervenors lack a significant protectable interest in this litigation." PL-ADD 173. In denying Intervenors' motion for a stay, the Ninth Circuit agreed, concluding that "Appellants have not carried their burden to demonstrate that they have the requisite standing to support jurisdiction at this stage of the proceedings." No. 24-1602, Dkt. 18.1, at 2. Two of the three Intervenors, Ybarra and Campos, *do not even reside or vote in LD15*, and thus have no possible cognizable interest in the district's configuration. *United States v. Hays*, 515 U.S. 737, 744-45 (1995). Indeed, in their application, Intervenors do not even attempt to establish standing to appeal the lower court's liability decision and injunction.

Below, Intervenors Campos and Trevino asserted an interest "in ensuring that any changes to the boundaries of [their] districts do not violate their rights to 'the equal protection of the laws'" and "that Legislative District 15 and its adjoining districts are drawn in a manner that complies with state and federal law." PL-ADD 167. But neither has been racially classified,[3] and a blanket interest in "proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [the intervenors] than it does the public at large[,] does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *Allen v. Wright*, 468 U.S.

[3] Certainly, the district court's *liability order* cannot plausibly have racially classified Intervenors, nor do they so allege.

737, 754-55 (1984).

Moreover, the district court has not ordered *Intervenors* "to do or refrain from doing anything." *Hollingsworth*, 570 U.S. at 705 (holding that non-governmental intervenor-defendants lack standing to appeal); *Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206 (2020) (Mem.) (denying stay of consent decree between state officials and plaintiffs because "no state official has expressed opposition" and intervenor "lack[s] a cognizable interest in the State's ability to enforce its duly enacted laws") (internal quotations omitted). Intervenors have no role in enforcing state statutes or implementing any remedial plan.[4] Thus, Intervenors' only interest in reversing the district court's decisions is "to vindicate the [] validity of a generally applicable [Washington] law." *Hollingsworth*, 570 U.S. at 706. But this Court has repeatedly held that "such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Id.*

Intervenor Ybarra's status as a legislator also does not confer standing. Any interest in "avoiding delays in the election cycle and in knowing ahead of time which voters will be included in his district," PL-ADD 169, is not particularized enough for Article III standing—every party (and the public) has an interest in an orderly election—and no legislator is entitled to advance notice of his constituents.[5] In

[4] It is insufficient that Intervenors have an adversarial position. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond*, 476 U.S. at 62, 68.

[5] Intervenors cite *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018) to support this point. But that case allowed individual congressmen to *permissively intervene* in district court litigation—it did not hold that an incumbent's interest in knowing his voters in advance was enough to establish Article III standing, let alone on appeal. *See Johnson*, 902 F.3d at 578-79.

addition, the district court's remedial order *guarantees* that Representative Ybarra will know his district's boundaries before the candidate filing date. ADD-43. Similarly, individual legislators have "no standing unless their own institutional position" is affected. *Newdow v. United States Cong.*, 313 F.3d 495, 498-99 (9th Cir. 2002). Nothing in this litigation impacts Representative Ybarra's institutional position or powers, and he is only one legislator of many, without the ability to assert harm on behalf of others. *Bethune-Hill*, 139 S. Ct. at 1953-54.

Nor does Representative Ybarra have standing based on his contention that the remedial map *might* make his reelection campaign more difficult or costly. No official is guaranteed reelection or particular district lines, and to assert standing a litigant "must do more than simply allege a nonobvious harm." *Id.* at 1951 (citing *Wittman v. Personhuballah*, 578 U.S. 539, 543-45 (2016)). Intervenors cannot. To begin, as of the date of this filing, Representative Ybarra's reelection campaign is uncontested.[6] Despite that fact, Intervenors speculate harm based on an "injection of Democrat [*sic*] voters into Representative's Ybarra's district." App. at 13. But that is not a cognizable injury, and the partisan lean of Representative Ybarra's district does not change in the remedial map. PL-ADD 119 (comparing LD13 in the Enacted Plan's 63.85% Republican performance to Map 3B's 63.21% Republican performance). If having new constituents established standing, *every legislator* would be able to sue

[6] *See* Washington Public Disclosure Commission, *Candidates: Legislative District 13-House*, https://www.pdc.wa.gov/political-disclosure-reporting-data/browse-search-data/candidates?jurisdiction=LEG+DISTRICT+13+-+HOUSE&jurisdiction_type=Legislative (last visited Mar. 29, 2024).

over almost any changes to their district at least every 10 years.[7] That cannot be so.

If anything, the remedial map *better* reflects Representative Ybarra's wishes for his own district boundaries, adding communities to his district he testified he desired be included and removing areas he desired be excluded. PL-ADD 425 (79:12-80:11). As such, Intervenors have not established any electoral or financial harm to Representative Ybarra. Indeed, a *stay* would harm Representative Ybarra's interests.

In addition to the reasons above, Intervenors have no other concrete interest in a liability or remedial appeal. Two of the three do not live in the remedial district. The district court's remedial decision did not order Intervenors to do or not do anything, nor are Intervenors injured in any way by changes they claim are beyond "necessary," App. at 29; only the State Defendants could raise such an argument and they have not appealed.

Moreover, any allegations that Intervenor Trevino was *personally* subject to a racial classification are not based in the record. The only evidence Intervenors' point to is that the entire city of Granger, Washington, where Mr. Trevino happens to live, was included in the remedial district, and an allegation that the district court considered uniting a community of interest as a "fundamental goal." App. at 12.[8] But neither demonstrates racial classification of him, let alone the particularized and

[7] Nor is spending $1 to voluntarily campaign for reelection in one's own district enough to establish standing to challenge a remedial map, particularly to challenge another district entirely (LD15). Representative Ybarra would spend more than $1 campaigning in LD13 *even if his district did not change*. For example, Representative Ybarra ran in uncontested primary and general elections in 2020 yet spent over $73,000 campaigning. *Id.*

[8] This misleading argument omits the lower court's finding that the community of interest is "based on more than just race," ADD-10, and misrepresents the court's remedial process, which considered the community of interest as one of several criteria in choosing a remedial district. ADD-36-37.

concrete harm necessary for Article III standing. *Hays*, 515 U.S. at 745 ("[A]bsent specific evidence" showing a voter has been subject to racial classification, the voter "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve"); *Cooper v. Harris*, 581 U.S. 285, 290 (2017). Nothing about the remedial map suggests that race predominated, and Intervenors waived this argument by not making it below. *See infra*. To the contrary, Plaintiffs' mapping expert "did not consider race or racial demographics in drawing the remedial plans." PL-ADD 46. Thus, the remedial map would not even prompt, let alone fail, strict scrutiny. *See Allen v. Milligan*, 599 U.S. 1, 41 (2023). And Intervenors' contention that the Court must "assume for standing purposes that Mr. Trevino stated a valid legal claim," App. at 12 (internal quotation marks omitted), is misplaced because Mr. Trevino *never stated this legal claim* in the district court.

Even if Intervenors somehow have standing to raise their waived racial gerrymandering claim, "standing is not dispensed in gross; rather, [Intervenors] must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Intervenors make no contention that they have standing to challenge the district court's order finding a Section 2 violation and permanently enjoining further use of the enacted map. App. at 11-13. Rather, they contend only that the particular remedial map imposed by the district court harms them. App. at 11-13. Intervenors cannot bootstrap standing to appeal the district court's liability order and injunction onto their purported standing to belatedly claim the remedial map is a racial gerrymander. Nor does their argument

about racial gerrymandering confer standing to raise arguments about the *State's* purported injury from the remedial map—*e.g.*, that the remedial map alters more of the State's policy choices than is necessary to remedy the Section 2 violation.

