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FILED 8/27/25

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-35595, 24-1602

SUSAN SOTO PALMER, et al.,
Appellees,
v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Appellants.

Before: McKEOWN, GOULD, and OWENS, Circuit Judges.

OPINION

McKEOWN, Circuit Judge:

***1137** In the last four years, there have been two consecutive attempts to ensure that all voters in Washington State's Yakima Valley could cast votes of equal weight. The state's redistricting commission tried first in 2021, as part of the statewide reapportionment process that occurs every ten years. This appeal centers on the second effort: After enjoining the part of the commission's map corresponding to the Yakima Valley region, a federal district court imposed a new map in place of the original. On appeal, we address certain challenges to the district court's remedial map.

***1138** The case comes to our court in an unusual posture. Susan Soto Palmer and a group of Latino voters in the Yakima Valley sued the State of Washington and its Secretary of State, Steven Hobbs, arguing that the commission's map violated Section 2 of the Voting Rights Act. Their lawsuit was successful, such that the district court enjoined the enacted map. After the redistricting commission declined to craft a new map, the court did so itself. The State chose to accept the new map rather than appeal. Consequently, none of the original parties sought to disturb the district court's decision.

Instead, three Yakima Valley voters, after permissively intervening before the district court, now challenge both the liability determination and the new remedial map. They argue that the liability determination against the commission's enacted map, as well as the remedial map, violated the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act. They also challenge the district court's jurisdiction.

After determining that the district court had jurisdiction, we conclude that the Intervenors lack standing to challenge the district court's liability determination. They also lack standing to challenge the remedial map under Section 2. However, at least one Intervenor has standing to challenge the remedial map under the Fourteenth Amendment. Despite Intervenors' likely forfeiture of the equal protection argument, we exercise our discretion to consider the issue. In sum, the district court's remedial map did not discriminate on the basis of race in violation of the Equal Protection Clause, and we affirm the district

court.

Background

As required by the Constitution, the U.S. Census is conducted every ten years. The updated numbers of residents are used to ensure that each federal and state district within the states have approximately the same number of people, in accordance with constitutional equal-population requirements. Thus, the Census regularly catalyzes redistricting efforts, and the latest Census—conducted in 2020—was no different.

Washington State requires that its federal and state legislative districts be drawn by a five-member, bipartisan, independent redistricting commission ("Commission"). After the 2020 Census, new members were appointed to the Commission according to the procedures laid out in the state constitution: The majority and minority leaders in both legislative houses each appointed one of the four voting Commissioners, and the four voting Commissioners then voted to appoint the nonvoting chair. The Commission was tasked with agreeing by majority vote on a new legislative map for the state by November 15, 2021.

The 2020 Census data for Washington State showed significant population growth in the Yakima Valley, a region in central Washington known for its agriculture, particularly fruit production. During the Commission's map negotiations, a debate arose

among the Commissioners over whether and how the districts in the Yakima Valley needed to be altered to comply with the Voting Rights Act. At the center of this debate was the area including and to the east of the Yakama Nation Reservation, which would become Legislative District 15 ("LD 15").

On November 16, 2021, the Commission unanimously approved a new legislative district map ("the Enacted Map"). The Legislature adopted the map, with minor adjustments, in February 2022.

Susan Soto Palmer and other voters in Washington State's Yakima Valley ("collectively Soto Pamer") filed suit against Washington State and its Secretary of ***1139** State ("the State"), alleging that the Enacted Map, especially the configuration of LD 15, diluted their votes and deprived them of an equal opportunity to elect the candidates of their choice, in violation of Section 2 of the Voting Rights Act.

Jose Trevino, Alex Ybarra, and Ismael Campos ("Intervenors") were granted permissive intervention by the district court. Trevino is a Latino voter who was re-sorted from LD 15 under the Enacted Map to the new LD 14 under the district court's remedial map. Ybarra is a Washington state legislator representing LD 13 and also a voter in that district. Campos is a registered Latino voter in LD 8.

After conducting a four-day bench trial, the district court determined that Latinos in the Yakima Valley formed a geographically compact community of interest. According to the district court, the

boundaries of LD 15 illegally "cracked"[1] that community, thereby depriving them of an equal opportunity to elect candidates of their choice in violation of Section 2.

The district court then requested that the Commission draw a remedial district. When the Commission "declined," the court drew its own map, relying in part on briefs and remedial proposals from Soto Palmer. Intervenors and the State elected not to submit any proposed maps by the court's deadline. Later, Intervenors offered a map that failed to remedy the Section 2 violation. The court considered this proffered map despite its untimeliness. Intervenors offered feedback on the proposed maps, which Soto Palmer revised in response. Upon learning that Soto Palmer's Map 3A was the court's likely preferred alternative, Intervenors requested an evidentiary hearing. Following a hearing, the court imposed an adjusted version of Map 3A, known as Plaintiffs' Map 3B (the "Remedial Map"). Intervenors timely appealed, seeking to vacate the Remedial Map. That appeal was consolidated with Intervenors' earlier timely appeal on liability. We have jurisdiction under 28 U.S.C. § 1291.

Analysis

I. District Court's Jurisdiction

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[1] "Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one." *Gill v. Whitford*, 585 U.S. 48, 55, 138 S.Ct. 1916, 201 L.Ed.2d 313 (2018) (quoting allegations in the complaint).

We begin with Intervenors' challenge to the district court's jurisdiction. Although Intervenors conceded below that a single-judge court could hear Soto Palmer's statutory claims, Intervenors now argue that the single-judge district court lacked jurisdiction. They claim that 28 U.S.C. § 2284 requires a three-judge panel for statutory as well as constitutional challenges to state legislative districts. Section 2284(a) provides: "A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Intervenors read the phrase "the constitutionality of" to modify only "the apportionment of congressional districts," and not "the apportionment of any statewide legislative body." Thus, in their view, Section 2284 requires that statutory as well as constitutional challenges to the apportionment of state legislative districts be heard by three judges, not one.

We do not share Intervenors' strained interpretation of Section 2284's plain language. The most natural reading is that a three-judge district court must be convened to hear a statutory challenge when such a court is "required by Act of Congress." And, in the absence of such congressional guidance, a three-judge district ***1140** court must be convened only for a constitutional challenge to legislative apportionment, whether state or federal.

Although the text is unambiguous, the relevant interpretive canon corroborates our reading of the statute. The series-qualifier canon instructs that

"[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920). Under this principle, "the constitutionality of" should be read to apply to "the apportionment of any statewide legislative body" as well as to "the apportionment of congressional districts." *See Thomas v. Reeves*, 961 F.3d 800, 803 (5th Cir. 2020) (en banc) (Costa, J., concurring).

The statutory history further buttresses our interpretation of the text. Historically, general provisions for three-judge district courts concerned only constitutional questions. *See* Act of March 3, 1911, ch. 321, 36 Stat. 1162 (requiring that any interlocutory injunction against a state statute issued "upon the ground of the unconstitutionality of such statute" be "heard and determined by three judges"); Act of February 13, 1925, ch. 229, 43 Stat. 938 (extending the three-judge requirement to "the final hearing in such suit in the district court"); Act of August 24, 1937, ch. 754, 50 Stat. 752 (creating a three-judge procedure for "interlocutory or permanent injunction[s]" against "any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States").

In 1948, Congress consolidated general references to the three-judge procedure into a single short chapter—Chapter 155—of the U.S. Code. *See* Act of June 25, 1948, ch. 646, 62 Stat. 968. Section 2281, mirroring the Act of 1911, barred single district

court judges from issuing injunctions for constitutional reasons against state statutes. 28 U.S.C. § 2281 (injunction "upon the ground of the unconstitutionality of such statute") (repealed 1976). Section 2282, mirroring the Act of 1937, did the same for federal statutes. 28 U.S.C. § 2282 ("for repugnance to the Constitution of the United States") (repealed 1976). Sections 2281 and 2282 required that applications for such constitutional injunctions be "heard and determined by a district court of three judges under section 2284 of this title." *Id.* Section 2284 incorporated external statutory directives by noting that "any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges" would follow its procedures.[2] *Id.*

In 1976, Sections 2281 and 2282—related to constitutional injunction of federal and state statutes—were repealed. Concurrently, Section 2284 was amended to the current text now in dispute: "A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." The first clause in the statute continued ***1141** the

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[2] Such independent directives appeared, for instance, in a statute designed to expedite antitrust suits, Act of February 11, 1903, ch. 544, 32 Stat. 823; a statute providing for judicial review of orders of the Interstate Commerce Commission, Act of June 29, 1906, ch. 3591, 34 Stat. 584, 592; and (of special interest here) Sections 4, 5, and 10—but not Section 2—of the Voting Rights Act. Pub. L. 89-110, 79 Stat. 437 §§ 4(a), 5, 10(c) (directing actions pursuant to those subsections to be "heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code").

function of Section 2284 as it had been since 1948—to ensure that three-judge courts required by an act of Congress would uniformly follow the congressionally-mandated procedures. The second clause of the statute, though narrowing the general requirement for three-judge courts to only apportionment challenges, is best read to otherwise reflect the historic constitutional focus of Sections 2281 and 2282 and their predecessors.

Thus, since the inception of the three-judge court, its convocation has been generally required only for constitutional challenges, or as otherwise specifically required by explicit directive in a separate statute. More than a century of statutory evolution underscores the consistency of this approach, including in the modern Section 2284. The action in the district court was undisputedly a statutory one. The district court's decision "deal[t] only with the Section 2 claim." (Even though Intervenors now raise constitutional issues on appeal, that does not transform what was before the district court below.) Intervenors cannot, of course, point to any "Act of Congress" that requires actions under Section 2 of the Voting Rights Act to be undertaken by a three-judge court under the procedures of Section 2284. In the absence of such a congressional mandate, "a district court of three judges" under Section 2284 is not required for a statutory challenge to the apportionment of state legislative bodies.

No court has adopted Intervenors' reading. On the contrary, the Supreme Court has affirmed the judgment of a single-judge district court in a Section 2 challenge to a state legislative apportionment

scheme. *See Allen v. Milligan*, 599 U.S. 1, 16, 143 S.Ct. 1487, 216 L.Ed.2d 60 (2023) (noting that the actions involving constitutional challenges "were consolidated before [a] three-judge Court ... while [a statutory challenge] proceeded before Judge Manasco on a parallel track"). There, as here, the single-judge district court had jurisdiction over the action.

II. Standing

We now assess whether Intervenors have standing to bring this appeal. Intervenors allege racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment, as well as vote dilution under Section 2 of the Voting Rights Act, and they challenge both the liability determination and the Remedial Map. "We consider [each Intervenor's] standing on a claim-by-claim basis." *Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 952 (9th Cir. 2006).

A. Standing as to the Liability Determination

Given the absence of traceability and redressability, none of the Intervenors has standing to challenge the liability determination.

Trevino, the voter who was re-sorted from LD 15 under the Enacted Map to the new LD 14 under the Remedial Map, alleges an injury of racial classification. In the context of a racial-gerrymandering claim, "racial classification itself is the relevant harm." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 38, 144 S.Ct. 1221, 218 L.Ed.2d 512 (2024). Trevino also alleges that he is

suffering ongoing injury from "special representational harms" inflicted because of that classification. *United States v. Hays*, 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995).

To sustain standing, Trevino's alleged injuries must be "fairly traceable to the judgment below"—that is, each judgment he challenges here: the liability determination and the injunction. *West Virginia v. EPA*, 597 U.S. 697, 718, 142 S.Ct. 2587, 213 L.Ed.2d 896 (2022) (emphasis ***1142** omitted) (quoting *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 433, 139 S.Ct. 2356, 204 L.Ed.2d 742 (2019)). An injury is fairly traceable if "the links in the proffered chain of causation are not hypothetical or tenuous and remain plausible." *Idaho Conservation League v. Bonneville Power Admin.*, 83 F.4th 1182, 1188 (9th Cir. 2023) (quoting *Ass'n of Irritated Residents v. EPA*, 10 F.4th 937, 943 (9th Cir. 2021)).

Curiously, Intervenors have not provided any evidence that, in reaching its liability determination, the district court classified them based on their race. They barely argue that the determination classified anyone. After all, in racial classification cases, plaintiffs typically allege that "race predominated *in the drawing of a district*." *Alexander*, 602 U.S. at 38, 144 S.Ct. 1221 (emphasis added). Trevino did not plausibly allege that the district court, in determining that the Enacted Map violated Section 2, used race, classified Trevino by race, or treated him unequally based on his race. Nor has Trevino alleged that the liability determination "required [him] to do anything or to refrain from doing anything" because of his race or otherwise. *Food & Drug Admin. v. All. for*

Hippocratic Med., 602 U.S. 367, 385, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024).

In the absence of evidence, Intervenors resort to the rhetoric that Trevino's injury is traceable to the liability determination, because racial classification is "inherent to Section 2 remedies" and so "inexorably" results from Section 2 liability determinations. We disagree.

While in many cases redistricting implicates racial considerations, those challenges rest on "unequal treatment," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), or a constitutionally prohibited "use of race," *Miller v. Johnson*, 515 U.S. 900, 914, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *see also* Stephen Menendian, *What Constitutes A "Racial Classification"?: Equal Protection Doctrine Scrutinized*, 24 Temp. Pol. & Civ. Rts. L. Rev. 81, 85 (2014) ("[I]t is the further *use* of [racial] classification ... that generally raises constitutional concerns."). This general principle holds in the racial-gerrymandering context, where standing is accorded citizens who are "able to allege injury as a direct result of having personally been denied equal treatment." *Hays*, 515 U.S. at 746, 115 S.Ct. 2431 (cleaned up). Even if it is possible to trace a racial-classification injury to a liability determination, Trevino has not done so, because he has not plausibly alleged that the specific method or substance of that determination somehow made race-based treatment in the remedial phase more likely. Because Trevino's alleged harm arose only from the alleged use of race in crafting the Remedial Map and bears no connection to the liability

judgment, he lacks standing to challenge the latter.[3]

***1143** Ybarra, the Washington state legislator, alleges two harms: increased campaign expenditures and reduced chances of reelection. At the time of this appeal, the 2024 election for the Washington state legislature had not yet occurred.

Ybarra's past harms do not support his standing. Because the Intervenors seek only prospective relief, harms Ybarra suffered in the 2024 election are past and cannot support his standing. Ybarra is not "seek[ing] a remedy that redresses [his] injury." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282, 141 S.Ct. 792, 209 L.Ed.2d 94 (2021).

As for his alleged future harms, Ybarra has not demonstrated "a sufficient likelihood that he will

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[3] There are additional reasons to view Intervenors' traceability argument with skepticism. At the close of the liability phase, Trevino's assertions of future racial classification were purely speculative. As the State put it, "there were lots of ways the district court could have enacted a remedy that didn't affect Mr. Trevino in the slightest." Importantly, the district court's challenged resolution in the remedial process—the conduct giving rise to Intervenors' alleged harms—was not foreseeable or on the table at the time of the liability determination. Upon making its liability determination, the district court requested that the state redistricting commission take up the task of drawing a remedial map. The anticipated remedy flowing from the liability determination was a baton-pass to an independent decisionmaker. The liability finding was just that—striking down a portion of the map but with no resolution as to how the map would end up.

again" potentially suffer increased campaign expenditures. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). He has not declared any intention of running again for state legislative office, and even if we could divine such an intent, Ybarra has provided no reason to believe that increased expenditures associated with meeting new constituents on an expedited timeline will persist. Constituents who were unfamiliar to him leading up to the 2024 election have since become familiar to him, and they will remain familiar in 2026 and beyond.

An unfounded concern regarding an unspecified future election, in which Ybarra may not even participate, does not allege a "real and immediate threat of repeated injury." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

The claim that Ybarra's chances of reelection may be reduced does not support standing as to the liability determination, because it is not traceable to that judgment. Intervenors proffered hardly any chain of causation leading back to the liability order, let alone a "plausible" one. *Idaho Conservation League*, 83 F.4th at 1188. Ybarra's alleged electoral disadvantage—a 0.64% decrease in the Republican lean of his district, from 63.85% to 63.21%—flows from which constituents were subsequently sorted into and out of LD 13. The liability order had no assured impact whatsoever on LD 13. Nor did the order determine which of LD 13's constituents might be removed or which constituents from other districts might be added. Any chain of causation from the

liability determination to Ybarra's injury is too tenuous to support standing.

Intervenors declined to defend the standing of Campos, the voter in LD 8. Unlike Trevino, Campos does not allege that he was resorted into a different district under the Remedial Map. Having provided no clue as to what harm he might have suffered, Campos does not have standing.

B. Standing as to the Remedial Map

Standing as to the Remedial Map also poses a roadblock for Intervenors. No Intervenor has standing to challenge the Remedial Map under Section 2. However, at least one Intervenor, Trevino, does have standing to challenge the Remedial Map under the Fourteenth Amendment.

1. No Intervenor has standing to bring a challenge against the Remedial Map under Section 2

Intervenors seek to challenge the Remedial Map as an illegal remedy under Section 2. We note at the outset that Intervenors have not brought their own Section 2 claim. In fact, Intervenors' Section 2 arguments contradict the heart of their position. Throughout this litigation, they have strenuously denied that Section 2 applies at all to the Yakima Valley—contesting ***1144** every one of the district court's findings regarding the *Gingles* preconditions.[4]

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[4] The Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), developed a framework for evaluating claims brought under Section 2 of the Voting Rights Act.

To now seek to utilize Section 2 is strange indeed. Even if their attempt is made in good faith, it fails.

Intervenors do not have a freestanding right to attack the district court's remedial decision. *See Diamond v. Charles*, 476 U.S. 54, 68, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). Because no other party joins them in this appeal, Intervenors must demonstrate that they individually satisfy the requirements of Article III. *Id.*; *see also Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (standing on appeal "in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome" (internal marks and citations omitted)). As usual, Intervenors must make this showing claim-by-claim. *Valley Outdoor, Inc.*, 446 F.3d at 952.

Intervenors do not endeavor to justify their standing with respect to the Remedial Map. They have failed to adequately allege the only injury that supports a Section 2 claim. "Under [Section] 2, by contrast [to the equal protection context], the injury is

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Plaintiffs alleging a Section 2 violation must first satisfy three "preconditions," *id.* at 50, 106 S.Ct. 2752: first, whether the minority group is sufficiently compact and numerous to have "the potential to elect a representative of its own choice in some single-member district," *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); second, whether the minority population has "expressed clear political preferences that are distinct from those of the majority," *Old Person v. Cooney*, 230 F.3d 1113, 1121 (9th Cir. 2000) (citation omitted); and third, whether the majority votes sufficiently as a bloc "usually to defeat the minority's preferred candidate," *id.* at 1122 (quoting *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752).

vote dilution." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). At most, Intervenors merely imply an injury of vote dilution. The only evidence proffered tending to show vote dilution is that the Hispanic Citizen Voting-Age Population ("HCVAP") declined slightly, from 52.6% in the Enacted LD 15 to 50.2% in the Remedial LD 14. But a vote dilution claim in the redistricting context involves a holistic analysis of the relative opportunities for political participation of various groups, considering the specific political dynamics of a given region. Taken alone, the bare assertion of a marginally diminished group is not enough to show, let alone permit reasonable inference of any change in the effectiveness of any Intervenor's vote or other individualized disadvantage to any Intervenor's political participation. The Supreme Court has repeatedly reiterated that voters of a particular race cannot be assumed to "think alike, share the same political interests, [or] prefer the same candidates at the polls." *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). We decline to infer from Intervenors' allegations that the vote of Jose Trevino, the only Intervenor who lives in the new LD 14, has been diluted merely because he is Hispanic and will now vote alongside fewer Hispanics.

2. At least one Intervenor has standing to bring an equal protection challenge against the Remedial Map.

Trevino's asserted racial-classification injury is a cognizable harm in the context of racial gerrymandering, as is any representational harm that

may flow from such classification. *Alexander*, 602 U.S. at 38, 144 S.Ct. 1221; *Hays*, 515 U.S. at 745, 115 S.Ct. 2431. The alleged classification ***1145** occurred when Trevino was "specifically moved from Enacted LD 15 to Remedial LD 14" under the district court's Remedial Map. Contrary to Soto Palmer's arguments, the standing analysis does not require us to decide whether the Remedial Map actually classified voters by race; that is a question left to analysis on the merits.

Trevino's grievance is sufficiently individualized under *Hays*, which requires only that the party reside in an allegedly racially gerrymandered district. 515 U.S. at 744–45, 115 S.Ct. 2431. No one disputes that Trevino's change from one district to the other is traceable to the Remedial Map. And the remedy Trevino seeks—vacatur of the Remedial Map—could redress his ongoing representational harms as a registered voter in LD 14. *See Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 904, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (concluding that registered voters and residents of a district subject to a racial-gerrymandering claim had standing to seek prospective relief). Trevino therefore has standing to bring an equal protection claim against the Remedial Map. Because Trevino has standing on this claim, we need not assess standing for either Ybarra or Campos. *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

III. Forfeiture

Although Trevino has standing to bring an equal protection challenge against the Remedial Map, he may have forfeited that challenge by failing to make it in the district court. It is well established that "we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so." *In re Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000).

Intervenors argue that they preserved their equal protection challenge by asserting their Fourteenth Amendment rights in their statement of interest seeking intervention. Notably, that argument was not directed at the Remedial Map—not could it have been—because the map had not yet been drawn. Intervenors also claim that they made an equal protection argument at the evidentiary hearing on Map 3A, which the district court granted at Intervenors' request. But the hearing transcript reflects only one question about whether Soto Palmer's map-drawing expert "kn[e]w if [P]laintiffs' counsel consulted any racial or political data." Taken alone, this single inquiry is insufficient to preserve the equal protection argument.

At oral argument, Intervenors complained that they had little time to raise an equal protection argument during the remedial phase. In fact, they had plenty of opportunities. They could have raised the issue at the hearing on Map 3A, among their multiple written objections to Soto Palmer's map proposals, or as part of the presentation of their own alternative map. Even after the district court selected Map 3B as the Remedial Map, they could have moved to amend

or set aside the judgment. But they did not.

That said, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). There is "no general rule," but "a federal appellate court is justified in resolving an issue not passed on below ... where injustice might otherwise result." *Id.* (internal marks and citation omitted). Despite the deficiencies in Intervenors' equal protection challenge, we recognize that this case is suffused with ***1146** concerns about equal treatment under the law. In our view, given the nature of the challenge, an injustice might result from dismissal of this case without a substantive analysis of the equal protection claim as it pertains to the Remedial Map. We therefore turn to the merits.

IV. Remedial Map

Intervenors challenge the Remedial Map on several grounds, including their characterization that the map represents an unconstitutional racial gerrymander, an abuse of the district court's discretion, and a further dilution of Latino voting strength. These claims are ambiguously styled and could be construed as arguments under the Equal Protection Clause or Section 2. However, because Intervenors lack standing to bring a Section 2 challenge, we consider their arguments only under an equal protection framework.

To demonstrate that a map is an

unconstitutional racial gerrymander, Intervenors must prove that "race was the predominant factor motivating the [map drawer's] decision to place a significant number of voters within or without a particular district." *Cooper v. Harris*, 581 U.S. 285, 291, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475). Importantly, not all mentions of race trigger strict scrutiny, and the mere fact that the district court was "aware of racial considerations" does not indicate that the court was "motivated by them." *North Carolina v. Covington*, 585 U.S. 969, 978, 138 S.Ct. 2548, 201 L.Ed.2d 993 (2018) (quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475).

If race predominated in the redistricting process, then "the design of the district must withstand strict scrutiny." *Cooper*, 581 U.S. at 292, 137 S.Ct. 1455. Nothing in the record, however, supports a claim that race predominated in the redistricting process. To the contrary, the district court accomplished three distinct, non-racial objectives when it adopted a map that: (1) "starts with, and avoids gratuitous changes to, the enacted map while remedying the Voting Rights Act violation at issue"; (2) "keeps the vast majority of the lands that are of interest to the Yakama Nation together"; and (3) "is consistent with the other state law and traditional redistricting criteria." In particular, the map minimizes population deviations, maintains district compactness, and creates districts of contiguous, traversable territory that do not unnecessarily split counties, cities, or precincts. The Remedial Map stands.

A. LD 14's Shape

The shape of LD 14 itself does not reflect that race predominated in the district court's construction of the Remedial Map. In Intervenors' view, the shape of LD 14 is so exceptional that it is "unexplainable-except-by-racial-grounds," and therefore presumptively unconstitutional. Indeed, we recognize that when a district is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting," strict scrutiny applies. *Bush v. Vera*, 517 U.S. 952, 958, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (quoting *Shaw I*, 509 U.S. at 642, 113 S.Ct. 2816). No such irregularity triggers strict scrutiny here. Despite Intervenors' rhetoric denigrating LD 14 as an "octopus slithering along the ocean floor" akin to the "sacred Mayan bird" and "bizarrely shaped tentacles" in *Bush v. Vera*, LD 14's shape is neither unusual nor "extremely irregular on its face" as Intervenors suggest—and nowhere near as inexplicable as the districts in *Shaw* and *Bush v. Vera*. *Vera*, 517 U.S. at 958, 965, 974, 116 S.Ct. 1941.

A visual review of LD 14 (Figure 1) reveals a district that, like many of the ***1147** other districts in Washington, is essentially a large contiguous tract with only a small portion surrounding another district. In contrast, District 12 in *Shaw I* (Figure 2) was a noncompact squiggle that ran, like a river, directly through the middle of multiple other districts. Districts 18, 29 and 30 in *Bush v. Vera* (Figure 3) were similarly irregular, with complex, interlocking borders; narrow corridors; and strange protrusions. The districts' bizarre, noncompact shapes were evidence that Texas had "substantially neglected traditional districting criteria such as compactness,

that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data." *Vera*, 517 U.S. at 962, 116 S.Ct. 1941. The shapes of the three districts reflected an "utter disregard for traditional redistricting criteria" and were "ultimately unexplainable on grounds other than" race. *Id.* at 976, 116 S.Ct. 1941 (addressing Districts 18 and 29); *see also id.* at 971, 116 S.Ct. 1941 (discussing how District 30's shape similarly "reveal[s] that political considerations were subordinated to racial classification in the drawing of many of the most extreme and bizarre district lines"). The Texas districts look more like inkblots of a Rorschach test than legislative districts.

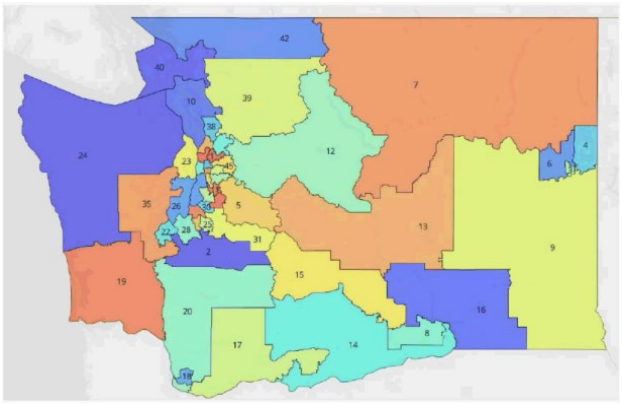
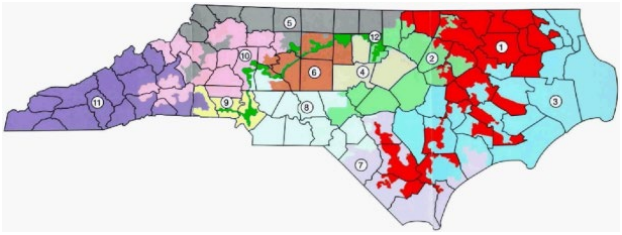


Figure 1: Remedial Map 3A.



***1148** *Figure 2*: The electoral map in *Shaw* I.

509 U.S. at 659, 113 S.Ct. 2816 (App'x) (District 12 colored in green).

Figure 3: Districts 18, 29, and 30 in *Bush v. Vera*.

517 U.S. at 986, 116 S.Ct. 1941 (App'x A-C).

Here, unlike in *Shaw I* or *Vera*, rational, non-racial explanations readily support the shape of LD 14. Soto Palmer notes that the challenged protrusions were added to "include the Yakama Nation's off-reservation trust lands and fishing villages in the same district as its reservation" to address Intervenors' objection that the proposed map did not include off-Reservation trust land. To the extent LD 14's shape is in any way unusual, it is directly attributable to Intervenors' own requests during the remedial process–not to any improper racial considerations. In short, LD 14's shape alone does not subject it to strict scrutiny.

B. Alternative Maps

In equal protection challenges to redistricting plans, alternative plans can "serve as key evidence" of racial predominance. *Cooper*, 581 U.S. at 317, 137 S.Ct. 1455. But the alternative maps here do not supply such proof.

Intervenors point to Plaintiffs' Maps 4 and 5 and their own map, offered by Dr. Trende, as evidence that the district court could have adopted a less disruptive map. Based on our review of the record, the district court carefully considered all proposed remedial maps and ultimately selected Map 3A because it was most "consistent with traditional redistricting criteria. It seems to remedy the Voting Rights Act violation, even with a relatively low LCVAP. It keeps tribal lands together ... and it avoids another cross-Cascade [mountains] district."

The district court's rejection of Maps 4 and 5 on the grounds of traditional redistricting principles does not suggest that the district court improperly considered race by adopting a variant of Map 3A. Significantly, the district court considered and rejected Intervenors' proposed map for failure to remedy the Section 2 violation.

For each of Intervenors' proffered alternatives, the district court rejected the alternative maps on race-neutral grounds. The district court's thoughtful attention to the details of the maps, population and voter numbers, and viable alternatives does not furnish evidence of racial predominance. Instead, it confirms that race was not the predominant factor in

shaping the map.

C. Intent to Remedy Section 2 Violation

Finally, the record does not otherwise support a claim that "race was the predominant factor motivating the [map drawer's] decision to place a significant number of voters within or without a particular district." *Cooper*, 581 U.S. at 291, 137 S.Ct. 1455 (quoting ***1149** *Miller*, 515 U.S. at 916, 115 S.Ct. 2475). We acknowledge that "[a]pplying traditional equal protection principles in the voting-rights context is 'a most delicate task.' " *Shaw II*, 517 U.S. 899, 905, 116 S.Ct. 1894 (1996) (quoting *Miller*, 515 U.S. at 905, 115 S.Ct. 2475). And we are especially cognizant of our obligation to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. The "[Supreme] Court has long recognized," however, "[t]he distinction between being aware of racial considerations and being motivated by them,' " *Covington*, 585 U.S. at 978, 138 S.Ct. 2548 (quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475). The mere mention of race is not enough to trigger strict scrutiny. Race must be more than "*a* motivation" to trigger strict scrutiny; it must be "the *predominant* factor," "subordinating traditional race-neutral districting principles to racial considerations." *Easley v. Cromartie*, 532 U.S. 234, 241, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (cleaned up). Although this map was configured by the district court and not the state legislature, we afford the same "presumption of good faith" to the district court. *Miller*, 515 U.S. at 916, 115 S.Ct. 2475.

Intervenors identify two points in the district court proceedings that supposedly demonstrate race's predominance in the decision-making: first, the district court's recognition that a "fundamental goal of the remedial process" is to "unite the Latino community of interest in the region," and second, the district court's rejection of Intervenors' proof-of-concept map because it failed to unite the Latino community in the Yakima Valley.

These references are far from sufficient to show that race predominated. The Supreme Court has distinguished between racial classification and the unification of "tangible communities of interest." *Miller*, 515 U.S. at 919, 115 S.Ct. 2475 (internal marks and citation omitted). As the Court counseled: "A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." *Id.* at 920, 115 S.Ct. 2475. That is precisely what the district court did here. Experts testified that communities in the larger Yakima Valley were dependent on the agriculture and dairy industries, had large Spanish-speaking and first-generation populations, shared housing access issues due to substandard and overcrowded farmworker housing, and shared common migration patterns and historical experiences of racism in the region. Unlike in *Miller*, where "[a] comprehensive report demonstrated the fractured political, social, and economic interests" of the minority population, here, the Latino community in the Yakima Valley evinces the "common thread of relevant interests" rendering it a "tangible communit[y] of interest." *Id.* at 919–20, 115 S.Ct. 2475

(internal marks and citation omitted). An intent to unify that political community is not tantamount to a predominantly racial motivation.

Even if race—as distinct from belonging in a political community—were "*a* motivation" in the district court's actions, which it was not, that motivation alone would not trigger strict scrutiny. The touchstone is whether race predominates in shaping the configuration. In *Cromartie*, the Court held that a map drawer's direct admission that a challenged redistricting plan sought "racial balance" in a congressional delegation, even if it "shows that the legislature considered race, along with other partisan and geographic considerations ... 'sa[id] little or nothing about whether race played a *predominant* role comparatively speaking.' " 532 U.S. at 253, 121 S.Ct. 1452 (emphasis in original).

To bring that point home, in *Miller*, the record supported a finding of racial predominance ***1150** where the state admitted that certain counties would not have been excluded or included "*but for* the need to include additional black population in that district," and that the need to create majority-black districts required the state to "violate all reasonable standards of compactness and contiguity." 515 U.S. at 918–19, 115 S.Ct. 2475 (emphasis added) (cleaned up). Here, in contrast, the district court considered traditional, race-neutral districting principles throughout the remedial process, including minimizing total population deviation; ensuring the reasonable shape, compactness, and contiguity of affected districts; keeping together the lands of interest to the Yakama Nation; and maintaining partisan competitiveness of

the impacted districts. The district court did not subordinate these race-neutral redistricting principles to race when it drew the Remedial Map.

D. Intervenors' Other Arguments

Intervenors' remaining objections to the Remedial Map do not support a claim that race predominated. Intervenors now contend that too many Washingtonians were moved into new districts, that the Remedial Map's partisan composition now favors Democrats, and that incumbents were harmed.

We begin by noting that the factual record furnishes only limited support for Intervenors' objections, which are, in any case, not germane to the issue of racial predominance. For instance, Intervenors claim that 500,000 of Washington's approximately 7.7 million residents were moved into new districts, whereas Plaintiffs suggest that the number is nearly 100,000 fewer. Intervenors also assert that the Remedial Map was drawn to benefit Democrats, whereas both Plaintiffs and the district court note that the Remedial Map "confer[red] no gain or loss to any party beyond LDs 14 and 15, and the overall partisan tilt of the legislative map remains slightly Republican, just as in the enacted plan."

But even accepting Intervenors' view of the facts, these arguments, which center on the political lean of the new LD 14, are not obviously relevant to Intervenors' claim that the Remedial Map was an illegal racial gerrymander. They are objections based on partisanship, not race. The equal protection challenge is grounded in race, not partisanship.

Intervenors' remaining arguments—that the Remedial Map improperly lowered the HCVAP of LD 15 from 51.1% to 50.2% (based on the 2021 census), that LD 14 is an improper coalition or crossover district, and that the Remedial Map altered too many districts to remedy the Section 2 violation—also do not bear on the question of whether race predominated in the district court's redistricting process.

Conclusion

The district court properly exercised jurisdiction over the challenge to the Remedial Map. Section 2284 does not require a three-judge court for a statutory challenge to redistricting under the Voting Rights Act. Although Intervenors lack standing to appeal the liability finding and lack standing as to the Section 2 claims under the Voting Rights Act, they have standing to challenge the Remedial Map on equal protection grounds. The appeal of the liability order is dismissed for lack of jurisdiction. The appeal of the remedial order and judgment is also dismissed for lack of jurisdiction, except for Intervenors' equal protection claims, as to which we affirm the district court. Intervenors shall bear the costs of appeal.

AFFIRMED IN PART and DISMISSED IN PART FOR LACK OF JURISDICTION.

FILED 3/15/24

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE**

CASE NO. 3:22-cv-05035-RSL

SUSAN SOTO PALMER, et al.,
Plaintiffs,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Defendants.

And

JOSE TREVINO, et al.,
Intervenor-Defendants.

ORDER REGARDING REMEDY

ROBERT S. LASNIK, United States District Judge:

Background

***1** On August 10, 2023, the Court found that the boundaries of Legislative District 15 ("LD 15"), as drawn by the Redistricting Commission and enacted in February 2022 ("the enacted map"), worked in combination with the social, economic, and historical conditions in the Yakima Valley region to impair the ability of Latino voters to elect candidates of their choice on an equal basis with other voters. Dkt. # 218.

The State of Washington was given an opportunity to revise and adopt the legislative district maps pursuant to the process set forth in the Washington State Constitution and statutes, but it declined to do so. The parties were therefore directed to meet and confer with the goal of reaching a consensus on a remedial map. When they were not able to reach an agreement, plaintiffs presented five remedial map options for consideration by the deadline established by the Court, and the parties nominated redistricting experts who could assist the Court in the assessment and modification of the proposed remedial maps. The Court selected Karin Mac Donald from the nominees.[1]

In response to criticisms levied by intervenors, plaintiffs revised their five remedial maps to avoid incumbent displacement and/or incumbent pairing where possible. Dkt. # 254. After reviewing the ten alternative maps that had been provided, the written submissions of the parties, and the competing expert reports, and after conferring with Ms. Mac Donald, the Court developed a preference for what was called Remedial Map 3A. Dkt. # 254-1 at 31-33.[2] The Court heard oral argument regarding the remedial proposals on February 9, 2023, and informed the parties that it was leaning towards adopting Remedial Map 3A. At Intervenors' request, the Court scheduled an evidentiary hearing and invited the parties to submit supplemental expert reports focusing on any problems or concerns with Remedial

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[1] The documents provided and the instructions given to Ms. Mac Donald are set forth in Dkt. # 246.

[2] The Court and Ms. Mac Donald independently gravitated towards Remedial Map 3A as the best of the ten options presented.

Map 3A. The Court also reached out to the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), soliciting their written input and participation at the March 8th evidentiary hearing. Having reviewed the submissions of the parties[3] and the Yakama Nation and having heard from the parties' experts, one of the named plaintiffs, and a representative of the Yakama Nation, the Court requested that plaintiffs and intervenors each make changes to their proposed maps to address shortcomings identified in the record.[4] This matter is again before the Court for the adoption of a redistricting plan that remedies the racially discriminatory vote dilution in the Yakima Valley region.

Choice of Remedial Map

***2** The Court hereby adopts Remedial Map 3B, described in the CSV data and map submitted by plaintiffs on March 14, 2023, as exhibits to Dkt. # 288,[5] with the following adjustments to be made by the Secretary of State in implementing the map:

(1) Reassign that portion of Census Block 530770018013012 annexed by the City of

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[3] Although untimely submitted, the intervenors' proposed remedial map, Dkt. # 273 at 8, was considered.

[4] Through this process, Remedial Map 3A was replaced with Remedial Map 3B.