Finally, Intervenors' lack of standing does not "squarely present a concern that has underlain two recent grants of certiorari," as Intervenors claim. App. at 33 (citing *Arizona v. San Francisco*, 142 S. Ct. 1926 (2022), and *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1312 (2023)). To begin, the question presented in the *Arizona* cases was whether *States* should be permitted to intervene to defend certain nationwide immigration rules when the United States ceased to defend them on appeal following a change in administration. *See, e.g.*, *San Francisco*, 142 S. Ct. at 1928; *Mayorkas*, 143 S. Ct. at 1312. But Intervenors here are only three private individuals, and at issue is the legality of a single state legislative district in one state. Moreover, unlike the *Arizona* cases, here there has been no change in administration during the litigation, nor did the State of Washington "reverse[] course and opt[] to voluntarily dismiss [] appeals" that it had previously brought, or circumvent usual administrative procedures required under federal law to do so. *San Francisco*, 142 S. Ct. at 1928. Indeed, the State defended against Plaintiffs' Section 2 discriminatory results claim until the evidence became insurmountable and continued to defend against Plaintiffs' discriminatory intent claim (which the lower court did not reach). A State's choice not to appeal a liability decision is not collusion. *See, e.g.*, *Hollingsworth*, 570 U.S. at 702. As such, Intervenors' claims of "collusive actions" by the Washington Attorney General, App. at 35, have no basis in reality and do not

support a stay here.

Intervenors lack standing to appeal both the liability and remedial decisions below, and their stay application fails on that basis.

II. *Purcell* forecloses Intervenors' stay application.

This Court's decision in *Purcell* precludes a stay of the remedial map "just weeks before an election," contrary to Intervenors' arguments. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The district court enjoined the 2022 legislative map in August of 2023, and the district court indicated its preferred remedial legislative district configuration during a February 9, 2024, hearing. PL-ADD 288. Additionally, in May of 2023, Intervenors stipulated that March 25, 2024, would be the latest date by which legislative district lines would need to be finalized to avoid "significantly disrupting the 2024 election cycle." PL-ADD 176-77. In contrast with a remedial process that concluded before the March 25 deadline, Intervenors seek a stay that would take effect after that deadline making it the type of "conflicting order[]" that this Court seeks to avoid when an election is imminent. *See Purcell*, 549 U.S. at 4. Intervenors further find themselves in a different position than the State of Alabama in *Merrill*, where this Court stayed a preliminary injunction of a state-enacted map that had not yet been replaced by any remedial map. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring).

Here, Intervenors ask this Court to halt a permanent injunction enjoining a redistricting plan based on the merits that has been in effect for six months. Intervenors cannot characterize the district court's August 10, 2023, order as "late-

breaking" or an "injunction" in the same sense as the one addressed by Justice Kavanaugh in his concurrence. *See id.* at 882 n.3 (Kavanaugh, J., concurring) (discussing stay of a preliminary injunction). Intervenors fail to present any evidence that a stay at this point would not put state and county election officials in such a position in which "even heroic efforts likely would not be enough to avoid chaos and confusion." *See id.* at 880 (Kavanaugh, J., concurring).

III. There is not a fair prospect that a majority of the Court would vote to reverse the district court's finding of a Section 2 violation and its selection of a remedial map.

If the Ninth Circuit affirms the district court's liability and remedial map orders, there is no fair prospect that this Court would reverse.

A. This Court would not likely reverse the district court's ruling that LD15 violated the VRA.

The Court would not likely reverse the district court's Section 2 liability ruling and injunction. Intervenors have no standing to make their arguments, *see supra*, and their arguments are meritless. First, LD15's majority HCVAP status did not preclude a finding of a Section 2 violation. Second, the district court did not clearly err in its compactness analysis. Third, Intervenors' causation argument is wrong on the law and the record in any event establishes that race, not partisanship, is the cause of racially polarized voting in the Yakima Valley.

1. LD15's majority HCVAP status did not preclude a finding of a Section 2 violation.

The district court did not clearly err in finding a Section 2 violation notwithstanding LD15's bare majority of Latino voters. A majority-minority district

can dilute the minority's voting power where, as here, the minority lacks a real opportunity to elect their candidates of choice. *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017) ("[T]he existence of a majority HCVAP in a district does not, standing alone, establish that the district provides Latinos an opportunity to elect, nor does it prove non-dilution."); *Pope v. Cnty. Of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) ("[T]he law allows plaintiffs to challenge legislatively created bare majority-minority districts on the ground that they do not present the 'real electoral opportunity' protected by Section 2."); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 933 (8th Cir. 2018); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989). This Court has further recognized that it is "possible for a *citizen voting-age majority* to lack real electoral opportunity," *LULAC v. Perry*, 548 U.S. 399, 428 (2006) (emphasis added), and, as the district court held, "the evidence shows that that is the case here." ADD-29.

Intervenors altogether ignore the district court's "searching practical evaluation of the past and present reality" in the Yakima Valley, *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (internal quotations omitted), contending that "the district court did not hold that the existing Hispanic majority in LD-15 was hollow or a mere façade" and that "if a group constitutes a majority of the citizen-age voting population, then the majority group necessarily possesses *at least* an 'equal opportunity' to elect representatives of its choice." App. at 18 (emphasis in original). But the district court found that, in the particular area included in the enacted

version of LD15, "[a] majority Latino CVAP of slightly more than 50% is insufficient to provide equal electoral opportunity where past discrimination, current social/economic conditions, and a sense of hopelessness keep Latino voters from the polls in numbers significantly greater than white voters." ADD-29.[9] This finding accords with extensive evidence presented at trial, including evidence that LD15 cracked the Latino community of interest "in Yakima, Pasco, [and] along the highways and rivers in between." ADD-11; *see*, *e.g.*, PL-ADD 249-51 (82:25-84:12) ("[W]hite voting power was higher in the included precincts, even though they're high-density Latino, relative to the excluded precincts."); PL-ADD-31-32; PL-ADD-264-65 (832:18-833:1) ("[I]f they would have done a better job to make sure we're not split in the community . . . that would be ideal for representation."); *see also* ADD-22 n.10 ("[T]he Section 2 claim is based on allegations that the boundaries of LD 15 were drawn in such a way that it cracked the Latino vote."); *Perez*, 253 F. Supp. 3d at 887-88 (fracturing politically active communities had "the foreseeable effect of depressing Latino turnout"). Intervenors do not show that this was a clear error.

Intervenors' attempt to reduce the district court's assessment to a partisan one, App. at 18, highlights their misunderstanding of the requirements and protections of Section 2. The district court's inquiry, consistent with this Court's precedent, was into the "electoral opportunities" for Latino voters. ADD-32. The district court found "that white voters in the Yakima Valley region vote cohesively to block the Latino preferred candidates"—"candidates who are responsive to the needs of the Latino community,"

[9] When adopted, LD15 was *50.02%* Hispanic CVAP. PL-ADD 175.

"who support unions, farmworker rights, expanded healthcare, education, and housing options, *etc.*," ADD-12, 31—thereby denying Latino voters "real electoral opportunity." *LULAC*, 548 U.S. at 428. That the Latino-preferred candidates, in this case, aligned with one party does not turn the district court's assessment into a partisan one. The district court did not err in applying this Court's precedent to assess Latino electoral opportunity.

2. The district court did not clearly err in finding that Plaintiffs satisfied the compactness requirement of the first *Gingles* precondition.

The district court properly found that Plaintiffs satisfied the compactness requirement of the first *Gingles* precondition. ADD-9-11. Intervenors argue that "rather than analyze the compactness of the minority population, the district court instead analyzed the geographic shape of Plaintiffs' proposed illustrative maps." App. at 19. This argument has no merit.

In *LULAC*, this Court held that a Texas congressional district stretching from the Mexican border to Austin was not reasonably compact for Section 2 purposes because of the "enormous geographical distance" separating the two pockets of Latino communities and the "disparate needs and interests" of those communities. 548 U.S. at 435. In so doing, the Court "emphasize[d] it is the enormous geographic[] distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes." *Id.*; *see id.* at 424 (concluding that another

district stretching 500 miles satisfied *Gingles* 1 where its Latino population had shared interests).