[5] The CSV data in the record identifies every census block in the State and the legislative district to which it is assigned. The data was originally submitted to the Court via email on March 13, 2024. Because the CSV file could not be uploaded into our CM/ECF system, the data had to be converted into a pdf. The Secretary of State may use the CSV file when implementing the new district boundaries.

Grandview (Ordinance 2022-12, effective Aug. 29, 2022) from Legislative District ("LD") 15 to LD14;

(2) Reassign that portion of Census Block 530770018012077 annexed by the City of Grandview (Ordinance 2021-13, effective Oct. 4, 2021) from LD15 to LD14;

(3) Reassign that portion of Census Blocks 530770020042004 and 530770020042005 annexed by the City of Sunnyside (Ordinance 2020-06A, effective Aug. 10, 2020) from LD15 to LD14; and

(4) Reassign that portion of Census Block 530770018011075 annexed by the City of Sunnyside (Ordinance 2021-06, effective June 21, 2021) from LD15 to LD14.

(hereinafter "the adopted map.")

The adopted map starts with, and avoids gratuitous changes to, the enacted map while remedying the Voting Rights Act violation at issue. The Latino community of interest that stretches from East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco is unified in a single legislative district. Although the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district, the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature, especially with the shift into an even-numbered district, which ensures that state Senate elections will fall on a presidential year when Latino voter turnout is generally higher.

The adopted map also keeps the vast majority of the

lands that are of interest to the Yakama Nation together and has the highest proportion of Native American citizen voting age population when compared to the enacted map or the map proposed by intervenors.

Finally, the adopted map is consistent with the other state law and traditional redistricting criteria. It has a negligible total population deviation from the target population of 157,251. LD 14 and the surrounding districts of the adopted map are reasonably shaped and compact, and the districts consist of contiguous territory that is traversable and minimizes county, city, and precinct splits.[6] Plaintiffs' expert, Dr. Kassra Oskooii, drew the adopted map without reference to political or partisan criteria, seeking only to rectify the dilution of Latino voters that is at the center of this case.

Intervenors' Objections

***3** Intervenors object to the adopted map on a number of grounds, primarily (1) that LD 14 does not include all off-Reservation trust land, associated Yakama communities of interest, and traditional hunting and fishing lands of the Yakama Nation, (2) that the adopted map requires boundary adjustments for too many districts, and (3) that it disrupts the political

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[6] With the able (and much appreciated) assistance of the Secretary of State's staff and the Yakama Nation, plaintiffs have made a number of small boundary adjustments to ensure that areas of land are not "trapped" between county boundaries, congressional districts, legislative districts, county council or commissioner districts, and city or town limits and that three parcels identified as MV-72, 1026, and 1025 are included in LD 14.

lean of Washington's legislative districts outside of LD 14.

1. Yakama Nation

The first issue appears to be a non-starter. As described at the evidentiary hearing, the lands in which the Yakama Nation has an interest expand across much of the central part of the State: all of those lands cannot possibly be included in a single legislative district. The adopted map does, however, preserve the integrity of the Reservation and all off-Reservation trust lands designated by the U.S. Census. It also increases the Native American citizen voting age population of LD 14, thereby increasing the communities' electoral opportunities. While the White Salmon River basin and a portion of Klickitat County south of the Reservation are excluded, significant portions of the Yakima, Klickitat, and Columbia watersheds are included in LD 14. The area that was shifted to LD 17 has a significant population (approximately 15,750) and its exclusion from LD 14 was essential to satisfying the statutory requirement of population parity. Importantly, the Native American population in that area is only 662, with a white population of over 12,200. To retain this area in LD 14 of the adopted map would not only overpopulate the district in violation of the equal population criterion, but would also skew the demographics and perpetuate the vote dilution at issue in this lawsuit.

2. Scope of Boundary Adjustments

Intervenors argue that the adopted map disrupts too many districts and that population shifts in thirteen

legislative districts are not needed to remedy the Voting Rights Act violation at issue. In doing so, they overstate the magnitude of the shifts, they fail to explain why the changes are of any real import, and they offer no viable alternative that would both remedy the Voting Rights Act violation found by the Court and comport with traditional redistricting criteria.

a. Magnitude of Population Shifts

Intervenors' expert, Dr. Sean Trende, presents figures and maps showing the number of individuals and the size of the geographic areas moving from one district to another under the adopted map. Dkt. # 273 at 12-13. The percentage of individuals shifted out of and into LD 8, LD 13, LD 14, LD 15, and LD 16 are significant, with core population retention percentages ranging from 47.8% to 80.4%. Dkt. # 254-1 at 45; Dkt. # 273 at 13. But shifts of that magnitude are necessary to unite the Latino community of interest in the region.[7] Despite these significant movements and the ripple effect they cause, the adopted plan impacts only 5.5% of the State's population overall.

With regards to Dr. Trende's map, Dkt. # 273 at 12, its large, red splotches, while striking, are misleading as a representation of population movement. The red

[7] As discussed below, intervenors' proposed map (Dkt. # 289) does not accomplish this fundamental goal of the remedial process. The only other map Dr. Trende regards as suitably limited in its geographic scope, Remedial Map 5A, fails to respect the Yakama Nation community of interest and involves shifts in LD 13, LD 14, LD 15, and LD 16 that have core population retention percentages ranging from 51.3% to 90%.

portions represent acreage which, as anyone familiar with central Washington knows, is often a poor substitute for population. Depending on the population density, an area representing the same number of people (approximately 15,600) could be represented by a small red dot or a large red block. A more apt representation of the magnitude of the population shift would compare apples to apples (total population of the district compared to the population shifted), as reflected in Dr. Oskooii's core retention figures.

b. Importance of Population Shifts

***4** Intervenors presume that the consistency of legislative boundaries over time is a goal of redistricting and/or this remedial process. Dkt. # 273 at 9 n.3 and 14 n.4. It is not. The constitutional and statutory requirements for legislative districts do not compel the Redistricting Commission to consider, much less safeguard, existing boundaries. Moreover, the boundaries at issue were put in place for the 2022 election cycle: there is no evidence or reason to presume that the population within any particular legislative district has developed a familiarity with or an affinity for the recently-enacted borders.

Under Washington law, population parity is a primary consideration in the redistricting process, with other traditional redistricting criteria (such as keeping precincts and communities of interest together) accomplished only "[t]o the extent consistent with" population parity. RCW 44.05.090(1) and (2). Thus, when making a change in the center of the state to unify a particular community of interest – in this

case, by moving over 100,000 individuals into LD 14 – a nearly identical number of individuals must move out of LD 14 and into neighboring districts which must, in turn, lose some portion of their population to their neighbors. Where population parity is paramount, making a substantial change in the population of one legislative district is like dropping a stone into the middle of a lake: the ripple effect reaches beyond the immediate area in a way that is neither unexpected nor necessarily problematic.

The ripple in the adopted map appears to be a normal redistricting occurrence, especially common when one centrally-located district must be redrawn. The majority of the 100,000+ individuals moved into LD 14 are offset by a swap with LD 15, but Dr. Oskooii still had to lower LD 14's population by approximately 15,600 individuals to meet the population parity requirement. These 15,600 persons are what caused the ripple effect, and Dr. Oskooii was diligent in moving this population through the neighboring districts while adhering to state law, traditional redistricting criteria, and public input. As has been made abundantly clear throughout the trial and the remedial process, there is no perfect map. Redistricting is a system of constraints where the various criteria often pull the map maker in different directions. His or her choices are further restricted by the requirements of the Voting Rights Act. The question for the Court is, as between the maps generated by the Commission, plaintiffs, and intervenors, which is most consistent with the applicable, and sometimes competing, legal demands.

c. Viable Alternatives

For the reasons discussed above, the Court approves of the choices Dr. Oskooii made when generating the adopted map. The downside to this particular map is that it affects thirteen legislative districts to some extent. Dr. Trende, in contrast, focuses his map-making efforts on creating smaller shifts in population that emulate the boundaries of the enacted map to the greatest extent possible. This focus is not compelled by governing law. And, more importantly, achieving static boundaries comes at a cost: intervenors' final map (Dkt. # 289), fails to unify the Latino community of interest that was identified at trial (see Dkt. # 218 at 10-11) and described by Caty Padilla during the evidentiary hearing. It also retains an artifact of the enacted map that cuts off a bit of the Yakama Reservation in Union Gap from the remainder. Both of these problems are resolved in the adopted map. Intervenors' map cannot be considered proof that limited disruption is achievable where it fails to satisfy mandatory state and federal requirements.

3. Political Lean

***5** Intervenors argue that the adopted map is somehow faulty because it impacts "the political lean of Washington's legislative districts beyond those found in the Yakima River valley." Dkt. # 273 at 17. State law required the Redistricting Commission to "exercise its powers to provide fair and effective representation and to encourage electoral competition. The [C]ommission's plan shall not be drawn purposely to favor or discriminate against any political party or group." RCW 44.05.090(5). Neither Dr. Oskooii nor the undersigned has any interest in

the partisan performance of the adopted map: the map was not drawn or adopted to favor or discriminate against either political party, but rather to unite the Latino community of interest in the Yakima Valley region. Dr. Trende does not explain what aspect of state or federal law is at stake here, but his data suggests that the adopted map generally increases the competitiveness of the impacted districts, in keeping with the dictates of RCW 44.05.090(5). *See* Dkt. # 273 at 18. The one glaring exception is LD 14, which is made substantially more Democratic than its LD 15 predecessor given the requirement of creating a Latino opportunity district. Dr. Trende acknowledges that this shift cannot be avoided. Overall, the adopted map retains the slight Republican bias of the enacted map. The Court finds that the adopted map does not meaningfully shift the partisan balance of the State and that it was not drawn (or adopted) purposely to favor one political party over the other.

Conclusion

The task of fashioning a remedy for a Voting Rights Act violation is not one that falls within the Court's normal duties. It is only because the State declined to reconvene the Redistricting Commission – with its expertise, staff, and ability to solicit public comments – that the Court was compelled to step in. Nevertheless, with the comprehensive and extensive presentations from the parties, the participation of the Yakama Nation, and the able assistance of Ms. Mac Donald, the Court is confident that the adopted map best achieves the many goals of the remedial process.

The Secretary of State is hereby ORDERED to conduct future elections according to Remedial Map 3B (Dkt. # 288), with the following adjustments:

(1) Reassign that portion of Census Block 530770018013012 annexed by the City of Grandview (Ordinance 2022-12, effective Aug. 29, 2022) from Legislative District ("LD") 15 to LD14;

(2) Reassign that portion of Census Block 530770018012077 annexed by the City of Grandview (Ordinance 2021-13, effective Oct. 4, 2021) from LD15 to LD14;

(3) Reassign that portion of Census Blocks 530770020042004 and 530770020042005 annexed by the City of Sunnyside (Ordinance 2020-06A, effective Aug. 10, 2020) from LD15 to LD14; and

(4) Reassign that portion of Census Block 530770018011075 annexed by the City of Sunnyside (Ordinance 2021-06, effective June 21, 2021) from LD15 to LD14.

FILED 8/10/23

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE**

CASE NO. 3:22-cv-05035-RSL

SUSAN SOTO PALMER, et al.,
Plaintiffs,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Defendants.

And

JOSE TREVINO, et al.,
Intervenor-Defendants.

MEMORANDUM OF DECISION

ROBERT S. LASNIK, United States District Judge:

***1220** Plaintiffs, five registered Latino[1] voters in Legislative Districts 14 and 15 in the Yakima Valley region of Washington State,[2]brought suit seeking to

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[1]1 Latino refers to individuals who identify as Hispanic or Latino, as defined by the U.S. Census. References to white voters herein refer to non-Hispanic white voters.

[2] The Court uses the terms "Yakima Valley region" as a shorthand for the geographic region on and around the Yakima and Columbia Rivers, including parts of Adams, Benton,

stop the Secretary of State from conducting elections under a redistricting plan adopted by the Washington State Legislature on February 8, 2022. Plaintiffs argue that the redistricting plan cracks the Latino vote and is therefore invalid under Section 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301. "Cracking" is a type of vote dilution that involves splitting up a group of voters "among multiple districts so that they fall short of a majority in each one." *Portugal v. Franklin Cnty.*, —— Wn.3d ——, 530 P.3d 994, 1001 (2023) (quoting *Gill v. Whitford*, 585 U.S. 48, 55, 138 S.Ct. 1916, 1924, 201 L.Ed.2d 313 (2018)). Intervenors, three registered Latino voters from legislative districts whose boundaries may be impacted if plaintiffs prevail in this litigation, were permitted to intervene to oppose plaintiffs' Section 2 claim because, at the time, there were no other truly adverse parties.[3]

In a parallel litigation, Benancio Garcia III challenged legislative district ("LD") 15 as an illegal racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment to the United

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Franklin, Grant, and Yakima counties. These counties feature in the versions of LD 14 and 15 considered by the bipartisan commission tasked with redistricting state legislative and congressional districts in Washington.

[3] The State of Washington was subsequently joined as a defendant to ensure that, if plaintiffs were able to prove their claims, the Court would have the power to provide all of the relief requested, particularly the development and adoption of a VRA-compliant redistricting plan. After retaining its own voting rights expert and reviewing the evidence in the case, the State concluded that the existing legislative plan dilutes the Latino vote in the Yakima Valley region in violation of Section 2, but strenuously opposed plaintiffs' claim that it intended to crack Latino voters.

***1221** States Constitution. *Garcia v. Hobbs*, C22-5152-RSL-DGE-LJCV (W.D. Wash.). Pursuant to 28 U.S.C. § 2284, a three-judge district court was empaneled to hear that claim. The trial of the Section 2 results claim asserted in *Soto Palmer* began on June 2, 2023, before the undersigned: the Court heard the testimony of Faviola Lopez, Dr. Loren Collingwood, Dr. Josue Estrada, and Senator Rebecca Saldaña on that first day. The remainder of the evidence was presented before a panel comprised of the undersigned, Chief Judge David E. Estudillo, and Circuit Judge Lawrence J.C. VanDyke between June 5th and June 7th. This Memorandum of Decision deals only with the Section 2 claim. A separate order will be issued in *Garcia* regarding the Equal Protection claim.

Over the course of the *Soto Palmer* trial, the Court heard live testimony from 15 witnesses, accepted the deposition testimony of another 18 witnesses, considered as substantive evidence the reports of the parties' experts, admitted 548 exhibits into evidence, and reviewed the parties' excellent closing statements. Having heard the testimony and considered the extensive record, the Court concludes that LD 15 violates Section 2's prohibition on discriminatory results. The redistricting plan for the Yakima Valley region is therefore invalid, and the Court need not decide plaintiffs' discriminatory intent claim.

A. Redistricting Process

Article I, § 2, of the United States Constitution requires that Members of the House of Representatives "be apportioned among the several States ... according to their respective Numbers." Each state's population is counted every ten years in a national census, and states rely on census data to apportion their congressional seats into districts. In Washington, the state constitution provides for a bipartisan commission ("the Commission") tasked with redistricting state legislative and congressional districts. Wash. Const. art. II, § 43. The Commission consists of four voting members and one non-voting member who serves as the chairperson. Wash. Const. art. II, § 43(2). The voting members are appointed by the legislative leaders of the two largest political parties in each house of the Legislature. *Id.* A state statute sets forth specific requirements for the redistricting plan:

> (1) Districts shall have a population as nearly equal as is practicable, excluding nonresident military personnel, based on the population reported in the federal decennial census as adjusted by RCW 44.05.140.
>
> (2) To the extent consistent with subsection (1) of this section the commission plan should, insofar as practical, accomplish the following:
>
> > (a) District lines should be drawn so as to coincide with the boundaries of local political subdivisions and areas recognized as communities of interest. The number of counties and municipalities divided among more than one district should be as small as possible;

> (b) Districts should be composed of convenient, contiguous, and compact territory. Land areas may be deemed contiguous if they share a common land border or are connected by a ferry, highway, bridge, or tunnel. Areas separated by geographical boundaries or artificial barriers that prevent transportation within a district should not be deemed contiguous; and
>
> (c) Whenever practicable, a precinct shall be wholly within a single legislative district.
>
> (3) The commission's plan and any plan adopted by the supreme court under RCW 44.05.100(4) shall provide for forty-nine legislative districts.
>
> (4) The house of representatives shall consist of ninety-eight members, two of ***1222** whom shall be elected from and run at large within each legislative district. The senate shall consist of forty-nine members, one of whom shall be elected from each legislative district.
>
> (5) The commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition. The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.

RCW 44.05.090.

The Commission must agree, by majority vote, to a redistricting plan by November 15 of the relevant year,[4] at which point the Commission transmits the

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[4] Though not relevant to the results analysis which ultimately resolves this case, the evidence at trial showed that the Commission faced and overcame a set of challenges unlike

plan to the Legislature. RCW 44.05.100(1); Wash. Const. art. II, § 43(2). If the Commission fails to agree upon a redistricting plan within the time allowed, the task falls to the state Supreme Court. RCW 44.05.100(4). Following submission of the plan by the Commission, the Legislature has 30 days during a regular or special session to amend the plan by an affirmative two-thirds vote, but the amendment may not include more than two percent of the population of any legislative or congressional district. RCW 44.05.100(2). The redistricting plan becomes final

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anything any prior Commission had ever faced. Not only did the COVID-19 pandemic prevent the Commissioners from meeting face-to-face, but the Commission's schedule was compressed by several months as a result of a delay in receiving the census data and a statutory change in the deadline for submission of the redistricting plan to the Legislature. In addition, the Commission was the first in Washington history to address the serious possibility that the VRA imposed redistricting requirements that had to be accommodated along with the traditional redistricting criteria laid out in Washington's constitution and statutes.

In addressing these challenges, the Commissioners pored over countless iterations of various maps and spreadsheets, held 17 public outreach meetings, consulted with Washington's 29 federally-recognized tribes, conducted 22 regular business meetings, reviewed VRA litigation from the Yakima Valley region, obtained VRA analyses, and considered thousands of public comments. Throughout the process, the Commissioners endeavored to reach a bipartisan consensus on maps which not only divided up a diverse and geographically complex state into 49 reasonably compact districts of roughly 157,000, but also promoted competitiveness in elections. The Court commends the Commissioners for their diligence, determination, and commitment to the various legal requirements that guided their deliberations, particularly the requirement that the redistricting "plan shall not be drawn purposely to favor or discriminate against any political party or group." Wash. Const. art. II, § 43(5); *see also* RCW 44.05.090(5).

upon the Legislature's approval of any amendment or after the expiration of the 30-day window for amending the plan, whichever occurs sooner. RCW 44.05.100(3).

The redistricting plan as enacted in February 2022 contains a legislative district in the Yakima Valley region, LD 15, that has a Hispanic citizen voting age population ("HCVAP") of approximately 51.5%. Plaintiffs argue that, although Latinos form a slim majority of voting-age citizens in LD 15, the district nevertheless fails to afford Latinos equal opportunity to elect candidates of their choice given the totality of the circumstances, including voter turnout, the degree of racial polarized voting in the area, a history of voter suppression and discrimination, and socio-economic disparities that chill Latino political activity. Plaintiffs request that the redistricting map of the Yakima Valley region be invalidated under Section 2 of the VRA and redrawn to include a majority-HCVAP district in which Latinos have a real opportunity to elect candidates of their choice.

***1223 B. Three-Part *Gingles* Framework**

The Supreme Court evaluates claims brought under Section 2 using the so-called *Gingles* framework developed in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).[5] To prove a violation

[5] While voting rights advocates and many legal scholars feared that the Supreme Court would alter, if not invalidate, the existing analytical framework for Section 2 cases when it decided *Allen v. Milligan* in June 2023, the majority instead "decline[d] to recast our § 2 case law" and reaffirmed the *Gingles* inquiry "that has been the baseline of our § 2 jurisprudence for nearly forty years." 599 U.S. 1, 24, 26, 143 S.Ct. 1487, 1507, 1508, 216

of Section 2, plaintiffs must satisfy three "preconditions." *Id.* at 50, 106 S.Ct. 2752. First, the "minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 402, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (per curiam) (citing *Gingles*, 478 U.S. at 46–51, 106 S.Ct. 2752). A district is reasonably configured if it comports with traditional districting criteria. *See Milligan*, 143 S.Ct. at 1503 (citing *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015)). "Second, the minority group must be able to show that it is politically cohesive," such that it could, in fact, elect a representative of its choice. *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. The first two preconditions "are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. "[T]he 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population." *Growe*, 507 U.S. at 40, 113 S.Ct. 1075.

If a plaintiff fails to establish the three preconditions

L.Ed.2d 60 (2023) (internal quotation marks and citation omitted).

"there neither has been a wrong nor can be a remedy." *Id.* at 40–41, 113 S.Ct. 1075. If, however, a plaintiff demonstrates the three preconditions, he or she must also show that under the "totality of circumstances" the political process is not "equally open" to minority voters in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. Factors to be considered when evaluating the totality of circumstances include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political ***1224** subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction[;]
>
> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and]
>
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles, 478 U.S. at 36–37, 106 S.Ct. 2752 (the "Senate Factors") (quoting S. Rep. 97-417, 28–29, 1982 U.S.C.C.A.N. 177, 206–07).

In applying Section 2, the Court must keep in mind the ill the statute is designed to redress. In 1986 and again in 2023, the Supreme Court explained that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Id.* at 47, 106 S.Ct. 2752; *see also Milligan*, 143 S.Ct. at 1503. Where an electoral structure, such as the boundary lines of a legislative district, "operates to minimize or cancel out" minority voters' "ability to elect their preferred candidates," relief under Section 2 may be available. *Gingles*, 478 U.S. at 48, 106 S.Ct. 2752; *Milligan*, 143 S.Ct. at 1503. "Such a risk is greatest 'where minority and majority voters consistently prefer different candidates' and where minority voters are submerged in a majority voting population that 'regularly defeat[s]' their choices." *Milligan*, 143 S.Ct. at 1503 (quoting *Gingles*, 478 U.S. at 48, 106 S.Ct. 2752). Before courts can find a violation of Section 2, they must conduct "an intensely local appraisal" of the electoral structure at issue, as well as a "searching practical evaluation of the 'past and present reality.' " *Milligan*, 143 S.Ct. at 1503 (quoting *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752).[6]

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[6] In writing the majority opinion in *Milligan*, Chief Justice Roberts provides the historical context out of which the Voting Rights Act arose, starting from the end of the Civil War and going through the 1982 amendments to the statute. The primer chronicles the "parchment promise" of the Fifteenth Amendment, the unchecked proliferation of literacy tests, poll taxes, and "good-morals" requirements, the statutory effort to "banish the blight of racial discrimination in voting," the

C. Numerosity and Geographic Compactness

It is undisputed that Latino voters in the Yakima Valley region are numerous enough that they could have a realistic chance of electing their preferred candidates if a legislative district were drawn with that goal in mind. Plaintiffs have shown that such a district could be reasonably configured. Dr. Loren Collingwood, ***1225** plaintiffs' expert on the statistical and demographic analysis of political data, presented three proposed maps that perform similarly or better than the enacted map when evaluated for compactness and adherence to traditional redistricting criteria. The Commissioners and Dr. Matthew Barreto, an expert on Latino voting patterns with whom some of the Commissioners consulted, also created maps that would unify Latino communities in the Yakima Valley region in a single legislative district without the kind of " 'tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find' them sufficiently compact." *Milligan*, 143 S.Ct. at 1504 (quoting *Singleton v. Merrill*, 582 F. Supp.3d 924, 1011 (N.D. Ala. 2022)). The State's redistricting and voting rights

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judiciary's narrow interpretation of the original VRA, and the corrective amendment proposed by Senator Bob Dole that reinvigorated the fight against electoral schemes that have a disparate impact on minorities even if there was no discriminatory intent. 143 S.Ct. at 1498–1501 (citation omitted). The summary is a forceful reminder that ferreting out racial discrimination in voting does not merely involve ensuring that minority voters can register to vote and go to the polls without hindrance, but also requires an evaluation of facially neutral electoral practices that have the effect of keeping minority voters from the polls and/or their preferred candidates from office.

expert, Dr. John Alford, testified that plaintiffs' examples are "among the more compact demonstration districts [he's] seen" in thirty years. Tr. 857:11-14.

Intervenors take issue with the length and breadth of the demonstrative districts, arguing that because Yakima is 80+ miles away from Pasco, the Latino populations of those cities are "farflung segments of a racial group with disparate interests." Dkt. # 215 at 16 (quoting *LULAC v. Perry*, 548 U.S. 399, 433, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006)). But the evidence in the case shows that Yakima and Pasco are geographically connected by other, smaller, Latino population centers and that the community as a whole largely shares a rural, agricultural environment, performs similar jobs in similar industries, has common concerns regarding housing and labor protections, uses the same languages, participates in the same religious and cultural practices, and has significant immigrant populations. The Court finds that Latinos in the Yakima Valley region form a community of interest based on more than just race. While the community is by no means uniform or monolithic, its members share many of the same experiences and concerns regardless of whether they live in Yakima, Pasco, or along the highways and rivers in between.[7]

Plaintiffs have the burden under the first *Gingles*

[7] Intervenors' political science expert, Dr. Mark Owens, raised the issue of disparate and therefore distinct Latino populations but 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.

precondition to "adduce[ ] at least one illustrative map" that shows a reasonably configured district in which Latino voters have an equal opportunity to elect their preferred representatives. *Milligan*, 143 S.Ct. at 1512. They have done so.

D. Political Cohesiveness

The second *Gingles* precondition focuses on whether the Latino community in the relevant area is politically cohesive, such that it would rally around a preferred candidate. *Milligan*, 143 S.Ct. at 1503. Each of the experts who addressed this issue, including Intervenors' expert, testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied. The one exception to this unanimous opinion was the 2022 State Senate race pitting a Latina Republican against a white Democrat. With regards to that election, Dr. Owens' analysis showed a 52/48 split in the Latino vote, which he interpreted as a lack of cohesion. Dr. Collingwood, on the other hand, calculated that between 60-68% of the Latino vote went to the white Democrat, a showing of moderate cohesion that was consistent with the overall pattern of racially polarized voting.[8] Despite this one ***1226** point of

[8] Dr. Owens also identified the 2020 Superintendent of Public Institutions race as something of an anomaly, noting that the Latino vote in the Yakima Valley region did not coalesce around the Democratic candidate, but rather around his Republican opponent. The question under the second Gingles precondition is whether Latino voters in the relevant area exhibit sufficient political cohesiveness to elect their preferred candidate – of any party or no party – if given the chance. As Dr. Barreto explained, a Latino preferred candidate is not necessarily the same thing as

disagreement in the expert testimony, the statistical evidence shows that Latino voter cohesion is stable in the 70% range across election types and election cycles over the last decade.

E. Impact of the Majority Vote

The third *Gingles* precondition focuses on whether the challenged district boundaries allow the non-Hispanic white majority to thwart the cohesive minority vote. *Milligan*, 143 S.Ct. at 1503. In order to have a chance at succeeding on their Section 2 claim, plaintiffs must show not only that the relevant minority and majority communities are politically cohesive, but also that they are in opposition such that the majority overwhelms the choice of the minority. Dr. Collingwood concluded, and Dr. Alford confirmed, that white voters in the Yakima Valley region vote cohesively to block the Latino-preferred candidates in the majority of elections (approximately 70%). Intervenors do not dispute the data or the opinions offered by Drs. Collingwood and Alford, but argue that because the margins by which the white-preferred candidates win are, in some instances, quite small, relief is unavailable under Section 2. Plaintiffs have shown "that the white majority votes sufficient as a bloc to enable it – in the absence of special

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a Democratic candidate. In southern Florida, for example, an opportunity district for Latinos would have to perform well for Republicans rather than for Democrats. The evidence in this case shows that Latino voters have cohesively preferred a particular candidate in almost every election in the last decade, but that their preference can vary based on the ethnicity of the candidates and/or the policies they champion.

circumstances, such as the minority candidate running unopposed ... – usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. A defeat is a defeat, regardless of the vote count. Intervenors provide no support for the assertion that losses by a small margin are somehow excluded from the tally when determining whether there is legally significant bloc voting or whether the majority "usually" votes to defeat the minority's preferred candidate. White bloc voting is "legally significant" when white voters "normally ... defeat the combined strength of minority support plus white 'crossover' votes." *Gingles*, 478 U.S. at 56, 106 S.Ct. 2752. Such is the case here.[9]

Finally Intervenors argue that because the Latino community in the Yakima Valley region generally prefers Democratic candidates, its choices are partisan and, therefore, the community's losses at the polls are not "on account of race or color" as required for a successful claim under Section 2(a). While the Court will certainly have to determine whether the totality of the circumstances in the Yakima Valley region shows that Latino voters have less opportunity than white voters to elect representatives of their choice on account of their ethnicity (as opposed to their partisan preferences), that question does not inform the political cohesiveness or bloc voting analyses. *See Milligan*, 143 S.Ct. at 1503 (describing

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[9] Although small margins of defeat do not impact the cohesiveness and/or bloc voting analyses, the closeness of the elections is not irrelevant. As Dr. Alford suggests, it goes to the extent of the map alterations that may be necessary to remedy the Section 2 violation. It does not, however, go to whether there is or is not a Section 2 violation in the first place.

the second and third *Gingles* preconditions without reference to the ***1227** cause of the bloc voting); *Gingles*, 478 U.S. at 100, 106 S.Ct. 2752 (O'Connor, J., concurring) (finding that defendants cannot rebut statistical evidence of divergent racial voting patterns by offering evidence that the patterns may be explained by causes other than race, although the evidence may be relevant to the overall voter dilution inquiry); *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000) (noting that *Gingles* establishes preconditions, but they are not necessarily dispositive if other circumstances, such as political or personal affiliations of the different racial groups with different candidates, explain the election losses); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359, 361 (7th Cir. 1992) (assuming that plaintiffs can prove the three *Gingles* preconditions before considering as part of the totality of the circumstances whether electoral losses had more to do with party than with race); *but see LULAC v. Clements*, 999 F.2d 831, 856 (5th Cir. 1993) (finding that a white majority that votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate is legally significant under the third *Gingles* precondition only if based on the race of the candidate).

F. Totality of the Circumstances

"[A] plaintiff who demonstrates the three preconditions must also show, under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters." *Milligan*, 143 S.Ct. at 1503 (quoting *Gingles*, 478 U.S. at 45–46, 106 S.Ct. 2752). Proof that the contested electoral practice – here, the drawing of the boundaries of LD 15 – was

adopted with an intent to discriminate against Latino voters is not required. Rather, the correct question "is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.' " *Gingles*, 478 U.S. at 44, 106 S.Ct. 2752 (quoting S. Rep. 97-417 at 28, 1982 U.S.C.C.A.N. at 206). In enacting Section 2, Congress recognized that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Gingles*, 478 U.S. at 44 n.9, 106 S.Ct. 2752 (quoting S. Rep. 97-417 at 40, 1982 U.S.C.C.A.N. at 218). The Court "must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors,' " i.e., the Senate Factors, *Gingles*, 478 U.S. at 44, 106 S.Ct. 2752 (quoting S. Rep. 97–417, at 27, 1982 U.S.C.C.A.N. at 205), in order to determine whether the structure or practice is causally connected to the observed statistical disparities between Latino and white voters in the Yakima Valley region, *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012). "[T]here is no requirement that any particular number of [the Senate Factors] be proved, or that a majority of them point one way or the other." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 (quoting S. Rep. No. 97–417 at 29, 1982 U.S.C.C.A.N. at 209) (internal quotation marks omitted).

1. History of Official Discrimination

The first Senate Factor requires an evaluation of the history of official discrimination in the state or political subdivision that impacted the right of Latinos to register, to vote, or otherwise to participate

in the democratic process. Plaintiffs provided ample historical evidence of discriminatory English literacy tests, English-only election materials, and at-large systems of election that prevented or suppressed Latino voting. In addition, plaintiffs identified official election practices and procedures that have prevented Latino voters in the Yakima Valley region from electing candidates of their choice as recently as the last few years. *See* ***1228** *Aguilar v. Yakima Cnty.*, No. 20-2-0018019 (Kittitas Cnty. Super. Ct.); *Glatt v. City of Pasco*, 4:16-cv-05108-LRS (E.D. Wash.); *Montes v. City of Yakima*, 40 F. Supp.3d 1377 (E.D. Wash. 2014). *See also Portugal*, 530 P.3d at 1006. While progress has been made towards making registration and voting more accessible to all Washington voters, those advances have been hard won, following decades of community organizing and multiple lawsuits designed to undo a half century of blatant anti-Latino discrimination.

Intervenors do not dispute this evidence, but argue that plaintiffs have failed to show that the "litany of past miscarriages of justice ... work to deny Hispanics equal opportunity to participate in the political process today." Dkt. # 215 at 26. The Court disagrees. State Senator Rebecca Saldaña explained that historic barriers to voting have continuing effects on the Latino population. Seemingly small, everyday municipal decisions, like which neighborhoods would get sidewalks, as well as larger decisions about who could vote, were for decades decided by people who owned property.

> And so the people that are renters, the people that are living in labor camps, would not be allowed to

> have a say in those circumstances. So there's a bias towards land ownership, historically, and how lines are drawn, who gets to vote, who gets to have a say in their democracy. If you don't feel like you can even have a say about sidewalks, it creates a barrier for you to actually believe that your vote would matter, even if you could vote.

Trial Tr. at 181. This problem is compounded by the significant percentage of the community that is ineligible to vote because of their immigration status or who face literacy and language barriers that prevent full access to the electoral process. "[A]ll of these are barriers that make it harder for Latino voters to be able to believe that their vote counts [or that they] have access to vote." Trial Tr. at 182. In addition, both Senator Saldaña and plaintiff Susan Soto Palmer testified that the historic and continuing lack of candidates and representatives who truly represent Latino voters – those who are aligned with their interests, their perspectives, and their experiences – continues to suppress the community's voter turnout. Trial Tr. at 182 and 296. There is ample evidence to support the conclusion that Latino voters in the Yakima Valley region faced official discrimination that impacted and continues to impact their rights to participate in the democratic process.

2. Extent of Racially Polarized Voting

As discussed above, voting in the Yakima Valley region is racially polarized. The Intervenors do not separately address Senate Factor 2, which the Supreme Court has indicated is one of the most important of the factors bearing on the Section 2 analysis.

3. Voting Practices That May Enhance the Opportunity for Discrimination

Three of the experts who testified at trial opined that there are voting practices, separate and apart from the drawing of LD 15's boundaries, that may hinder Latino voters' ability to fully participate in the electoral process in the Yakima Valley region. First, LD 15 holds its senate election in a non-presidential (off) election year. Drs. Collingwood, Estrada, and Barreto opined that Latino voter turnout is at its lowest in off-year elections, enlarging the turnout gap between Latino and white voters in the area. Second, Dr. Barreto indicated that Washington uses at-large, nested districts to elect state house representatives, a system that may further dilute minority voting strength. *See Gingles*, 478 U.S. at 47, 106 S.Ct. 2752. Third, Dr. Estrada testified that the ballots of Latino ***1229** voters in Yakima and Franklin Counties are rejected at a disproportionally high rate during the signature verification process, a procedure that is currently being challenged in the United States District Court for the Eastern District of Washington in *Reyes v. Chilton*, No. 4:21-cv-05075-MKD.

Intervenors generally ignore this testimony and the experts' reports, baldly asserting that there is "no evidence" of other voting practices or procedures that discriminate against Latino voters in the Yakima Valley region. Dkt. # 215 at 27. The State, for its part, challenges only the signature verification argument. It appears that Dr. Estrada's opinion that Latino voters are disproportionately impacted by the process is based entirely on an article published on Crosscut.com which summarized two other articles

from a non-profit organization called Investigate West. While it may be that experts in the fields of history and Latino voter suppression would rely on facts asserted in secondary articles when developing their opinions, the Court need not decide the admissibility of this opinion under Fed. R. Ev. 703. Even without considering the possibility that the State's signature verification process, as implemented in Yakima and Franklin Counties, suppresses the Latino vote, plaintiffs have produced unrebutted evidence of other electoral practices that may enhance the opportunity for discrimination against the minority group.

4. Access to Candidate Slating Process

There is no evidence that there is a candidate slating process or that members of the minority group have been denied access to that process.

5. Continuing Effects of Discrimination

Senate Factor 5 evaluates "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752. Intervenors do not dispute plaintiffs' evidence of significant socioeconomic disparities between Latino and white residents of the Yakima Valley region, but they assert that there is no evidence of a causal connection between these disparities and Latino political participation. The assertion is belied by the record. Dr. Estrada opined that decades of

discrimination against Latinos in the area has had lingering effects, as evidenced by present-day disparities with regard to income, unemployment, poverty, voter participation, education, housing, health, and criminal justice. He also opined that the observed disparities hinder and limit the ability of Latino voters to participate fully in the electoral process. Trial Tr. at 142 ("And all these barriers compounded, they limit, they hinder Latinos' ability to participate in the political process. If an individual is already struggling to find a job, if they don't have a bachelor's degree, can't find employment, maybe are also having to deal with finding child care, registering to vote, voting is not necessarily one of their priorities."); *see also* Trial Tr. at 182 (Senator Saldaña noting that the language and educational barriers Latino voters face makes it hard for them to access the vote); Trial Tr. at 834-86 (Mr. Portugal describing the need for decades of advocacy work to educate Latino voters about the legal and electoral processes and to help them navigate through the systems). In addition, there is evidence that the unequal power structure between white land owners and Latino agricultural workers suppresses the Latino community's participation in the electoral process out of a concern that they could jeopardize their jobs and, in some cases, their homes if they get involved in politics or vote against their employers' wishes. Senate Factor 5 weighs heavily in plaintiffs' favor.

***1230 6. Overt or Subtle Racial Appeals in Political Campaigns**

Assertions that "non-citizens" are voting in and affecting the outcome of elections, that white voters

will soon be outnumbered and disenfranchised, and that the Democratic Party is promoting immigration as a means of winning elections are all race-based appeals that have been put forward by candidates in the Yakima Valley region during the past decade. Plaintiffs have also provided evidence that a candidate campaigned against the Fourteenth Amendment's guarantee that "[a]ll persons born or naturalized in the United States ... are citizens of the United States," a part of U.S. law since 1868. Political messages such as this that avoid naming race directly but manipulate racial concepts and stereotypes to invoke negative reactions in and garner support from the audience are commonly referred to as dog-whistles. The impact of these appeals is heightened by the speakers' tendencies to equate "immigrant" or "non-citizen" with the derogatory term "illegal" and then use those terms to describe the entire Latino community without regard to actual facts regarding citizenship and/or immigration status.

Intervenors take the position that illegal immigration is a fair topic for political debate, and it is. But the Senate Factors are designed to guide the determination of whether "the political processes leading to nomination or election in the ... political subdivision are not equally open to participation by members of" the Latino community. *Gingles*, 478 U.S. at 36, 106 S.Ct. 2752 (quoting Section 2). If candidates are making race an issue on the campaign trail – especially in a way that demonizes the minority community and stokes fear and/or anger in the majority – the possibility of inequality in electoral opportunities increases. As recognized by the Senate when enacting Section 2, such appeals are clearly a

circumstance that should be considered.

7. Success of Latino Candidates

This Senate Factor evaluates the extent to which members of the minority group have been elected to public office in the jurisdiction, a calculation made more difficult in this case by the fact that the boundaries of the "jurisdiction" have moved over time. The parties agree, however, that in the history of Washington State, only three Latinos were elected to the state Legislature from legislative districts that included parts of the Yakima Valley region. That is a "very, very small number" compared to the number of representatives elected over time and considering the large Latino population in the area. Trial Tr. at 145 (Dr. Estrada testifying). Even when the boundaries of the "jurisdiction" are reduced to county lines, Latino candidates have not fared well in countywide elections: as of the time of trial, only one Latino had ever been elected to the three-member Board of Yakima County Commissioners, and no Latino had ever been elected to the Franklin County Board of Commissioners.[10]

The Court finds two other facts in the record to be relevant when evaluating the electoral success of

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[10] Intervenors criticize Dr. Estrada for disregarding municipal elections, but the 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, a practice that is virtually impossible in a single polity with defined borders and a sizeable majority. That Latino candidates are successful in municipal elections where they make up a significant majority of an electorate that cannot be cracked has little relevance to the Section 2 claim asserted here.

Latino candidates in the Yakima Valley region. First, State Senator Nikki Torres, one of the three Latino candidates elected to the state legislature, was elected from LD 15 under the ***1231** challenged map. Her election is a welcome sign that the race-based bloc voting that prevails in the Yakima Valley region is not insurmountable. The other factor is not so hopeful, however. Plaintiff Soto Palmer testified to experiencing blatant and explicit racial animosity while campaigning for a Latino candidate in LD 15. Her testimony suggests not only the existence of white voter antipathy toward Latino candidates, but also that Latino candidates may be at a disadvantage in their efforts to participate in the political process if, as Ms. Soto Palmer did, they fear to campaign in areas that are predominately white because of safety concerns.

8. Responsiveness of Elected Officials

Senate Factor 8 considers whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of Latinos in the Yakima Valley region. Members of the Latino community in the area testified that their statewide representatives have not supported their community events (such as May Day and Citizenship Day), have failed to support legislation that is important to the community (such as the Washington Voting Rights Act, healthcare funding for undocumented individuals, and the Dream Act), do not support unions and farmworker rights, and were dismissive of safety concerns that arose following the anti-Latino rhetoric of the 2016 presidential election. Ms. Lopez and Ms. Soto Palmer have concluded that their

representatives in the Legislature simply do not care about Latinos and often vote against the statutes and resources that would help them.

Senator Saldaña, who represents LD 37 on the west side of the state, considers herself a "very unique voice" in the Legislature, one that she uses to help her fellow legislators understand how their work impacts the people of Washington. Trial Tr. 173. When she first went to Olympia as a student advocating for farmworker housing, she realized that the then-senator from LD 15 was not supportive of or advocating for the issues she was hearing were important to the Yakima Valley Latino community, things like farmworker housing, education, dual-language education, access to healthcare, access to counsel, and access to state IDs. Senator Saldaña testified that Latinos from around the state, including the Yakima Valley, seek meetings with her, rather than their own representatives, to discuss issues that are important to them.

Plaintiffs also presented expert testimony on this point. Dr. Estrada compared the 2022 legislative priorities of Washington's Latino Civic Alliance ("LCA") to the voting records of the legislators from the Yakima Valley region. LCA sent the list of bills the community supported to the legislators ahead of the Legislative Day held in February 2022. The voting records of elected officials in LD 14, LD 15, and LD 16 on these bills are set forth in Trial Exhibit 4 at 75-76. Of the forty-eight votes cast, only eight of them were in favor of legislation that LCA supported.

The Intervenors point out that the Washington State

Legislature has required an investigation into racially-restrictive covenants, has funded a Spanish-language radio station in the Yakima Valley, and has enacted a law making undocumented students eligible for state college financial aid programs. Even if one assumes that the elected officials from the Yakima Valley region voted for these successful initiatives, Intervenors do not acknowledge the years of community effort it took to bring the bills to the floor or that these three initiatives reflect only a few of the bills that the Latino community supports.

9. Justification for Challenged Electoral Practice

The ninth Senate Factor asks whether the reasons given for the redrawn ***1232** boundaries of LD 15 are tenuous. They are not. The four voting members of the redistricting Commission testified at trial that they each cared deeply about doing their jobs in a fair and principled manner and tried to comply with the law as they understood it to the best of their abilities. The boundaries that were drawn by the bipartisan and independent commission reflected a difficult balance of many competing factors and could be justified in any number of rational, nondiscriminatory ways.

10. Proportionality

Section 2(b) specifies that courts can consider the extent to which members of a protected class have been elected to office in the jurisdiction (an evaluation performed under Senate Factor 7), but expressly rejects any right "to have members of a protected class elected in numbers equal to their proportion in the

population." 52 U.S.C. § 10301(b). The Supreme Court recently made clear that application of the *Gingles* preconditions, in particular the geographically compact and reasonably configured requirements of the first precondition, will guard against any sort of proportionality requirement. *Milligan*, 143 S.Ct. at 1518.

Other Supreme Court cases evaluate proportionality in a different way, however, comparing the percentage of districts in which the minority has an equal opportunity to elect candidates of its choice with the minority's share of the CVAP. It is, after all, possible that despite having shown racial bloc voting and continuing impacts of discrimination, a minority group may nevertheless hold the power to elect candidates of its choice in numbers that mirror its share of the voting population, thereby preventing a finding of voter dilution. *See Johnson v. De Grandy*, 512 U.S. 997, 1006, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). In *De Grandy*, the Supreme Court acknowledged the district court's *Gingles* analysis and conclusions in favor of the minority population, but found that the Hispanics of Dade County, Florida, nevertheless enjoyed equal political opportunity where they constituted 50% of the voting-age population and would make up supermajorities in 9 of the 18 new legislative districts in the county. In those circumstances, the Court could "not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity." *De Grandy*, 512 U.S. at 1014, 114 S.Ct. 2647. The Supreme Court subsequently held that the proportionality check should look at equality of opportunity across the

entire state as part of the analysis of whether the redistricting at issue dilutes the voting strength of minority voters in a particular legislative district. *LULAC v. Perry*, 548 U.S. 399, 437, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006).[11]

***1233** The proportionality inquiry supports plaintiffs' claim for relief under Section 2 even if evaluated on a statewide basis. Although Latino voters make up between 8 and 9% of Washington's CVAP, they hold a bare majority in only one legislative district out of 49, or 2%. Given the low voter turnout rate among Latino voters in the bare-majority district, Latinos do not have an effective majority anywhere in the State. They do not, therefore, enjoy roughly proportional opportunity in Washington.

Intervenors argue that the proportionality inquiry

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[11] The Court notes that the record in *Perry* showed "the presence of racially polarized voting – and the possible submergence of minority votes – throughout Texas," and it therefore made "sense to use the entire State in assessing proportionality." 548 U.S. at 438, 126 S.Ct. 2594. There is nothing in the record to suggest the presence of racially polarized voting throughout Washington, and almost all of the testimony and evidence at trial focused on the totality of the circumstances in the Yakima Valley region. A statewide assessment of proportionality seems particularly inappropriate here where the interests and representation of Latinos in the rural and agricultural Yakima Valley region may diverge significantly from those who live in the more urban King and Pierce Counties. Applying a statewide proportionality check in these circumstances "would ratify 'an unexplored premise of highly suspect validity: that in any given voting jurisdiction ..., the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class.' " *Perry*, 548 U.S. at 436, 126 S.Ct. 2594 (quoting *De Grandy*, 512 U.S. at 1019, 114 S.Ct. 2647).

must focus on how many legislative districts are represented by at least one Democrat, whom Latino voters are presumed to prefer. From that number, Intervenors calculate that 63% of Washington's legislative districts are Latino "opportunity districts" as defined in *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009). The cited discussion defines "majority-minority districts," "influence districts," and "crossover districts," however, and ultimately concludes that a district in which minority voters have the potential to elect representatives of their own choice – the key to the Section 2 analysis – qualifies as a majority-minority district. *Bartlett*, 556 U.S. at 15, 129 S.Ct. 1231. As discussed in *Perry*, then, the proper inquiry is "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." 548 U.S. at 426, 126 S.Ct. 2594. *See also Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000) (describing "proportionality" as "the relation of the number of majority-Indian voting districts to the American Indians' share of the relevant population). The fact that Democrats are elected to statewide offices by other voters in other parts of the state is not relevant to the proportionality evaluation.[12]

Regardless, the Court finds that, in the circumstances of this case, the proportionality check does not overcome the other evidence of Latino vote dilution in

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[12] Intervenors also suggest that a comparison of the statewide Latino CVAP with the number of Latino members of the state Legislature is the appropriate way to evaluate proportionality. No case law supports this evaluative method.

LD 15. The totality of the circumstances factors "are not to be applied woodenly," *Old Person*, 230 F.3d at 1129, and "the degree of probative value assigned to proportionality may vary with other facts," *De Grandy*, 512 U.S. at 1020, 114 S.Ct. 2647. In this case, the distinct history of and economic/social conditions facing Latino voters in the Yakima Valley region make it particularly inappropriate to trade off their rights in favor of opportunity or representation enjoyed by others across the state. The intensely local appraisal set forth in the preceding sections shows that the enactment of LD 15 has diluted the Latino vote in the Yakima Valley region in violation of plaintiffs' rights under Section 2. "[B]ecause the right to an undiluted vote does not belong to the minority as a group, but rather to its individual members," the wrong plaintiffs have suffered is remediable under Section 2. *Perry*, 548 U.S. at 437, 126 S.Ct. 2594.

* * *

The question in this case is whether the state has engaged in line-drawing which, in combination with the social and historical conditions in the Yakima Valley region, impairs the ability of Latino voters in that area to elect their candidate of choice on an equal basis with other voters. The answer is yes. The three *Gingles* preconditions are satisfied, and Senate ***1234** Factors 1, 2, 3, 5, 6, 7, and 8 all support the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates. While a detailed evaluation of the situation in the Yakima Valley region suggests that things are moving in the right direction thanks to aggressive advocacy, voter registration, and

litigation efforts that have brought at least some electoral improvements in the area,[13] it remains the case that the candidates preferred by Latino voters in LD 15 usually go down in defeat given the racially polarized voting patterns in the area.

Intervenors make two additional arguments that are not squarely addressed through application of the *Gingles* analysis. The first is that the analysis is inapplicable where the challenged district already contains a majority Latino CVAP, and the Court should "simply hold that, as a matter of sound logic, Hispanic voters have equal opportunity to participate in the democratic process and elect candidates as they choose." Dkt. # 215 at 13. The Supreme Court has recognized, however, that "it may be possible for a

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[13] As Ms. Soto Palmer eloquently put it in response to the Court's questioning:

> So I agree with you, there is progress being made. But I believe that many in my community would like to get to a day where we don't have to advocate so hard for the Latino and Hispanic communities to be able to fairly and equitably elect someone of their preference, so that we can work on other things that will benefit all of us, such as healthcare for all, and other things that are really important, like income inequality, and so forth.... So it is my hope that every little step of the way, anything I can do to help us get there, that is why I'm here.

Trial Tr. at 307-08. Mr. Portugal similarly pointed out that while incremental improvement in political representation is possible, it will not come without continued effort on the part of the community:

> I think with advocacy and being able to continue organizing, and not give up, because it's a lot of things that we still have, in a lot of areas that are affecting our community, to get to the point where we can have some great representation. So, yes, [things can slowly improve] – they will continue, but we need to – we cannot let the foot off the gas ....

Trial Tr. at 842.

citizen voting-age majority to lack real electoral opportunity," *Perry*, 548 U.S. at 428, 126 S.Ct. 2594, and the evidence shows that that is the case here. 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. Plaintiffs have shown that a geographically and reasonably configured district could be drawn in which the Latino CVAP constitutes an effective majority that would actually enable Latinos to have a fair and equal opportunity to obtain representatives of their choice. That is the purpose of Section 2, and creating a bare, ineffective majority in the Yakima Valley region does not immunize the redistricting plan from its mandates.

Intervenors' second argument is that plaintiffs have not been denied an equal opportunity to elect candidates of their choice because of their race or color, but rather because they prefer candidates from the Democratic Party, which, as a matter of partisan politics, is a losing proposition in the Yakima Valley region. Party labels help identify candidates that favor a certain bundle of policy prescriptions and choices, and the Democratic platform is apparently better aligned with the economic and social preferences of Latinos in the Yakima Valley region than is the Republican platform. Intervenors are essentially arguing that Latino voters should change the things they care about and embrace Republican policies (at least some of the ***1235** time) if they hope

to enjoy electoral success.[14] But Section 2 prohibits electoral laws, practices, or structures that operate to minimize or cancel out minority voters' ability to elect their preferred candidates: the focus of the analysis is the impact of electoral practices on a minority, not discriminatory intent towards the minority. *Milligan*, 143 S.Ct. at 1503; *Gingles*, 478 U.S. at 47-48 and 87, 106 S.Ct. 2752. There is no indication in Section 2 or the Supreme Court's decisions that a minority waives its statutory protections simply because its needs and interests align with one partisan party over another.

Intervenors make much of the fact that Justice Brennan was joined by only three other justices when opining that "[i]t is the difference between the choices made by blacks and white – not the reasons for that difference – that results in blacks having less opportunity than whites to elect their preferred representatives." *Gingles*, 478 U.S. at 63, 106 S.Ct. 2752. But Justice O'Connor disagreed with Justice Brennan on this point only because she could imagine a very specific situation in which the reason for the divergence between white and minority voters could be relevant to evaluating a claim for voter dilution. Such would be the case, she explained, if the "candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made the candidate

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[14] As noted above in n.8, there is evidence in the record that Latino voters in the Yakima Valley region did coalesce around a Republican candidate in the 2020 Superintendent of Public Institutions race. Intervenors do not acknowledge this divergence from the normal pattern, nor do they explain how it would impact their partisanship argument.

the preferred choice of the minority group." *Gingles*, 478 U.S. at 100, 106 S.Ct. 2752. In that situation, the oddity that made the candidate unpalatable to the white majority would presumably not apply to another minority-preferred candidate who might then "be able to attract greater white support in future elections," reducing any inference of systemic vote dilution. *Gingles*, 478 U.S. at 100, 106 S.Ct. 2752. There is no evidence that Latino-preferred candidates in the Yakima Valley region are rejected by white voters for any reason other than the policy/platform reasons which made those candidates the preferred choice, and there is no reason to suspect that future elections will see more white support for candidates who support unions, farmworker rights, expanded healthcare, education, and housing options, etc. Especially in light of the evidence showing significant past discrimination against Latinos, on-going impacts of that discrimination, racial appeals in campaigns, and a lack of responsiveness on the part of elected officials, plaintiffs have shown inequality in electoral opportunities in the Yakima Valley region: they prefer candidates who are responsive to the needs of the Latino community whereas their white neighbors do not. The fact that the candidates identify with certain partisan labels does not detract from this finding.

For all of the foregoing reasons, the Court finds that the boundaries of LD 15, in combination with the social, economic, and historical conditions in the Yakima Valley region, results in an inequality in the electoral opportunities enjoyed by white and Latino voters in the area. The Clerk of Court is directed to enter judgment in plaintiffs' favor on their Section 2 claim. The State of Washington will be given an

opportunity to adopt revised legislative district maps for the Yakima Valley region pursuant to the process set forth in the Washington State Constitution and state statutes, with the caveat that the revised maps must be fully adopted and enacted by February 7, 2024.

***1236** The parties shall file a joint status report on January 8, 2024, notifying the Court whether a reconvened Commission was able to redraw and transmit to the Legislature a revised map by that date. If the Commission was unable to do so, the parties shall present proposed maps (jointly or separately) with supporting memoranda and exhibits for the Court's consideration on or before January 15, 2024. Regardless whether the State or the Court adopts the new redistricting plan, it will be transmitted to the Secretary of State on or before March 25, 2024, so that it will be in effect for the 2024 elections.

FILED 1/20/23

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE**

CASE NO. 3:22-cv-05035-RSL

SUSAN SOTO PALMER, et al.,
Plaintiffs,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Defendants.

And

JOSE TREVINO, et al.,
Intervenor-Defendants.

ORDER DENYING REQUEST FOR LEAVE TO AMEND AND CONTINUING TRIAL DATE

ROBERT S. LASNIK, United States District Judge:

***1** This matter comes before the Court on the Intervenor-Defendants' request to amend their answer to add a crossclaim for declaratory and injunctive relief (Dkt. # 103 at 2 n.1)[1] and "Plaintiffs'

[1] Federal Rule of Civil Procedure 15(a) establishes the procedure for amending pleadings before trial. The fact that the Court established a deadline for amending pleadings in the case management order does not alter that procedure. Because Intervenor-Defendants are seeking to amend their answer more

Motion to Bifurcate and Transfer, Strike, and/or Dismiss Intervenors' Crossclaim" (Dkt. # 105). The proposed amendment challenges the constitutionality of Legislative District 15 and requests the appointment of a 3-judge panel to hear the crossclaim. When the Intervenor-Defendants sought leave to intervene on March 29, 2022, they argued that intervention was necessary "because the current posture of the case lacks a true 'adversarial presentation of the issues' " and each of the three intervenors had a stake in the boundaries as drawn by the Commission. Dkt. # 57 at 2-3. Their avowed purpose was to defend the existing boundaries and make sure that any changes that came out of this litigation did not violate their equal protection rights. They specifically declined to seek a modification of the case management deadlines.

Seven months later, Intervenor-Defendants filed an amended answer adding a crossclaim which, at its heart, is based on the proposition that the existing map is an unconstitutional racial gerrymander that cannot be justified under Section 2 of the Voting Rights Act because there was no legally significant racially polarized voting at the time the new district boundaries were drawn. The claim is essentially the same one presented in *Garcia v. Hobbs*, C22-5152RSL, which was filed on March 15, 2022, by attorney Andrew Stokesbary. Mr. Stokesbary also represents the Intervenor-Defendants in this case.

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than 21 days after the original pleading was served, they may do so "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). There is no indication that plaintiffs consented to the amendment. The Court therefore construes the amended pleading as a request for leave to amend.

Intervenor-Defendants did not file a motion for leave to amend, nor have they addressed Fed. R. Civ. P. 15 or its application in any subsequent filing. At oral argument, Intervenor-Defendants merely pointed out that amendment under Rule 15(a)(2) should be freely granted when justice so requires and that the State believes that trying the Section 2 and constitutional claims together will be more efficient and avoid the risk of conflicting judgments.

There is a "strong policy in favor of allowing amendment" under Rule 15 (*Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994)), and "[c]ourts may decline to grant leave to amend only if there is strong evidence of 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, etc." (*Sonoma County Ass'n of Retired Employees v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (internal quotation marks and alterations omitted)). The underlying purpose of Rule 15 is "to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Having reviewed the papers submitted by the parties and the remainder of the record, the Court finds that there is strong evidence of undue delay and prejudice to non-moving parties in this case.

***2** With regards to delay, Intervenor-Defendants have known of the alleged basis for their crossclaim since

before they filed their motion to intervene. The only explanation offered for their delay in asserting the crossclaim is that discovery has confirmed that race was illegally emphasized during the redistricting process. But the discovery of additional evidence supporting a claim about which Intervenor-Defendants already knew in no way justifies a seven-month delay in asserting the claim. An unjustified delay is 'undue' for the purposes of the Rule 15 analysis. *W. Shoshone Nat'l Council v. Molini,* 951 F.2d 200, 204 (9th Cir. 2000).

With regards to prejudice, this case involves a Section 2 Voting Rights Act claim which may impact the boundaries of a legislative district and, thus, must be decided well ahead of the next election cycle if plaintiffs are to obtain timely relief. *See Republican Nat'l Comm. V. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).[2] Secretary of State Hobbs requests that there be no alteration to the current case management deadlines so that there is adequate time for a decision in this case, any appropriate appellate review, the revision of the legislative maps, adoption of the new maps, dissemination of the maps to local election officials, and implementation. Dkt. # 112. But the proposed amendment will almost assuredly

[2] Plaintiffs filed the above-captioned matter on January 19, 2022, after the Washington State Redistricting Commission had completed its redistricting tasks but before the legislature approved the amendments to the plan under RCW 44.05.100(2). Despite what might have been considered a "premature" or "early" lawsuit, their request for preliminary injunctive relief was denied because, by the time the matter was fully briefed, the date by which a revised districting plan needed to be in the hands of local election officials for the 2022 election cycle had already passed.

require changes to the case management schedule. The nature of this case required an aggressive discovery schedule to ensure its timely resolution: discovery in this matter closed (with limited exceptions) on January 1, 2023. Motions practice and appeals related to standing and jurisdictional issues arising from the addition of a crossclaim subject to 28 U.S.C. § 2284 will likely occupy many weeks, if not months, of the time remaining before trial. Finally, even if the first two issues could be resolved or avoided, it is highly unlikely that a newly-appointed three-judge district court will be able to keep the current trial date of May 1, 2023.[3] Because introduction of Intervenor- Defendants' proposed crossclaim at this late date will introduce complicating factors and issues that will undoubtedly impact the case management schedule and would likely prevent the resolution of plaintiffs' claims in time for the 2024 election cycle, the Court finds that the requested amendment would cause prejudice to the non-moving parties.

Finally, denying leave to amend under Rule 15 will not thwart a decision on the merits of the proposed equal protection claim. As mentioned above, that claim is already being pursued in Garcia, and a three-judge district court is scheduled to hear that case in June 2023.

***3** For all of the foregoing reasons, Intervenor-Defendants' request for leave to amend their answer

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[3] The three-judge district court assigned to hear Garcia is not available on that date.

to add a crossclaim in the above-captioned matter (Dkt. # 103 at 2 n.1) is DENIED, and plaintiff's motion to bifurcate, transfer, strike, or dismiss the crossclaim (Dkt. # 105) is DENIED as moot. The Court finds, however, that judicial efficiency will best be served by hearing the Section 2 and the equal protection claims together on June 5, 2023, the date on which Garcia is currently scheduled for trial before a three-judge district court. A revised case management order will be issued in Palmer. At the close of evidence at the consolidated trial, the undersigned will issue a decision on the Section 2 claim, and the three-judge district court will then consider the constitutional claim. Judgments in the two matters will be issued on the same day so that the appeals, if any, can proceed together.

FILED 5/06/22

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE**

CASE NO. 3:22-cv-05035-RSL

SUSAN SOTO PALMER, et al.,
Plaintiffs,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Defendants.

ORDER GRANTING MOTION TO INTERVENE

ROBERT S. LASNIK, United States District Judge:

***1** This matter comes before the Court on a "Motion to Intervene" filed by Jose Trevino (a resident of Granger, Washington), Ismael Campos (a resident of Kennewick, Washington), and Alex Ybarra (a State Representative and resident of Quincy, Washington). Dkt. # 57. Plaintiffs filed this lawsuit to challenge the redistricting plan for Washington's state legislative districts, alleging that the Washington State Redistricting Commission ("the Commission") intentionally configured District 15 in a way that cracks apart politically cohesive Latino/Hispanic[1]

[1] The Complaint and this Order use the terms "Hispanic" and "Latino" interchangeably to refer to individuals who self-identify as Hispanic or Latino and to persons of Hispanic Origin as defined by the United States Census Bureau and United States

populations and placed the district on a non-presidential election year cycle in order to dilute Latino voters' ability to elect candidates of their choice. Plaintiffs assert a claim under Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301(a), and request that the Court enjoin defendants from utilizing the existing legislative map and order the implementation and use of a valid state legislative plan that does not dilute, cancel out, or minimize the voting strength of Latino voters in the Yakima Valley.

Plaintiffs named as defendants Steven Hobbs (Washington's Secretary of State), Laurie Jinkins (the Speaker of the Washington State House of Representatives), and Andy Billig (the Majority Leader of the Washington State Senate). The claims against Representative Jinkins and Senator Billig were dismissed on the ground that plaintiffs failed to plausibly allege an entitlement to relief from either of them. Dkt. # 66 at 4-5. Secretary Hobbs does not have an interest in defending the existing districting plan and has taken no position regarding the merits of plaintiffs' Section 2 claim. The intervenors assert that they are registered voters who intend to vote in future elections and that they have a stake in this litigation. Mr. Trevino falls within District 15 as drawn by the Commission, Mr. Campos falls within District 8 and could find himself in District 15 if new boundaries are drawn, and Representative Ybarra represents District 13, the boundaries of which may shift if plaintiffs' prevail in this case.

Office of Management and Budget.

A. Intervention as of Right

Rule 24 of the Federal Rules of Civil Procedure establishes the circumstances in which intervention as a matter of right is appropriate:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Ninth Circuit has distilled four elements from Rule 24(a): intervention of right applies when an applicant "(i) timely moves to intervene; (ii) has a significantly protectable interest related to the subject of the action; (iii) may have that interest impaired by the disposition of the action; and (iv) will not be adequately represented by existing parties." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020) (citation omitted). Plaintiffs argue that intervenors cannot satisfy the first, second, or fourth criteria. "While an applicant seeking to intervene has the burden to show that these four elements are met, the requirements are broadly interpreted in favor of intervention." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citation omitted).

(1) Timeliness

***2** Intervenors' motion to intervene was timely filed. The motion was filed a week after it became apparent that none of the named defendants were interested in defending the existing redistricting map, and it had had no adverse impact on the resolution of the then-pending motion for preliminary injunction.

(2) Significant Protectable Interest

A proposed intervenor "has a significant protectable interest in an action if (1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiff's claims." *Kalbers v. United States Dep't of Justice*, 22 F.4th 816, 827 (9th Cir. 2021) (citation omitted). "The interest test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established.... Instead, the 'interest' test directs courts to make a practical, threshold inquiry and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (internal quotation marks, citations, and alterations omitted). "The relationship requirement is met if the resolution of the plaintiff's claims actually will affect the applicant." *Id.*

Intervenors Trevino and Campos claim "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' under the Fourteenth Amendment...." Dkt. # 57 at 6. Representative Ybarra

claims "a heightened interest in not only the orderly administration of elections, but also in knowing which voters will be included in his district." *Id.* All three intervenors claim an interest in the boundaries of the legislative districts in which they find themselves and "in ensuring that Legislative District 15 and its adjoining districts are drawn in a manner that complies with state and federal law." *Id.* at 6-7.

As an initial matter, under Washington law, intervenors have no right or protectable interest in any particular redistricting plan or boundary lines. The legislative district map must be redrawn after each decennial census: change is part of the process. Intervenors, in keeping with all other registered voters in the State of Washington, may file a petition with the state Supreme Court to challenge a redistricting plan (RCW 44.05.130), but they have no role to play in the redistricting process. Nor is there any indication that a general preference for a particular boundary or configuration is a legally cognizable interest.

Intervenors do not allege that their right to vote or to be on the ballot will be impacted by this litigation. Nor have they identified any direct and concrete injury that has befallen or is likely to befall them if plaintiffs' Section 2 claim is successful. Rather, they broadly allege that they have an interest in ensuring that any plan that comes out of this litigation complies with the Equal Protection Clause, state law, and federal law. But a generic interest in the government's "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 v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)), and it would be premature to litigate a hypothetical constitutional violation (*i.e.*, being subjected to a racial gerrymander through a remedial map established in this action) when no such violative conduct has occurred. With the possible exception of Representative Ybarra (discussed below), intervenors have not identified a significant protectable interest for purposes of intervention under Rule 24(a).

(3) Adequacy of Representation

***3** In addition to the uncognizable interest in legislative district boundaries and the generic interest in ensuring that any new redistricting map complies with the law, Representative Ybarra claims an interest in avoiding delays in the election cycle and in knowing ahead of time which voters will be included in his district. The Court assumes, for purposes of this motion, that these interests are significant enough to give Representative Ybarra standing to pursue relief in this litigation. He cannot, however, show that the existing parties will not adequately represent these interests.

"The most important factor to determine whether a proposed intervenor is adequately represented by a present party to the action is how the intervenor's interest compares with the interests of existing parties.... Where the party and the proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a compelling showing to the contrary...." *Perry v.*

Proposition 8 Off. Proponents, 587 F.3d 947, 950-51 (9th Cir. 2009) (internal quotation marks, citations, and alterations omitted). The arguably protectable interests asserted by Representative Ybarra were ably and successfully urged by Secretary Hobbs in opposition to plaintiffs' motion for a preliminary injunction. Concerns regarding delays in the election cycle that might arise if district boundaries were redrawn this spring and the disruption to candidates who were considering a run for office were identified by Secretary Hobbs and played a part in the Court's decision.

Because Representative Ybarra's arguably protectable interests are essentially identical to the arguments that were actually asserted by Secretary Hobbs, Representative Ybarra may defeat the presumption (and evidence) of adequate representation only by making a compelling showing that Secretary Hobbs will abandon or fail to adequately make these arguments in the future. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (assessing the proposed intervenor's efforts to rebut the presumption in terms of three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect"). Representative Ybarra has not attempted to show that Secretary Hobbs will fail to pursue arguments regarding election schedules and the need for certainty as this case progresses. The intervenors have therefore failed to show that the protectable

interests they have identified will not be adequately represented in this litigation.[2]

B. Permissive Intervention

Pursuant to Rule 24(b), "[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact.... In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." In the Ninth Circuit, "a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *City of Los Angeles*, 288 F.3d at 403 (citation omitted). If the initial conditions for permissive intervention are met, the court is then required to consider other factors in making its discretionary decision on whether to allow permissive intervention.

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[2] Representative Ybarra also argues that he will be able to add to the litigation by providing a "valuable perspective on the close interaction between race and partisanship" in opposition to plaintiffs Section 2 claim, and that none of the existing parties is prepared to make such arguments. Dkt. # 57 at 9. That a proposed intervenor has testimony or other evidence that is relevant to a claim or defense does not mean that they have a significant protectable interest for purposes of Rule 24(a), however. It is only protectable interests that must be adequately represented in the litigation when considering intervention as a matter of right.

> ***4** These relevant factors include the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case. The court may also consider whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Spangler v. Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th Cir. 1977) (internal footnotes omitted). Plaintiffs argue that intervenors' motion is untimely, intervention would risk undue delay and would unfairly prejudice plaintiffs, and intervenors' chosen counsel is likely to be a witness in this matter and has already filed a lawsuit challenging Legislative District 15 that is inconsistent with his representation here. Plaintiffs request that, if intervenors are permitted to participate in this litigation at all, it should be in the role of *amicus curiae*, not as parties.

(1) Timeliness

For the reasons stated above, intervenors' motion to intervene was timely filed.

(2) Undue Delay and Unfair Prejudice

Plaintiffs argue that the resolution of their Section 2 claim will be unduly delayed and they will be unfairly prejudiced if they are forced to expend resources responding to intervenors' arguments. Plaintiffs acknowledge, however, that intervenors – unlike the defendants they chose to name – intend to oppose plaintiffs' request for relief under Section 2. It is unclear how forcing a litigant to prove its claims through the adversarial process could be considered unfairly prejudicial or how the resulting delay could be characterized as undue. "That [intervenors] might raise new, legitimate arguments is a reason to grant intervention, not deny it. *W. Watersheds Project v. Haaland*, 22 F.4th 828, 839 (9th Cir. 2022). The presence of an opposing party is the standard in federal practice: intervenors' insertion into that role would restore the normal adversarial nature of litigation rather than create undue delay or unfair prejudice. To the extent plaintiffs' opposition to intervention is based on their assessment that intervenors' arguments are meritless or irrelevant, the Court declines to prejudge the merits of intervenors' defenses in the context of this procedural motion.

(3) Complications Arising From Counsel's Participation

Plaintiffs do not cite, and the Court is unaware of, any authority supporting the denial of a motion to intervene because of objections to the intervenors' counsel. At present, the Court does not perceive an insurmountable conflict between the claims set forth

in *Garcia v. Hobbs*, C22-5152RSL, and intervenors' opposition to plaintiffs' Section 2 claim. If it turns out that counsel's representation gives rise to a conflict under the Rules of Professional Conduct or if he is a percipient witness from whom discovery is necessary, those issues can be heard and determined through motions practice as the case proceeds.

(4) Other Relevant Factors

After considering the various factors set forth in *Spangler*, 552 F.3d at 1329, the Court finds that, although intervenors lack a significant protectable interest in this litigation, the legal positions they seek to advance in opposition to plaintiffs' Section 2 claim are relevant and, in the absence of other truly adverse parties, are likely to significantly contribute to the full development of the record and to the just and equitable adjudication of the legal questions presented.

***5** For all of the foregoing reasons, the motion to intervene (Dkt. # 57) is GRANTED. Intervenors shall file their proposed answer (Dkt. # 57-1) within seven days of the date of this Order. The case management deadlines established at Dkt. # 46 remain unchanged.

FILED 8/27/25

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2603

BENANCIO GARCIA, III,
Appellant,
v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Appellees.

Before: McKEOWN, GOULD, and OWENS,
Circuit Judges.

MEMORANDUM

***1** Benancio Garcia III sued the State of Washington and its Secretary of State, Steven Hobbs, alleging that Legislative District 15 ("LD 15"), drawn by an independent state redistricting commission (the "Commission"), was an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Submission was vacated pending this court's resolution of *Palmer, et al. v. Trevino, et al.*, Nos. 23-35595 & 24-1602. Because the court has issued its decision in *Palmer v. Trevino*, we now turn to the merits of this appeal.

We have jurisdiction under 28 U.S.C. § 1291. Reviewing the district court's dismissal for mootness, *Rosemere Neighborhood Ass'n v. U.S. Env't Prot.*

Agency, 581 F.3d 1169, 1172 (9th Cir. 2009), we affirm. Because the parties are familiar with the facts, we need not recount them here.

In *Palmer v. Trevino*, we affirmed the district court's invalidation of LD 15 and the adoption of a remedial map that invalidated LD 15 and replaced it with a new legislative district, Legislative District 14 ("LD 14"). No. 23-35595 (9th Cir. Aug. 27, 2025). Garcia's action, which challenges LD 15 on equal protection grounds, is therefore moot.

"[T]he repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot ...." *Teter v. Lopez*, 125 F.4th 1301, 1306 (9th Cir. 2025) (en banc) (quoting *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc)). Garcia, citing *North Carolina v. Covington*, 585 U.S. 969 (2018), argues that even though LD 14 has replaced LD 15, he experiences a "continuing injury" of racial segregation. To avoid mootness, the plaintiffs in *Covington* specifically argued "that some of the new districts were *mere continuations* of the old, gerrymandered districts." *Covington*, 585 U.S. at 976 (emphasis added).

To determine whether LD 14 is a continuation of LD 15, "the case or controversy giving rise to jurisdiction is the touchstone." *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 875 (9th Cir. 2006), *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare*, 941 F.3d 1195. At the district court, this case was centered entirely on the Commission's actions. The operative complaint

alleged that "[r]ace was the predominant factor motivating the Commission's decision to draw the lines encompassing Legislative District 15." At trial, the parties submitted extensive trial exhibits, including expert reports, proposed maps, communications between commissioners, recordings of committee meetings, and notes from negotiations. Such evidence is plainly directed towards the intent of the Commission and does not bear on whether the district court similarly considered race as a predominant factor in drawing LD 14.

LD 14 was crafted by an entirely different party—the district court—from the Commission, the party that drew LD 15, and thus the "character of the system" has been "alter[ed] significantly." *Fusari v. Steinberg*, 419 U.S. 379, 386–87 (1975). Consequently, it is no longer "permissible to say that the [Commission's] challenged conduct continues." *Chem. Producers & Distribs.*, 463 F.3d at 875 (internal quotations omitted). The case is moot.

***2 AFFIRMED.**

FILED: 9/08/2023

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. 3:22-cv-05152

BENANCIO GARCIA III,
Plaintiff,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,
Defendants.

OPINION AND ORDER DISMISSING PLAINTIFF'S CLAIM AS MOOT

Chief District Judge David G. Estudillo authored the majority opinion, in which District Judge Robert S. Lasnik joined. Circuit Judge Lawrence J.C. VanDyke filed a dissenting opinion.[1]

***1255** Plaintiff Benancio Garcia III brings suit arguing that Washington Legislative District 15 ("LD 15") in the Yakima Valley is an illegal racial gerrymander in violation of the Equal Protection

[1]Because Plaintiff "challeng[ed] the constitutionality of the apportionment" of a "statewide legislative body" under 28 U.S.C. § 2284(a), the Chief Judge of the Ninth Circuit designated a three-judge panel to hear Plaintiff's constitutional claim. (*See* Dkt. No. 18.)

Clause of the Fourteenth Amendment. The Panel sat for a three-day trial from June 5th to June 7th to hear evidence regarding Plaintiff's Equal Protection Clause claim.[2] In light of the court's decision in *Soto Palmer*, the Court DISMISSES Plaintiff's claim as moot.

I MOOTNESS

"[T]he judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' " *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). "There is thus no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S.Ct. 1017, 185 L.Ed.2d 1 (2013) (cleaned up). Article III's case-or-controversy requirement prevents federal courts from issuing advisory opinions. *See id.* A party must have "a specific live grievance," and cannot seek to litigate an "abstract disagreement over the constitutionality" of a law or other government action. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479, 110

[2] The Panel heard evidence for the Garcia case concurrent with evidence presented for parallel litigation in *Soto Palmer v. Hobbs*, No. 3:22-cv-5035-RSL (W.D. Wash.). For purposes of judicial economy, the Court refers the reader to the procedural and factual background in *Soto Palmer*, 686 F.Supp.3d 1213, 1220-23, (W.D. Wash. Aug. 10, 2023) and this Court's prior order (Dkt. No. 56). The Court presumes reader familiarity with the facts of this case. This order only addresses Plaintiff Benancio Garcia III's Equal Protection claim.

S.Ct. 1249, 108 L.Ed.2d 400 (1990) (cleaned up).