Here, neither factor is present. The district court concluded that the Latino population was geographically proximate and connected. ADD-10-11. And the district court concluded, based upon the testimony at trial, that the communities had shared "socio-economic status, education, employment, health, and other characteristics," 548 U.S. at 424 (internal quotation marks omitted), and "form a community of interest based on more than just race." ADD-10-11, 19. Intervenors flippantly label these shared socio-economic disparities and interests as "characteristics common to many Hispanic voters," App. at 20, but do not show how the district court clearly erred. Their own expert, Dr. Mark Owens, "acknowledged at trial that he does not know anything about the communities in the Yakima Valley region other than what the maps and data show," ADD-11 n.7, and testified that he had no opinion on whether LD15 was compact. PL-ADD 256 (599:10-15). As such, the record evidence contradicts Intervenors' claims, and the district court did not err in finding the Latino community compact.

3. The district court did not err by failing to analyze the cause of racially polarized voting.

The district court did not err by failing to analyze the cause of racially polarized voting in the Yakima Valley. Intervenors do not dispute that Latino voters are cohesive (*Gingles* 2), and that white voters vote as a bloc to routinely defeat the preferred candidate of Latino voters (*Gingles* 3), but instead argue that any

polarization is caused by partisanship, App. at 21, not racial attitudes of voters. Intervenors are wrong on the law and facts.

A majority of this Court has concluded that this type of causation argument is not pertinent to assessing racially polarized voting as part of the *Gingles* preconditions. *Gingles*, 478 U.S. at 51, 62-63, 74 (plurality) (the "legal concept of racially polarized voting incorporates neither causation nor intent" and "the reasons [Latino] and white voters vote differently have no relevance to the central inquiry of § 2"); *id.* at 100 (O'Connor concurring) (agreeing, along with three other justices, that where statistical evidence shows minority political cohesion and assesses prospects of winning, "defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race"); *see also Allen*, 599 U.S. at 19 (explaining that the third *Gingles* precondition "establish[es] that the challenged districting thwarts a distinctive minority vote at least plausibly on account of race" (internal quotation marks omitted) (bracket in original)).

Intervenors cite *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997), for the proposition that "Plaintiffs 'must show a causal connection between the challenged voting practice and a prohibited discriminatory result.'" App. at 20. But like this Court, the Ninth Circuit has held that in vote dilution claims, "evidence of racial bloc voting provides the requisite causal link between the voting procedure and the discriminatory result" and that plaintiffs do not have "the additional burden of proving that white bloc voting is due

to discriminatory motives." *United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 912 & n.21 (9th Cir. 2004); *id.* at 912 n.21 (expressly rejecting Intervenors' reading of *Salt River*); *Old Person v. Cooney*, 230 F.3d 1113, 1128 (9th Cir. 2000) (noting that *Gingles* plurality rejected this argument); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415-16 (9th Cir. 1988) (holding that "[t]he court should have looked only to *actual voting patterns* rather than speculating as to the reasons why" (emphasis in original)).

In any event, the district court found that Intervenors' argument was factually incorrect, ADD-11-14, 30-31, and Intervenors identify no clear error in that conclusion. The State's expert Dr. John Alford—who routinely testifies on behalf of state governments defending against Section 2 claims[10]—persuasively testified about "a real ethnic effect on voting in this area," PL-ADD 266-67 (853:21-854:15). Plaintiffs' expert Dr. Collingwood's analysis demonstrated that Latino voters cohesively prefer candidates that are routinely defeated by white bloc voting, including candidates with Spanish surnames, in both nonpartisan and partisan races. PL-ADD 247 (65:7-66:24); PL-ADD 7-8.[11] And Intervenors' counsels' other client, Benancio Garcia, testified to racial discrimination he faced from the

[10] Dr. Alford is regularly hired by Texas to defend against redistricting challenges. *See, e.g.*, *LULAC v. Abbott*, 601 F. Supp. 3d 147, 166 (W.D. Tex. 2022); *Perez v. Abbott*, 267 F. Supp. 3d 750, 778 n.27 (W.D. Tex. 2017), *rev'd in part*, 585 U.S. 579 (2018). Indeed, *Intervenors' counsel* retained Dr. Alford to defend their government clients in another case pending at the same time as this case. *See Petteway v. Galveston County*, No. 3:22-cv-57, __ F. Supp. 3d __, 2023 WL 6786025, at *4 (S.D. Tex. Oct. 13, 2023).

[11] Intervenors claim there is "weak polarization," App. at 36, but that misstates the record. Indeed, "each of the experts who addressed [cohesion], *including Intervenors' expert*, testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied." ADD-11 (emphasis added). Similarly, the evidence established "that white voters in the Yakima Valley [] vote cohesively to block the Latino-preferred candidates in the majority of elections." *Id*. at 12-13. Intervenors' expert admitted he had no reason to doubt that white voters overwhelm the preferences of Latino voters. PL-ADD 257 (601:4-11).

Washington State Republican Party as a Latino candidate running for Congress in the Yakima Valley. In Mr. Garcia's own words, this discrimination "greatly affected th[e] election, the outcome, and suppressed the Latino vote." PL-ADD 428-30 (75:2-79:7; 90:12-91:13).[12]

Intervenors also claim that the district court ignored the victory of candidate Nikki Torres in LD15 in 2022, App. at 21, but that is belied by the record. The district court found that the election confirmed the overall statistical evidence of racially polarized voting, with Latino voters cohesively voting for the *losing* candidate Lindsey Keesling, and white voters cohesively preferring Ms. Torres, the winning candidate. ADD-11-12. Intervenors' constant refrain that Ms. Torres (a candidate opposed by Latino voters) won by 35 points simply highlights *the harm* of the enjoined district.[13]

More fundamentally, even if, contrary to the evidence, the 2022 election in LD15 did not confirm the continued pattern of racially polarized voting, it is only *one election*. One election contest cannot outweigh the findings of all four experts in the case that Latino voters cohesively prefer the same candidates, and that those candidates are continually defeated by white bloc voting over a decade of elections in

[12] Mr. Garcia's testimony demonstrates that even within the Washington Republican Party, white Republicans are favored over Latino Republicans.

[13] Intervenors assume that because Ms. Torres is Latina, she *must* be the Latino-preferred candidate. That assumption is as offensive as it is incorrect. A minority *candidate* is not automatically the minority *candidate of choice*. *See, e.g.*, *LULAC*, 548 U.S. at 438-41 (redistricting diluted Latino voting strength because Latino voters were near ousting non-Latino-preferred Latino incumbent); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 551 (9th Cir. 1998) ("[A] candidate is not minority-preferred simply because the candidate is a member of the minority") (collecting cases).

the region. *See, e.g., Gingles*, 478 U.S. at 57 (stating that "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election").

This is particularly so because the 2022 election in LD15 is subject to the "special circumstances" doctrine, under which courts discount the probative value of elections that are "not representative of the typical way in which the electoral process functions." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557-58 (9th Cir. 1998); *Gingles*, 478 U.S. at 75-76. The election took place during the pendency of VRA litigation, featured the unexpected retirement of the longtime incumbent, a severely underfunded Latino-preferred candidate nominated as a write-in, and abysmally low Latino turnout. PL-ADD 258-59 (604:6-605:21), 35-41; *Gingles*, 478 U.S. at 75-76 (finding such elections can "work[] a one-time advantage . . . in the form of unusual organized political support by white leaders").[14] Ms. Keesling, the write-in candidate in the primary, spent only $4,000 in the general election, less than five percent of what Sen. Torres spent on her campaign. PL-ADD 258-59 (604:6-605:21). And contrary to Intervenors' claim, App. at 21-22, *Gingles* expressly discusses elections taking place during the pendency of VRA litigation as special circumstances. 478 U.S. at 76; *see also id.* at 76 n.37. As such, the 2022 LD15 election is not probative for evaluating Latino electoral opportunity.