The Court finds that Plaintiff's challenge to the constitutionality of LD 15 is moot given the *Soto Palmer* court's finding that LD 15 violates § 2 of the Voting Rights Act ("VRA"). Plaintiff seeks declaratory relief determining that LD 15 "is an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment" and an injunction "enjoining Defendant from enforcing or giving any effect to the boundaries of [ ] [LD 15], including an injunction barring Defendant from conducting any further elections for the Legislature based on [ ] [LD 15]." (Dkt. No. 14 at 18.) Plaintiff further requests the Court order a new legislative map be drawn. (*Id.*)

The *Soto Palmer* court determined that LD 15 violated § 2 of the VRA's prohibition against discriminatory results. *See Soto Palmer*, 686 F.Supp.3d at 1233-34. In so deciding, the court found LD 15 to be invalid and ordered that the State's legislative districts be redrawn. *Id.* at 1235-36. Since LD 15 has been found to be invalid and will be redrawn (and therefore not used for further elections), the Court cannot ***1256** provide any more relief to Plaintiff. Plaintiff does not assert that any new district drawn by the Washington State Redistricting Commission ("Commission") would be a "mere continuation[ ] of the old, gerrymandered district[ ]." *North Carolina v. Covington*, 585 U.S. 969, 138 S. Ct. 2548, 2553, 201 L.Ed.2d 993 (2018). Plaintiff therefore lacks a specific, live grievance, and his case is moot.

Traditional principles of judicial restraint also counsel

against resolving Plaintiff's Equal Protection Clause claim. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); *see also Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138, 157, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them."). The court's decision in *Soto Palmer* makes any decision in the instant case superfluous. A new Commission will draw new legislative districts in the Yakima Valley and, if challenged thereafter, the propriety of the new districts will be decided by analyzing the motivations and decisions of new individuals who constitute the Commission.[3] The Court cannot and will not presume that the new Commission will be motivated by the same factors that motivated its predecessor. Federal courts are courts of limited jurisdiction, and to unnecessarily decide a constitutional issue where there are alternate grounds available or where there is an absence of a case or controversy is to overstep our "proper, limited role in our Nation's governance." *Biden v. Nebraska*, 600 U.S. ——, 143 S. Ct. 2355, 2384, 216 L.Ed.2d 1063 (2023) (Kagan, J., dissenting).

Our dissenting colleague disagrees that the instant

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[3] In the event that the Commission fails to draw a new map by the deadline set by the *Soto Palmer* court, the parties will submit proposed maps to the *Soto Palmer* court and the court will adopt and enforce a new redistricting plan. *See Soto Palmer*, 686 F.Supp.3d at 1235-36.

case is moot. In his view, the Commissioners racially gerrymandered the 2021 Washington Redistricting Map in violation of the Equal Protection Clause and therefore "the map was 'void *ab initio*.' " Additionally, the dissent argues that longstanding principles of judicial restraint and constitutional avoidance are inapplicable here because the decision in *Soto Palmer* does not completely moot the relief sought by Plaintiff. These arguments are uncompelling.

First, the view that LD 15 was void *ab initio* presupposes that Plaintiff established an Equal Protection violation. To the contrary, a full analysis of the record presented does not yield such a result. The Court declines to issue an advisory opinion on the validity of Plaintiff's Equal Protection claim, however. Rather, it is sufficient to note only that we disagree with the dissent's summary and interpretation of the facts surrounding the creation of LD 15. Importantly, the Commissioners' testimony on the specific issue of whether race predominated in the formation of LD 15 is absent from the dissent's summary of the facts, and the Court encourages readers to examine the Commissioners' testimony in full.[4] This testimony

[4] Commissioner April Sims, for example, specifically disclaimed that race was the most important factor. (See Dkt. No. 73 at 77.) As she testified, "I would not agree that [race] [ ] was the most important factor. But that it was a factor." (Id.) Commissioner Brady Walkinshaw similarly noted that the Commissioners discussed a number of factors, including race, but "none of those [factors] were predominant." (Id. at 124.) He further emphasized the impact that the Commissioners' desire to unify the Yakama Nation into one legislative district had on the map (see id.), a factor that all Commissioners attested was important but is conspicuously absent from our colleague's analysis.

weighs heavily against finding that race predominated in the ***1257** drawing of LD 15 and against finding an Equal Protection violation.[5]

Commissioner Joe Fain testified that his overriding interest in drawing maps for LD 15 was to ensure "competitiveness." (See Dkt. No. 74 at 48, 58.) He also testified that he believed Commissioner Walkinshaw would have voted for a map in LD 15 that would not have had a majority Latino Citizen Voting Age Population ("CVAP"). (Id. at 51.) Finally, Commissioner Paul Graves testified that "race and the partisan breakdown of the district were" tied in his mind as the most important factors. (Dkt. No. 75 at 85.)

[5] The dissent's "ab initio" argument leads to the surprising assertion that the *Soto Palmer* court should have declined to issue an opinion in that case. *Soto Palmer* was the first-filed challenge to the redistricting map, and it presented a clearly justiciable case and controversy. Federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and our dissenting colleague makes no effort to show that one of the "exceptional" circumstances that could justify a district court's refusal to exercise or postponement of the exercise of its jurisdiction existed, *Id.* at 813 and 817, 96 S.Ct. 1236. Although the intervenors in *Soto Palmer* twice requested that the case be stayed, they did so on the ground that judicial efficiency would be served by waiting for the Supreme Court's decision in *Allen v. Milligan*, 599 U.S. 1, 143 S. Ct. 1487, 216 L.Ed.2d 60 (2023). At no point prior to the dissemination of the dissent did anyone suggest that a decision in *Soto Palmer* would be advisory or otherwise improper.

More importantly, the suggestion that the VRA claim should have been stayed or held in abeyance while the Equal Protection claim was resolved is not supported by case law or legal analysis. The dissent does not discuss whether a stay of *Soto Palmer* would have been appropriate pending the resolution of *Garcia* under

It is also erroneous to argue that "resolving *Soto Palmer* in the *Soto Palmer* plaintiffs' favor does not moot *Garcia*." As noted, LD 15 will be redrawn and will not be used in its current form for any future election. The *Soto Palmer* court has therefore granted Plaintiff complete relief for purposes of our mootness analysis. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 590 U.S. 336, 140 S. Ct. 1525, 1526, 206 L.Ed.2d 798 (2020) (vacating judgment as moot where New York City amended its laws to grant "the precise relief that petitioners requested in the prayer for relief in their complaint" notwithstanding requests for declaratory and injunctive relief from future constitutional violations).[6]

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the rubric established in *Landis v. N. Am. Co.*, 299 U.S. 248, 254-56, 57 S.Ct. 163, 81 L.Ed. 153 (1936), nor does it cite any cases in which a decision on a VRA claim was postponed because of a related Equal Protection challenge. *Milligan* itself presented just such a confluence of claims, and the Supreme Court addressed the appropriateness of injunctive relief on the VRA claim without considering, much less prioritizing, the pending Equal Protection challenge. *See also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (resolving VRA claims without reaching the companion Equal Protection claim); *Singleton v. Allen*, 2:21-cv-1291-AMM-SM-TFM, Dkt. # 272 at 7–8, 194–95 (N.D. Ala. Sept. 5, 2023) (resolving VRA claims and reserving ruling on Equal Protection claims in light of the fundamental and longstanding principles of judicial restraint and constitutional avoidance).

[6] The dissent attempts to distinguish *New York State Rifle & Pistol Ass'n*, but the petitioners in that case argued, like our colleague, that an intervening change to New York City's firearms laws did not moot their request for declaratory and injunctive relief because of the continued possibility of future harm from New York City's unconstitutional firearms licensing

***1258** Our colleague argues that this case is not moot because Plaintiff may obtain partial injunctive and declaratory relief. Specifically, the Court could declare that LD 15 was an illegal racial gerrymander and enjoin the state from "performing an illegal racial gerrymander when it redraws the map." This type of relief is insufficient to avoid a finding of mootness. It goes without saying that a federal court may only direct parties to undertake activities that comply with the Constitution, and the *Soto Palmer* court's directive to the State to redraw LD 15 properly presumes that the State will comply with the Constitution when it does so lest the future district be challenged once again. *Cf. Holloway v. City of Virginia Beach*, 42 F.4th 266, 275 (4th Cir. 2022) (rejecting argument that VRA case was not moot and Plaintiffs were entitled to court order "directing implementation of a new system that 'compl[ies] with Section 2' " of

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scheme. *See* Petitioners' Response to Respondents' Suggestion of Mootness at 15–17, *New York State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280). As the petitioners noted in their brief, "nothing in the City's revised rule precludes the previous version of the rule, which governed for nearly two decades, from having continuing adverse effects." *Id.* at 16. The petitioners specifically sought a declaration from the Supreme Court that "that the City's longstanding restrictive [firearms] licensing scheme is incompatible with the Second Amendment" and that any attempt to impose a licensing scheme was "null and void ab initio." *Id.* The Supreme Court, however, rejected the petitioners' argument and held that the case was moot notwithstanding the continued possibility of constitutional harm from the newly revised rule.

the VRA in light of changes to state law that provided otherwise complete relief).

The dissent asserts that "the order in *Soto Palmer* ensures that [Garcia] will not receive what he argues is a constitutionally valid legislative map" because his "claimed injury is not merely capable of repetition; it almost is certain to repeat itself." In the dissent's opinion, Garcia will most certainly suffer injury because *Soto Palmer* "ordered that the State engage in *even more* racial gerrymandering" than that claimed by Garcia in this case. But this claimed injury from a future legislative district is speculative because compliance with § 2 of the VRA, as ordered in *Soto Palmer*, would not result in a violation of the Equal Protection Clause. *See Cooper v. Harris*, 581 U.S. 285, 306, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) ("States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA."); *see also Milligan*, 143 S. Ct. at 1516–17 ("[F]or the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2.").

As the dissent concedes, "the Supreme Court has given States 'leeway' to draw lines on the basis of race in redistricting when States have good reasons, based in the evidence, to believe the racial gerrymander necessary under the VRA." The *Soto Palmer* court detailed in depth why a VRA compliant district is required for the Yakima Valley. *See, e.g.*, 686 F.Supp.3d at 1224-27, 1233-34 (finding that the three

Gingles factors were met and that the State had "impair[ed] the ability of Latino voters in [ ] [the Yakima Valley] to elect their candidate of choice on an equal basis with other voters"). The dissent would find that the prior Commissioners failed to judge a VRA district necessary, and therefore any racial prioritization that the Commissioners engaged in would not survive strict scrutiny. But this determination is necessarily fact-specific and only applicable to the actions of the prior Commission. ***1259** By the dissent's own admission, so long as the State judges the use of race necessary to comply with the VRA it is not unlawful for the State to create a district with a higher Latino CVAP.

The dissent also argues the case is not moot because Plaintiff may want to appeal this case to the Supreme Court. Whether Plaintiff may desire to utilize this litigation to "challenge current precedent that considers compliance with the VRA a sufficient reason to racially gerrymander" is immaterial to the issue of whether a case is moot. Neither *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 142 S. Ct. 1245, 212 L.Ed.2d 251 (2022), nor *Allen v. Santa Clara Cnty. Corr. Peace Officers Ass'n*, 38 F.4th 68 (9th Cir. 2022), stands for the proposition that a trial court, in deciding whether a case is moot, should consider how a party might utilize the litigation to challenge established Supreme Court precedent. Indeed, such an argument reinforces the majority's finding that the case is moot because a desire to appeal binding Supreme Court precedent, untethered from any specific injury, is far removed from a specific, live

controversy.[7] It "would [also] reverse the canon of [constitutional] avoidance ... [by addressing] divisive constitutional questions that are both unnecessary and contrary to the purposes of our precedents under the Voting Rights Act." *Bartlett v. Strickland*, 556 U.S. 1, 23, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009).

This Court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *People of State of California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314, 13 S.Ct. 876, 37 L.Ed. 747 (1893). The fact remains that the *Soto Palmer* court has ordered the State to redraft legislative districts in the Yakima Valley. Having done so, the relief Plaintiff seeks in this litigation is now moot.

II CONCLUSION

Accordingly, the Court DISMISSES as moot Plaintiff's claim that LD 15 violates the Equal Protection Clause. A judgment will be entered concurrent with this order.

VANDYKE, United States Circuit Judge, dissenting,

In 2021, the State of Washington redistricted its state legislature electoral map. In the process, the State,

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[7] The dissent, like the State of Alabama, might wish for a different interpretation of § 2 of the VRA than that which has prevailed in this country for nearly forty years. The United States Supreme Court, however, recently rejected Alabama's invitation to do so in *Milligan*.

acting through its Redistricting Commission, made the racial composition of Legislative District 15 (LD-15), a district in the Yakima Valley, a nonnegotiable criterion. In other words, the Commission racially gerrymandered. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017). This discrimination means the map was enacted in violation of the U.S. Constitution unless the Commission had a "strong basis in evidence" to believe, and in fact believed, that the federal Voting Rights Act (VRA) required the Commission to perform such racial gerrymandering. *See Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 142 S. Ct. 1245, 1250, 212 L.Ed.2d 251 (2022) (quotation omitted). A majority of the Commissioners did not believe the VRA required racial gerrymandering, so the map was drawn—and later enacted—in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

***1260** In a parallel case before a single district court judge, *Soto Palmer v. Hobbs*, plaintiffs also challenged the 2021 map as invalid. 686 F.Supp.3d 1213, No. 3:22-cv-5035 (W.D. Wash. Aug. 10, 2023). But they alleged the map violated the VRA, which presented a more challenging question than the relatively straightforward one presented in this matter. Nonetheless, instead of waiting for this case to be decided, which would have mooted *Soto Palmer*, the court in *Soto Palmer* undertook a complicated analysis involving multiple expert witnesses and an indeterminate nine-factor balancing test and opined that the map violated the VRA and must be redrawn. Worse than undertaking a needless analysis, the

court necessarily assumed that the map was not enacted in violation of the Equal Protection Clause. But it was. And because the map violated the Equal Protection Clause, it was "void *ab initio*." *Mester Mfg. Co. v. INS*, 879 F.2d 561, 570 (9th Cir. 1989) (citation omitted); *see Collins v. Yellen*, 594 U.S. 220, 141 S. Ct. 1761, 1788–89, 210 L.Ed.2d 432 (2021). As it was void ab initio, the *Soto Palmer* decision amounts to an advisory opinion on whether a void map would violate the VRA if it existed. That decision should never have been issued.

Even putting aside the advisory nature of the *Soto Palmer* decision, it does not moot this case. Garcia is seeking relief that the court in *Soto Palmer* never provided, and he can still assert arguments not foreclosed by *Soto Palmer*. I thus respectfully dissent from my colleagues' conclusion to dismiss this case based on mootness.

BACKGROUND

I. In 2021, the State of Washington Drew New Legislative and Congressional Electoral Maps Following the Federal Census.

Under Washington law, the State of Washington redistricts its "state legislative and congressional districts" after the decennial federal census and congressional reapportionment. Wash. Const. art. II, § 43(1); *see* U.S. Const., art. I, § 2. Washington performs this redistricting through a Redistricting Commission consisting of four voting Commissioners and one non-voting Commission Chair. *See* Wash.

Const. art. II, § 43(2). The "legislative leader of the two largest political parties in each house of the legislature" each appoints one Commissioner. *Id.* The four voting Commissioners then select by majority vote a nonvoting chairperson of the Commission. *Id.* "The commission shall complete redistricting as soon as possible following the federal decennial census, but no later than November 15th of each year ending in one." *Id.* § 43(6). The "redistricting plan" must be approved by "[a]t least three of the voting members." *Id.* After the Commission approves a plan, a supermajority of two-thirds of the Washington State Legislature may make minor amendments to the plan or do nothing—either way, the map is enacted after "the end of the thirtieth day of the first session convened after the commission ... submitted its plan to the legislature." *Id.* § 43(7). And in neither event can the Legislature reject the map. *See id.*

After the 2020 decennial census, Washington law called for the appointment of a Redistricting Commission to redistrict Washington's "state legislative and congressional districts." *Id.* § 43(1). The House Democratic leadership selected April Sims, the Senate Democratic leadership selected Brady Piñero Walkinshaw, the Senate Republican leadership selected Joe Fain, and the House Republican leadership selected Paul Graves. *Garcia* Dkt. No. 64 at ¶ 58–59. These four voting Commissioners selected Sarah Augustine as the Commission chairperson. *Garcia* Dkt. No. 64 at ¶ 60.

***1261** On September 21, 2021, each of the voting Commissioners released proposed redistricting maps. *Garcia* Dkt. No. 64 at ¶ 62. According to 2020

American Community Survey 5-year estimates, every Commissioner's September legislative map proposal included a legislative district in the Yakima Valley area of Washington made up of less than 50% Hispanic Citizen Voting Age Population (HCVAP). *Soto Palmer* Dkt. No. 191 at ¶¶ 75–78, 87. The Yakima Valley area, which is in southcentral Washington and encompasses areas in Yakima, Adams, Benton, Grant, and Franklin counties, would ultimately contain LD-15, the district challenged in this case and in *Soto Palmer*. *Soto Palmer* Dkt. No. 191 at ¶ 88.

Around a month later, the Commission received a slideshow presentation file from the Washington State Senate Democratic Caucus. *Garcia* Dkt. No. 64 at ¶ 68. The presentation was prepared by Matt Barreto, PhD, who opined that there was "racially polarized voting" in the Yakima Valley area and that the Republican Commissioners' maps "crack[ed]" the Latino population into multiple districts. Ex. 179 at 17–18. The presentation also offered two alternative, "VRA Complaint," maps. Ex. 179 at 22–23.

From the circulation of this slideshow onward, the racial composition of the Yakima Valley district became an enduring focus of the Commission. Unlike with any other district, the Commission focused intensely on the racial composition of LD-15. As Commissioner Fain put it, although the racial composition of districts was a topic generally discussed for "many districts," "it was more widely discussed with regards to the Yakima Valley area." *Garcia* Dkt. No. 74 at 86–87. For LD-15, the "racial composition" was "a very important component of that

negotiation" and there were not "other districts where [racial composition] was as important of a component." *Garcia* Dkt. No. 74 at 87.

Commissioner Sims confirmed in her testimony that without a "majority Hispanic ... CVAP in LD 15," she "[wasn't] going to reach an agreement on LD 15." *Garcia* Dkt. No. 73 at 440. More broadly, one of Commissioner Sims's "priorities with the Redistricting Commission[ ] was to create a majority-minority district for Hispanic and Latino voters in the Yakima Valley," specifically, "to create a majority CVAP Hispanic district in the Yakima Valley." *Garcia* Dkt. No. 73 at 37. One of Commissioner Walkinshaw's draft maps included a note that the map "[c]reate[d] a majority Hispanic district" in the Yakima Valley. *Garcia* Dkt. No. 73 at 132; Ex. 150 at 17. And a member of Walkinshaw's staff confirmed in her testimony that a district that "perform[ed] for Latino voters" "should be nonnegotiable." *Garcia* Dkt. No. 75 at 111.

Commissioner Fain paid attention to the "Hispanic CVAP measurement" "through the various iterations of maps, in most cases." *Garcia* Dkt. No. 74 at 49. He "belie[ved]" that "the Hispanic CVAP was a metric that was important to Democratic commissioners" and he was "willing to give [an increase in Hispanic CVAP in LD-15] in order to secure support for a final compromise map." *Garcia* Dkt. No. 74 at 49–50. Ultimately, "creating more minority-majority, or majority-minority districts" was important to Fain "as part of the negotiation in getting a final map." *Garcia* Dkt. No. 74 at 61. Fain testified that "[he] tried to prioritize greater CVAP districts" and that one of the

things he was "willing to do" was "of course ... most definitely increasing minority-majority districts." *Garcia* Dkt. No. 74 at 84.

Commissioner Graves testified that he thought a majority Hispanic CVAP district in LD-15 would be required to obtain both ***1262** Commissioner Sims and Commissioner Walkinshaw's votes. He "had [it] in mind" that he "would need to draw a major[ity] Hispanic CVAP district in the 15th LD[ ] if [he] wanted to secure [Commissioner Walkinshaw's] vote for the final plan." *Garcia* Dkt. No. 75 at 67. Based on a variety of indicia, Graves believed that a majority Hispanic CVAP district in LD-15 "would probably be a go, no-go decision point for [Commissioner Walkinshaw]." *Garcia* Dkt. No. 75 at 67–68. Graves also thought that a majority Hispanic CVAP LD-15 was necessary "to get Commissioner Sims's vote for a final plan." *Garcia* Dkt. No. 75 at 70. It was "[v]ery hard for [Commissioner Graves] to see three of the voting commissioners voting for a map that did not have a majority Hispanic CVAP district in the Yakima Valley." *Garcia* Dkt. No. 75 at 73.

Anton Grose, one of Commissioner Graves's staffers, testified that "[a]s time went on, it became apparent that a Yakima Valley district that was majority Hispanic, by citizens of voting age population, ... would be a requirement to get support from both Republicans and Democrats." *Garcia* Dkt. No. 73 at 153. Grose testified that for LD-15, in particular, [HCVAP data] was very, very important to our kind of counterparts, and it was [thus] very important to us." *Garcia* Dkt. No. 73 at 153–54. LD-15, "in particular, certainly was far more race-focused than [Grose]

th[ought] any other district on the map." *Garcia* Dkt. No. 73 at 155. "[T]here were some other considerations neglected in the drawing of the 15th," Grose thought, "race predominantly being ... the major focus of that district." *Garcia* Dkt. No. 73 at 153. When drawing proposed maps, Grose was "cognizant" of racial compositions because Commissioner Graves wanted a majority HCVAP district so that he could get a map that passed. *Garcia* Dkt. No. 73 at 186–87.

The Commission had a November 15 deadline to agree to a redistricting plan. Wash. Const. art. II, § 43(6). As the negotiations got underway, the Commissioners split up for negotiations into two groups of two. *Garcia* Dkt. No. 75 at 17, 49. Commissioners Graves and Sims were primarily responsible for negotiating the legislative map, while Commissioners Walkinshaw and Fain were primarily responsible for the congressional map. *Garcia* Dkt. No. 75 at 49. Several days before a final agreement was reached on November 15, Commissioners Graves and Sims "agreed to ... make the district 50 percent Latino CVAP." *Garcia* Dkt. No. 75 at 31; *see also id.* at 91, 88 S.Ct. 1942 (noting that before the November 15th deadline, Commissioner Graves had reached an agreement with Commissioner Sims that LD-15 "would be a majority Hispanic district[ ] by eligible voters"). There was "an agreement ... between [Commissioner Graves] and Commissioner Sims that this district would be greater than 50 percent [Hispanic] CVAP." *Garcia* Dkt. No. 75 at 32. The partisan balance of LD-15 was still "up in the air," but however that turned out, the district would contain above 50% Hispanic CVAP. *Garcia* Dkt. No. 75 at 32.

Commissioner Sims appears to have made a Hispanic CVAP district a nonnegotiable criterion because she believed such a district was required by the VRA. *Garcia* Dkt. No. 73 at 51. Commissioner Walkinshaw might have believed this, but his testimony on the point was less clear. *Garcia* Dkt. No. 73 at 135. Commissioners Graves and Fain did not think that the VRA required a legislative district in the Yakima Valley containing a majority HCVAP. *Garcia* Dkt. Nos. 75 at 71 (Graves); 74 at 50 (Fain).

When November 15 finally arrived, the Commissioners moved their negotiations to a hotel in Federal Way, Washington. ***1263** *Garcia* Dkt. No. 73 at 30. There the Commissioners reached what they referred to as a "framework agreement." *Garcia* Dkt. Nos. 73 at 16–17; 74 at 71; 75 at 42. Although they did not vote on specific maps before the deadline, they voted on an agreement that they testified could be turned into a legislative map. *Garcia* Dkt. No. 75 at 41 (Commissioner Graves confirming that he stated in a press conference "that the framework that had been agreed to was sufficiently detailed that, without discretion, it could be turned into a map"). The framework agreement was "that [LD-15] would be that 50.1 Hispanic CVAP number." *Garcia* Dkt. No. 75 at 42. The framework agreement did not "stipulate the racial composition of any other district[ ] besides the 15th." *Garcia* Dkt. No. 75 at 72.

After the Commissioners shook on their framework agreement in the evening of November 15, the Commissioners and their staff began turning the framework agreement into an actual map. *Garcia* Dkt. No. 73 at 192. This process went late through the

night and into the morning of November 16. During this time, the map drawers tweaked the racial composition (*i.e.*, the percentage of Hispanic citizens of voting age) of LD-15, bringing it as close as reasonably possible to 50% while staying barely above a 50/50 split. Ex. 487 at 7 (comparing Commissioner Graves's November 12 map, with a 50.2% Hispanic CVAP, to the enacted map, with a 50.02% Hispanic CVAP). While drawing the maps in the early morning hours of November 16, Grose was "also trying to ensure the district was majority Hispanic by CVAP." *Garcia* Dkt. No. 73 at 205. It is clear the map drawers were aware of the nonnegotiable criteria that LD-15 must be over 50% HCVAP.

On November 16, 2021, the Commission transmitted its final maps to the Washington State Legislature. Ex. 123. The Legislature made minor amendments to the maps, changing only a few census blocks that resulted in no change in the population of LD-15, and voted to enact the maps in February 2022. *See* H. Con. Res. 4407, 67th Leg. Reg. Sess., at 2:35–36, 71:9–77:26.

II. Following Redistricting, Two Challenges Were Brought Against the Enacted 2021 Legislative Map.

On January 19, 2022, several plaintiffs—including lead plaintiff Susan Soto Palmer—filed a lawsuit against the Washington Secretary of State alleging that the legislative map ratified by the legislature in February, the "2021 Legislative Map," was enacted in violation of the VRA because (i) the map diluted the voting power of Hispanic residents of LD-15 and

because (ii) the Commission drew the map with discriminatory intent. *Soto Palmer* Dkt. No. 70 at 39–40. On March 15, 2022, Benancio Garcia, III, filed a lawsuit against the Washington Secretary of State alleging that the Commission, in drawing LD-15, racially gerrymandered in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Garcia* Dkt. No. 14 at 17. Pursuant to Garcia's request under 28 U.S.C. § 2284, a three-judge panel was drawn consisting of my colleagues in the majority and me. *Garcia* Dkt. No. 1 at 1, 18. The court in both cases joined the State of Washington as a defendant, and the court in *Soto Palmer* granted several individuals' motion to intervene and defend the map. *Garcia* Dkt. No. 13; *Soto Palmer* Dkt. Nos. 68–69. The court consolidated the cases for trial, which was held the week of June 5, 2023.[8] On August 10, the court in *Soto Palmer* issued a decision finding in favor of the ***1264** *Soto Palmer* plaintiffs and directing the State of Washington to redraw the legislative map. *Soto Palmer*, 686 F.Supp.3d at 1235-36.

ANALYSIS

The majority dismisses this case as moot. It is not. Not only is the case not moot, but the panel should have acknowledged the map was enacted in violation of the Equal Protection Clause, found in favor of Garcia, and directed the State of Washington to redraw the maps in a way that does not violate the Constitution. That

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[8] *Soto Palmer* also included an additional trial day on June 2, 2023.

would have mooted the VRA challenge in *Soto Palmer* and avoided the issuance of an advisory opinion in that case.

I. This Case Is Not Moot.

The majority concludes Garcia's lawsuit is "moot" because, in the panel's opinion, the court in *Soto Palmer* concluded that the 2021 map violated the VRA and ordered the State of Washington to redraw it. That opinion was advisory, should never have been rendered, and even putting that aside, does not moot this case.

The *Soto Palmer* decision should never have been issued. Because the 2021 map violates the Equal Protection Clause, it was "void *ab initio*." *Mester Mfg. Co.*, 879 F.2d at 570 (citation omitted). "An act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). Indeed, as the Supreme Court put it recently, "an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)." *Collins*, 141 S. Ct. at 1788–89. In deciding the claim in *Soto Palmer*—while necessarily aware of this challenge against the map on constitutional grounds—the *Soto Palmer* court simply ignored the unconstitutionality of the map and jumped ahead to decide whether a hypothetically constitutional map would violate the VRA.

In other words, the *Soto Palmer* court issued an

advisory opinion. *See Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969) (declining to address the constitutionality of a statute that was no longer legally extant on other grounds because of the need to "avoid advisory opinions on abstract propositions of law"). Opining on "important" but hypothetical "questions of law" is not a function within the "exercise of [the] judicial power" granted in Article III of the U.S. Constitution. *United States v. Evans*, 213 U.S. 297, 300–01, 29 S.Ct. 507, 53 L.Ed. 803 (1909). Indeed, "[federal courts] are constitutionally forbidden from issuing advisory opinions." *United States v. Guzman-Padilla*, 573 F.3d 865, 879 (9th Cir. 2009); *see also United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947) ("[F]ederal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

Beyond the jurisdictional reason to avoid deciding the VRA claim, there is also an important prudential reason that the court in *Soto Palmer* should have at least deferred resolution of the VRA claim until this panel resolved the Equal Protection claim. The VRA claim in *Soto Palmer* was complex and involved the application of a nine-factor indeterminate balancing test. *See Soto Palmer*, 686 F.Supp.3d at 1226-34. As a matter of prudence, it makes little sense to undertake a complicated test that involves indeterminate balancing when a simpler threshold basis exists for resolving the matter.

The majority cites to *Landis v. North American Co.*, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936), as a possible reason not to have prioritized this panel's

Equal ***1265** Protection claim. First, it's not clear *Landis* is even relevant. *Landis* considered a court's power to grant a *motion* for a stay, whereas the issue here involves a court's *internal* docket management. *See id.* at 256, 57 S.Ct. 163. I do not suggest, as the majority believes, that *Soto Palmer* should have been formally "held in abeyance." Different considerations come into play when a court is assessing its own order-of-business than when a court is considering an application for a formal stay or for a case to be held in abeyance. But even assuming *Landis* did govern, it was no bar to the court in *Soto Palmer* appropriately deferring. "Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id.*

Similarly, despite the majority's assertion otherwise, the Supreme Court's recent decision in *Allen v. Milligan* does not indicate that a court should undertake a many-factored VRA analysis ahead of a simple Equal Protection analysis that would moot the VRA claim. 599 U.S. 1, 143 S. Ct. 1487, 216 L.Ed.2d 60 (2023). The Supreme Court in *Allen* granted review on only one question: "Whether the State of Alabama's 2021 Redistricting Plan ... violated Section 2 of the Voting Rights Act." The Court did not grant review on any Equal Protection claim. There was thus no Equal Protection claim pending before the Court that would have potentially mooted the case and which it could have answered before addressing the VRA question. The Supreme Court's discretionary docket allows it to limit itself just to a question granted. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips*

Corp., 510 U.S. 27, 28, 114 S.Ct. 425, 126 L.Ed.2d 396 (1993). But we, of course, are not the Supreme Court.

While my colleagues in the majority opine that the *Soto Palmer* decision was not advisory because of the principle of constitutional avoidance, that principle has no application here. That discretionary principle indicates that a nonconstitutional decision should usually be preferred to a constitutional decision when the nonconstitutional decision would render the constitutional decision unnecessary. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (explaining that, "before addressing [a] constitutional issue," courts should consider "whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims"). Perhaps if there were a symmetrical relationship between the *Soto Palmer* and *Garcia* cases, such that a decision in one would necessarily moot the other case, and vice versa, there might be a better argument for constitutional avoidance in *Garcia.* But that is not the case. There is instead an asymmetry, where the correct decision in *Garcia* would moot *Soto Palmer*, but a decision in *Soto Palmer*, regardless of the result, does not moot *Garcia.*

Resolving *Garcia* in the plaintiff's favor would have mooted *Soto Palmer*. It would have meant recognizing that the map challenged in *Soto Palmer* has never legally existed—enacted in violation of the Equal Protection Clause, there never was a constitutionally valid map that could possibly violate the VRA. *See*

Collins, 141 S. Ct. at 1788–89; *Mester Mfg. Co.*, 879 F.2d at 570. That recognition would leave no map for the *Soto Palmer* plaintiffs to challenge, and thus moot their action.

By contrast, resolving *Soto Palmer* in the *Soto Palmer* plaintiffs' favor does not moot *Garcia.* The majority disagrees, stating ***1266** that because LD-15 is now gone as a result of the decision in *Soto Palmer*, the *Garcia* plaintiff got what he wanted. But he didn't, of course. Consider what happened: In this case, Plaintiff Garcia complains that the State considered race unlawfully in drawing the legislative map. In *Soto Palmer*, the plaintiff complained that the State violated the VRA because LD-15 did not *consider race enough*—that is, that the final LD-15 contains too few Hispanic voters. The Court in *Soto Palmer* agreed with the plaintiff that there were not enough Hispanic voters in LD-15 to comply with the VRA and directed the State to go redraw the map in a way that complies with the VRA. The State will do this by placing *more* Hispanic voters in LD-15, a task which necessarily requires the State to consider race.[9]

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[9] The majority cites a recent order in the now-remanded *Milligan* litigation as support for its decision to dismiss Garcia's claims as moot. *See Milligan v. Allen*, 2:21-cv-1530-AMM, Dkt. No. 272 at 7–8, 194–95 (N.D. Ala. Sept. 5, 2023). But the relationship between the VRA and constitutional claims in *Milligan* is noticeably different from the relationship between *Soto Palmer*'s VRA claim and *Garcia*'s constitutional claim. Thus, *Milligan* does not support the majority's reliance on constitutional avoidance here.

The *Milligan* litigation involves several consolidated cases, but among those with constitutional claims are the aforementioned *Milligan* case and the *Singleton v. Allen* case. The *Milligan* plaintiffs argue that Alabama's remedial proposal fails to remedy

the VRA violation, and because Alabama's racial gerrymandering cannot otherwise survive strict scrutiny, it also violates the Equal Protection Clause. *See id.*, Dkt. No. 200 at 16–19, 23–26. As the *Milligan* plaintiffs have presented their arguments, their VRA and Equal Protection claims seek the same thing, and both depend on their underlying theory that Alabama has an affirmative obligation to use race properly to satisfy the demands of the VRA. Thus, their constitutional claims effectively serve as a backstop to their VRA claims, and so relief on the latter necessarily eliminates any need to reach the former. That is a textbook application of mootness. Garcia's argument here, in contrast, is that the Equal Protection Clause requires the State to abstain from considering race, which is, of course, directly at odds with the *Soto Palmer* plaintiffs' arguments that the State must consider race more. Unlike in *Milligan*, where plaintiffs received all the relief they sought (under either of their claims) when the district court tossed Alabama's remedial maps based on the VRA, the majority here cannot avoid Garcia's constitutional claim based on *Soto Palmer*, which does not offer relief that redresses Garcia's claim.

The *Singleton* plaintiffs, who are advancing only constitutional claims, have taken a different view of the Alabama redistricting dispute. They have offered alternative congressional maps that they contend comply with the VRA without taking race into consideration at all. *See Singleton v. Allen*, 2:21-cv-1291-AMM, Dkt. No. 147 at 19–20. If race need not be considered to satisfy the demands of the VRA, they argue, then Alabama's admitted consideration of race must violate the Equal Protection Clause. *Id.* at 17–18, 129 S.Ct. 1231. Because the Alabama court again granted relief on VRA grounds, it had no need to separately consider *at this point in the litigation* the *Singleton* plaintiffs' claim that VRA compliance can be achieved without resort to racial gerrymandering. But that reasoning has no purchase here, where Garcia's claim that the State is improperly using race is neither addressed nor resolved by the *Soto Palmer* court's admonition that the State needs to double down on its use of race to comply with the VRA's demands.

And in any event, while it is true that, when faced with both VRA and constitutional claims, the Alabama court in its recent *Milligan* order decided only the VRA claims, the court neither ultimately rejected the constitutional claims nor took any other

The majority's position is thus that an order directing the State to consider race ***1267** *more* has "granted ... complete relief" to a plaintiff who complains the State shouldn't have considered race *at all*. This kind of logic should make us wonder if this case is really moot.

It is not, for at least two reasons. First, the plaintiff in this case may wish to appeal this matter to the Supreme Court to challenge current precedent that considers compliance with the VRA a sufficient reason to racially gerrymander. *See Wis. Legislature*, 142 S. Ct. at 1248; *Allen v. Santa Clara Cnty. Corr. Peace Officers Ass'n*, 38 F.4th 68, 70 n.1 (9th Cir. 2022) (noting that the appellants "concede[d] that binding precedent forecloses" one of their arguments "and only seek to preserve that claim for further appellate review"). While that issue is currently foreclosed by current Supreme Court precedent, the plaintiff in *Garcia* could ask the Supreme Court to revisit that precedent. Even assuming success in that endeavor is a longshot, that doesn't *moot* this case. I agree with the majority that, *if* Garcia had no ongoing injury, he could not litigate a case with simply the hope that he could persuade the Supreme Court to revisit one of its precedents. But he still has injury. He claims injury

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action preventing their future adjudication. Instead, it merely "reserve[d] ruling" on them. *Milligan v. Allen*, 2:21-cv-1530-AMM, Dkt. No. 272 at 8, 194. Especially in view of the *Singleton* plaintiffs' claim, which—not unlike Garcia's—do not wholly depend on the outcome of the VRA claim, the Alabama court's decision was a measured and constrained course of action that undercuts rather than supports the majority's severe and terminal decision here.

from past racial gerrymandering. The decision in *Soto Palmer* ordered that the State engage in *even more* racial gerrymandering. That does not somehow eliminate Garcia's injury.

Secondly, even putting aside the possibility of *Garcia* seeking relief from the Supreme Court, the *Garcia* case is also not moot because, notwithstanding the finding of a VRA violation in *Soto Palmer* and the resulting invalidation of the redistricting maps, "there is still a live controversy" in *Garcia* "as to the adequacy of" the remedy in *Soto Palmer* in addressing all of the relief sought by Garcia in this case. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307–08, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (cleaned up). And "the burden of demonstrating mootness is a heavy one." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (cleaned up). Moreover, a case is not moot simply because the exact remedy sought by the plaintiff cannot be fully given. The existence of a possible partial remedy "is sufficient to prevent [a] case from being moot." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

In this case, Garcia seeks a declaration "that Legislative District 15 is an illegal racial gerrymander in violation of the Equal Protection Clause" *and* an order from this court that the State create a "new valid plan for legislative districts ... that does not

violate the Equal Protection Clause." *Garcia* Dkt. No. 14 at 18. Although the decision in *Soto Palmer* might moot some of the relief that Garcia sought to obtain in this case, the court in *Soto Palmer* did not issue an order directing the State to avoid performing an illegal racial gerrymander when it redraws the map—that is, to avoid violating the Equal Protection Clause. *See Soto Palmer*, 686 F.Supp.3d at 1235-36. Garcia requested the map be redrawn without violating the Equal Protection Clause, and this unfulfilled request for relief "is sufficient to prevent this case from being moot." *Church of Scientology*, 506 U.S. at 13, 113 S.Ct. 447.

The majority disagrees because "a federal court may only direct parties to undertake activities that comply with the Constitution." Thus, the panel "presumes" that the court in *Soto Palmer* "direct[ed] the State to redraw LD 15" in a way that ***1268** complies with the Constitution. The source of this presumption is unclear. Although courts obviously should avoid intentionally directing parties to violate the Constitution, there is little reason to presume that the court's order in *Soto Palmer* implicitly instructed the State not to violate the Equal Protection Clause. The State had earlier violated the Equal Protection Clause *by unlawfully considering race*, and the court's order directs the State to consider race *more*. It doesn't set any limit for how much more. Garcia has still not received a court order directing the State to redraw the map in a way that does not violate the Equal Protection Clause. The majority is therefore wrong that there remains no "availability of any meaningful injunctive relief."

The majority relies on *New York State Rifle and Pistol Association, Inc. v. City of New York* to support its belief that the mere fact that the *Soto Palmer* court directed the map be redrawn is enough to moot this case. *See* 590 U.S. 336, 140 S. Ct. 1525, 206 L.Ed.2d 798 (2020) (per curiam). The Supreme Court in *New York* said no such thing. The Court instead concluded that a case was partially moot when plaintiffs challenged a rule that was subsequently amended by state and local authorities during litigation. *See id.* at 1526. In this case, however, Garcia requested not just that the old map be held invalid but that a new map be drawn in a way that does not violate the Constitution. He is still seeking that relief and has not received it from the order in *Soto Palmer*. Indeed, the order in *Soto Palmer* ensures that he will not receive what he argues is a constitutionally valid legislative map. Garcia's claimed injury is not merely capable of repetition; it is almost certain to repeat itself.

The majority's insistent portrayal of this case as indistinguishable from *New York* glosses over the starkly different procedural postures of the two cases and ignores the practical consequences of its own decision to dismiss Garcia's claim as moot. In *New York*, petitioners' constitutional claims were considered on a discretionary basis by a court of last resort. Here, Garcia's constitution claim was presented in the first instance to a district court with a non-discretionary obligation to adjudicate it, and that distinction makes a difference.

After the Supreme Court granted certiorari in *New York*, "the State of New York amended its firearm licensing statute, and the City amended the

[challenged] rule" to provide "the precise relief that petitioners requested[.]" 140 S. Ct. at 1526. In response to New York's argument that the amendments mooted their claims, the petitioners noted (1) that the new rule shared some of the old rule's constitutional problems and (2) raised the prospect of saving their complaint by amending it to seek damages. *Id.* at 1526–27.

While the Supreme Court concluded that petitioners' old claims were moot, its subsequent vacatur *and remand* (which, it bears noting, is nowhere near the same thing as this court *finally dismissing* this case for mootness) affirmatively disclaimed neither of petitioners' arguments. As to the petitioners' first argument, the Supreme Court gave no indication that it disagreed with their contention that New York's replacement rule might have constitutional problems of its own. Instead, it ordered the lower court to address that argument in the first instance. And then, just two years later, the Supreme Court vindicated that exact argument from the very same petitioners. *See New York State Rifle & Pistol Ass'n v. Bruen*, 587 U.S. 1, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022). And as to petitioners' second argument that they might amend their challenge to the old rule and avoid mootness by adding a damages claim, the Supreme Court ***1269** *again* merely sent that argument back to the lower court to address in the first instance. *New York*, 140 S. Ct. at 1527. It did not, like the majority does here, reject and dismiss that claim. In short, while the Supreme Court in *New York* did conclude the petitioners' challenge to the old rule was "moot" for purposes of the Supreme Court's own continued review, the Court's actions taken in response to that

conclusion bear no resemblance to the majority's decision here. Instead, the Supreme Court merely exercised its unique discretion to have the lower courts address all the remaining non-moot issues in the first instance.

But it bears repeating: we are not the Supreme Court. A three-judge district court panel has nowhere to remand the remaining non-moot issues in this case. The Supreme Court's unique method of managing its own discretionary appellate docket, which in *New York* kept alive the prospect that petitioners' non-moot claims would receive substantive review, provides no support for the majority's broad mootness decision here, which kills Garcia's entire case—including the parts that aren't moot—before any court had the opportunity to review its merits.

In sum, the panel is wrong on the narrow question of mootness in this case. More broadly—and more disconcerting—the court in *Soto Palmer* was incorrect to issue an advisory opinion opining on whether, assuming LD-15 had been enacted in compliance with the Constitution and was thus legally extant, the district would have violated the VRA. My criticism that the *Soto Palmer* decision is an advisory opinion depends, of course, on my conclusion that the State of Washington violated the Equal Protection Clause. I thus turn now to that question. It is not a hard one on this record.

II. The State of Washington Violated the Equal Protection Clause by Racially Gerrymandering Without a Compelling Interest.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "[A]bsent extraordinary justification," this clause prohibits a State from "segregat[ing] citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools." *Miller v. Johnson*, 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal citations omitted). Such sifting is odious to the Constitution and our Republic. It is no less so when a "State assigns voters on the basis of race" and "engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.' " *Id.* at 911–12, 115 S.Ct. 2475 (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)). These "[r]ace-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.* In short, "[u]nder the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious" and "cannot be upheld unless they are narrowly tailored to achieve a compelling state interest." *Wis. Legislature*, 142 S. Ct. at 1248 (cleaned up).

When a plaintiff has shown that a State racially gerrymandered in drawing a particular district, the burden shifts to the State to show that the gerrymander was "narrowly tailored to achieve a compelling ***1270** interest." *Miller*, 515 U.S. at 904,

115 S.Ct. 2475; *see also Wis. Legislature*, 142 S. Ct. at 1248. A State may have a compelling interest to draw lines on the basis of race when, "at the time of imposition," it has a "strong basis in evidence" to believe the racial gerrymander was necessary to comply with the VRA and in fact "judg[ed] [such gerrymandering] necessary under a proper interpretation of the VRA." *Wis. Legislature*, 142 S. Ct. at 1249–50.[10]

In this case, the 2021 Washington State Redistricting Commission (1) racially gerrymandered in drawing LD-15 and (2) a majority of the Commission did not, "at the time of imposition, judge [such a gerrymander] necessary under a proper interpretation of the VRA." *Id.* (cleaned up). Because the Commission racially gerrymandered without a compelling interest, the 2021 Redistricting Map violated the Equal Protection Clause of the U.S. Constitution and was "void *ab initio*." *Mester Mfg. Co.*, 879 F.2d at 570; *see also Collins*, 141 S. Ct. at 1788–89. But before discussing

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[10] The majority mischaracterizes me as "admi[tting]" that "so long as the State judges the use of race necessary to comply with the VRA it is not unlawful for the State to create a district with a higher Latino CVAP." That is incorrect. The mere fact that a State (through its officials) "judges the use of race necessary to comply with the VRA" is decidedly *not* the correct standard for policing the line between racial discrimination that violates the Equal Protection Clause and racial discrimination that complies with the VRA. It is one thing to subject a State that is racially gerrymandering to "the burden of showing that the design of th[e] district withstands strict scrutiny." *Wis. Legislature*, 142 S. Ct. at 1249. It is quite another to bless a State's racial discrimination any time "the State judges the use of race necessary to comply with the VRA." While the Supreme Court has sanctioned the former approach, it has never endorsed the latter, and for good reason.

the evidence showing the Commission grouped voters on the basis of race and that its racial sorting was not in furtherance of a compelling interest, a threshold question must first be considered. Specifically, the parties dispute whether the Commission or the Washington Legislature is the entity whose intent matters for determining whether the State violated the Equal Protection Clause. The answer is not difficult: it is the Commission's intent that matters.

A. The Redistricting Commission's Intent Matters for Garcia's Equal Protection Claim.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). To establish his prima facie case that the State of Washington violated the Equal Protection Clause in enacting the 2021 map, Garcia must thus show that the State intentionally racially gerrymandered. But whose intent? The State of Washington argues it is the Washington Legislature's intent. *Garcia* Dkt. No. 78 at 30. Because Washington law structurally makes the Redistricting Commission primarily responsible for redistricting and because the Legislature made only minor changes to the map submitted by the 2021 Redistricting Commission—none of which affected the racial composition of LD-15 imposed by the Commission—the State is incorrect. It is the Commission's intent that is legally relevant.

"[Supreme Court] precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which

may include," for example, the popular "referendum and the Governor's veto." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015). Accordingly, it is important to first attend to ***1271** what institution Washington law makes responsible for redistricting. Structurally, Washington law delegates redistricting to the Redistricting Commission, leaving only a minor role for the Washington Legislature.

The Washington Constitution provides that "redistricting of state legislative and congressional districts" shall be performed by "a commission." Wash. Const. art. II, § 43(1). "The legislature may amend the redistricting plan but must do so by a two-thirds vote of the legislators elected or appointed to each house of the legislature." *Id.* § 43(7). "After submission of the plan by the commission, the legislature shall have the next thirty days during any regular or special session to amend the commission's plan." Wash. Rev. Code § 44.05.100(2). The Legislature's amendments "may not include [a change of] more than two percent of the population of any legislative or congressional district." *Id.* Moreover, if the Legislature fails to timely make any amendments, the Commission's plan automatically becomes "the state districting law." Wash. Const. art. II, § 43(7).

It is plain from these state constitutional and statutory requirements that Washington law delegates primary redistricting responsibility to the Commission, leaving only tightly circumscribed discretion for a supermajority of the Legislature to make minor changes to the map. Because Washington law delegates almost all responsibility to the

Redistricting Commission, the Commission is at least presumptively responsible for performing the "legislative function" of redistricting and is thus the entity whose intent matters for evaluating an Equal Protection claim. *Ariz. State Legislature*, 576 U.S. at 808, 135 S.Ct. 2652.

Even assuming that presumption could be overcome in some case, it was not here. The Legislature minimally amended LD-15, the district that Garcia contends was drawn discriminatorily, changing only a few census blocks that resulted in no change in population to LD-15. *See* H. Con. Res. 4407, 67th Leg. Reg. Sess., at 2:35–36, 71:9–77:26. Moreover, the House and Senate majority leaders both explained that they viewed the Commission as the entity responsible for drawing the maps, with the Legislature playing a minor role. The House Majority Leader discussed the changes as "technical in nature" and explained that "[i]f we do nothing, then the maps come into being without our vote" but that the maps would then "come into being without [certain] changes that were recommended by the county commissioners." Ex. 1065 at 5:04–22. The Senate Majority Leader explained that adopting the maps "is not an approval of the redistricting map and the redistricting plans; it's not an endorsement of that plan. The Legislature does not have the power to approve or endorse the redistricting plan that the Redistricting Commission approved." Ex. 126 at 2:10–2:38.

The intent of the 2021 Redistricting Commission is the intent we must consider when evaluating Garcia's Equal Protection claim.

B. Race Predominated the Commission's Considerations in Drawing LD-15.

Garcia claims that the 2021 Redistricting Commission racially gerrymandered when it drew LD-15. The evidence establishes that he is right. "[A] plaintiff alleging racial gerrymandering bears the burden 'to show ... that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' " *Bethune-Hill*, 580 U.S. at 187, 137 S.Ct. 788 (quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475). "Race may predominate even when a reapportionment plan respects traditional principles ... if race was the criterion that, in the State's view, could not be ***1272** compromised, and race-neutral considerations came into play only after the race-based decision had been made." *Id.* at 189, 137 S.Ct. 788 (cleaned up) (quoting *Shaw v. Hunt*, 517 U.S. 899, 907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996)).[11] Finally, it is no excuse that a government racially sorted voters so that it could accomplish an ultimate non-race objective. *See Cooper v. Harris*, 581 U.S. 285, 291 n.1, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017).

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[11] The Supreme Court recently reinforced that when a State makes the racial composition of a district the criterion on which it will not compromise, it has elevated race to a position of predominance. *See Allen v. Milligan*, 143 S. Ct. at 1510–12 (plurality op.) (obtaining only a minority of the justices for an analysis opining that race does not necessarily predominate when a State crafts a district with an objective of a specific racial composition).

Race clearly predominated the considerations of the 2021 Redistricting Commission when it drew LD-15. The racial composition of LD-15 featured heavily in the Commissioner's negotiations over the legislative map. *Garcia* Dkt. Nos. 73 at 117, 153–54, 177; 75 at 30–31. And in the ramp-up to final negotiations, the Commissioners reached an agreement to racially gerrymander LD-15 to be at least a bare majority Hispanic CVAP. *Garcia* Dkt. No. 75 at 30, 91. This initial agreement to make LD-15 a majority HCVAP district was then cemented in the final framework agreement among the Commissioners. *Garcia* Dkt. Nos. 73 at 16–17; 74 at 71; 75 at 42, 72. This agreement was the primary criterion for LD-15, contrasting with the other districts where the Commission was aware of racial demographics but nonetheless did not make race a nonnegotiable criterion. *Garcia* Dkt. No. 75 at 42.

All the Commissioners, for varying reasons, elevated the racial composition of LD-15 to be a nonnegotiable criterion around which other factors and passage of the map itself must fall. Commissioner Sims believed that a majority HCVAP in LD-15 was required by the VRA and also believed that the Commission must follow the law. *Garcia* Dkt. No. 73 at 48, 51. One of Commissioner Walkinshaw's draft maps included a note that the map "[c]reate[d] a majority Hispanic district" in the Yakima Valley. *Garcia* Dkt. No. 73 at 132. And one of Walkinshaw's staff stated that a district that "perform[ed] for Latino voters" should be nonnegotiable." *Garcia* Dkt. No. 75 at 110–11. Making LD-15 a majority HCVAP was critical to Commissioner Fain because he "belie[ved] that "the Hispanic CVAP was a metric that was important to

Democratic commissioners" and he was "willing to give [an increase in Hispanic CVAP in LD-15] in order to secure support for a final compromise map." *Garcia* Dkt. No. 74 at 49–50. Commissioner Graves wanted LD-15 to be a majority HCVAP so that he could get a map that obtained a majority of the Commissioners' votes; it was "[v]ery hard for [Commissioner Graves] to see three of the voting commissioners voting for a map that did not have a majority Hispanic CVAP district in the Yakima Valley." *Garcia* Dkt. Nos. 73 at 186–87; 75 at 73. Commissioners Fain and Graves may have wanted LD-15 to be a majority HCVAP district for reasons unrelated to their own concerns about race, but the government may not "elevate[ ] race to the predominant criterion in order to advance other goals, including political ones." *Cooper*, 581 U.S. at 291 n.1, 137 S.Ct. 1455.

The Commissioners then transformed these intents into an agreement that, come what may, LD-15 would be a majority HCVAP district. In the days leading up to the Commission's deadline to agree on maps, the two Commissioners responsible for negotiating the legislative map (as opposed to the congressional map) reached an agreement that LD-15 "would be a ***1273** majority Hispanic district by eligible voters." *Garcia* Dkt. No. 75 at 91. They "agreed to ... make the district 50 percent Latino CVAP." *Garcia* Dkt. No. 75 at 31. The district's partisan makeup was still "up in the air," but it was agreed that the district would be majority HCVAP.[12] *Garcia* Dkt. No. 75 at 32. And

[12] The State of Washington notes that Commissioner Fain did not remember the racial composition of LD-15 being a part of the framework agreement. *Garcia* Dkt. No. 78 at 32 n.12. But Commissioner Fain's lack of memory is hardly surprising given

finally, when November 15 arrived, all the Commissioners reached a framework agreement on how the maps would be drawn, which included that LD-15 would be a majority HCVAP district. *Garcia* Dkt. Nos. 73 at 16–17; 74 at 71; 75 at 42, 72.

Underlining that race predominated the Commission's drawing of LD-15 is the fact that the Commission did not elevate race to be the predominant factor in drawing other districts. Grose, one of Commissioner Graves's staffers, testified that LD-15, "in particular," was "certainly ... far more race-focused than [Grose] th[ought] any other district on the map." *Garcia* Dkt. No. 73 at 155. Commissioner Fain testified that the "racial composition" of LD-15 was "a very important component of that negotiation" and confirmed that there were not "other districts where [racial composition] was as important of a component." *Garcia* Dkt. No. 74 at 87. In making the racial composition of LD-15 nonnegotiable—the "criterion that ... could not be compromised"—the Commission elevated race, and it predominated the drawing of LD-15. *Bethune-Hill*, 580 U.S. at 189, 137 S.Ct. 788 (cleaned up).

The majority does not dispute that the racial composition of LD-15 was nonnegotiable for the Commission. The majority instead argues that race

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that he was negotiating the congressional map, not the legislative map. *Garcia* Dkt. No. 75 at 49. And his inability to remember this part of the framework agreement is unpersuasive evidence of whether the agreement contained this nonnegotiable criterion, in light of testimony from one of the legislative map negotiators that it was part of the agreement.

did not predominate because the Commissioners considered other factors when drawing the legislative map and because the Commissioners later denied that race predominated their considerations. The reason several of the Commissioners gave for believing that race did not predominate is the same reason relied on by the majority: simply that, in addition to considering race a nonnegotiable criterion, they also considered other factors.

It is of course not surprising at all that the Commissioners considered other factors. But it is also irrelevant. When a map drawer elevates a specific racial composition as "a "criterion that, in the [map drawer's] view, could not be compromised," race predominates. *Bethune-Hill*, 580 U.S. at 189, 137 S.Ct. 788. If the mere consideration of other factors *in addition* to making race nonnegotiable meant race no longer predominated, then race would literally never predominate. Map drawers always consider more than just race, even when they operate with the express purpose of meeting a racial target. Take a simple example. Map drawers always attempt to comply with the Constitution's requirement that states' legislative maps be drawn with "equality of population among the districts." *Mahan v. Howell*, 410 U.S. 315, 321, 93 S.Ct. 979, 35 L.Ed.2d 320, *modified*, 411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973). If the mere consideration of other factors could stop race from predominating when a map drawer makes racial composition a nonnegotiable criterion, then it would make little sense for the Court to repeatedly state that race predominates when it is a "criterion that ... could not be compromised." ***1274** *Shaw*, 517 U.S. at 907, 116 S.Ct. 1894; *Bethune-Hill*,

580 U.S. at 189, 137 S.Ct. 788.

By the basic nature of their task, drawers of legislative districts always take a number of essential considerations into account. The ever-present nature of such considerations cannot somehow dilute the constitutional taint of a map drawer who makes race a nonnegotiable criterion in drawing a map. *See Lee v. City of Los Angeles*, 908 F.3d 1175, 1183 (9th Cir. 2018) (explaining that "traditional redistricting principles are 'numerous and malleable' " and "a legislative body 'could construct a plethora of potential maps that look consistent with traditional, race-neutral principles' ") (quoting *Bethune-Hill*, 580 U.S. at 190, 137 S.Ct. 788). That the Commission here unsurprisingly considered "traditional, race-neutral principles" *in addition* to making race a nonnegotiable requirement does not mean those other factors somehow sufficiently watered-down race as the Commission's predominant consideration in drawing LD-15. *Id.* The racial composition of LD-15—specifically, that it be majority HCVAP—was a "criterion that, in the [Commission's] view, could not be compromised," and thus "race-neutral considerations came into play only after the race-based decision had been made." *Bethune-Hill*, 580 U.S. at 189, 137 S.Ct. 788 (quoting *Shaw*, 517 U.S. at 907, 116 S.Ct. 1894).

C. The 2021 Legislative Map Fails Strict Scrutiny.

Race predominated the Commission's decision to draw LD-15 as it did. For the map to nonetheless be constitutional, the State must show that it survives

strict scrutiny. Specifically, the State must show that the map is "narrowly tailored to achieve a compelling state interest." *Miller*, 515 U.S. at 904, 115 S.Ct. 2475. The State argues the gerrymander was justified under the VRA. *Garcia* Dkt. No. 78 at 34. The Supreme Court has held that complying with the VRA can be a compelling state interest, but only if the State, "at the time of imposition, judge[d] [the racial gerrymander] necessary under a proper interpretation of the VRA." *Wis. Legislature*, 142 S. Ct. at 1248, 1250 (cleaned up). Because a majority of the voting Commissioners did not "judg[e]" the gerrymander "necessary" under the VRA at the time that the Commission approved the 2021 Legislative Map, the map fails strict scrutiny. *Id.*

Commissioner Graves testified that he was "entirely uncertain" of whether the VRA required "a Hispanic CVAP district." He thought "that the law was entirely unclear on that particular question." *Garcia* Dkt. No. 75 at 71. When asked if he had a "clear understanding of what the VRA required[ ] in the Yakima Valley," Commissioner Graves answered that he was "not sure the VRA itself has a clear understanding of exactly what it requires in the Yakima Valley." *Garcia* Dkt. No. 75 at 58. It is evident that Commissioner Graves's decision to racially gerrymander LD-15 was not because he thought that it was required by the VRA.

So too Commissioner Fain. When he was asked point-blank at trial whether he believed the Hispanic CVAP majority in LD-15 was "required[ ] by the Voting Rights Act," Commissioner Fain answered: "No." *Garcia* Dkt. No. 74 at 50.

Commissioner Walkinshaw was less direct but also

unclear as to whether he believed a majority HCVAP was necessary in LD-15. He certainly believed complying with the VRA was important, calling it "mission critical." *Garcia* Dkt. No. 73 at 106. After he received the slideshow prepared by Dr. Barreto, Commissioner Walkinshaw released a new map that included an explanation that "[n]ow that we have this information, we as Commissioners should not consider legislative district ***1275** maps that don't comply with the VRA." *Garcia* Dkt. No. 73 at 135. But his general statement that the Commission should comply with the law does not clearly evince that he actually believed the racial gerrymander ultimately embodied in the final legislative map was *necessary* under the VRA. It is possible that Commissioner Walkinshaw believed the VRA required a racial gerrymander, but his testimony and the record are ambiguous.

Ultimately, only Commissioner Sims clearly believed the racial gerrymander performed in LD-15 was required by the VRA. Commissioner Sims straightforwardly answered "Yes" when asked whether she "believe[d] that the VRA required the Commission to create a majority Hispanic CVAP district[ ] in the Yakima Valley." *Garcia* Dkt. No. 73 at 51.

The State bears the burden of showing that the 2021 Legislative map survives strict scrutiny. *See Cooper*, 581 U.S. at 292, 137 S.Ct. 1455. Even giving the State the benefit of the doubt (which, of course, would not be particularly *strict* scrutiny), and thus assuming Commissioner Walkinshaw believed the VRA required that LD-15 be racially gerrymandered, the

State cannot show that a majority of commissioners racially gerrymandered because they intended to comply with the VRA. Two of four commissioners do not constitute a majority of the Commission, *see* Wash. Const. art. II, § 43(6), and thus there was no majority of the Commission who, "at the time of imposition, judge[d] [the racial gerrymander] necessary under a proper interpretation of the VRA," *Wis. Legislature*, 142 S. Ct. at 1250 (cleaned up). The judgment of only two Commissioners was not enough to demonstrate that the Commission in any official sense believed racial sorting was necessary to comply with the VRA.

State governments may not arrange people into districts based on race and then hope to justify it by simply pantomiming at the VRA as an interest that could have justified their gerrymander. "What matters is 'the actual considerations that provided the essential basis for the lines drawn, not post hoc justifications the legislative body in theory could have used but in reality did not.' " *Lee*, 908 F.3d at 1182 (cleaned up) (quoting *Bethune-Hill*, 137 S. Ct. at 799). For good or ill, the Supreme Court has given States "leeway" to draw lines on the basis of race in redistricting when States have good reasons, based in the evidence, to believe the racial gerrymander necessary under the VRA. *Cooper*, 581 U.S. at 306, 137 S.Ct. 1455; *see Wis. Legislature*, 142 S. Ct. at 1250. But the Supreme Court also understandably requires that states *actually* judge such segregation necessary under the VRA, not just hope that they can find good experts and good lawyers to make post hoc arguments if someone challenges it as violating the Equal Protection Clause. The State of Washington

took the latter approach and so fails to satisfy strict scrutiny. The State thus enacted the 2021 Legislative Map in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

* * *

My colleagues in the majority are not properly dismissing an already dead case as moot. Instead, after improperly (and unsuccessfully) trying to indirectly kill this case from a distance in *Soto Palmer*, they are forcefully pulling the plug on a case that—even now—still has some life in it. And had they properly reached the merits, a straightforward analysis shows both that race predominated in the drawing of LD-15 in the 2021 Legislative Map and that, because a majority of the Commission did not judge such racial ordering necessary under the VRA at the time the map was adopted, the map cannot survive strict ***1276** scrutiny. We should have found in favor of Garcia and directed the State of Washington to redraw the Legislative Map without violating the Equal Protection Clause. And then *that* map could be properly evaluated for compliance with the VRA, instead of the advisory analysis provided in the *Soto Palmer* decision. I thus respectfully dissent.

U.S. CONST. AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

52 U.S.C. § 10301

§ 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

FILED 1/19/22

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE**

CASE NO. 3:22-cv-05035-RSL

SUSAN SOTO PALMER, et al.,
Plaintiffs,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Under 42 U.S.C. § 1983 and 52 U.S.C. § 10301, Plaintiffs allege as follows:

INTRODUCTION

1. The Washington State Redistricting Commission (the "Commission") intentionally selected redistricting plans for Washington's state legislative districts that dilute Hispanic and/or Latino[1] voters' ability to elect candidates of choice.

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[1] This complaint uses the terms "Latino" and "Hispanic" interchangeably to refer to individuals who self-identify as Latino or Hispanic. Additionally, the terms "Latino" and "Hispanic" mean persons of Hispanic Origin as defined by the United States Census Bureau and U.S. Office of Management and Budget (OMB).

2. The Commission did so by configuring District 15, which includes parts of the Yakima Valley and Pasco, to be a *façade* of a Latino opportunity district.

3. Election results show that the approved map's District 15 is unlikely to afford Latino voters an equal opportunity to elect their candidates of choice in violation of the Voting Rights Act.

4. The district's Hispanic citizen voting age population ("HCVAP") is just 50.02%.

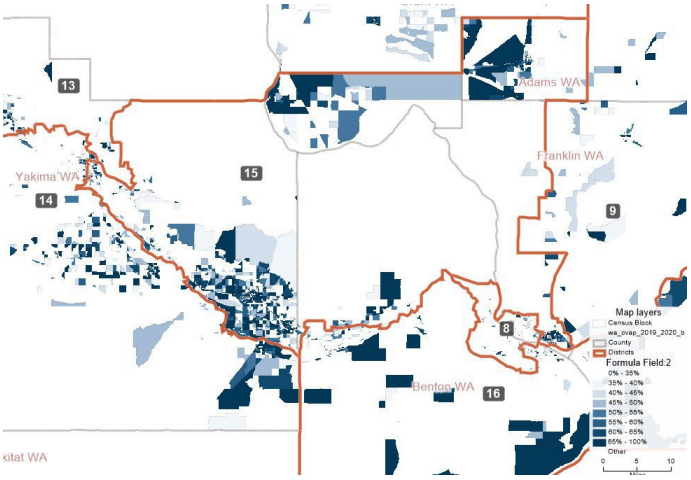
5. This number is needlessly depressed because the Commission excluded a number of adjacent, heavily Latino communities in Yakima County--including parts of the City of Yakima and the cities of Toppenish, Wapato, Mabton, and their surrounding areas--and instead included an expanse of rural, white communities in Benton, Grant, and Franklin Counties.

6. The election data shows that these rural white voters participate at much higher rates than the district's Latino population and exhibit stark racially polarized voting patterns against Latino-preferred candidates.

7. At the northeastern end of that swath of rural, white voters, the Commission included the City of Othello in Adams County in District 15. Othello and areas to its immediate west are majority HCVAP, but to a lesser degree than the Yakima Valley Hispanic communities that the Commission excluded from District 15.

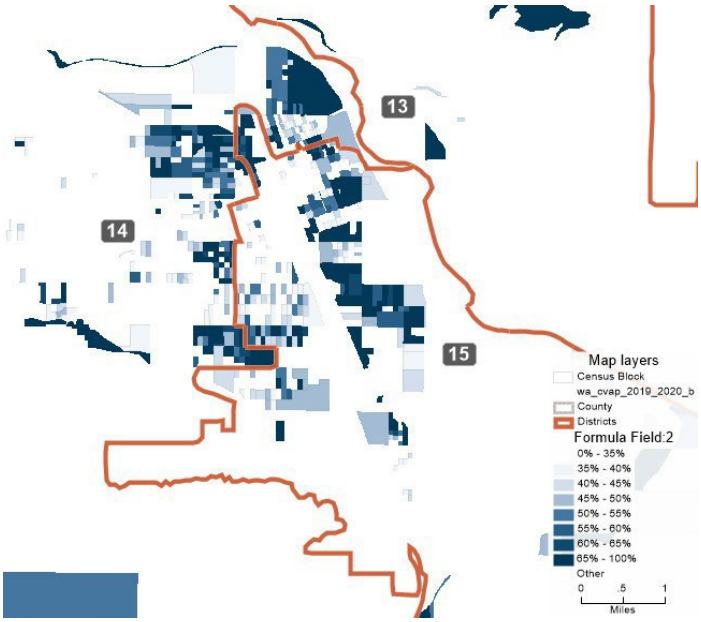
8. The map below shows how the Commission cracked apart Yakima County's Latino population between Districts 14 and 15. Census blocks with Latino CVAP exceeding 35% are shown in gradations of blue.

District View



9. The map below shows the cracking of the Latino population in the City of Yakima.

City of Yakima View



10. The Commission's design of District 15 dilutes Latinos' voting strength in four ways.

11. First, reaching for Othello rather than including adjacent Yakima County Latino voters unnecessarily increases the number of bloc-voting white voters in the district, who must be included in order to extend the lines to Adams County.

12. Alternative configurations would have resulted in the district's HCVAP being higher and providing a real opportunity for Latino voters to elect their candidates of choice.

13. Second, the Commissioners included a large number of rural white voters that vote against Latino-preferred candidates.

14. Third, the election data show that Othello's Latino voters are less politically active than those the Commission excluded from the district in Yakima County.

15. Indeed, in the Adams County portion of

District 15 (where Othello is located), former President Donald Trump--who is not the candidate of choice for Yakima County and Franklin County Latinos--received 60.7% of the vote.

16. Adams County Latinos exhibit low voting turnout in elections.

17. The Commission's decision to extend District 15's lines to Othello in order to include low-propensity Latino voters created a district that has *just* a bare minority Hispanic citizen voting age population while not improving the electoral prospects of Latino-preferred candidates.

18. The approved map's District 15 worsened the electoral prospects of Latino-preferred candidates.

19. Fourth, the election data show that Latino voters turn out to vote at greater numbers in presidential election years (when even-numbered legislative district elections are held) than in non-presidential election years (when odd-numbered legislative district elections are held).

20. By assigning the district an odd number, the Commission has ensured even lower Latino voter turnout in the district.

21. These choices--(1) excluding adjacent, politically cohesive Latino voters, (2) including a large number of rural white voters, (3) extending the district to reach non-politically active Latino voters, and (4) placing the district on a non-presidential election year cycle--result in a district that is a façade of Latino opportunity district.

22. The Supreme Court has held that these precise maneuvers--cracking apart politically-cohesive Latino populations and instead including less politically active Latinos "to create the façade of

a Latino district"--violates Section 2 of the Voting Rights Act. *LULAC v. Perry*, 548 U.S. 399, 441 (2006).

23. The election data confirm this.

24. Reconstituted election results show that the Latino-preferred candidates would have lost almost all recent statewide elections in District 15: 2020 President, 2020 Governor, 2020 Attorney General, 2018 Senate, 2016 President, and 2016 Governor. In only the 2016 Senate election would the Latino-preferred candidate have carried the district.

25. The situation is even worse than that for Latino voters and candidates. In all of the above statewide elections, the Latino-preferred candidates were white and were running well-funded, statewide races. The election data show that when Latino candidates run for state legislative office in the area, they perform below these white candidates.

26. The current District 15 includes the eastern half of Yakima County and has an HCVAP of 39.3%.

27. Maria Cantwell, a white woman who was the Latino candidate of choice for U.S. Senate in 2018, received 43.3% of the vote. Meanwhile, Plaintiff Evangelina Aguilar--who was a candidate for state senate in District 15 that year and the Latino candidate of choice--received just 39.4%.

28. The Commission could have avoided creating a façade Latino opportunity district; alternative configurations are possible that have a higher HCVAP percentage, and reconstituted election results demonstrate that Latino-preferred candidates would have a real opportunity to elect their candidates of choice in those configurations.

29. Every member of the Commission was made aware of the adverse effect that the adopted

maps would have on Latino voters in the Yakima Valley region.

30. This information was widely reported on in Washington before the Commission is alleged to have approved the plan. *See* Jim Brunner, *Washington's Redistricting Commissioners Confident They'll Meet Deadline, But Face Pushback Over South Seattle Plans*, Seattle Times (Nov. 10, 2021), https://www.seattletimes.com/seattle-news/politics/washingtons-redistricting-commissioners-confident-theyll-meet-deadline-but-face-pushback-over-south-seattle-plans/; Melissa Santos, *Proposed WA Redistricting Maps May Violate Voting Rights Act*, Crosscut (Oct. 21, 2021), https://crosscut.com/politics/2021/10/proposed-wa-redistricting-maps-may-violate-voting-rights-act.

31. One of the Commissioners, Commissioner Graves, has stated in relation to District 15, that the Federal Voting Rights Act "forbids districts where members of a racial group 'have less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice' " while also stating that District 15 "using recent election results ... leans Republican rather than Democrat."

32. In races that require political affiliation, Latinos in the Yakima Valley region prefer Democratic candidates and Latino-preferred candidates have run as Democrats.

33. By drawing District 15 in such a manner, Latinos in District 15 will be unable to elect candidates of choice.

34. The Commission's decision to create the façade of a Latino opportunity district that they knew would not perform to elect Latino-preferred

candidates has the intent and effect of diluting the voting power of Latino voters in violation of the Voting Rights Act.

JURISDICTION AND VENUE

35. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1357, and 52 U.S.C. § 10301 *et seq*. to hear the claims for legal and equitable relief arising under the Voting Rights Act. It also has general jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, and Federal Rules of Civil Procedure 57 and 65 to grant the declaratory and injunctive relief requested by Plaintiffs.

36. Jurisdiction for Plaintiffs' claim for costs and attorneys' fees is based upon Federal Rule of Civil Procedure 54, 42 U.S.C. § 1988, and 52 U.S.C. § 10310(e).

37. This Court has personal jurisdiction over all Defendant. Defendant Steve Hobbs is a state official who resides in Washington and performs official duties in Olympia, Washington.

38. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred and will occur in this judicial district. In addition, Defendant is a state official performing official duties in the Western District of Washington.

PARTIES

39. Plaintiff Susan Soto Palmer is a United States citizen, Latina, over the age of eighteen, and a registered voter in the State of Washington.

40. Plaintiff Soto Palmer resides in Yakima,

Washington, and under the Commission-approved map, resides in Legislative District 15. She intends to vote in future elections.

41. Plaintiff Alberto Isaac Macias is a United States citizen, Latino, over the age of eighteen, and a registered voter in the State of Washington.

42. Plaintiff Macias resides in Yakima, Washington, and under the Commission-approved map, resides in Legislative District 15. He intends to vote in future elections.

43. Plaintiff Brenda Rodriguez Garcia is a United States citizen, Latina, over the age of eighteen, and a registered voter in the State of Washington.

44. Plaintiff Rodriguez Garcia resides in Yakima, Washington, and under the Commission-approved map, resides in Legislative District 14. She intends to vote in future elections.

45. Plaintiff Fabiola Lopez is a United States citizen, Latina, over the age of eighteen, and a registered voter in the State of Washington.

46. Plaintiff Lopez resides in Wapato, Washington in Yakima County, and under the Commission-approved map, resides in Legislative District 14. She intends to vote in future elections.

47. Plaintiff Caty Padilla is a United States citizen, Latina, over the age of eighteen, and a registered voter in the State of Washington.

48. Plaintiff Padilla resides in Toppenish, Washington in Yakima County, and under the Commission-approved map, resides in Legislative District 14. She intends to vote in future elections.

49. Plaintiff Evangelina Aguilar is a United States citizen, Latina, over the age of eighteen, and a registered voter in the State of Washington.

50. Plaintiff Aguilar resides in Sunnyside,

Washington and under the Commission-approved map, resides in Legislative District 15. She intends to vote in future elections.

51. Plaintiff Lizette Parra is a United States citizen, Latina, over the age of eighteen, and a registered voter in the State of Washington.

52. Plaintiff Parra resides in Pasco, Washington in Franklin County, and under the Commission-approved map, resides in Legislative District 15. She intends to vote in future elections.

53. Plaintiffs Heliodora Morfin is a United States citizen, Latina, over the age of eighteen, and a registered voter in the State of Washington.

54. Plaintiff Morfin resides in Pasco, Washington, and under the Commission-approved map, resides in Legislative District 15. She intends to vote in future elections.

55. The Individual Plaintiffs are Latino voters whose votes are diluted in violation of Section 2 of the Voting Rights Act by being placed in state legislative districts that crack them from other Latino voters and where their voting power will be overwhelmed by a white bloc voting in opposition to their candidate of choice.

56. Plaintiff Southcentral Coalition of People of Color for Redistricting is a Washington non-profit organization whose members include Latino registered voters who reside in the Yakima Valley region and Yakima County.

57. Plaintiff Southcentral Coalition of People of Color for Redistricting's mission of "[p]romoting public awareness of voting rights and representation in southcentral Washington" is directly related to securing fair representation of the Latino community in the Yakima Valley region.

58. Plaintiff Southcentral Coalition of People of Color for Redistricting will bear the additional burden of expending resources to ensure that Latinos are able to elect candidates of choice under the current Commission-approved map.

59. Defendant Steve Hobbs is being sued in his official capacity as the Secretary of State of Washington. Hobbs, as Secretary of State, "shall be the chief election officer for all federal, state, county, city, town, and district elections." RCW 29A.04.230. The Secretary of State shall accept and file documents including declarations of candidacy. RCW 29A.04.255. The Secretary of State oversees and implements elections that take place once adopted redistricting plans take effect and ensures that elections are conducted in accordance with those plans.

60. Defendant Laurie Jinkins is being sued in her official capacity as the Speaker of the Washington State House of Representatives. As Speaker of the Washington State House of Representatives, Jinkins has the power to call for a vote to reconvene the Washington Redistricting Commission for purposes of modifying the redistricting plan. RCW 44.05.120.

61. Defendant Andy Billig is being sued in his official capacity as Majority Leader of the Washington State Senate. As the Senate Majority Leader, Billig has the power to call for a vote to reconvene the Washington Redistricting Commission for purposes of modifying the redistricting plan. RCW 44.05.120.