[14] Plaintiffs filed their lawsuit months before Ms. Torres declared her candidacy, which was followed three days later by the retirement of longtime white incumbent Jim Honeyford. Honeyford then endorsed Ms. Torres. *See* Brett Davis, *Nikki Torres resigns from Pasco City Council to focus on state Senate run*, The Center Square (June 1, 2022), https://www.thecentersquare.com/washington/article_8902dab6-e203-11ec-a1a3-4b9e5f13bd74.html.

B. This Court is not likely to reverse the district court's selection of a remedial map.

If the Ninth Circuit affirms the district court's order imposing a remedial map, this Court is unlikely to reverse. To begin, Intervenors have no standing to appeal the district court's remedial order. *See supra* Part I. Intervenors' arguments also have no merit. First, the district court did not clearly err by imposing a remedial map that cures the Section 2 violation despite having a slightly lower share of Latino voters than the enjoined map. Vote dilution is not assessed by racial targets, as Intervenors contend, but rather is based on a functional analysis of the *Gingles* preconditions and totality of circumstances. Intervenors do not attempt to show that the remedial district runs afoul of *Gingles*, nor could they. Second, only the State could appeal the district court's remedial order on account of the extent to which it altered the State's policy choices in the enacted map, not Intervenors. Moreover, their arguments badly misstate the record. Third, Intervenors have waived any claim of racial gerrymandering in the remedial map by failing to raise that claim in the district court. In any event, the record evidence shows that racial information was not considered at all in the map drawing, defeating Intervenors' racial gerrymandering contention.

1. The district court did not clearly err on account of the remedial district's HCVAP percentage.

The district court did not clearly err by ordering a remedial district that has an HCVAP slightly below that of the enjoined version of LD15. "When devising a remedy to a § 2 violation, the district court's 'first and foremost obligation . . . is to

correct the Section 2 violation.'" *United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009) (quoting *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006)). Whether a district violates (or remedies a violation of) Section 2 "entails a functional analysis that is 'peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanism.'" *Anne Harding v. Cnty. of Dallas*, 948 F.3d 302, 309 (5th Cir. 2020) (quoting *Gingles*, 478 at 79); *see also Sanchez v. State of Colo.*, 97 F.3d 1303, 1310 (10th Cir. 1996) (noting inquiry involves a functional view of the local political process).

The district court found that its remedial map cured the Section 2 violation—a conclusion that was supported by both Plaintiffs' expert Dr. Loren Collingwood and Intervenors' expert Dr. Trende. ADD-36, 155; PL-ADD 154. Dr. Collingwood found that, under the remedial map's version of LD14 in the Yakama Valley, Latino voters in the region would have been able to elect their candidates of choice in 8 out of 8 analyzed elections. PL-ADD 156. By contrast, Dr. Collingwood and the State's expert, Dr. Alford, found that under the enjoined version of LD15, white voters usually defeated the preferred candidates of Latino voters (70% of the time). ADD-12.

Intervenors characterize the remedial district as a "cure-dilution-with-dilution remedy," App. at 23, because its HCVAP is slightly lower than the enjoined district's.[15] This argument is meritless. Whether a district violates Section 2—or, as here, remedies a Section 2 violation—is not about a numerical racial target, but

[15] Intervenors cite outdated HCVAP numbers to make the difference appear double its current magnitude. The most recent HCVAP for the remedial district is 51.04% and 52.18% for the enacted district. PL-ADD 124.

rather whether it triggers the *Gingles* preconditions and is dilutive under the totality of the circumstances. *See Cooper v. Harris*, 581 U.S. 285, 306 (2017) (noting that Section 2 compliance does not demand "precise[]" minority population targets). Every district configuration has different circumstances; a demographic percentage in one district may be dilutive but that same demographic percentage may not be dilutive in the context of a different district configuration with different voting patterns. For that reason, the vote dilution inquiry is a functional analysis of the election results and voter behavior in a particular district. For example, in *Cooper*, this Court held that a North Carolina congressional district in which Black voters constituted less than a majority of eligible voters complied with Section 2—and that race-predominating efforts to boost its Black voting population to majority status were unconstitutional—because white voters were not usually defeating Black voters' preferred candidates in the district. *See id.*

Intervenors' contention that a Section 2 remedy is only lawful if it increases the Latino share of the district is flatly contradicted by *Cooper*. And this objection is perplexing. Intervenors cannot both object that race was not considered enough in Plaintiffs' proposed maps and that it was simultaneously considered too much.[16]

To show that the remedial district diluted Latino voting strength, as Intervenors casually contend, they must show that white voters in the district will usually defeat the preferred candidates of Latino voters. *Id.* at 302. They make no

[16] Intervenors contend that the purpose behind the remedial map was to add white Democrats or Native American Democrats, but merely cite a chart of the demographic figures. App. at 23. Dr. Oskooii, the mapdrawer, testified that he considered neither race nor partisan data when drawing the map. PL-ADD 329-30 (28:9-12, 29:4-8).

effort to do so, nor could they given their own expert's electoral analysis of the map. ADD-155. Instead, they merely compare HCVAP numbers and label any decrease "dilution." That is not the test for Section 2 compliance—it is a talking point. And the district court did not clearly err by applying *Gingles* and its progeny, rather than Intervenors' mechanical racial target.[17]

2. This Court is not likely to reverse the district court's order imposing a remedial map on account of the scope of its changes to the State's policy choices.

The Court is unlikely to reverse the district court's remedial order on account of the scope of its changes to the enjoined map. When a court enjoins a state's legislative redistricting plan for violating Section 2, the state must be given the first opportunity to draw a remedy. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). If the state does not or cannot timely do so,[18] the court must exercise its broad equitable powers to cure the violation. *Id.* In selecting a remedy, "a court, as a general rule, should be guided by the legislative policies underlying the existing plan" if those policies do not perpetuate a violation. *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). While that plan "serves as a starting point for the district court," the state policies owed deference are not limited to those expressed in its existing (unlawful) plan. *Perry v. Perez*, 565 U.S. 388, 393 (2012). As this Court instructed in *Upham* and *Weiser*, district courts "should follow the policies and preferences of the State, as expressed *in statutory and*

[17] Intervenors essentially contend that the district court's sole focus should have been the HCVAP percentage—a peculiar position given their (meritless) allegation of racial gerrymandering.

[18] The district court gave the State five months to draw and enact a remedial plan according to its usual legislative procedures, and ordered a parallel remedial process only when it became the clear the State was unlikely to remedy the violation on its own. ADD-33; PL-ADD 182-84.

constitutional provisions or in the reapportionment plans proposed by the state legislature." *Upham v. Seamon*, 456 U.S. 37, 41 (1982) (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)) (emphasis added).[19] The state's redistricting criteria are thus necessary considerations, as are any proposals or submissions the state offers during the remedial process. This Court has also made clear that adherence to state policies cannot impede the fundamental goal of fully rectifying the unlawful dilution of minority voting power found in the enacted plan. *Weiser*, 412 U.S. at 797 ("The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress the . . . violations that have been adjudicated and must be rectified."). This is why courts are instructed not to intrude on state policy "any more than necessary." *Upham*, 456 U.S. at 42.

The district court's selection of Plaintiffs' Remedial Map 3B is consistent with these principles.[20] The map follows state and traditional redistricting criteria, respects the State's policy judgments, and alters the enacted plan no more than is necessary to remedy the Section 2 violation.

As an initial matter, Plaintiffs' expert Dr. Oskooii drew all proposals, including Map 3B, by starting with the enacted plan and adjusting only as needed to remedy the violation while abiding by state and traditional redistricting principles. PL-ADD 81-82, 329 (28:3-19). And the district court committed no error in finding that Map

[19] Intervenors inexplicably omit this italicized portion of *Upham*, App. at 25, and thus misstate the relevant standard.