LEGAL BACKGROUND

62. Section 2 of the Voting Rights Act, 52

U.S.C. § 10301(a), prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." A violation of Section 2 is established if it is shown that "the political processes leading to nomination or election" in the jurisdiction "are not equally open to participation by [a racial minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

63. The dilution of Latino voter strength "may be caused by the dispersal of [Latino voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [Latino voters] into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

64. In *Gingles*, the Supreme Court identified three necessary preconditions ("the *Gingles* preconditions") for a claim of vote dilution under Section 2: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

65. The second and third preconditions refer to the existence of racially polarized voting. "This legal concept 'incorporates neither causation nor intent' regarding voter preferences, for '[i]t is the difference between the choices made by [minorities] and whites--not the reasons for that difference--that results' in the opportunity for discriminatory laws to

have their intended political effect." *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016) (citing *Gingles*, 478 U.S. at 62-63).

66. In addition to the preconditions, the statute directs courts to assess whether, under the totality of the circumstances, members of the racial group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b). The Supreme Court has directed courts to consider the non-exhaustive list of factors found in the Senate Report on the 1982 amendments to the Voting Rights Act in determining whether, under the totality of the circumstances, the challenged electoral device results in a violation of Section 2.

67. The Senate Factors include: (1) the history of official voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which members of the minority group bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

68. Courts also consider whether there is a lack of responsiveness on the part of elected officials

to the particularized needs of the minority community, *see Luna v. Cty. of Kern*, 291 F. Supp. 3d 1088, 1139 (E.D. Cal. 2018), and whether the policy underlying the state or political subdivision's use of the challenged standard, practice, or procedure is tenuous, *see Hall v. Louisiana*, 108 F. Supp. 3d 419, 427 (M.D. La. 2015).

69. "There is no requirement that any particular number of factors be proved, or that a majority of them point one way or other." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1566 n.33 (11th Cir. 1984) (quoting S. Rep. No. 97-417, at 29 (1982)); *see also id*. ("The statute explicitly calls for a 'totality of the circumstances' approach and the Senate Report indicates that no particular factor is an indispensable element of a dilution claim.").

70. Section 2 of the Voting Rights Act also prohibits intentional discrimination.

71. A court, when evaluating whether discriminatory intent motivated a redistricting plan, undertakes a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). "Challengers need not show that discriminatory purpose was the 'sole[]' or even a 'primary' motive for the legislation, just that it was '*a* motivating factor.' " *McCrory*, 831 F.3d at 220 (4th Cir. 2016) (quoting *Arlington Heights*, 429 U.S. at 265-66) (emphasis in original).

72. In making such an evaluation, the court utilizes a non-exhaustive list of factors, including "the historical background of the challenged decision; the specific sequences of events leading up to the challenged decision; the legislative history of the

decision; and [] the disproportionate impact of the official action -- whether it bears more heavily on one race than another." *Id.* at 220-21 (internal citations and brackets omitted).

73. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

74. Courts have found Section 2 violations where the district drawn was majority-minority citizen voting age population or voting age population, but the minority group still did not have the ability to elect candidates of choice. *See, e.g.*, *Thomas v. Bryant*, 366 F. Supp. 3d 786, 809 (S.D. Miss. 2019), *aff'd*, 938 F.3d 134 (5th Cir. 2019) (rejecting the defense's argument that a majority-minority district cannot be found to be dilutive in violation of Section 2) (citing *Monroe v. City of Woodville*, 881 F.2d 1327 (5th Cir. 1989)); *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 933 (8th Cir. 2018)).

75. The Supreme Court has stated that "it may be possible for citizen voting-age majority to lack a real electoral opportunity" in a district. *LULAC*, 548 U.S. at 428.

76. A redistricting plan that intentionally draws a district that has a majority of a minority group but minimizes voter registration and turnout such that the district does not elect the minority group's candidate of choice is a violation of Section 2. *See Perez v. Abbott*, 250 F. Supp. 3d 123, 148 (W.D. Tex. 2017).

77. Where the data show that the State has

used race to create a nominal Latino majority district that will not functionally perform for Latino voters--where alternative options that would perform are possible--it has unlawfully diluted Latinos' voting strength "to create the façade of a Latino district." *LULAC*, 548 U.S. at 441; *Perez*, 250 F. Supp. 3d at 884-85 (finding intentional racial discrimination where race was used "not . . .to provide or protect Latino voter opportunity but rather to create the façade of a Latino district." (internal quotation marks omitted)).

FACTUAL ALLEGATIONS

A. 2020 Demographic Changes in Washington State

78. Washington State's Latino population surpassed one million in 2020 according to the 2020 United States Decennial Census.

79. Washington now has the twelfth largest Latino population out of the fifty states.

80. Under 13 U.S.C. § 141(c), commonly referred to as Public Law 94-171 ("P.L. 94-171"), the Secretary of Commerce must complete, report, and transmit to each state the detailed tabulations of population for specific geographic areas within each state. States ordinarily use the P.L. 94-171 data to redraw district lines.

81. Washington received P.L. 94-171 data on August 12, 2021.

82. Under RCW 44.05.140, the Commission is required to adjust the 2020 census redistricting data (PL 94-171) by relocating specified incarcerated or involuntarily committed populations from their

location of confinement to their last known place of residence.

83. According to P.L. 94-171 data, Washington State's population grew by 980,741 residents from 2010 to 2020, a growth rate of 14.5%.

84. Washington's overall population growth was driven by the growth of its Latino population, which grew at a rate 3.5 times greater than that of non-Latinos.

85. The Latino population in Washington grew by 303,423 for a growth rate of 40.1%, compared to a growth rate of 11.3% for non-Latinos.

86. The growth of the Latino population has been especially large in the Yakima Valley region and is concentrated in that region.

87. The Yakima Valley region consists of Yakima, Benton, and Franklin Counties, and includes Latino population centers in the City of Yakima, Toppenish, Sunnyside, Grandview, and the Tri-Cities.

88. Yakima County added more than 20,000 Latinos over the decade.

89. The total population of Yakima County in 2020 was 256,728.

90. The Latino population of Yakima County in 2020 was 130,049, with Latinos growing from 45% to 51% of the County's total population.

91. Franklin County added more than 12,000 Latinos over the decade.

92. Franklin County's total Latino population is now 54% of the total population or 52,445.

93. Benton County added 16,645 Latinos, a growth of 51% in 10 years, and reported a total of 49,339 Latinos in 2020.

94. According to the Census Bureau's 2019

1-Year American Community Survey ("ACS") estimates, in 2019, Yakima County's HCVAP was 46,611.

95. According to the Census Bureau's 2019 1-year ACS estimates, in 2019, Franklin County's HCVAP was 16,931.

96. According to the Census Bureau's 2019 1-year ACS estimates, in 2019, Benton County's HCVAP was 17,526.

97. Combined, the three-county Yakima Valley region had a total Latino population of 223,027 (2019 ACS) and 231,833 (2020 Census) and a total HCVAP of 81,068 (2019 ACS).

98. The Latino population in the Yakima Valley region is sufficiently large and geographically compact to constitute the majority in a legislative district.

B. The Washington State Redistricting Commission

99. Article II, Section 43 of the Washington Constitution mandates the creation of a bipartisan Washington State Redistricting Commission every decade to complete redistricting in Washington for both congressional and state legislative districts.

100. The Commission is composed of five members; including four voting members and one non-voting member who acts as a chairperson. *See* Wash. Const. Art II, § 43(2).

101. Four members of the Commission are appointed by the legislative leaders of the two largest political parties in each house of the legislature. *Id*. The fifth member is selected by the four appointed members by an affirmative vote of at least three. *Id*.

102. Article II, Section 43(6) states that the

Commission "shall complete redistricting as soon as possible following the federal decennial census, but no later than November 15th of each year ending in one. At least three of the voting members shall approve such a redistricting plan. If three of the voting members of the commission fail to approve a plan within the time limitations provided in this subsection, the supreme court shall adopt a plan by April 30th of the year ending in two in conformance with the standards set forth in subsection (5) of this section."

103. Under RCW 44.05.100, "[i]f three of the voting members of the commission fail to approve and submit a plan within the time limitations provided in subsection (1) of this section, the supreme court shall adopt a plan by April 30th of the year ending in two. Any such plan approved by the court is final and constitutes the districting law applicable to this state for legislative and congressional elections, beginning with the next election held in the year ending in two. This plan shall be in force until the effective date of the plan based on the next succeeding federal decennial census or until a modified plan takes effect as provided in RCW 44.05.120(6)."

104. State legislative redistricting plans in Washington State must adhere to the requirements set out in RCW 44.05.090. Districts shall have a population as nearly equal as is practicable, excluding nonresident military personnel, based on the population reported in the federal decennial census as adjusted by RCW 44.05.140. And to the extent consistent with the equal-population requirement, insofar as practical: (a) District lines should be drawn so as to coincide with the boundaries of local political subdivisions and areas recognized as communities of

interest. The number of counties and municipalities divided among more than one district should be as small as possible; (b) Districts should be composed of convenient, contiguous, and compact territory. Land areas may be deemed contiguous if they share a common land border or are connected by a ferry, highway, bridge, or tunnel. Areas separated by geographical boundaries or artificial barriers that prevent transportation within a district should not be deemed contiguous; (c) Whenever practicable, a precinct shall be wholly within a single legislative district. RCW 44.05.090.

105. After the approval of a redistricting plan by three of the voting members of the Commission, the Commission submits its plan to the legislature. RCW 44.05.110.

106. Once a plan is submitted, the legislature has thirty days during any regular or special session to amend the Commission's plan by an affirmative vote of two-thirds of the members in each house. *Id*.

107. The amended edits by the legislature "may not include more than two percent of the population of any legislative or congressional district." *Id*.

108. "If a commission has ceased to exist, the legislature may, upon an affirmative vote in each house of two-thirds of the members elected or appointed thereto, adopt legislation reconvening the commission for the purpose of modifying the redistricting plan." RCW 44.05.120.

109. All districting plans must comply with the VRA and the United States Constitution.

C. 2021 Washington State Redistricting Commission's Official Actions and

Approval of Final Maps.

110. Commissioners Brady Piñero Walkinshaw and April Sims were appointed to the Washington Redistricting Commission on December 10, 2020, as the two Democratic Party representatives.

111. On January 15, 2021, Paul Graves and Joe Fain were appointed to the Washington Redistricting Commission as the two Republican Party representatives.

112. The four voting members, Brady Piñero Walkinshaw, April Sims, Paul Graves, and Joe Fain, voted unanimously to appoint Sarah Augustine as Chair of the 2021 Washington Redistricting Commission on January 30, 2021.

113. Between February 2021 and November 16, 2021, the Commission had Regular Business Meetings, Special Business Meetings, and Public Outreach Meetings to develop districting plans.

114. On September 21, 2021, all four voting Commissioners each submitted publicly proposed legislative maps.

115. None of the four state legislative maps proposed by any of the Defendant Commissioners included a Latino-majority CVAP district in the Yakima Valley region.

116. Commissioner Graves's map split the Latino population in the Yakima Valley into three districts: districts 14, 15, and 16.

117. None of these three proposed districts in Commissioner Grave's map had a Latino CVAP of over 34%.

118. Commissioner Fain's map split the Latino population in the Yakima Valley into four

districts: districts 13, 14, 15, and 16.

119. None of these four proposed districts in Commissioner Fain's map had a Latino CVAP of over 34%.

120. Commissioner Sims's map split the Latino population in the Yakima Valley into two districts: districts 14 and 15.

121. Neither of these proposed districts in Commissioner Sims's map had a Latino CVAP of over 47.6%.

122. Commissioner Sim's original proposed map does not include the Latino population of Pasco, which was put into district 16.

123. Commissioner Piñero Walkinshaw's original proposed map also split the Latino population in the Yakima Valley into two districts: districts 14 and 15.

124. Commissioner Piñero Walkinshaw's original proposed map does not include the Latino population of Pasco, which was put into district 16.

125. None of the districts in Commissioner Piñero Walkinshaw's original map had a Latino CVAP of over 43.2%.

126. On October 19, 2021, Dr. Matt A. Barreto, UCLA Political Science & Chicana/o Studies Professor and Faculty Director of the UCLA Voting Rights Project, released a research presentation analyzing the geographic size and location of Latino voters and the existence of racially polarized voting in the Yakima Valley Region. Matt A. Barreto, Assessment of Voting Patterns in Central/Eastern Washington and Review of the Federal Voting Rights Act, Section 2 Issues, (Oct. 19, 2021), https://senatedemocrats.wa.gov/wp-content/uploads/2021/10/Barreto-WA-Redistricting-

Public-Version.pdf.

127. Dr. Barreto was hired to provide analysis on voting patterns and compliance with the Federal Voting Rights Act to the Washington Senate Democrat Caucus.

128. Dr. Barreto's analysis determined that Latino voters in the Yakima Valley region are sufficiently large and geographically compact to form a performing majority-minority district.

129. Using ecological inference methodology, Dr. Barreto also determined that elections in the Yakima Valley region demonstrate racially polarized voting between Latino and White voters.

130. Dr. Barreto evaluated the four maps and concluded that the maps proposed by Defendant Commissioners Graves and Fain displayed "[t]extbook cracking of [the] Latino population" in the Yakima Valley. He further concluded that the original maps proposed by Commissioners Sims and Piñero Walkinshaw fell short of the necessary Latino CVAP to establish a performing VRA-compliance district.

131. Dr. Barreto, and the methods he used in his analysis, have been accepted and relied upon by state and federal courts throughout the country. *See e.g.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2nd Cir. 2020).

132. Dr. Barreto presented his report and analysis to the Washington State Redistricting Commission.

133. News outlets in Washington wrote articles about his analysis and quoted Dr. Barreto stating that there was a clear finding of racially polarized voting. *See, e.g.*, Melissa Santos, *Proposed WA Redistricting Maps May Violate Voting Rights Act*, Crosscut (Oct. 21, 2021),

https://crosscut.com/politics/2021/10/proposed-wa-redistricting-maps-may-violate-voting-rights-act.

134. Dr. Barreto's research presentation was publicly available for over three weeks before the Commission's November 15 deadline.

135. The Commissioners were aware of Dr. Barreto's presentation, had access to it, and reviewed it.

136. On October 25, 2021, Commissioner Graves texted Washington House Representatives Jeremie Dufault and Chris Corry to "take a look at slides 22 and 23 in [Dr. Barreto's] presentation and then give me a call."

137. Slides 22 and 23 of Dr. Barreto's presentation proposed two options for a performing VRA-compliant legislative district in the Yakima Valley. *See* Barreto, *supra* ¶ 126.

138. On slide 22 there is a VRA-compliant legislative district that follows the Yakima-Columbia River Valley and has a Latino CVAP of 60%. *See id*. at 22.

139. On slide 23 there is a VRA-complaint legislative district that grouped together the City of Yakima and the Yakama Nation and that has a Latino CVAP of 52%. *See id*. at 23.

140. Both map options were presented to the Commission.

141. On October 21, 2021, Commissioner Piñero Walkinshaw stated publicly, "I think for me, as the first ever Latino commissioner, it has been extremely important for me to lift up and elevate Hispanic voters, and undo patterns of racially polarized voting, particularly in the Yakima Valley. This is something that, under federal law, has to be done." Santos, *supra* ¶ 133.

142. On October 25, 2021, Commissioners Piñero Walkinshaw and Sims submitted revised maps for public comment six days after Dr. Barreto released his research presentation.

143. The maps proposed by Commissioner Piñero Walkinshaw included legislative districts in the Yakima Valley region that would perform for Latino-preferred candidates.

144. The Commission was required to approve and vote on final redistricting maps for both congressional and state legislative districts on November 15, 2021.

145. The Commission, however, failed to adopt maps on this date.

146. During their chaotic meetings spanning November 15, 2021 and November 16, 2021, the Commissioners spent much of the time in closed-door negotiations discussing matters in private.

147. The Commission did not approve maps for transmittal to the state legislature until the morning of November 16, 2021.

148. Over the course of the 2021 redistricting process, multiple versions of state legislative maps compliant with Section 2 of the Voting Rights Act were presented to the Commission.

149. On December 3, 2021, the Washington Supreme Court declined to exercise authority to adopt a state legislative or congressional redistricting plan, finding that the state legislative and congressional plans adopted by the Commission met the constitutional adoption deadline. *See Order Regarding the Washington State Redistricting Commission's Letter to the Supreme Court on November 16, 2021 and the Commission Chair's November 21, 2021, Declaration*, Order No. 25700-B-

676 (Dec. 3, 2021).

150. The Washington Supreme Court did not consider or rule on the compliance of the districting plans with respect to Section 2 of the VRA. *Id*. at 4 ("The court has not evaluated and does not render any opinion on the plan's compliance with any statutory and constitutional requirement other than the November 15 deadline.").

D. Elections in the Yakima Valley Region Exhibit Racially Polarized Voting.

151. Voting in the Yakima Valley region is racially polarized.

152. Dr. Barreto's report, which the Commission reviewed, demonstrated the existence of racially polarized voting in the Yakima Valley Region. *See* Barreto, *supra* ¶ 126.

153. Dr. Barreto employed ecological inference methodology to analyze candidate elections from 2012 to 2020 for offices that were consistent across a 5-county region of Yakima, Benton, Grant, Franklin, and Adams counties. Contests included races for President, U.S. Senate, U.S. House, Governor, and Attorney General in each relevant year. *Id*.

154. Clear and consistent patterns emerged from more than a dozen elections.

155. Latino voters in the Yakima Valley region are politically cohesive and vote together for candidates of choice.

156. Latino voters in the Yakima Valley region prefer the same candidates at margins of 2-to-1 or even 3-to-1.

157. This is well above the bar for what courts have relied on in finding cohesiveness.

158. Spanish-surnamed candidates have consistently run in and lost elections for the state legislature in Legislative District 15 for more than 10 years.

159. Latino-preferred candidates have consistently run in and lost elections for the state legislature in Legislative District 15 for more than 10 years.

160. According to ecological inference analysis of precinct results for Legislative District 15 under the 2011 state legislative district map, Latino voters preferred Pablo Gonzalez in 2012 for State Representative, but he lost to David Taylor, who was greatly preferred by White voters.

161. In the 2014 State Senate election for Legislative District 15, Gabriel Muñoz was preferred by Latino voters but lost to Jim Honeyford, who was greatly preferred by White voters.

162. In the 2014 State Representative election for Legislative District 15, Teodora Martinez-Chavez was preferred by Latino voters but lost to David Taylor, who was greatly preferred by White voters.

163. In the 2018 State Senate election for Legislative District 15, Plaintiff Aguilar was preferred by Latino voters but lost to Jim Honeyford, who was greatly preferred by White voters.

164. The most recent Latino candidate to run for state legislature was Plaintiff Aguilar in 2018.

165. Aguilar received an estimated 73% support from Latinos, but only 15% support from White voters.

166. In Yakima County Precinct 104, which is majority Latino, Aguilar won 72.6% of the vote.

167. In Yakima County Precinct 501 which is

majority Latino, Aguilar won 70% of the vote.

168. The pattern of Aguilar, a Latino candidate winning over 70% of support in Latino-dense precincts but garnering little support in White dense precincts, is clear across the 11 precincts in Legislative District 15 that were majority Latino.

169. All 11 Latino-majority precincts in the Legislative District 15 race under the 2011 map voted majority support for Aguilar.

170. White voters in the Yakima Valley region are also politically cohesive.

171. In the 2018 Legislative District 15 race under the 2011 map, White voters voted together as a bloc against Latino candidates of choice.

172. In Yakima County Precinct 4616, which is majority White, Aguilar won only 21.5% of the vote.

173. In Yakima County Precinct 4106, which is majority White, Aguilar won just 22% of the vote. This pattern is clear across the 21 precincts that are majority white, all of which voted against Aguilar.

174. Elections for the Washington state legislature are partisan and regularly feature a Republican-declared and Democratic-declared candidate vying for office.

175. Latino voters in the Yakima Valley region consistently prefer the Democratic candidates for state legislature and other political offices.

176. Latinos vote cohesively in favor of Democratic candidates by over a 2-to-1 margin.

177. Due to historical advantages and higher socioeconomic status, White voters in the Yakima Valley region have higher voter registration and turnout rates than Latinos.

178. In the Legislative District 15 approved by the 2021 Commission, White voters have greater

voting strength than Latinos and will consistently be able to elect their Republican candidates of choice.

179. White voters in the Yakima region overwhelmingly prefer different candidates and vote as a bloc to usually defeat Latino voters' candidates of choice.

180. In many races, Latino voters vote close to 75-25 in favor of their candidates of choice, while whites vote 75-25 in favor of different candidates, in complete opposite voting blocs.

181. As precincts increase in Latino population and voting strength, support for Latino candidates of choice increases.

182. This split, in which candidates who win a majority of the vote in high-density Latino voting precincts receive low support in high-density non-Latino precincts, is emblematic of racially polarized voting.

183. A federal court recently held that racially polarized voting exists in the Yakima region and ordered, in 2014, the City of Yakima to create two majority-Latino districts for City Council elections. *See Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

184. Likewise, in the first ever lawsuit filed under the Washington Voting Rights Act (WVRA), Latino plaintiffs challenged the election system in place for the Yakima County Board of Commissioners and alleged that racially polarized voting exists in Yakima County elections and that the County's election system diluted Latino voting strength in violation of the WVRA. The parties in that case agreed to and a state court accepted a settlement, leading to the creation of a majority-Latino district for Yakima County Board of Commissioner elections. *See Aguilar*

et al. v. Yakima County et al., No. 20-2-0018019 (Kittitas Cty. Sup. Ct. July 13, 2020),

185. In the *Aguilar* case, Plaintiffs' expert Dr. Grumbach analyzed several state legislative elections in the Yakima Valley area for racially polarized voting, including the 2012 Legislative District 15 primary and general elections, the 2016 Legislative District 14 primary and general elections, and the 2018 Legislative District 15 primary and general elections, which all featured Latino candidates running against white candidates. He found that voting was racially polarized in all of these elections.

186. A federal court also found that racially polarized voting exists in elections in Pasco, Washington, *see Glatt v. City of Pasco*, Case No. 4:16-CV-05108-LRS, (E.D. Wash. Jan. 27, 2017), and similarly, a state court found that racially polarized voting exists in elections in Franklin County as a whole.

187. There is also qualitative evidence of racially polarized voting in elections in the Yakima Valley region. *See, e.g.*, *Luna v. County of Kern*, 291 F. Supp. 3d 1088, 1126 (E.D. Cal. 2018) (stating that in addition to quantitative evidence, courts often "look to [non-statistical] evidence...since '[t]he experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive.' ").

188. Latino candidates for public office in the region encounter hostility from white voters.

189. For example, Plaintiff Susan Soto Palmer received such a hostile reception in predominantly white areas while campaigning for a seat on the Yakima County Board of Commissioners that she had to replace herself with white surrogates

out of concern for her personal safety.

190. It is clear that there is racially polarized voting in the Yakima Valley Region and in the region's main Latino-population centers of Yakima City and Pasco, Washington.

E. The Washington Redistricting Commission's Approved State Legislative Map Dilutes the Strength of Latino Voters in the Yakima Valley Region.

191. The Commission's approved state legislative district map cracks Latino voters in the Yakima Valley region, diluting their voting strength by placing them in several legislative districts with white voting majorities.

192. Under the Commission's approved state legislative district map, Latino voters in the Yakima Valley region will not be able to elect candidates of their choice and the map does not create a district in the Yakima Valley area that complies with the Voting Rights Act.

193. District 15 in the Commission's approved map has a Latino CVAP of 50.02%.

194. Legislative District 15 was crafted to ensure it would not elect Latino voters' candidates of choice.

195. This was an intentional decision by the Commission.

196. In a text message exchange between Commissioner Graves and Commissioner Fain, Fain stated that "[w]e will need to draw a dem leaning Latino district in Yakima that doesn't include any Yakima."

197. They did not do so.

198. The Commission's version of Legislative

District 15 also excludes majority-Latino areas such as areas of the City of Yakima and the cities of Wapato, Toppenish, and Mabton, intentionally cracking apart these adjacent Latino communities.

199. Latinos in areas excluded from the Commission's Legislative District 15, such as Wapato, Toppenish, and Mabton, are politically active and regularly elect Latino candidates of choice to local office.

200. The Commission's approved District 15 contains large pockets of rural voting precincts that are heavily White and vote against Latino voters' candidates of choice.

201. Moreover, District 15 reaches across large swaths of rural white areas to include at its northeastern tip the city of Othello in Adams County.

202. The inclusion of Othello--a majority HCVAP community--is what gets District 15 *just* above 50% HCVAP (50.02%).

203. Election data reveal that Othello Latinos are far less politically active than the Yakima County Latinos whom the Commission excluded from District 15.

204. The Commission included 16,147 Adams County voters in and around Othello, with a CVAP of 50.8%.

205. Regression analysis of voter turnout rates across the region finds that Latino voters in Adams County turnout at a statistically significant lower rate than Latino voters in both Yakima County and Franklin County.

206. Regression analysis of voter turnout rates across the region finds that Latino voters in Adams County turnout at a statistically significant lower rates than White voters in Adams County.

While the Latino population is large in Adams, Latino voting strength has historically been muted.

207. Republican candidates carry the included area (in Adams?), with Trump receiving 60.7% of the vote among these voters in 2020. Of the Adams County precincts included in District 15, Biden carried only three--those with HCVAPs of 74.5%, 72.2%, and 60.0%.

208. Election results from the 2020 election reveal that voters who reside in the new District 15 as adopted in the 2021 plan voted to elect Republican Donald Trump for President, Republican Culp for Governor, and Republican Larkin for Attorney General. In 2018, voters in the new District 15 voted to elect Republican Newhouse for U.S. Congress and Republican Hutchison for U.S. Senate. In 2016, voters in the new District 15 voted to elect Republican Donald Trump President and Republican Bryant Governor.

209. As drawn and adopted, the new District 15 does not perform for Latino candidates of choice and was deliberately drawn in such a manner.

210. The strategy of drawing a district that is majority Latino, but which in practice does not functionally allow Latino voters to elect their candidates of choice, is unlawful. *See e.g.*, *Perez v. Abbott*, 250 F. Supp.3d 123 (W.D. Tex. April 20, 2017) (three-judge court

211. The Latino CVAP in the Yakima Valley region is sufficiently large and geographically compact to constitute a majority in a newly configured District 15 that would provide Latino voters with an equal opportunity to elect their candidates of choice.

F. The Totality of the Circumstances Demonstrates That Latino Voters in the Yakima Valley Region Have Less Opportunity Than Others to Participate in the Political Process and Elect Candidates of Choice.

212. The totality of the circumstances demonstrates that Latino voters have less opportunity than other members of the electorate to participate in the political process and to elect representatives of choice. *See* 52 U.S.C. § 10301(b).

213. There is a history of official voting-related discrimination in the Yakima Valley region. *See Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014); *see also Glatt v. City of Pasco*, No. 4:16-CV-05108 (E.D. Wash. Jan. 27, 2017).

214. In 2004, Yakima County entered into a consent decree with the United States Department of Justice after being sued for failing to provide Spanish-language voting materials and voter assistance as required by Section 203 of the federal Voting Rights Act. *See U.S. v. Yakima County*, No. 04-cv-3072 (E.D. Wash. Sept. 3, 2004).

215. As explained above, voting in the Yakima Valley region is substantially racially polarized.

216. Latino voters in the Yakima Valley region also bear the effects of discrimination in education, employment, health, and other areas of life, which hinders their ability to participate effectively in the political process. *See Luna*, 291 F. Supp. 3d at 1137."Under this [] factor, plaintiffs must demonstrate both depressed political participation and socioeconomic inequality, but need not prove any

causal nexus between the two.". *Id*.

217. Racial tensions between white and Latino communities in the region persist today.

218. According to a report from Dr. Luis Fraga in the *Montes* case, "[t]he Yakima Valley has a long history of racial animus and hostile responses by Whites to minority groups seeking to gain more power or better position."

219. A 2015 report by the Yakima Herald-Republic explained that the "cultural conflict" between Latino and white communities in Yakima is "apparent in public where Latinos and non-Latinos gather at different parks and many businesses, and on the Internet, where forums and comment boards for local audiences can often be loaded with xenophobic vitriol." *See* Mike Faulk, *Yakima's Cultural Divide*, Yakima Herald (Oct. 16, 2015) https://www.yakimaherald.com/news/elections/yakima_city_council/yakimas-cultural-divide/article_590c92b4-7416-11e5-949e-dbfb62c94960.html.

220. Latinos in the Yakima Valley also bear the impacts of discriminatory policing.

221. On February 10, 2015, local Pasco police, themselves not racially reflective of the community, shot Antonio Zambrano-Montes seventeen times and killed him after he was allegedly throwing rocks at cars. Weeks of demonstrations calling for justice and more scrutiny over Pasco's policing of the Latino community followed.

222. Officials in Yakima and Franklin Counties have expressed anti-immigrant sentiment against the area's immigrant population--an overwhelming majority of which is Latino.

223. U.S. Census statistics reveal a number of

disparities between the white and Latino communities in the Yakima Valley area.

224. Latino residents in Franklin County are much less likely to have a high school diploma than white Franklin residents.

225. Only 7.1% of Latinos in Franklin County have a bachelor's degree or higher, compared to 29.9% of whites.

226. 7.5% of Franklin County's white population lives below the poverty line, but more than one out of five Latinos in the County live below the poverty line.

227. Socioeconomic indicators show clear and significant disparities between Latino and white residents in Yakima County.

228. 21.9% of Latino residents had an income below poverty level, a rate almost double that of white residents (11.4%).

229. Of all persons in Yakima County with an income below the poverty level, 62.3% were Latino, while only 28.2% were white.

230. While the median income for households in Yakima County is $51,637, the median household income for white residents is higher, at $57,398, while the median household income for Latino residents is lower, at $45,880.

231. Over half--51.6%--of the Latino population over the age of 25 in Yakima County does not have a high school diploma or its equivalent, compared to only 9.6% of white residents.

232. This trend continues for higher education, where only 5.7% of Yakima County's Latino residents over the age of 25 have a bachelor's degree, compared to 24.1% of white residents.

233. The unemployment rate for the Latino

population in Yakima County is 7.8%, almost double the rate of unemployment among white residents, which is only 4.2%.

234. Latino residents of Yakima County also face major disadvantages in housing compared to white residents.

235. There are an estimated 30,687 occupied housing units in Yakima County with a Latino householder, compared to 46,921 housing units with white residents. Of the units with a Latino householder, only 31.3% are owner-occupied, compared to 63.3% for whites.

236. A report prepared by the Homeless Network of Yakima County found that "Hispanics are twice as likely as non-Hispanics to be denied financing when applying for conventional loans to purchase housing and to obtain refinancing of existing mortgages thereby limiting their housing choices."

237. Latino residents in Yakima County also bear the effects of past discrimination with respect to health and healthcare access.

238. 19.6% of Yakima County's Latino population does not have health insurance, compared to only 5.9% of white residents.

239. The Latino community in Yakima County has been disparately impacted by the COVID-19 pandemic.

240. As of December 2, 2021, the County's own public website reported that 38% of COVID-19 positive individuals in the County are Hispanic or Latino, compared to 16.3% that are white.[2]

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[2] See Yakima Health District, Race and Ethnicity Breakdown of COVID-19 Positive Individuals, https://www.yakimacounty.us/2440/Confirmed-Cases-Race-Ethnicity (last updated Dec. 2, 2021).

241. Latinos in Yakima County have also been disproportionately impacted by other serious health issues like water contamination, including high nitrate levels and fecal matter in wells.

242. Voter registration and turnout levels in Yakima County are substantially lower among Latino residents than white residents.

243. January 2021 data from the Yakima County Elections Office demonstrates there are 127,512 registered voters countywide, but only 35,150 of those are "Spanish surnamed registered voters."

244. According to the County's own publicly available and regularly collected data, there is a clear disparity in political participation between Latino and white voters.

245. Statistics collected by the Yakima County Auditor show that for the 2020 general election, ballots were issued to 37,978 voters with a Spanish surname, but only 21,281 (56%) of those ballots were returned. By comparison, of the 89,713 ballots issued to voters with a non-Spanish surname, 75,704 (84%) of those ballots were returned.[3]

246. Latino voters in Eastern Washington, including both Yakima County and Franklin County, have their ballots challenged and rejected at higher rates than white voters.

247. According to an investigation, Latino voters in Yakima County had their ballots rejected for signature mismatch at 7.5 times the rate of non-Latino voters in the November 2020 election. *See* Joy Borkholder, *Investigation Finds Latino Ballots in WA*

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[3] *2020 General Election Voter Participation by Surname*, Yakima County, https://www.yakimacounty.us/ArchiveCenter/ViewFile/Item/1130 (last visited Dec. 9, 2021)

More Likely to Be Rejected, Crosscut (Feb. 15, 2021), https://crosscut.com/politics/2021/02/investigation-finds-latino-ballots-wa-more-likely-be-rejected.

248. Latino voters in Franklin County had their ballots rejected for signature mismatch at 3.9 times the rate of non-Latino voters in the November 2020 election. *Id*.

249. On May 7, 2021, an individual Latino voter, along with the Latino Community Fund and League of United Latin American Citizens, filed suit in federal court against Yakima County and two other counties alleging that the County's system for verifying ballot signatures discriminates against Latino voters. *See, e.g.*, *Reyes v. Chilton*, No. 4:21-cv-05075 (E.D. Wash. 2021).

250. Campaigns in the Yakima Valley region have also featured overt and subtle racial appeals.

251. In 2014, when Plaintiff Soto Palmer campaigned on behalf of Gabriel Muñoz, a Latino candidate for State Senate in Legislative District 15, she knocked on doors in the predominantly white town of Union Gap. At one home, a white resident who saw the campaign literature for Mr. Muñoz immediately said: "I'm not gonna vote for him, I'm racist."

252. In the 2016 election for Yakima County Board of Commissioners, in a campaign that covered all of Yakima County, candidate Ron Anderson shared a public Facebook post stating that "Illegals are being seduced into America by Democrats to steal our elections. Act of Treason, Arrest all involved!"

253. In a campaign for a seat on the Yakima City Council, Latina candidate Dulce Gutierrez was told by a white resident to "Go back to Mexico" while she was handing out campaign flyers, and had

another individual ask her why they "had to vote for a Mexican" while she was campaigning.

254. Jose Trevino, the Mayor of Granger--a city in the Lower Valley which has a total population of 3,756, of whom 88.4% are Latino--experienced multiple incidents while campaigning for various offices in Yakima County. For example, Mr. Trevino attributed his 2015 loss in the Granger mayoral race to a rumor spread during the campaign that he "was going to fire all the white people in the city."

255. Mr. Trevino also attributed his loss in the 2014 race for Yakima County Clerk, 2018 race for Yakima County Commissioner District 3, and his pulling out of the 2020 appointment process for a vacant Yakima County Board seat to negative coverage in the Yakima Herald-Republic, and commented that his opponents in those races, all but one of whom were white, did not receive similar treatment, and that he was the "only [candidate] they picked on' " because "it was easier to pick on the Republican Mexican than anyone else."

256. Further, county officials and elected officials have made overt and subtle racial appeals while in office.

257. During a September 21, 2021, Franklin County Commissioners' meeting, Commissioner Mullen stated, in reference to the discussion of Latino citizen voting age population in the current commissioner districts, that he "believes that there are non-citizens that are voting in the elections." *See* Franklin County Commissioners Meeting (Sept. 21, 2021), https://media.avcaptureall.cloud/meeting/e3e60dfb-87e0-4b8f-bb49-14dbe5167045 at 1:12:00-1:12:30.

258. In 2016, a Franklin County official

shared an image of a white farmer with the caption, "When is white history month?" and on the corner of the image, there was a white raised fist used by white supremacists with the words "100% White, 100% Proud."

259. Few Latino candidates have been elected to public office in the Yakima Valley region except to hyperlocal offices in areas and districts with high majority Latino CVAP.

260. Latino candidates for public office are routinely defeated.

261. Although several Latino candidates have run for election in Legislative District 15 in the last decade for both state house and senate, including at least Pablo Gonzalez, Teodora Martinez-Chavez, and Bengie Aguilar, none have won.

262. Legislative District 15 is currently represented by two white men in the state house, Bruce Chandler and Jeremie Dufault, and a white man in the state senate, Jim Honeyford.

263. Jim Honeyford has made racial appeals during his tenure as a Washington Representative.

264. At a 2015 legislative hearing, Jim Honeyford twice referred Latinos and other people of color as "coloreds" and said that they are "commit more crimes."[4]

265. Latino candidates have also run for

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[4] *Sen. Honeyford sorry for calling minorities 'coloreds,'* The Columbian (Mar. 6, 2015), https://www.columbian.com/news/2015/mar/06/sen-honeyford-sorry-calling-minorities-coloreds/; Ansel Herz, *Republican State Senator: Poor, "Colored" People Are More Likely to Commit Crimes*, The Stranger (Mar. 2, 2015), https://www.thestranger.com/blogs/slog/2015/03/02/21799665/washington-republican-poor-colored-people-are-more-likely-to-commit-crimes.

Legislative District 14, including Susan Soto Palmer in 2016, but were not elected to office.

266. Legislative District 14 is currently represented by two white representatives in the state house, Chris Corry and Gina Mosbrucker, and a white man in the state senate, Curtis King.

267. Latino voters lack representation at the County level in the Yakima Valley region.

268. Only one Latino candidate, Jesse Palacios, has *ever* been elected to the Yakima County Board of Commissioners, and he was last elected almost 20 years ago, in 2002.

269. No Latino-preferred candidates have been elected to the Franklin County Board of Commissioners.

270. Elected officials in the Yakima Valley region are not responsive to the particularized needs of Latinos in the region.

271. The policy underlying the Commission's crafting of a district that does not give Latinos the opportunity to elect their candidates of choice is tenuous.

272. These and other factors demonstrate that the totality of the circumstances show that Latino voters have less opportunity than other voters to participate in the political process and elect their candidates of choice.

CLAIMS FOR RELIEF

Count 1

Race and Language Minority Discrimination, Discriminatory Results in Violation of Section 2 of the Voting Rights Act 52 U.S.C. § 10301

273. Plaintiffs repeat, replead, and incorporate by reference, as though fully set forth in this paragraph, all allegations in this Complaint.

274. Section 2 of the Voting Rights Act prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that results in the denial or abridgement of the right of any U.S. citizen to vote on account of race, color, or membership in a language minority group. 52 U.S.C. § 10301(a).

275. The district boundaries of state legislative districts in the Commission's approved map crack Latino voters in the Yakima Valley region across multiple state legislative districts, resulting in dilution of the strength of the area's Latino voters, in violation of Section 2 of the Voting Rights Act.

276. Under Section 2 of the Voting Rights Act, the Commission was required to create a majority-Latino state legislative district in the Yakima Valley region in which Latino voters have the opportunity to elect their candidates of choice.

277. Latino voters in the Yakima Valley region are sufficiently large and geographically compact to constitute a majority in a legislative district.

278. Latino voters in the Yakima Valley region are politically cohesive, and elections in the area demonstrate a pattern of racially polarized

voting that allows a bloc of white voters usually to defeat Latino voters' preferred candidates, including in the version of Legislative District 15 included in the Commission's approved map.

279. The totality of circumstances show that the Commission's approved map has the effect of denying Latino voters in the Yakima Valley region an equal opportunity to participate in the political process and to elect their candidates of choice, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

280. Absent relief from this Court, Defendants will continue to engage in the denial of Plaintiffs' Section 2 rights.

281. Latino voters are thus entitled, under Section 2 of the Voting Rights Act, to a majority-Latino district that would provide them with an effective opportunity to elect the candidate of their choice to the Washington State Legislature.

Count 2

Race and Language Minority Discrimination, Discriminatory Intent in Violation of Section 2 of the Voting Rights Act 52 U.S.C. § 10301

282. Plaintiffs repeat, replead, and incorporate by reference, as though fully set forth in this paragraph, all allegations in this Complaint.

283. The state legislative map approved by the Commission was adopted with the intent to discriminate on the basis of race, national original, and/or language minority group status and has a discriminatory effect on that basis, by intentionally cracking Latino voters to ensure that Latino voters in the region are unable to elect candidates of choice.

PRAYER FOR RELIEF

Plaintiffs request that the Court:

a) Declare that the Washington State Redistricting Commission's Approved Final State Legislative Map results in vote dilution in violation of Section 2 of the Voting Rights Act by failing to draw an effective Latino-majority state legislative district in which Latino voters would have an equal opportunity to elect their candidate of choice to the Washington Legislature;

b) Declare that the Washington State Redistricting Commission's Approved Final State Legislative Map was drawn to intentionally dilute Latino voting strength in the Yakima Valley region in violation of Section 2 of the Voting Rights Act;

c) Preliminarily and permanently enjoin Defendants from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the Washington State Legislature from the illegal state legislative districts under the Washington State Redistricting Commission's Approved Final State Legislative Map. Plaintiffs have no adequate remedy at law other than judicial relief sought herein, and unless Defendants are enjoined from using the Commission's Approved Final State Legislative Map. Plaintiffs will be irreparably injured by the continued violation of their statutory rights;

d) Order the implementation and use of a valid state legislative plan that includes a majority-Latino state legislative district in the Yakima Valley region that does not dilute, cancel out, or minimize the voting strength of Latino voters;

e) Award Plaintiffs their costs, expenses,

disbursements, and reasonable attorneys' fees pursuant to Fed. R. Civ. P. 54, 42 U.S.C. § 1988, and 52 U.S.C. § 10310(e);

f) Retain jurisdiction and render any and further orders that the Court may find necessary to cure the violation; and

g) Grant any and all further relief to which Plaintiffs may show themselves to be entitled or that the Court deems proper.

Dated this the 19th day of January 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that all counsel of record were served a copy of the foregoing this 24th day of November, 2021, via the Court's CM/ECF system.

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT TACOMA**

No. 3:22-cv-5152

BENANCIO GARCIA III,
Plaintiff,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington,
Defendant.

COMPLAINT FOR THREE-JUDGE PANEL

"It is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

I. INTRODUCTION

1. Plaintiff brings this action to challenge the constitutionality of Washington State Legislative District 15 in the Yakima Valley as an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to Constitution of the United States.

2. As part of the 2021 redistricting process, the Washington State Redistricting Commission (the "Commission") approved, and the Washington State

Legislature (the "Legislature") amended and ratified, a plan for the redistricting of state legislative districts in which Legislative District 15 was purposefully drawn to have a Latino citizen voting age population ("CVAP") of 50.02%.

3. The Equal Protection Clause bars redistricting "on the basis of race without sufficient justification." *Abbott v. Perez,* 138 S. Ct. 2305, 2314 (2018) (citing *Shaw v. Reno,* 509 U.S.630,641 (1993).

4. This new Legislative District 15 can only be explained by race. The district's odd shape, which crosses five county lines, bisects two of the largest cities in Central and Eastern Washington and divides certain communities of interest while combining other communities with divergent interests, flies in the face of traditional districting principles (as well as Washington state constitutional and statutory requirements). Contemporaneous public statements of the voting members of the Commission (each, a "Commissioner") provide further evidence that a majority Latino CVAP legislative district in Central and Eastern Washington was a precondition to the Commission's approval of any state legislative district plan.

5. Because "racial considerations predominated over others, the design of the district must withstand strict scrutiny. The burden thus shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper v. Harris,* 137 S. Ct. 1455, 1464 (2017) (citing *Bethune-Hill v. Va. State Bd. of Elections,* 137 S. Ct. 788, 800 (2017)).

6. There was no compelling interest that justified using race as the predominant factor in creating Legislative District 15. While complying with Section 2 of the Voting Rights Act is a compelling state interest, the state has the burden of showing that it had a "strong basis in evidence" to conclude that Section 2 required its action. *Cooper v. Harris,* 137 S. Ct. at 1464 (quoting *Ala. Legislative Black Caucus v. Alabama,* 575 U.S. 254,278 (2015)).

7. Two Commissioners stated that Section 2 of the Voting Rights Act compelled a safe Democrat, majority Latino CVAP district. But that was solely based upon a short presentation solicited by the State Senate Democratic Caucus and created by an interested advocacy organization. Neither the Commission nor the State of Washington conducted independent analysis to determine what Section 2 of the Voting Rights Act required. A presentation by an interested party is not enough to create a compelling interest. As Justice Alito warned in an analogous redistricting case, "[a] group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what§ 2 demands. So one group's demands alone cannot be enough." *Abbott v. Perez,* 138 S. Ct. at 2334.

8. The state must also prove its action was narrowly tailored, which the state cannot do if it does not carefully evaluate and consider race-neutral alternatives. *See, e.g., Cooper v. Harris,* 137 S. Ct. at 1471. The Commissioners' stated prerequisite of a majority Latino CVAP district necessarily means the Commission did not consider race-neutral alternatives. Moreover, it is unclear how the Commission arrived at a 50.02% Latino CVAP in

Legislative District 15 other than to meet its preferred racial balance.

9. Because race was the predominant motivating factor in creating Legislative District 15, but such race-based sorting neither served a compelling government interest nor was narrowly tailored to that end, it violates the Equal Protection Clause of the Fourteenth Amendment.

10. Plaintiff seeks a declaration that Legislative District 15 is invalid and an injunction prohibiting the Defendant from calling, holding, supervising or taking any action with respect to State Legislative elections based on Legislative District 15 as it currently stands.

II. PARTIES

11. Plaintiff Benancio Garcia III is a United States citizen, over the age of 18, and registered voter in the State of Washington. He currently resides in Legislative District 15. He intends to vote in future elections.

12. Defendant Steven Hobbs is being sued in his official capacity as the Secretary of State of Washington. Under state law, the Secretary of State is "the chief election officer for all federal, state, county, city, town, and district elections," RCW 29A.04.230, responsible for "the administration, canvassing, and certification of ... state primaries, and state general elections,"[1] RCW 43.07.310. In addition,

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[1] The plan approved by the commission ... shall constitute the districting law applicable to this state for legislative ... elections, beginning with the next elections held in the year ending in two." RCW 44.05.100. Thus, the Secretary of State administers

"declarations of candidacy for the state legislature ... in a district comprised of voters from two or more counties"-such as Legislative District 15-are to be filed with the Secretary of State. RCW 29A.24.070.

III. JURISDICTION AND VENUE

13. This Court has jurisdiction to hear Plaintiffs claim pursuant to 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 1331, 1343(a)(3) and 1357. This Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction to award Plaintiffs costs and attorneys' fees pursuant to 42 U.S.C. § 1988, and 52 U.S.C. § 103 l0(e).

14. A three-judge district court is requested pursuant to 28 U.S.C. § 2284(a), as Plaintiff is "challenging the constitutionality of ... the apportionment of a[] statewide legislative body."

15. This Court has personal jurisdiction over the Defendant. Defendant Steve Hobbs is a state official who resides in Washington and performs his official duties in Olympia, Washington.

16. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs claims occurred and will occur in this judicial district. In addition, Defendant is a state official performing his official duties in the Western District of Washington.

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legislative district elections based on the boundaries established by the Commission's redistricting plan.

IV. FACTS

A. Washington State Redistricting

17. The Washington state constitution directs that "[i]n January of each year ending in one, a commission shall be established to provide for the redistricting of state legislative and congressional districts." WASH. CONST. art. II,§ 43(1); *see also* RCW 44.05.030.

18. The Commission is composed of five members. Each of the "leader[s] of the two largest political parties in each house of the legislature ... appoint one voting member." These four voting members select a fifth, nonvoting member to serve as the Commission's chairperson. WASH. CONST. art. II, § 43(2); *see also* RCW 44.05.030.

19. The Washington state constitution requires that "[each district . contain a population ... as nearly equal as practicable to the population of any other district" and that "[t]o the extent reasonable, each district ... contain contiguous territory, ... be compact and convenient, and ... be separated from adjoining districts by natural geographic barriers, artificial barriers, or political subdivision boundaries." WASH. CONST. art. II, § 43(5). In addition, the Commission's redistricting plan "shall not be drawn purposely to favor or discriminate against any political party or group." *Id.*

20. The Commission's redistricting plan must also, "insofar as practical," follow certain other traditional redistricting principles, including that "[d]istrict lines should be drawn so as to coincide with the boundaries of local political subdivisions and

areas recognized as communities of interest" and that "[t]he number of counties and municipalities divided among more than one district should be as small as possible." RCW 44.05.090.

21. In order to adopt a redistricting plan, it must be approved by "[a]t least three of the voting members" of the Commission. WASH. CONST. art. II,§ 43(6).

22. The Commission is required to "complete redistricting ... no later than November 15th of each year ending in one." *Id.; see also* RCW 44.05.100.

23. "Upon approval of a redistricting plan," the Commission "shall submit the plan to the legislature," which may amend the Commission's plan within the first 30 days of the next regular or special legislative session by "an affirmative vote in each house of two-thirds of the members elected or appointed thereto." RCW 44.05.100.

24. After such 30-day period, "[t]he plan approved by the commission, with any amendment approved by the legislature, shall be final ... and shall constitute the districting law applicable to this state for legislative and congressional elections, beginning with the next elections held in the year ending in two." *Id.*

25. Following the Commission's adoption of a redistricting plan, it "shall take all necessary steps to conclude its business and cease operations ... on July 1st of each year ending in two "RCW 44.05.110.

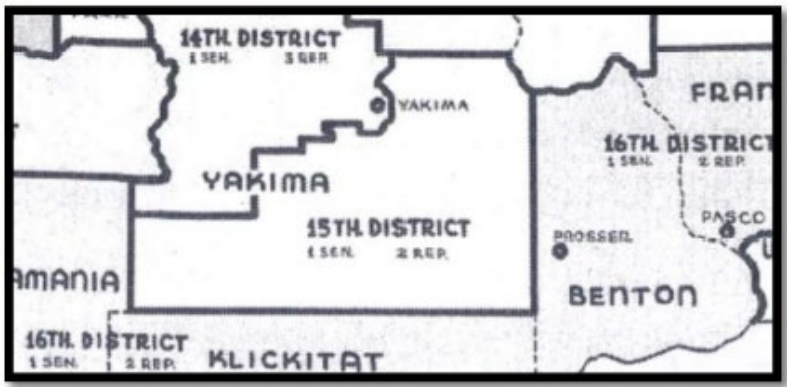
26. If the Commission has ceased to exist, the Legislature may "adopt legislation reconvening

the commission for purposes of modifying the redistricting plan." RCW 44.05.120(1).

B. The History of Legislative District 15

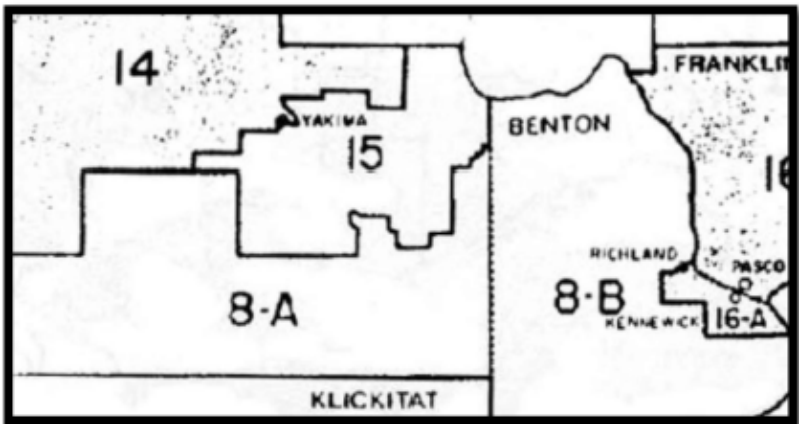
27. Over the past 90 years, Legislative District 15 has changed during each round of redistricting, but never as drastically as between 2012 and 2022. Historically, the district has covered a substantial portion of Yakima County. (From 1982 through 2001, it also included portions of neighboring counties, but never as far northeast as Othello or as far east as Pasco).

28. A map of Legislative District 15 from 1931 through 1957 is shown below. The district included only a portion of Yakima County. STATE OF WASH., MEMBERS OF THE LEGISLATURE 1889-2019 174 (2019).

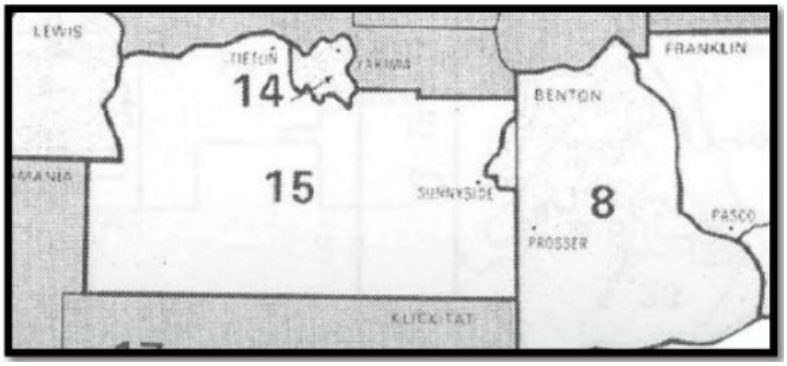


29. A map of Legislative District 15 from 1957 through 1965 is shown below. The districted included only a portion of Yakima County. *Id.* at 177.

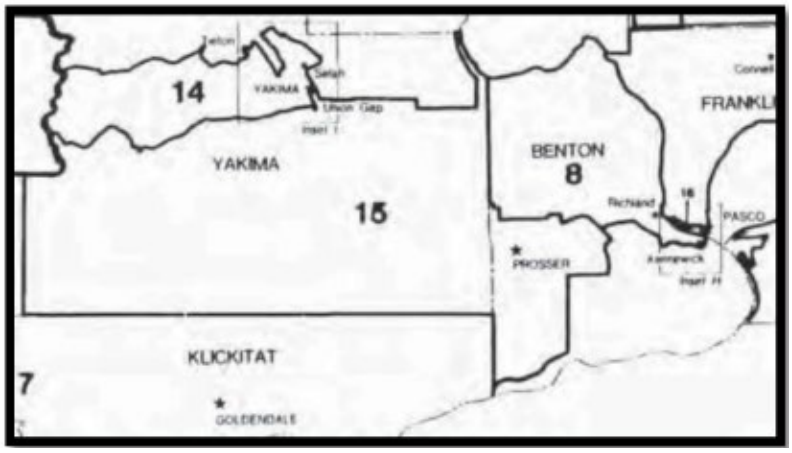
30. A map of Legislative District 15 from 1965 through 1972 is shown below. The district included only a portion of Yakima County. *Id.* at 180.



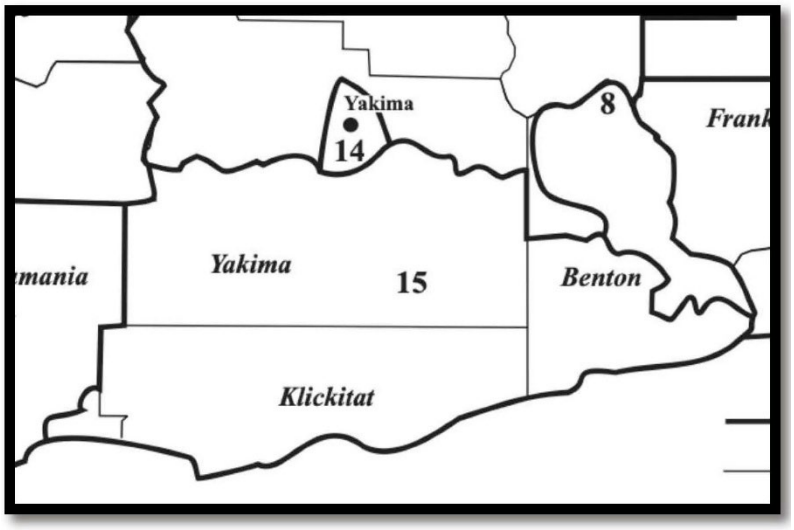
31. A map of Legislative District 15 from 1972 through 1981 is shown below. The district included only a portion of Yakima County. *Id.* at 182.



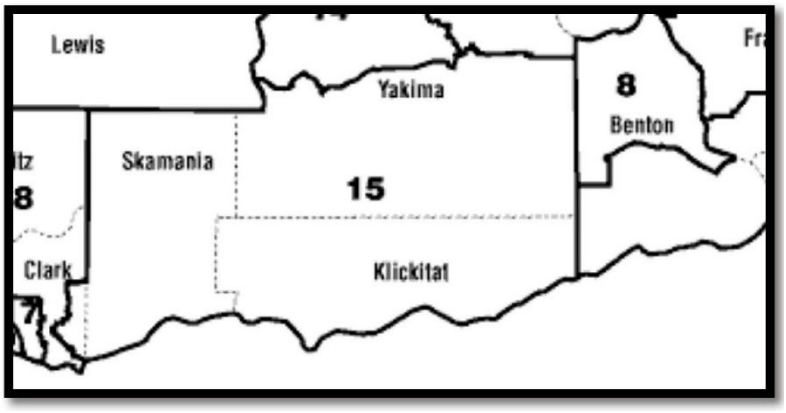
32. A map of Legislative District 15 from 1982 through 1991 is shown below. The district included portions of Yakima and Benton Counties. *Id* at 184.



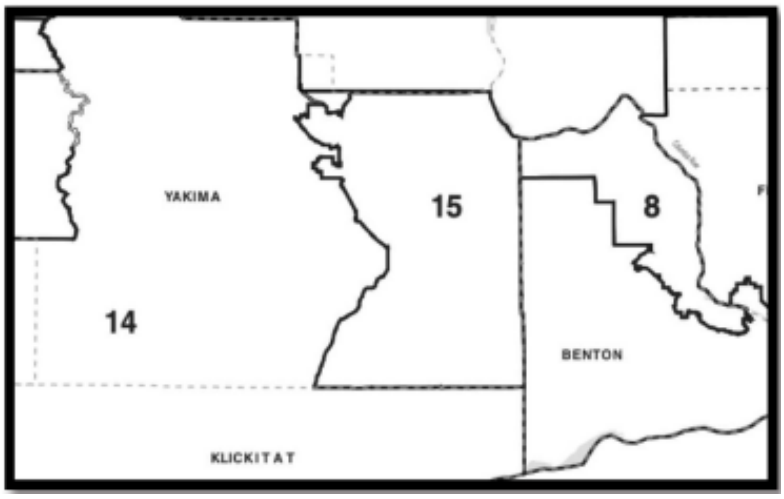
33. A map of Legislative District 15 from 1991 through 2001 is shown below. The district included a portion of Yakima, Benton, Klickitat, and Skamania Counties. *Id* at 186.



34. A map of Legislative District 15 from 2002 through 2011 is shown below. The district included a portion of Yakima, Klickitat, Skamania, and Clark Counties. *Id.* at 188.



35. A map of the current version of Legislative District 15, in effect since 2012, is shown below. The district once again includes only a portion of Yakima County. *Id.* at 190.



C. The 2021 Redistricting Process

36. On December 10, 2020, the Speaker of the House of Representatives announced the appointment of April Sims as a Commissioner representing the House Democratic Caucus and the Senate Majority Leader announced the appointment of Brady Pinero Walkinshaw as a Commissioner representing the Senate Democratic Caucus. *E.g.*, Press Release, Washington State House Democrats, *House, Senate leaders announce their appointees for Redistricting Commission* (Dec. 10, 2020), https://housedemocrats.wa.gov/blog/2020/12/10/house-senate-leaders-announce-their-appointees-for-redistricting-commission/.

37. On January 15, 2021, the Senate Minority Leader announced the appointment of Joe Fain as a Commissioner representing the Senate Republican Caucus and the House Minority leader announced the appointment of Paul Graves as a

Commissioner Representing the House Republican Caucus. *See, e.g.,* Eric Rosane, *Former Lawmakers Joe Fain, Paul Graves Tapped by Legislative GOP Leaders as Members of Redistricting Commission,* THE CHRONICLE (Centralia), Jan. 15. 2021, *available at* https://www.chronline.com/stories/former-lawmakers-joe-fain-paul-graves-tapped-by-legislative-gop-leaders-as-members-of,260219.

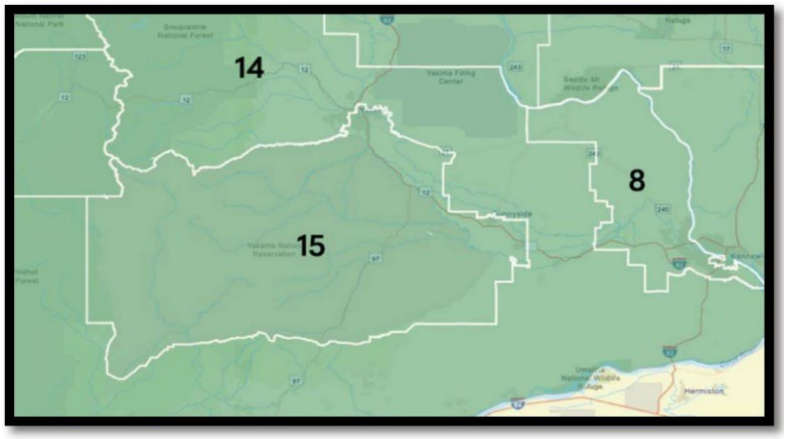
38. On January 30, 2021, the four voting Commissioners appointed Sarah Augustine as the nonvoting fifth member and Chair of the Commission. *E.g.,* Pat Muir, YAKIMA HERALD-REPUBLIC, *White Swan woman tapped to lead state Redistricting Commission,* Feb. 8, 2021, *available at* https://www.yakimaherald.com/news/local/white-swan-woman-tapped-to-lead-state-redistricting-commission/article_37671834-78c9-5cec-a5a5-d9dlaab30f72.html.

39. Between February 2021 and November 2021, the Commission held Special Business Meetings, Regular Business Meetings, and Public Outreach Meetings. *See, e.g.,* Washington State Redistricting Commission, Business Meetings, https://www.redistricting.wa.gov/commission-meetings; Washington State Redistricting Commission, Public Outreach Meetings, https://www.redistricting.wa.gov/outreach-meetings.

40. On September 21, 2021, each of the four voting Commissioners released a proposed legislative district map to the public. *E.g.,* Washington State Redistricting Commission, Legislative Maps, https://www.redistricting.wa.gov/commissioner-proposed-maps.

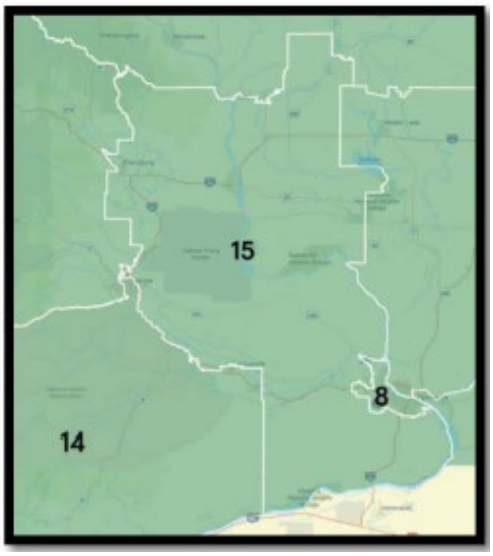
41. No Commissioner proposed a version of Legislative District 15 that resembled the district as drawn by the Commission's final redistricting plan. No proposal, for example, contained the cities of Pasco or Othello, and none contained a majority Latino CVAP. *See id.*

42. The map of Legislative District 15 initially proposed by Commissioner Sims is shown below. It combined the Yak:ama Indian Reservation with parts of Yak:ima and communities along Interstate 82 to Grandview. Commissioner Sims stated that her map "recognizes the responsibility to create districts that provide fair representation for communities of interest" and that "[m]aintaining and creating communities of interest" and "[c]entering and engaging communities that have been historically underrepresented" were "values guid[ing]" her efforts. *Id.*

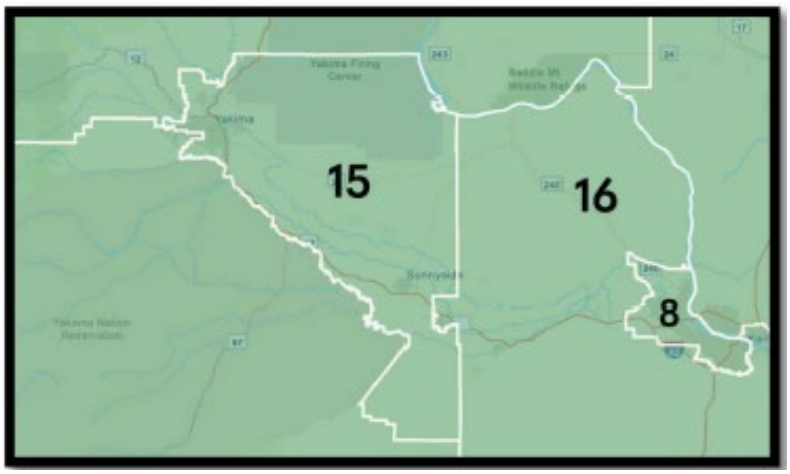


43. The map of Legislative District 15 initially proposed by Commissioner Walkinshaw is shown below. It merged cities around Yakima into a district that stretched north beyond Ellensburg and

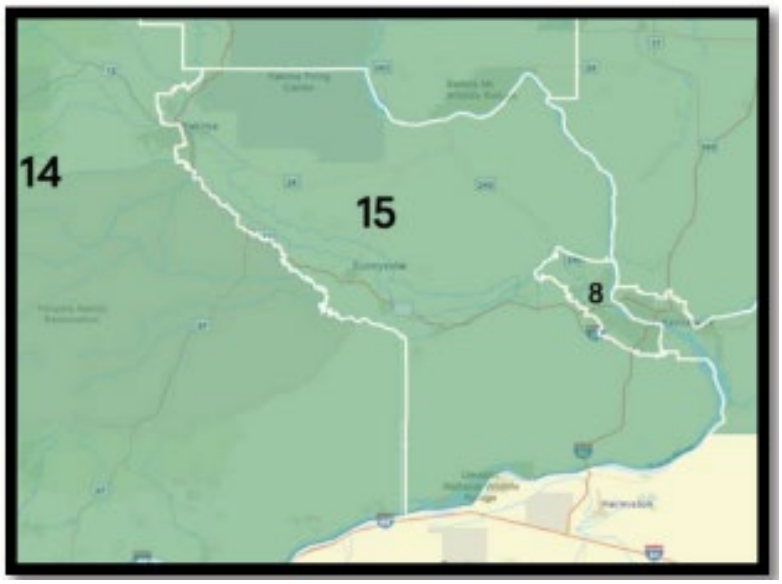
south to the Columbia River. Commissioner Walkinshaw stated his goals were to "[m]aintain and unite communities of interest and reduce city splits" and "prioritize[e] the needs of ... historically underrepresented communities." His plan also "[c]reate[d] a majority-Hispanic/Latino district" in the neighboring Legislative District 14, which was "55.5% [Hispanic/Latino] by Voting Age Population (VAP)" and "65.5% people-of-color by VAP." *Id.*



44. The map of Legislative District 15 as proposed by Commissioner Fain is shown below. It included the City of Yakima and consisted of the eastern third of Yakima County. Commissioner Fain "place[d] existing school district boundaries at the cornerstone of his legislative framework." His plan also "create[d] seven majority-minority districts statewide, and one additional majority-minority citizen voting age population (CVAP) district." *Id.*



45. The map of Legislative District 15 as proposed by Commissioner Graves is shown below. It combined the northeastern portion of Yakima County, including the cities along Interstate 82, with most of Benton County apart from Richland and Kennewick. Commissioner Graves's plan "focuses on communities of interest and is not drawn to favor either party or incumbents" and featured eight "majority-minority" districts. *Id.*



46. On October 19, 2021, the Washington State Senate Democratic Caucus circulated a presentation by Dr. Matt Barreto, a professor of political science and Chicana/o studies at UCLA and co-founder of the UCLA Voting Right Project. *See* Presentation by Matt Barreto, Assessment of Voting Patterns in Central/Eastern Washington and Review of the Federal Voting Rights Act, Section 2 Issues, (Oct. 19, 2021), https://senatedemocrats.wa.gov/wp-content/uploads/2021/10/Barreto-WA-Redistricting-Public-Version.pdf.

47. Upon information and belief, Dr. Barreto was hired by the Washington Senate Democrat Caucus, not by the Commission, the State of Washington or the Legislature.

48. The presentation argued that, in order to comply with Section 2 of the Voting Right Act, a majority Latino CVAP district in the Yakima Valley

that voted for the Democratic Party's preferred candidates is required. *See id.*

49. The presentation included analysis of voting patterns for just two statewide general elections, the 2012 U.S. Senate race between Maria Cantwell and Michael Baumgartner and the 2020 Governor race between Jay Inslee and Loren Culp. The presentation did not include analysis of voting patterns in primary elections, or any other analysis, exploring whether voting patterns could be explained by partisanship, rather than race. *See id.*

50. Importantly, the presentation also did not consider or suggest any race-neutral alternatives despite showing that the districts initially proposed by Commissioners Sims and Walkinshaw would have voted for the Latino bloc's preferred candidate over the majority bloc's preferred candidate in the 2020 President/Vice President race. *See id.*

51. Only two claimed "VRA Compliant" legislative district options were presented. One district contained a Latino CVAP of 60% and the other contained a combined Latino and Native American CVAP of 60%, without any explanation for why a 60% threshold was chosen or why Latino and Native American voters should or could be grouped together for Voting Rights Act purposes. *See id.*

52. Despite the brevity and potential bias of the analysis, Commissioner Walkinshaw issued a statement on October 21, 2021, two days after the presentation, stating that he and Commissioner Sims "will be releasing new statewide legislative maps early next week." Press Release, Washington Senate Democrats, *New definitive analysis by UCLA Voting*

Rights Expert: final Washington state legislative plan must include VRA-compliant district in the Yakima Valley (Oct. 21, 2021), https://senatedemocrats.wa.gov/blog/2021/10/21/new-definitive-analysis-by-ucla-voting-rights-expert-final-washington-state-legislative-plan-must-include-vra-compliant-district-in-the-yakima-valley/.

53. Commissioner Walkinshaw also stated that "as the first ever Latino commissioner, it has been extremely important for me to lift up and elevate Hispanic voters, and undo patterns of racially polarized voting, particularly in the Yakima Valley." Melissa Santos, *Proposed WA redistricting maps may violate Voting Rights Act,* CROSSCUT (Oct. 21, 2021), https://crosscut.com/politics/2021/10/proposed-wa-redistricting-maps-may-violate-voting-rights-act.

54. On October 25, 2021, Commissioners Sims and Walkinshaw released revised legislative plans, both of which incorporated the "Yakama Reservation" district option from Dr. Bareto's presentation, which achieved a 60% majority CVAP by combining Latino and Native populations.

55. On October 26, 2021, less than three weeks before the Commission's statutory deadline, Washington State Senate Democrats issued a press release holding out Dr. Bareto's presentation as "definitive," stipulating that "the final adopted map must include a majority-Hispanic district in the Yakima Valley." Press Release, Washington Senate Democrats, *WalkinshawReleases New VRA-Compliant LegislativeMap* (Oct. 26, 2021), https://senatedemocrats.wa.gov/blog/2021/10/26/following-new-analysis-commissioner-walkinshaw-

releases-new-legislative-map-compliant-with-voting-rights-act/.

D. Legislative District 15 under the 2021 Plan

56. Shortly before midnight on November 15, 2021, the Commission "voted unanimously to approve a legislative redistricting plan." Order Regarding the Washington State Redistricting Commission's Letter to the Supreme Court on November 16, 2021 and the Commission Chair's November 21, 2021 Declaration (Redistricting Order), No. 25700-B-676, at 2 (Wash. Dec. 3, 2021).

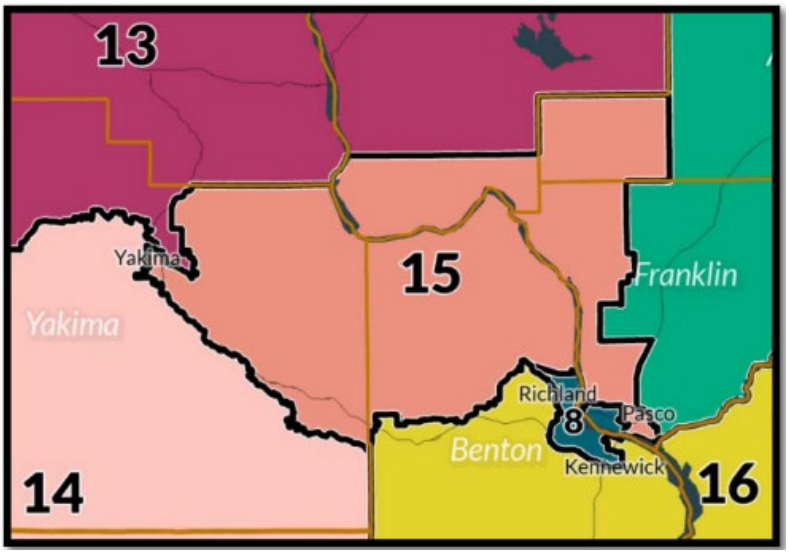
57. Shortly after midnight on November 16, 2021, the Commission submitted "a formal resolution adopting the redistricting plan" and "a letter transmitting the plan" to the Legislature. *Id.*

58. The Legislature approved minor adjustments to the Commission's final plan. *See* H. Con. Res. 4407, 67th Leg., 2022 Reg. Sess. (Wash. 2022).

59. The redistricting plan approved by the Commission, together with the Legislature's amendments, constitutes Washington state's districting law for legislative elections, beginning with the upcoming 2022 elections. *See* WASH. CONST. art. II, § 43(7); RCW 44.05.100(3); *see also* Redistricting Order at 4.

60. The map of the new Legislative District 15 as defined by the Commission's approved plan is shown below. It disregards traditional districting principles such as compactness, maintaining

communities of interest, and respecting political subdivisions or geographical boundaries.



61. The shape of Legislative District 15 is strained and noncompact. Its northwest and southeast comers are narrow slivers of land that reach into the cities of Yakima and Pasco respectively, where a substantial majority the district's population resides. The district extends north to Mattawa and northeast to Othello, based upon information and belief, for the sole purpose of including those cities' substantial Latino populations. The interior of the district is sparsely populated.

62. The odd shape of Legislative District 15 cannot be explained by political or natural boundaries. It stretches into parts of five counties, yet contains not a single whole county. Its western and eastern sections are divided by the Yakima Firing Center, Rattlesnake Hills, the Hanford Nuclear Site, and the Columbia River. Despite these geographic

boundaries, Legislative District 15 does not follow major thoroughfares. To travel just from Sunnyside to Pasco via Interstate 82 and Interstate 182 would require crossing through both Legislative Districts 16 and 8 before reentering Legislative District 15 in Pasco.

63. The Commission ignored communities of interest in creating Legislative District 15. The district's boundaries not only split up urban communities like Yakima and Pasco, but smaller cities like Grandview, Moxee and Union Gap. And while Legislative District 15 divides communities of shared interest, it also groups together communities with distinctly different interests. For example, it extends to Pasco, Othello, Mattawa and the Hanford Nuclear Site, none of which have previously been placed in the same legislative district as the city of Yakima or any portion of Yakima County in the state's history.

64. The boundaries of the new Legislative District 15 approved by the Commission do not resemble prior Legislative District 15 boundaries or those of any publicly-proposed districts by any Commissioner during the 2021 redistricting process.

65. However, the new Legislative District 15 does contain a Latino CVAP of 50.02%, a figure so barely sufficient to constitute a majority that it is statistically impossible to have occurred by random chance.

66. The boundaries of the new Legislative District 15 were clearly negotiated and approved predominantly on the basis of race in order to create a majority Latino CVAP legislative district.

67. No compelling interest justified the predominant consideration of race in creating Legislative District 15.

68. The Commission cannot justify its decision to use race as the predominant factor in drawing Legislative District 15's boundaries under Section 2 of the Voting Rights Act. The Commission could not have a strong basis in evidence to believe that it was required to create a new Latino-opportunity district to avoid liability under Section 2 because the Commission did not conduct any analysis of racial voting patterns or of what Section 2 required. *See, e.g., Cooper v. Harris,* 137 S. Ct. at 1464 ("[S]aid otherwise, the State must establish that it had 'good reasons' to think that it would transgress the [Voting Rights] Act if it did not draw race-based district lines." (citing *Ala. Legislative Black Caucus v. Alabama,* 575 U.S. at 278)).

69. Two Commissioners cited the presentation from the UCLA Voting Rights Project, but one advocacy group's demands alone are insufficient to create a strong basis in evidence that justifies sorting voters by race. *See, e.g., Abbott v. Perez,* 138 S. Ct. at 2334 ("A group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what§ 2 demands. So one group's demands alone cannot be enough.")

70. Even if there were a compelling state interest in creating Legislative District 15 using race as the predominant factor, Legislative District 15 is not narrowly tailored to achieve that interest. The Commission did not perform any analysis whatsoever of race-neutral alternatives, including, for example,

what percentage of Latino voters would be necessary to have the opportunity to elect their candidates of choice. *See, e.g., Cooper v. Harris,* 137 S. Ct. at 1471 ("To have a strong basis in evidence to conclude that§ 2 [of the Voting Rights Act] demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions ... in a new district created without those measures.").

V. CLAIMS

A. Violation of the Equal Protection Clause of the United States Constitution

71. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations in the paragraphs above.

72. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that"[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process oflaw; nor deny to any person within its jurisdiction the equal protection of the laws."

73. Race was the predominant factor motivating the Commission's decision to draw the lines encompassing Legislative District 15.