[20] Map 3B is a nearly identical version of Map 3A, reflecting only minor technical changes requested by the district court. PL-ADD 157-60. Map 3A is in turn very similar to Map 3, which was tweaked slightly to avoid incumbent displacement where possible. ADD-34; PL-ADD 333 (32:17-21).

3B satisfies those principles. ADD-36-37. No party disputed that the map has equally populated districts within acceptable deviation; is reasonably compact, contiguous, and convenient; minimizes county, city, and precinct splits; and respects communities of interest consistent with Washington law. *See* RCW § 44.05.090 (enumerating state's redistricting criteria); PL-ADD 89, 107-09, 334-35 (33:16-34:12); ADD-146.

The district court's selection of Map 3B also "follow[s] the policies and preferences of the State." *Upham*, 456 U.S. at 41. In lieu of submitting a proposed map, the State submitted a written remedial submission identifying only two such preferences. PL-ADD 204-05. First, it assented to whichever of Plaintiffs' proposed maps the court found to "best provide[] Latino voters with an equal opportunity to elect candidates of their choice while also balancing traditional redistricting criteria and federal law." *Id.* at 204. And second, it identified "respecting the sovereign interests of the Yakama Nation" as a "key consideration in creating [the enacted] LD 15" and urged that any remedial map should likewise respect these interests. *Id.* at 205. Heeding this call, the district court solicited the Yakama Nation's written input and participation at the March 8 remedial hearing. ADD-34. The Yakama Nation explained that its interests were to keep its Reservation and off-Reservation trust lands and fishing villages, to the extent practicable, in a single district. PL-ADD 230-42, 368-69 (67:6-68:13).

In selecting Map 3B,[21] the district court achieved all of the state's objectives. The map removes the unlawful vote dilution by unifying the communities cracked in the enacted map, adheres to state and traditional redistricting criteria, and includes in LD14 the entire Yakama Nation Reservation, more than 96% of tribal off-reservation trust lands, and 94% of the tribe's treaty fishing access sites along the Columbia River. PL-ADD 128-31. The district court did not clearly err in finding that Map 3B accomplishes these objectives while "avoid[ing] gratuitous changes[] to the enacted map." ADD-36; PL-ADD 416 (115:1-16). Intervenors' hyperbolic, unsupported claims to the contrary are meritless.

First, Intervenors have no standing to raise these claims because only the State could be harmed by a court failing to adhere to its policy goals. *See, e.g.*, *Bethune-Hill*, 139 S. Ct. at 1951 (holding that parties not authorized by law to represent state interests lack standing to appeal on state's behalf). The State has not appealed and has not contended its policy goals were infringed by the district court's selection of a remedial map.

Second, Intervenors note that Map 3B alters a quarter (13) of the state's 49 legislative districts. But the number of districts affected by a remedial map says nothing of the *magnitude* of the changes, which are indeed small. As the district court found, Map 3B impacts fewer than *5.5%* of the state's roughly 7.7 million people, based on Dr. Oskooii's undisputed core retention analysis. ADD-38; PL-ADD 121. In

[21] As indicated in its remedial order, both the district court and Special Master Dr. Karin MacDonald independently aligned on this map as the best of all options. ADD-34 n.2.

other words, the map retains 94.5% of Washingtonians in the same district as the enacted plan. *See Singleton v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 6567895, at *9 (N.D. Ala. Oct. 5, 2023) (ordering remedy with core population retention of 86.8%).

The relevant legal question under *Upham, Abrams*, and related precedent is not how many districts are affected but whether the district court found its changes "necessary" to cure the Section 2 violation in light of the context, including the nature of the violation and needed cure, the demands of other state redistricting criteria and policies, and the geographic location of relevant districts within the state. *See Abrams*, 521 U.S. at 86 (finding district court was justified in making "substantial changes to existing plan consistent with [state] districting principles" where two districts relevant to the violation were situated on opposite sides of the state). Here, as in *Abrams*, the district court did not clearly err in finding that the (ultimately minimal) ripple effects caused by shifting population between LD14 and LD15 were "necessary to unite the Latino community of interest in the region," because of the need to unite Yakama Nation lands in LD14 and maintain population parity, and given that the two districts are located in the center of the state, bordering several districts with large areas of sparsely populated territory. ADD-38-40; PL-ADD 82-85; Wash. State Redistricting Comm'n, District Maps & Handouts (Legislative District Maps), https://perma.cc/P48S-4GD9.[22]

[22] Intervenors' claim, *see* App. at 26, that Map 3B moves half a million people is incorrect. PL-ADD 133. They inflate by nearly 100,000 the number of affected people. PL-ADD 337 (36:3-15).

Third, Intervenors' complaints regarding incumbents are irrelevant. App. at 26. "[P]urely political considerations that might be appropriate for legislative bodies," like incumbent protection, "have no place in a plan formulated by the courts." *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004) (internal citations omitted). Nor is incumbent protection among the state's redistricting criteria. *See* RCW § 44.05.090. Nevertheless, after drawing Plaintiffs' map submissions first according to the state's actual criteria, Dr. Oskooii did adjust districts where possible to avoid incumbent displacement. PL-ADD 100-01, 107; *see Abrams*, 521 U.S. at 84 (upholding plan subordinating incumbent protection to other factors).

Fourth, Intervenors' demand for a remedial map that maintains the enacted map's precise partisan allocation is similarly misplaced. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 563-64 (E.D. Va. 2016) ("[W]e have found no case holding that we must maintain a specific political advantage in drawing a new plan[.]"). Because Washington prohibits favoring or disfavoring any political party, RCW § 44.05.090(5), Dr. Oskooii declined to consider any political, partisan, or electoral data while drawing his remedial proposals, including Map 3B. ADD-41; PL-ADD 46, 408 (107:11-19). Nonetheless, his subsequent analysis contradicts Intervenors' claim[23] of partisan bias: Map 3B confers no gain or loss for *either party* in any district beyond LD14, and according to accepted measures of partisan bias, the overall partisan tilt of the

[23] Intervenors provide no citation for their inaccurate assertion that Map 3B "changes the partisan composition of ten districts … in Democrats' favor." App. at 26.

legislative map remains slightly Republican, like the enacted plan. ADD-42; PL-ADD 95-100, 119-20, 408-11 (107:20-112:23).

Fifth, Intervenors wrongly contend that two of Plaintiffs' proposals, Map 4/4A and Map 5/5A, indicate that a "more modest" remedy could be ordered. App. at 26. Although those proposals change fewer districts, the district court concluded that Map 3B better satisfied all redistricting criteria it was required to consider. ADD-36-41. For example, Map 5/5A moved the fewest people, but it did not as thoroughly unify the Yakama Nation Reservation with its off-reservation trust lands and fishing villages, a traditional districting principle that the district court—and the *Intervenors themselves*—deemed important. ADD-37, 141.

Similarly, while Map 4/4A offers an identical remedial district by altering three fewer districts and moving slightly fewer people, its configuration resulted in a third "trans-Cascades" district (LD13), which the Commission had sought to avoid in the map-drawing process. PL-ADD 110. In any event, both plans have nearly identical core population retention rates (94.5% and 95.2%), meaning the difference in impact between Map 4/4A and Map 3B is exceedingly small—less than *one percent* of the state population. PL-ADD 121. Intervenors' maps, *see* App. at 28, that display "large, red splotches" representing geographic areas (much uninhabited) moved from one district to another in each proposed map are, as the district court found, "misleading" and should not be taken as any indication of difference in population movement between Maps 4/4A and Map 3B. ADD-38-39. The district court did not clearly err in

selecting Map 3B over Map 4/4A to avoid adding another district crossing the mountains.

Lastly, Intervenors claim that Dr. Trende's illustrative map—which was submitted to the district court three months after the parties' deadline to submit remedial proposals—likewise shows that a remedy could be ordered that entails fewer changes. But on cross examination, Dr. Trende testified that the purpose of his map was not to be a potential *remedy* for the Section 2 violation. PL-ADD 396 (95:18-25). Moreover, his map split the Yakama Reservation between LD14 and LD15, segregating residents of the Reservation from one another and failing to satisfy even the Nation's minimum request to maintain its Reservation's territorial integrity. PL-ADD 128-29, 340-41 (39:16-40:4). This problem is avoided in Map 3B. PL-ADD 129, 341. The district court did not err in failing to adopt a late-produced map that fails to satisfy traditional districting principles and that was not even offered as a potential remedial map.

Intervenors fail to show any error in the district court's selection of Map 3B as a remedy.

3. Intervenors' racial gerrymandering claim is waived and unsupported in law or fact.

Intervenors' contention that the remedial map is an unconstitutional racial gerrymander does not entitle them to a stay because that claim was waived in the district court and is foreclosed by the record evidence.

i. Intervenors waived their racial gerrymandering claim.

Intervenors have waived their claim that the remedial map is an unconstitutional racial gerrymander. "[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*)) (second bracket in original). This is an axiomatic appellate rule: "[i]f a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited." *Pucket v. United States*, 556 U.S. 129, 134 (2009). This Court's authority to entertain a forfeited issue is "strictly circumscribed" because the district court "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Id.* This rule also prevents litigants from "'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Id.* (quoting *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977)).

At no point during the district court's lengthy remedial proceedings did Intervenors contend that any of Plaintiffs' proposed remedial maps were an unconstitutional racial gerrymander. Intervenors have had Plaintiffs' proposed remedial maps, and accompanying expert reports, since December 1, 2023. PL-ADD 42-68, 77-121.[24] Intervenors submitted a brief, accompanied by their own expert

[24] Minor changes were made after December 1, as Intervenors acknowledge, to minimize incumbent pairings. App. at 9.

report, raising legal arguments why the district court should not adopt Plaintiffs' proposals. PL-ADD 207-221. The district court held oral argument on February 9, 2024, during which Intervenors presented their objections to Plaintiffs' proposals. PL-ADD 368-301. In neither their brief nor at oral argument did Intervenors once contend that the district court would be imposing an unconstitutional racial gerrymander were it to adopt any of Plaintiffs' proposed maps. Only on appeal—in their stay motion in the Ninth Circuit and now in this Court—have Intervenors ever argued that any of the remedial proposals considered by the district court were unconstitutional racial gerrymanders.

Intervenors' failure to raise their racial gerrymandering claim in the district court is especially fatal because the claim involves a fact-intensive assessment of a mapdrawer's intent. "[O]urs is a court of final review and not first view." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017) (quoting *Dep't of Transportation v. Assoc. of Am. R.Rs.*, 575 U.S. 43, 56 (2015)) (bracket in original). In *Bethune-Hill*, this Court declined an invitation to conclude, after correcting the district court's legal errors in adjudicating racial gerrymandering claims, that various Virginia legislative districts were unconstitutional racial gerrymanders. *Id.* at 192-93. "The District Court is best positioned to determine in the first instance the extent to which, under the proper standard, race directed the shape of these 11 districts. And if race did predominate, it is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied." *Id.* at 193. Here, unlike in *Bethune-Hill*, Intervenors never even claimed that any remedial proposal before the district

court was a racial gerrymander. Intervenors cannot ask this Court—particularly in this emergency stay posture—to make factual findings regarding the mapdrawer's motivations in order to advance a legal claim that was never raised in the district court.[25] Indeed, Intervenors contended in the district court that *partisanship* (not race) was the predominant motivation in the configuration of Plaintiffs' proposed remedial maps. *See, e.g.*, PL-ADD 207, 214-11 (contending that Plaintiffs proposed "an overtly partisan legislative map"); PL-ADD 276-77. Intervenors repeat that argument in their application, boldly contending that the *district court* was seeking partisan advantage in selecting a remedial map. App. at 26. But a party alleging a racial gerrymander must show "that race (not politics)" was the predominant consideration. *Cooper v. Harris*, 581 U.S. 285, 318 (2017). Intervenors cannot raise for the first time on appeal a racial gerrymandering contention that was "not raised before the district court [and is] inconsistent with positions employed there." *Momox-Caselis v. Donohue*, 987 F.3d 835, 841 (9th Cir. 2021).

In their Ninth Circuit reply brief, Intervenors contended that they had sufficiently raised a racial gerrymandering claim in the district court by asking Plaintiffs' expert witness a question about his awareness of racial demographics while drawing the map. But parties cannot raise legal claims by merely asking witnesses related questions in the absence of any argument. *See, e.g.*, *Ledford v. Peeples*, 657 F.3d 1222, 1258 (11th Cir. 2011) ("A mere recitation of the underlying

[25] In *Bethune-Hill*, this Court remanded to the district court to make racial gerrymandering factual findings after it corrected the district court's legal errors in adjudicating plaintiffs' claims. Intervenors would not be entitled a remand in this case, having waived the claim below.

facts . . . is insufficient to preserve an argument; the argument itself must have been made below."); *City of Nephi v. Fed'l Energy Regulatory Comm'n*, 147 F.3d 929, 933 n.9 (D.C. Cir. 1998) (holding that an argument is not preserved by "merely informing the [district] court in the statement of facts in its opening brief [of the factual predicate for a claim]"). And the answer to the question was that he had not considered race at all in the map drawing. PL-ADD 348. This does not alert the district court to an argument that the map might be an unconstitutional racial gerrymander.

ii. Intervenors' racial gerrymandering claim is unsupported by the record evidence.

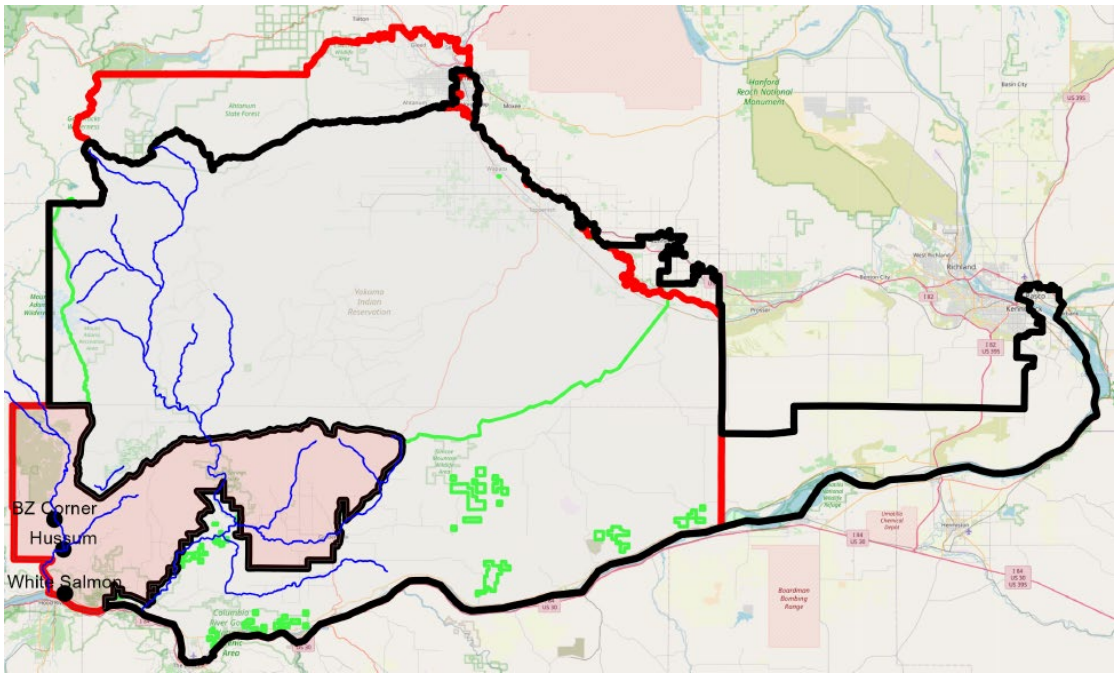
Intervenors' racial gerrymandering claim is unsupported by the record evidence. To show that a map is an unconstitutional racial gerrymander, a party must "prove that 'race was the predominant factor motivating the [mapdrawer's] decision to place a significant number of voters within or without a particular district.'" *Cooper*, 581 U.S. at 291 (quoting *Miller v. Johnson*, 515 U.S. 900, 919 (1995)). This showing "entails demonstrating that the [mapdrawer] "subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id.* (internal quotation marks omitted). The burden on the party claiming racial gerrymandering is "demanding." *Easley v. Cromartie*, 532 U.S. 234, 257 (2001). If the party succeeds in showing race was the predominant factor, "the design of the district must withstand strict scrutiny," with a compelling interest that is narrowly tailored. *Cooper*, 581 U.S. at 292. The Supreme Court "has long assumed that one compelling interest is complying with operative provisions of the

Voting Rights Act of 1965." *Id.* Intervenors' 2.5-page argument falls woefully short of their burden—particularly for an emergency stay application.

First, Intervenors cite no record evidence to support their contention that race predominated in the drawing of the remedial map—nor could they. The remedial map was drawn by Plaintiffs' expert Dr. Oskooii, who testified as follows about his mapmaking process: "I did not consider race or racial demographics in drawing the remedial plans. I did not make visible, view, or otherwise consult any racial demographic data while drawing districts." PL-ADD 46, 90. He reiterated that testimony at the evidentiary hearing, testifying that he removed the racial data from the mapdrawing program and was otherwise unaware of the racial demographics of the various communities. PL-ADD 329-30, 333, 348. By contrast, Intervenor's own expert testified to using race as a consideration in drawing Intervenor's illustrative map: "I think its admirable how [Plaintiffs' expert] Dr. Oskooii testified he went about doing it, but my understanding is it's not how it's required to do. You don't have to be completely race blind, especially once a VRA violation is found." PL-ADD 389. Intervenors' contention that the remedial map—which was drawn without consideration of any race data—somehow had race as its predominant motivation is belied by the record.

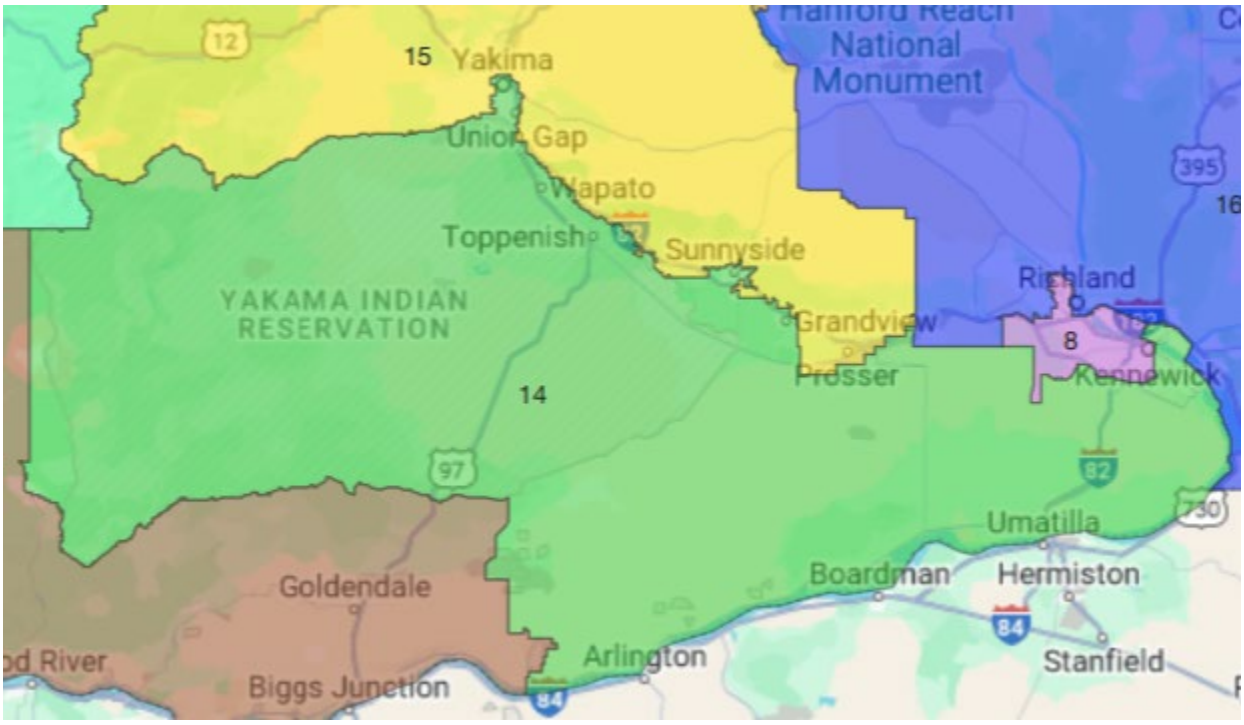
Second, Intervenors contend that the remedial district has a "bizarre shape" and resembles an "octopus slithering along the ocean floor," and on that basis flunks an "aesthetic test" and is "unexplainable except by race-based criteria." App. at 30 (internal quotation marks omitted). But the record reveals precisely why the district

is shaped as it is, and it has nothing to do with including or excluding voters on account of their race. As Dr. Oskooii explained, the district's southwestern hook was added to include the Yakama Nation's off-reservation trust lands and fishing villages in the same district as its reservation—a traditional districting principle and something *Intervenors requested*. PL-ADD 294-95, 222-27. Those areas of land are shown in green below:



ADD-144. Indeed, the remedial map selected by the district court was a variation of another of Plaintiffs' proposed remedial maps, shown below in green:

Plaintiffs' Map 1



PL-ADD 45.

This looks nothing like an octopus, or any other "bizarre shape." App. at 30 (internal quotation marks omitted).[26] As Dr. Oskooii explained, Map 3 (which with minor changes became the remedial map) modified Map 1 by including almost all, rather than just some, of the off-reservation trust lands and fishing villages. PL-ADD 46, 48; *see also* ADD-144 (map of trust lands). Intervenors now object to features of the remedial map that the record reflects were configured to address a concern *they raised* about including the maximum amount of tribal lands. *See also* ADD-37-38 (district court explaining map's purpose in maximizing inclusion of off-reservation

[26] This shows how Intervenors' contention that uniting Latino communities of interest in the region "wrought the octopus" is contrary to the record. App. at 31. At Intervenors' behest, Plaintiffs extended the district to include additional Yakama Nation tribal lands. Intervenors' contention that this was actually a method of adding Latino voters based upon race is misleading at best.

trust lands). Intervenors' misleading representation about the factual record does not establish a racial gerrymandering violation.

Third, unable to dispute that Dr. Oskooii—the mapdrawer—did not consider race in drawing the remedial district, Intervenors contend that race unconstitutionally predominated in the *district court's* selection among the proffered maps—all of which the record reflects were drawn without consideration of race data. App. at 30-31. This is so, Intervenors contend, because the district court observed that a "fundamental goal of the remedial process" was to "unite the Latino communities of interest in the region." App. at 30-31 (quoting ADD-38 n.7). But the Section 2 violation was a result of the enjoined map *cracking* these Latino populations into two legislative districts. ADD-1-2. It is hardly surprising—and certainly not unconstitutional—that the district court would select as a remedy a map that resolved that cracking. Intervenors do not explain how this retroactively converts the *mapdrawer's* process into one in which race predominated, nor how that factor alone could make race the predominant consideration.

Fourth, because strict scrutiny is not even triggered, Intervenors' contention that the remedial map is not narrowly tailored is irrelevant. App. at 31. But their argument is also wrong. They contend that the map is not narrowly tailored because of their belief that it alters more districts than necessary, App. at 31, which they accuse the district court of doing because it "had an unstated—but unmistakable—appetite for partisan changes," App. at 26. These arguments are at loggerheads: the

district court cannot flunk strict scrutiny for narrowly tailoring its use of *race* when Intervenors contend the district court was actually motivated by *partisanship*.[27]

Finally, Intervenors' contradictory and shifting positions in this litigation underscore the emptiness of their arguments. They ask this Court to stay the district court's liability and remedial orders and to thereby resurrect the enacted version of LD15. But in the district court Intervenors (belatedly) sought to plead a crossclaim alleging that the *enacted district* was itself an unconstitutional racial gerrymander. ECF No. 136. Now, Intervenors want that district to take effect—the same district that Intervenors' counsels' other client, Mr. Garcia, still contends is an unconstitutional racial gerrymander. *Garcia v. Hobbs*. *See Garcia v. Hobbs*, No. 23-467, 2024 WL 674643, at *1 (U.S. Feb. 20, 2024) (Mem.) (vacating for entry of fresh judgment from which an appeal may be taken to the Ninth Circuit).[28]

This Court is not likely to reverse the district court's order imposing a remedial map on a constitutional claim Intervenors failed to raise in the district court and that is flatly contradicted by the record evidence.

IV. There is no reasonable probability that four Justices will vote to grant certiorari in this case.

There is no reasonable probability that "four Justices will consider the issue[s]

[27] The district court was actually motivated by neither race nor partisanship, as the court well explains in its remedial decision.

[28] This maze of conflicting arguments resulted in an ethical inquiry in the district court followed by Intervenors and Mr. Garcia filing declarations waiving any conflicts between their contradictory legal arguments. ECF No. 165. Then, counsel sought to file a deposition errata affidavit on Mr. Garcia's behalf recanting all his sworn testimony about his counsels' (1) conflicts, (2) unauthorized intent to dismiss his lawsuit, and (3) failure to communicate with him. ECF No. 173. The district court then granted the State's motion to strike the deposition errata as a sham affidavit. ECF No. 173.

[presented by Intervenors] sufficiently meritorious to grant certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

First, Intervenors have already filed a petition for certiorari in this case, which this Court denied with no noted dissents. *See Trevino v. Palmer* No. 23-484, 2024 WL 675259, at *1 (U.S. Feb. 20, 2024) (Mem.). This Court's denial of Intervenors' petition for a writ of certiorari before judgment makes the likelihood of the Court granting a subsequent petition for a writ of certiorari low.

Second, Intervenors have no standing to appeal. Indeed, they do not even make any argument in support of their standing to appeal the district court's liability order and injunction against the enacted map. There is no reasonable probability that four Justices will vote to grant certiorari on an appeal for which Intervenors do not even assert any Article III injuries. Moreover, the only injuries they do claim—alleged racial sorting—they failed to raise in the district court and are foreclosed by the record evidence.

Third, the only circuit split Intervenors identify is related to whether the cause of racially polarized voting should be considered at the *Gingles* precondition stage or as part of the totality of circumstances. App. at 36-37. But, as discussed above, Intervenors offer no explanation for how they have standing to appeal the district court's liability order and injunction. And this case would be a poor vehicle to resolve that circuit split because this case does not turn on its resolution; the record evidence established that race was the cause of the polarization, regardless of which step of the analysis it is considered. Intervenors raise no other circuit splits warranting this

Court's review, and this Court cannot resolve a circuit split in a case it lacks subject matter jurisdiction to decide.

Fourth, as explained *supra*, Intervenors' substantive arguments misstate the law and facts and are meritless. None rises to the level of warranting this Court's review.

There is no reasonable probability that four Justices will vote to grant certiorari to hear an appeal the Court lacks jurisdiction to decide.

V. The balance of equities and public interest disfavor a stay.

The balance of the equities among the parties and the public interest disfavors entry of a stay. Intervenors face no harm whatsoever, while Plaintiffs', the Secretary, the State, and the public would be harmed by the issuance of a stay.

A. Intervenors face no harm, irreparable or otherwise.

Intervenors face no irreparable harm absent a stay. Mr. Trevino's claim of irreparable harm on account of purported "race-based sorting," App. at 37, is belied by his failure to make that claim in the district court. Indeed, the only legislative district that Mr. Trevino actually raised racial gerrymandering claims about in the district court is the *enacted LD15*—the one he now asks this Court to resurrect. Moreover, Representative Ybarra—who to date lacks an opponent in his next election and whose district's partisan makeup imperceptibly changed—suffers no harm to his campaign, irreparable or otherwise, as explained above. *See Nken*, 556 U.S. at 434-35 (holding that "simply showing some possibility of irreparable injury fails" the irreparable harm stay factor and would be "too lenient" a standard (internal quotation marks and citations omitted)).

B. A stay would irreparably harm Plaintiffs.

A stay would irreparably harm Plaintiffs. "Courts routinely deem restrictions on fundamental voting rights irreparable injury" including "violations of . . . the Voting Rights Act." *Singleton v. Allen*, No. 2:21-cv-1291-AMM, 2023 WL 5920139, at *8 (N.D. Ala. Sept. 11, 2013) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). Here, the district court has found a Section 2 violation—one that the State, after obtaining the opinion of its well-known defense side VRA expert—concedes. Intervenors advance no argument to support their standing to appeal that liability order and injunction. A stay in that circumstance would plainly irreparably harm Plaintiffs.

C. A stay would irreparably harm the Secretary and the State.

A stay would irreparably harm the Secretary and the State. All parties agreed that March 25—a date that has since passed—was the "latest deadline a finalized legislative district map must be transmitted to counties without significantly disrupting the 2024 election cycle." PL-ADD 177. The remedial map was transmitted to counties in advance of that deadline, yet Intervenors now seek to upend that and thus, as they stipulated to be the case, "significantly disrupt[] the 2024 election cycle." *Id.* Doing so at this late stage would substantially harm the Secretary and the State. Moreover, given Intervenors' failure to even assert standing to challenge the district court's liability decision and injunction against the enacted map, a stay of the remedial map would leave the State with *no* map under which to implement the 2024 election. Finally, the *State* has determined that the enacted map violates Section 2

and has raised no objection to the remedial map. Intervenors have no standing or authority to assert harms they think the State suffers that the State itself rejects.

D. The public interest disfavors entry of a stay.

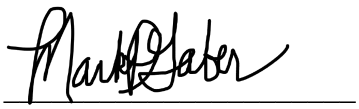
The public interest disfavors entry of a stay. The public's interest "is in the conduct of lawful [legislative] elections." *Singleton*, 2023 WL 5920139, at *10. The public already endured one election cycle conducted under a map deemed unlawful; the harm to the public interest compounds for each subsequent election conducted under that unlawful map. *See Larios v. Cox*, 305 F. Supp 2d 1335, 1344 (N.D. Ga. 2004), *aff'd* 542 U.S. 947 (2004). Washington's enacted map has been adjudicated to violate Section 2 and no entity with standing to appeal that ruling has done so. The public's interest in a lawful legislative map favors denying a stay.

CONCLUSION

The application for a stay should be denied. Moreover, given that Intervenors do not even assert standing to appeal the district court's liability order and permanent injunction against the enacted map, even if this Court were to somehow conclude that a stay is warranted with respect to the remedial district selected by the district court, a remand would be necessary for the district court to select a different remedial map lest the state be left with no map under which to conduct the 2024 election.

March 29, 2024

Respectfully submitted,



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