74. The Commission's race-based sorting of voters in Legislative District 15 neither served a compelling state interest nor was narrowly tailored to that end.

75. Therefore, Legislative District 15 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

76. Plaintiff has no adequate remedy at law other than the judicial relief sought here. The failure to temporarily and permanently enjoin the conduct of elections based on Legislative District 15 will irreparably harm Plaintiff by violating his constitutional rights.

VI. PRAYER FOR RELIEF

77. WHEREFORE, Plaintiff asks for the following relief:

a. Convene a court of three judges pursuant to 28 U.S.C. § 2284(a);

b. Declare that Legislative District 15 is an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution;

c. Issue a permanent injunction enjoining Defendant from enforcing or giving any effect to the boundaries of Legislative District 15, including an injunction barring Defendant from conducting any further elections for the Legislature based on Legislative District 15;

d. Order the creation of a new valid plan for legislative districts in the State of Washington that does not violate the Equal Protection Clause;

e. Award Plaintiff reasonable attorneys' fees and costs incurred in this action under 42

U.S.C. § 1988, 52 U.S.C. § 10310(e) and any other applicable law; and

f. Grant such other and further relief as this Court deems just and proper.

DATED this 15th day of March, 2022.

Respectfully submitted,

Stokesbary PLLC
Attorney for Plaintiff

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE**

CASE NO. 3:22-cv-05035-RSL

SUSAN SOTO PALMER, et al.,
Plaintiffs,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Defendants.

And

JOSE TREVINO, et al.,
Intervenor-Defendants.

MOTION TO INTERVENE

Proposed Intervenor-Defendants Jose Trevino, Ismael G. Campos and State Representative Alex Ybarra ("Intervenors") respectfully move for leave to intervene in the above-captioned matter, as a matter of right pursuant to Fed. R. Civ. P. 24(a) or, in the alternative, permissively pursuant to Fed. R. Civ. P. 24(b). In accordance with Fed. R. Civ. P. 24(c) and Local Rules W.D. Wash. LCR 7(b)(1), the grounds for intervention and arguments in support thereof are set forth below.

Counsel for Intervenors have consulted with counsel for Plaintiffs and Defendants. Defendants Hobbs,

Jinkins and Billig do not object to intervention, but Plaintiffs have indicated they will oppose the motion.

Pursuant to Fed. R. Civ. P. 24(c), Intervenors are filing their Answer to Complaint for Declaratory and Injunctive Relief in conjunction with this motion. Intervenors further provide notice of their intent to submit additional filings, including a response in opposition to Plaintiffs' motion for preliminary injunction.[1]

INTRODUCTION

This action concerns the decennial apportionment of state legislative districts performed by the Washington State Redistricting Commission (the "Commission"). In particular, Plaintiffs have challenged the validity of the Commission's legislative redistricting plan in the greater Yakima Valley region under Section 2 of the Voting Rights Act ("VRA"). Intervenors strenuously dispute Plaintiffs' legal claims and political aims. They have chosen to intervene, in part, because the current posture of the case lacks a true "adversarial presentation of the issues." (Notice That Def. Hobbs Takes No Position, Dkt. # 40 at 2.)

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[1] In light of significance of the issues presented in this case, Intervenors respectfully request that, if the Court grants this Motion to Intervene and/or Defendant Hobbs' Motion to Join Required Parties (Dkt.#53), it also consider extending briefing schedules for responses in opposition to Plaintiffs' Motion for Preliminary Injunction so that the Court can benefit from a full adversarial presentation of the issues. and a motion to dismiss. Intervenors do not seek modifications to the Court's Minute Order Setting Trial Dates and Related Dates (Dkt. # 46).

Intervenors, all of whom are Hispanic and registered voters in Central Washington, are:

- Jose Trevino, a resident of Granger,
- Ismael Campos, a resident of Kennewick, and
- State Representative Alex Ybarra, a resident of Quincy.

All three Intervenors are registered to vote in their respective legislative districts and each intends to vote in future elections. As a voter in Legislative District 15,[2] Mr. Campos, who resides in Legislative District 8, just beyond the boundaries of Legislative District 15, could easily find himself located in a new or significantly redrawn legislative district if Plaintiffs' claim is successful.

And while Representative Ybarra's hometown of Quincy is unlikely to be drawn into a Yakima Valley-centered district, the boundaries of his Legislative District 13-where he is currently and actively running for reelection-would almost certainly shift to accommodate any Court-mandated change to Legislative Districts 14 or 15. Clearly, Intervenors have a significant interest in this case. But the unusual posture of this case[3] means that none of the

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[2] For clarity, references to the legislative districts of each Intervenor refer to the new versions of legislative districts under the Commission's redistricting plan. Mr. Trevino has an obvious stake in this case.

[3] Plaintiffs chose not to sue the Commission, the "most natural" defendant (Def. Hobbs' Resp. to Defs. Jinkins and Billig's Mot. to Dismiss, Dkt. # 45 at 1), and thus far, the Commission has declined to intervene itself, see, e.g., Jim Brunner, WA redistricting commission chair resigns after Democrats refuse to defend new maps, The Seattle Times, Mar. 7, 2022, https://www.seattletimes.com/seattle-news/politics/wa-

present parties will adequately protect those interests. Thus, not only do these factors and others justify intervention as more fully detailed below, but granting this motion will also ensure full adversarial presentation of the issues.

ARGUMENT

Intervention is warranted on multiple grounds.

I. Intervention as of Right under Rule 24(a)

Intervenors are entitled to intervene as a matter of right in this case. Fed. R. Civ. P. 24(a) requires that "[o]n timely motion, the court must permit anyone to intervene who... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." That is, Rule 24(a) "entitles intervention of right when an applicant: (i) timely moves to intervene; (ii) has a significantly protectable interest related to the subject of the action; (iii) may have that interest impaired by the disposition of the action; and (iv) will not be adequately represented by existing parties." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*,

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redistricting-commission-chair-resigns-after-democrats-refuse-to-defend-new-maps/. Defendants Billig and Jinkins have moved to be dismissed as Defendants (see Mot. to Dismiss Defs. Jinkins and Billig, Dkt. #37), and Defendant Hobbs has "notifie[d] the Court that he intends to take no position on the issue of whether the state legislative redistricting plan violates section 2 of the Voting Rights Act" (Notice That Def. Hobbs Takes No Position, Dkt. # 40 at 2; see also Def. Hobbs' Resp. to Pls.' Mot. for Prelim. Inj., Dkt. # 50 at 7-8).

960 F.3d 603, 620 (9th Cir. 2020) (citing *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)). As discussed below, all four elements are satisfied here. (Intervenors also note that, although they have "the burden to show that these four elements are met, the requirements are broadly interpreted in favor of intervention" *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citing *Prete*, 438 F.3d at 954)).

A. Timeliness

Intervenor's application is timely, which is "determined by the totality of the circumstances facing would-be intervenors, with a focus on three primary factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (quoting *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004)).

The proceedings are at a very preliminary stage. Plaintiffs filed their Complaint for Declaratory and Injunctive Relief (Dkt. # 1) on January 19, 2022. Plaintiffs then filed a Motion for Preliminary Injunction (Dkt. #38) on February 25, which was noted for consideration by the Court on March 25. Given that no oral arguments have been heard, or even (to Intervenor's knowledge) scheduled, and that the Court has not yet ruled on any substantive motions, a more "preliminary stage" of litigation could hardly exist than the present stage of this case. *Cf. LULAC v. Wilson*, 131 F.3d 1297, 1303 (9th Cir. 1997) (denying intervention as of right where "the district

court has substantively—and substantially—engaged the issues" involved in the case).

In part because the case is at such a preliminary stage, there is no discernable prejudice or delay to either Plaintiffs or Defendants that would result in granting the proposed intervention. As mentioned, the Court has not yet ruled on the pending Motion to Dismiss Defendants Laurie Jinkins and Andrew Billig (Dkt. #37) or Plaintiffs' Motion for Preliminary Injunction (Dkt. # 38). Nor do Intervenors seek changes to the dates established in the Court's Minute Order Setting Trial Dates and Related Dates (Dkt. # 46).

Given the early stage of the proceedings, there is hardly a "delay" for Intervenors to justify. But even if there were, "[t]he crucial date for assessing the timeliness of a motion to intervene is when proposed intervenors should have been aware that their interests would not be adequately protected by the existing parties." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (citing *Wilson*, 131 F.3d at 1304). For Intervenors, this date was March 21, when Defendants filed their respective Responses to Plaintiffs' Motion for Preliminary Injunction (Dkts. #49-50). While Intervenors appreciate Defendant Hobbs' articulation of the Purcell principle and his explanation of all the work his office performs in order to successfully manage Washington's elections (see Dkt. # 50 at 8-16), as well as Defendants Jinkins and Billig's summary of VRA jurisprudence (see Dkt. # 49 at 9-14), neither response brief argues that Plaintiffs' VRA claim is unlikely to succeed on the merits, or even applies VRA caselaw to Plaintiffs' allegations. The "delay" to intervene, then, has been one week. It

is eminently reasonable for Intervenors to spend a week (a) assessing the potential outcomes of the case given the lack of briefing on the merits of Plaintiffs' VRA claim, (b) deciding whether to move to intervene as parties themselves and (c) preparing the necessary court filings to do so. *Cf. Smith v. Marsh*, 194 F.3d at 1052 (noting that prospective intervenors' "determin[ation] that their interests were inadequately represented only after reviewing closely the briefs filed... could constitute a proper explanation for delay").

Thus, intervention at this early stage is timely because the motion comes just one week after Intervenors became aware that their interests would not be adequately protected by the existing parties and intervention will neither delay the proceedings nor prejudice the other parties.

B. Significantly Protectable Interest

There is no doubt that Intervenors have significantly protectable interests related to the subject matter of this case. "The requirement of a significantly protectable interest is generally satisfied when 'the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)). Although "[t]he 'interest' test is not a clear-cut or bright-line rule, because 'no specific legal or equitable interest need be established," *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)), Intervenors can nonetheless identify several specific interests they have in these proceedings.

First, as registered voters in or near Legislative District 15, Intervenors Trevino and Campos have an interest in ensuring that any changes to the boundaries of those districts do not violate their rights to "the equal protection of the laws" under the Fourteenth Amendment to the Constitution of the United States, which, among other things, "forbids... intentionally assigning citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641 (1993)). Plaintiffs assert a violation of Section 2 of the VRA, a statute that the Supreme Court has noted "pulls in the opposite direction" of the Equal Protection Clause which "restricts the consideration of race in the districting process." *Perez*, 138 S. Ct. at 2314. Intervenors Trevino and Campos have an interest in ensuring that Plaintiffs' VRA claim does not pull so hard it draws them into a district that abridges their right to equal protection under law.

Second, as a state legislator running for reelection in a district that borders Legislative District 15, Intervenor Representative Ybarra has a heightened interest in not only the orderly administration of elections, but also in knowing which voters will be included in his district. Any stay of elections in the region would disrupt this interest, as would any alteration to the boundaries of Legislative District 15 since such a change would almost certainly result in corresponding changes his own legislative districts.

Lastly, all three Intervenors-like the eight individual Plaintiffs are registered voters in either Legislative District 15 or a neighboring district and intend to vote in future elections. (See Compl., Dkt. # 1 at 8-10.)

Intervenors have just as strong of an interest as these Plaintiffs in ensuring that Legislative District 15 and its adjoining districts are drawn in a manner that complies with state and federal law. And as registered voters, Intervenors also have an interest in orderly, well-run elections that avoid chaos or delay.

These interests are clearly related to the present case. "The relationship requirement is met 'if the resolution of the plaintiff's claims actually will affect the applicant," *United States v. City of L.A.*, 288 F.3d 391 at 398 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). As noted above, the resolution of this case will affect Intervenors because Plaintiffs' VRA claim "pulls in the opposite direction" of their Fourteenth Amendment right to not be assigned "to a district on the basis of race without sufficient justification." *Perez*, 138 S. Ct. at 2314. The outcome of this case will also affect the boundaries of the legislative districts in which each of the Intervenors are registered and intend to vote and where Representative Ybarra is actively running for reelection. Clearly, Intervenors possess a significantly protectable interest in this case.

C. Practical Impairment

Intervenors also "must show that they are so situated that the disposition of the action without [them] may as a practical matter impair or impede their ability to safeguard their protectable interest." *Smith v. L.A. Unified Sch. Dist.,* 830 F.3d at 862. And critically, "the relevant inquiry is whether [the absence of a party seeking intervention] 'may' impair rights 'as a practical matter' rather than whether [such absence] will 'necessarily' impair them." *United States v. City*

of L.A., 288 F.3d 391 at 401 (quoting Fed. R. Civ. P 24(a)(2)).

For reasons similar to those described above, this "practical impairment" element is satisfied here as well. Indeed, the existence of an intervenor's significantly protectable interest often goes hand-in-hand with the potential for impairment of that interest. *See, e.g., California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) ("Having found that appellants have a significant protectable interest, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it." (citing *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001))).

Intervenors' ability to safeguard their Fourteenth Amendment interests may be impaired by their absence from this case. Representative Ybarra's ability to safeguard his interest in knowing who his voters will be and when the election will occur may be impaired by his absence. And the ability for all Intervenors to safeguard their interest in the orderly conduct of elections (which Plaintiffs seek to enjoin) and in the design of Central Washington legislative districts (which Plaintiffs seek to redraw) as current and future voters in those districts may be impaired by being excluded from this case. Thus, Intervenors' interests will be impaired if this litigation goes forward without them.

D. Adequate Representation

None of the present parties can adequately protect Intervenors' interests in this case. The adequacy of a prospective intervenor's representation by existing parties is based on "(1) whether the interest of a

present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086 (citing *California v. Tahoe Reg'l Planning Agency*, 702 F.2d 775, 778 (9th Cir. 1986)). This requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (quoting 3B James Moore, Federal Practice § 24.09-1[4] (2d ed. 1969)).

Certainly the Plaintiffs do not represent Intervenors' interest. As noted above, Plaintiffs' VRA claim "pulls in the opposite direction" of Intervenors' Fourteenth Amendment rights to not be assigned "to a district on the basis of race without sufficient justification." *Perez*, 138 S. Ct. at 2314. And Plaintiffs' requested relief of "enjoin[ing] Defendants from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the Washington State Legislature" would interfere with Representative Ybarra's interest in maintaining a consistent schedule of elections. (Compl., Dkt. #1 at 41.)

As for the Defendants, not only do none of the present Defendants have an interest such that they will "undoubtedly" make "all" of Intervenors' arguments, but the record already contains evidence that these Defendants are unwilling to make such arguments. Defendant Hobbs has "notifie[d] the Court that he

intends to take no position on the issue of whether the state legislative redistricting plan violates section 2 of the Voting Rights Act." (Notice That Def. Hobbs Takes No Position, Dkt. # 40 at 2; see also Def. Hobbs' Resp. to Pls.' Mot. for Prelim. Inj., Dkt. # 50 at 7-8.) Defendants Billig and Jinkins have moved to be dismissed as defendants. (Mot. to Dismiss Defs. Jinkins and Billig, Dkt. # 37.) Of course, if such motion is granted, they would no longer be present to make any arguments in this case. But even if the Court denies their motion, they do not have the same interests as any of the Intervenors, so cannot be expected to make Intervenors' arguments. Nor do they appear willing to do so. For example, in their Response to Plaintiffs' Motion for Preliminary Injunction (Dkt. # 49), Defendants Billig and Jinkins admit that "neither [of them] is in a position to support or oppose the merits of Plaintiffs' vote dilution claim." (Dkt. # 49 at 9.) And while their Response briefs the Court on some of the "legal standards" applicable to VRA cases, it does not present any arguments as to why Plaintiffs' claim fails to meet those standards. (See Dkt. # 49 at 9-14.) In contrast, Intervenors wish to vigorously oppose Plaintiffs' VRA claim on the merits.

Intervenors would also offer additional "elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086. As alluded to above, Intervenors can offer this Court a perspective regarding the tension between the VRA and the Equal Protection Clause. As a state representative who lists "Republican" as his party preference on the ballot and who is a member of the House Republican Caucus in the Legislature, Representative Ybarra can offer the Court a valuable perspective on the close interaction

between race and partisanship, a perspective currently missing since all three present Defendants list the "Democratic" as their party preference on the ballot and are current or former members of Democratic caucuses in the Legislature. *See, e.g.*, *Perez*, 138 S.Ct. at 2314 ("[B]ecause a voter's race sometimes correlates closely with political party preference, it may be very difficult for a court to determine whether a districting decision was based on race or party preference." (internal citations omitted)); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.").

The present Defendants have also acknowledged the problematic posture of this case. Defendants Billig and Jinkins noted that "this case currently lacks a proper party to defend the redistricting plan on its merits" (Reply in Supp. of Mot. to Dismiss Defs. Jinkins and Billig, Dkt. #47 at 6) and that "[t]he current structure of the case... will not lead to a full and fair adjudication on the merits" (Def. Jinkins and Billig's Resp. to Pls.' Mot. for Prelim. Inj., Dkt. # 49 at 2).

Defendant Hobbs stated that "[p]articipation by other interested intervenors may also ensure that the Court can promptly and clearly resolve" this case (Notice That Def. Hobbs Takes No Position, Dkt. # 40 at 2) and that he "continues to believe this litigation must include additional proper parties, whether through intervention or involuntary joinder, to allow thorough consideration of the issues and complete relief (Def.

Hobbs' Resp. to Pls.' Mot. for Prelim. Inj., Dkt. # 50 at 8).[4]

For these reasons, Intervenors will not be adequately represented by any of the existing parties, and their intervention will ensure a more complete adversarial presentation of the issues.

Therefore, Intervenors are entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a). They have moved to intervene in a timely fashion, they have multiple significantly protectable interests related to the subject of the action, those interests may be impaired by the disposition of this case, and their position will not be adequately represented by existing parties. The Court should thus grant their motion.

II. Permissive Intervention under Rule 24(b)

Even if the criteria for intervention of right were not satisfied, the Court should grant permissive intervention under Fed. R. Civ. P. 24(b), pursuant to

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[4] As this motion was being drafted, but shortly before it was filed, Defendant Hobbs filed a Motion to Join Required Parties (Dkt. # 53), requesting that the Court "join the Redistricting Commission, members of the Redistricting Commission in their official capacities, and/or the State of Washington" pursuant to Fed. R. Civ. P. 19(a)(2). (Dkt. #53 at 1.) Intervenors do not oppose this motion, but neither do they believe their right to intervene under Fed. R. Civ. P. 24(a) is diminished by joinder of any of those parties. Intervenors do not believe that (a) the interest of the State, the Commission, or the Commissioners is such that they will undoubtedly make all of Intervenors' arguments, (b) such additional parties are capable and willing to make such arguments, or (c) such additional parties would offer the same elements to the case that Intervenors can offer but that the present parties are neglecting.

which, "[o]n timely motion, the court may permit anyone to intervene who... has a claim or defense that shares with the main action a common question of law or fact." Courts may grant permissive intervention under Rule 24(b) "where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996) (citing *Greene*, 996 F.2d at 978).

A. Independent Grounds for Jurisdiction

Federal courts generally require "independent jurisdictional grounds" to prevent permissive intervention from being used "to gain a federal forum for state-law claims" or "to destroy complete diversity in state-law actions." *Freedom From Religion Found. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011). But "[w]here the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away." *Id.* at 844 (citing 7C Charles Alan Wright et al., Federal Practice Procedure § 1917 (3d ed. 2010)). In their Answer to Complaint filed in conjunction with this motion, Intervenors assert several affirmative defenses and ask the Court for certain relief (convening a court of three judges pursuant to 28 U.S.C. § 2284(a), dismissing Plaintiffs' Complaint, awarding Intervenors' reasonable attorneys' fees, and granting other relief the Court deems just and proper) but are not raising new claims in any of their pleadings or motions filed today. Thus, the "independent jurisdictional grounds requirement" does not apply, because this is a "federal-question

case" where the Intervenors "are not raising new claims." *Id.*

B. Timeliness

"In determining timeliness under Rule 24(b)(2), we consider precisely the same three factors—the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay [as] considered in determining timeliness under Rule 24(a)(2)." *Wilson*, 131 F.3d at 1308 (citing *County of Orange v. Air California*, 799 F.2d 535, 539 (9th Cir. 1986)). Thus, a motion for permissive intervention is timely for the same reasons explained with respect to intervention as of right in Part A.1 above.

C. Common Questions of Law or Fact

Out of concerns for judicial economy, the claims and defenses of a Rule 24(b) intervenor must "have a question of law or a question of fact in common" with the main action. *Nw. Forest Res. Council*, 82 F.3d at 839. This element is plainly satisfied because, as set forth in their Answer to Complaint filed in conjunction with this motion, Intervenors seek to assert affirmative defenses that squarely address the factual and legal premise of Plaintiffs' claims, including but not limited to whether Plaintiffs' Complaint states a claim upon which relief can be granted, whether Plaintiffs have standing, whether this Court has subject matter jurisdiction over Plaintiffs' VRA claim, whether Defendants have any lawful remedy and whether any Defendants can even grant Plaintiffs the relief they request.

D. Undue Delay or Prejudice

Fed. R. Civ. P. 24(b)(3) cautions that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." As noted above, the Court has not yet ruled on the pending motions to dismiss (see Dkt. # 37) or for preliminary injunction (see Dkt. # 38), nor do Intervenors seek to change to the Court's current scheduling order (see Dkt. # 46) (which they have communicated to the other parties through respective counsel). Thus, there is no discernable prejudice or delay to any of the present parties that would result in granting intervention.

Therefore, even if Court determines Intervenors are not entitled to intervene as a matter of right, the Court should exercise its broad discretion to grant permissive intervention.

CONCLUSION

For the foregoing reasons, Intervenors respectfully requests that this Court enter an order granting their Motion to Intervene in this action.

DATED this 29th day of March, 2022.

Respectfully submitted,

s/ Andrew R. Stokesbary
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 29th day of March, 2022.

Respectfully submitted,

s/ Andrew R. Stokesbary
Andrew R. Stokesbary, WSBA #46097

Counsel for Proposed Intervenor Defendants

FILED 11/02/22

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE**

CASE NO. 3:22-cv-05035-RSL

SUSAN SOTO PALMER, et al.,
Plaintiffs,
v.
STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Defendants.

And
JOSE TREVINO, et al.,
Intervenor-Defendants.

INTERVENOR-DEFENDANTS' AMENDED ANSWER TO AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND CROSSCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

REQUEST FOR THREE JUDGE COURT

Intervenor-Defendants Jose Trevino, Ismael G. Campos and State Representative Alex Ybarra ("Intervenors") hereby file this Amended Answer and Crossclaim to Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief (Dkt # 70) as follows. To the extent an allegation is directed to Defendants Steven Hobbs or the State of Washington,

Intervenors are without sufficient information to form a belief as to the truth of the allegation and therefore deny. To the extent that the Amended Complaint's headings or subheadings contain factual allegations, they are denied. Intervenors reserve the right to amend this pleading as permitted by this Courts rules and orders, including Fed. R. Civ. P. 15.[1]

INTRODUCTION

1. This paragraph states a legal conclusion to which no response is required. To the extent a further response is required, denied.

2. Intervenors admit that Legislative District 15[2] includes parts of the Yakima Valley and Pasco. The remainder of this paragraph states a legal

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[1] Pursuant to this Court's Scheduling Order, (*see* Dkt. # 93 at 1 (setting the "[d]eadline for amending pleadings" as November 2, 2022)), Intervenors file this Amended Answer and Intervenors/Cross-Plaintiffs Ybarra and Trevino file this Crossclaim. To the extent the Court deems that a separate Motion for Leave to Amend is required, Intervenors request that the Court treat this filing as a Motion for Leave to Amend with a proposed Amended Answer. *See, e.g.*, *CollegeNET, Inc. v. XAP Corp.*, No. CV-03-1229-HU, 2004 U.S. Dist. LEXIS 13983, at *5 (D. Or. July 14, 2004) ("[The court] allowed defendant's Amended Answer and Counterclaims to stand based on interpreting the scheduling order's express deadline to amend pleadings as obviating the need for a party to move to amend before it could file an amended pleading.").

[2] Unless specifically indicated otherwise, all references to "Legislative District 15" contained in this Answer refer to the "new" boundaries of Legislative District 15 as established by the Commission's legislative redistricting plan submitted in December 2021 and amended by the Washington State Legislature during its 2022 regular session. *See* H. Con. Res. 4407, 67th Leg., 2022 Reg. Sess. (Wash. 2022) (adopted).

conclusion to which no response is required. To the extent a further response is required, denied.

3. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

4. Denied.

5. Intervenors admit that the cities of Toppenish, Wapato and Mabton, portions of the city of Yakima, and Benton, Grant and Franklin Counties are located within Legislative District 15. The remainder of this paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

6. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

7. Intervenors admit that the City of Othello is located in Adams County and in Legislative District 15. Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

8. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

9. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form

a belief as to the truth of the allegations in this paragraph, and therefore deny.

10. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

11. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

12. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

13. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

14. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

15. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form

a belief as to the truth of the allegations in this paragraph, and therefore deny.

16. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

17. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

18. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

19. Intervenors deny that even-number legislative district elections are held only in presidential election years and odd-numbered legislative district elections are held only in non-presidential years. (Elections for state representative positions are held every two years, in both presidential and non-presidential election years. Elections for state senator positions are held every four years, with elections in 13 odd-numbered districts and 12 even-numbered districts occurring in presidential election years, and elections in 12 odd-numbered districts and 12 even-numbered districts occurring in non-presidential election years.) The remainder of this paragraph states a legal conclusion and contains legal arguments to which no response is

required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

20. Intervenors admit that 15 is an odd-number and that elections for state senator in Legislative District 15 are currently held in non-presidential years. Intervenors deny that "[b]y assigning the district an odd number, the Commission has ensured even lower Latino voter turnout in the district." As noted in the paragraph above, elections for state representative positions, including those for Legislative District 15, are held every two years, meaning both presidential and non-presidential election years. Elections for state senator positions are held during presidential election years in 13 odd-numbered districts and 12 even-numbered districts, and during non-presidential election years in 12 odd-numbered districts and 12 even-numbered districts.

21. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

22. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the brief quotation from *LULAC v. Perry*, 548 U.S. 399 (2006). To the extent a further response is required, denied.

23. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

24. This paragraph states a legal conclusion and contains legal arguments to which no response is

required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

25. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

26. Intervenors admit that Legislative District 15 as currently constituted encompasses the eastern portion of Yakima County. To the extent a further response is required, denied.

27. Intervenors admit that, in the November 2018 general election, incumbent United States Senator Maria Cantwell, running for reelection to her fourth term, received 43.27 percent of the total votes (not including write-ins) within current Legislative District 15, and that challenger Bengie Aguilar received 39.41 percent of the total votes (not including write-ins) for the position of Legislative District 15 State Senator, running against a five-term incumbent (who was also elected to two terms in the State House of Representatives from Legislative District 15 prior to his election to the State Senate). Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

28. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

29. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

30. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

31. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

32. Intervenors admit only that presidential preference primaries conducted pursuant to Wash. Rev. Code ch. 29A.56 require political affiliation. Intervenors deny that any other races or offices require political affiliation. *See* Wash. Rev. Code § 29A.52.112.(4) ("A candidate may choose to express no party preference."). Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

33. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

34. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

JURISDICTION AND VENUE

35. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

36. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only that 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e) authorize certain courts to award certain fees to certain prevailing parties bringing certain claims under certain statutes in certain situations.

37. Admitted.

38. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only that venue is proper in this judicial district.

PARTIES

39. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

40. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

41. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

42. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

43. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

44. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

45. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

46. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

47. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

48. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

49. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

50. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

51. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

52. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

53. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

54. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph.

55. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form

a belief as to the truth of the allegations in this paragraph, and therefore deny.

56. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

57. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

58. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

59. Intervenors admit only that the language in quotations in the second sentence of this paragraph accurately quotes a portion of Wash. Rev. Code § 29A.04.230. Intervenors further admit that Wash. Rev. Code § 29A.04.255 provides that the Secretary of State will accept and file certain documents, including some declarations of candidacy. Intervenors admit that the Amended Complaint purports to assert a claim against Defendant Hobbs in his official capacity as the Secretary of State of Washington. Otherwise, this paragraph asserts legal conclusions and contains legal arguments, to which no response is required. To the extent a further response is required, denied.

60. Intervenors admit that that this Court entered an Order of Joinder (Dkt. # 68) ordering Plaintiffs to amend their original Complaint (Dkt. #1) to add the State of Washington as a Defendant. Otherwise, this paragraph asserts legal conclusions and contains legal arguments, to which no response is required. To the extent a further response is required, denied.

LEGAL BACKGROUND

61. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotations from Section 2 of the Voting Rights Act. To the extent a further response is required, denied.

62. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from *Thornburg v. Gingles*, 478 U.S. 30 (1986). To the extent a further response is required, denied.

63. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from *Thornburg v. Gingles*. To the extent a further response is required, denied.

64. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). To the extent a further response is required, denied.

65. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only that this paragraph cites to Section 2(b) of the Voting Rights Act. To the extent a further response is required, denied.

66. Intervenors admit that the majority report of the Senate Committee on the Judiciary

accompanying the 1982 bill which amended Section 2 of the Voting Rights Act, S. Rep. No. 97-417, at 28-29 (1982), listed seven "typical factors" courts may consider in deciding whether Section 2 has been violated. Intervenors further admit that this paragraph substantially copies a summary of these factors that the United States Department of Justice maintains on its website. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

67. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only that this paragraph cites to two district court opinions. To the extent a further response is required, denied.

68. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotations from *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir. 1984). To the extent a further response is required, denied.

69. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

70. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotations

from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *North Carolina State Conference of NAACP v. McCrory*. To the extent a further response is required, denied.

71. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from *North Carolina State Conference of NAACP v. McCrory*. To the extent a further response is required, denied.

72. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from *Hunter v. Underwood*, 471 U.S. 222 (1985). To the extent a further response is required, denied.

73. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only that this paragraph cites an opinion by a district court in the Fifth Circuit and another opinion from the Sixth Circuit. To the extent a further response is required, denied.

74. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from *LULAC v. Perry*. To the extent a further response is required, denied.

75. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only that this paragraph cites an

opinion by a district court in the Fifth Circuit. To the extent a further response is required, denied.

76. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the brief quotations from *LULAC v. Perry* and *Perez v. Abbott*, 250 F. Supp. 3d 123 (W.D. Tex. 2017). To the extent a further response is required, denied.

FACTUAL ALLEGATIONS

77. Admitted.

78. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

79. Admitted.

80. Admitted.

81. Admitted.

82. Admitted.

83. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

84. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

85. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

86. Intervenors admit that much of Yakima County, including the cities of Yakima, Toppenish, Sunnyside and Grandview, is part of the "Yakima Valley," but deny that this paragraph contains an accurate or complete list of the cities and counties within the "Yakima Valley" as typically conceived by

residents of the region, and further deny that Benton or Franklin Counties or any of the Tri-Cities are part of the "Yakima Valley."

87. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

88. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

89. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

90. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

91. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

92. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

93. Admitted.

94. Admitted.

95. Admitted.

96. Intervenors admit that, according to the 2020 Census, the total combined population of individuals who identify as Hispanic or Latino in Benton, Franklin and Yakima Counties is 231,833. Intervenors deny that Benton and Franklin Counties, or even the entirety of Yakima County, are part of the "Yakima Valley." Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

97. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

98. Admitted.

99. Admitted.

100. Admitted.

101. Admitted.

102. Admitted.

103. Admitted.

104. Intervenors admit that upon approval of a redistricting plan by three of the voting members of the Commission, the Commission must submit the plan to the Legislature, but deny that Wash. Rev. Code § 44.05.110 is the authority for this proposition.

105. Intervenors admit that after submission of the plan by the Commission, the Legislature has the next thirty days during any regular or special session to amend the Commission's plan by an affirmative vote in each house of two-thirds of the members elected or appointed thereto, but deny that Wash Rev. Code § 44.05.110 is the authority for this proposition.

106. Intervenors admit that if the Legislature amends the Commission's plan, the legislative amendment may not include more than two percent of the population of any legislative or congressional district, but deny that Wash. Rev. Code § 44.05.110 is the authority for this proposition.

107. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from subsection (1) of Wash. Rev. Code § 44.05.120. To the extent a further response is required, denied.

108. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only that redistricting plans must comply with the United States Constitution and deny the allegations in the remainder of this paragraph.

109. Admitted.

110. Admitted.

111. Admitted.

112. Admitted.

113. Admitted.

114. Admitted.

115. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

116. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

117. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

118. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

119. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

120. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

121. Intervenors admit that Commissioner Sims' original proposed map placed the City of Pasco into Legislative District 16, but are otherwise without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph.

122. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

123. Intervenors admit that Commissioner Walkinshaw's original proposed map placed the City of Pasco into Legislative District 16, but are otherwise without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph.

124. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

125. Intervenors admit only that on or about October 19, 2021, the Washington State Senate Democratic Caucus circulated a presentation by Dr. Matt Barreto, a professor of political science and Chicana/o studies at UCLA and co-founder of the UCLA Voting Right Project and that a copy of the presentation slide deck is available at https://senatedemocrats.wa.gov/wp-content/uploads/2021/10/Barreto-WA-Redistricting-Public-Version.pdf. Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

126. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore deny.

127. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

128. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

129. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

130. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

131. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

132. Intervenors admit only that several news outlets in Washington published articles regarding Dr. Bareto's presentation. Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

133. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

134. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

135. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

136. Intervenors admit only that slides 22 and 23 of the referenced slide deck each contain the phrase "VRA Compliant Option" in large font, depict a noncompact shaded area superimposed on a map of South-Central Washington, and present several numbers in a table. Otherwise, this paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth

of the allegations in this paragraph, and therefore deny.

137. Intervenors admit only that slide 22 of the referenced slide deck contains the phrase "VRA Compliant Option-1: Yakima-Columbia River Valley" in large font, depicts a noncompact shaded area superimposed on a map of South-Central Washington, and presents several numbers in a table. Otherwise, this paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

138. Intervenors admit only that slide 23 of the referenced slide deck contains the phrase "VRA Compliant Option-2: Yakama Reservation" in large font, depicts a noncompact shaded area superimposed on a map of South-Central Washington, and presents a several numbers in a table. Otherwise, this paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

139. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

140. Admitted.

141. Intervenors admit that a page on the Commission's website, available at https://www.redistricting.wa.gov/commissioner-proposed-maps, contains a subheading titled "Revised Map October 25, 2021" below the names of both

Commissioner Sims and Commissioner Walkinshaw, and that below each of these subheading are links to legislative district maps in various formats. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

142. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

143. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

144. Denied. *See* Order Regarding the Washington State Redistricting Commission's Letter to the Supreme Court on November 16, 2021 and the Commission Chair's November 21, 2021 Declaration ("Redistricting Order"), No. 25700-B-676, at 2 (Wash. Dec. 3, 2021) ("This dispute was resolved before midnight on November 15, 2021. That night, at 11:59:28 p.m., the Commission voted unanimously to approve a congressional redistricting plan, and, at 11:59:47 p.m., voted unanimously to approve a legislative redistricting plan. Taken together, the chair's sworn declaration and the minutes of the Commission's November 15, 2021 meeting establish that the Commission approved both redistricting plans by the constitutional deadline established in article II, section 43 of the Washington State Constitution.").

145. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

146. Intervenors admit only that the Commission did not approve "a *letter* transmitting the plan" to the Legislature until shortly after midnight on November 16, 2021. Redistricting Order at 2 (emphasis added); *cf. supra* ¶ 145 (explaining that the redistricting plan itself was approved on November 15). To the extent a further response is required, denied.

147. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

148. Intervenors admit that the Washington Supreme Court "decline[d] to exercise its authority under article II, subsection 43(6) and chapter 44.05 Wash. Rev. Code to adopt a redistricting plan because it concludes that the plan adopted by the Washington State Redistricting Commission met the constitutional deadline and substantially complied with the statutory deadline to transmit the matter to the legislature." Redistricting Order at 4.

149. Admitted.

150. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

151. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

152. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

153. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

154. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

155. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

156. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

157. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

158. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

159. Intervenors admit only that in the November 2012 general election for State Representative, Position 2 in Legislative District 15, then-Representative David Taylor defeated a challenger named Pablo Gonzalez. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

160. Intervenors admit only that in the November 2014 general election for State Senator in Legislative District 15, Senator Jim Honeyford defeated a challenger named Gabriel Muñoz.

Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

161. Intervenors admit only that in the November 2014 general election for State Representative, Position 2 in Legislative District 15, then-Representative David Taylor defeated a challenger named Teodora Martinez-Chavez. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

162. Intervenors admit only that in the November 2018 general election for State Senator in Legislative District 15, Senator Jim Honeyford defeated a challenger named Bengie Aguilar. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

163. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

164. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

165. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

166. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

167. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

168. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

169. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

170. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

171. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

172. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

173. Intervenors admit that, under Washington law, state legislative offices are "[p]artisan office[s] . . . for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." Wash. Rev. Code § 29A.04.110. Intervenors further admit that the "Republican" and "Democratic" parties are frequently listed by candidates for state legislative office as their party preference. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

174. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form

a belief as to the truth of the allegations in this paragraph, and therefore deny.

175. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

176. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

177. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

178. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

179. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

180. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

181. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

182. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

183. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

184. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

185. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

186. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from *Luna v. County of Kern*, 291 F. Supp. 3d 1088 (E.D. Cal. 2018). Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

187. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

188. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

189. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

190. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

191. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

192. Denied.

193. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

194. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

195. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

196. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

197. Intervenors admit that the cities of Wapato, Toppenish and Mabton are not located within Legislative District 15. Intervenors deny that Legislative District 15 excludes the City of Yakima. The remainder of this paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

198. Intervenors admit only that the cities of Wapato, Toppenish and Mabton are not located within Legislative District 15, but are otherwise without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

199. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

200. Intervenors admit that the City of Othello is located in Adams County and in Legislative District 15. Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

201. Denied.

202. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

203. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

204. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

205. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

206. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

207. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

208. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

209. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

210. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

211. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

212. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

213. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

214. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

215. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, Intervenors admit only the accuracy of the quotation from *Luna v. County of Kern*. To the extent a further response is required, denied.

216. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

217. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

218. Intervenors admit only the accuracy of the quotation from the article cited in this paragraph. To the extent a further response is required, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

219. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

220. Intervenors admit that, according to contemporaneous news coverage, Mr. Zambrano-Montes was shot and killed by police, but are otherwise without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

221. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

222. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

223. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

224. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

225. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

226. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

227. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

228. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

229. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

230. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

231. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

232. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

233. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

234. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

235. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

236. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

237. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

238. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

239. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

240. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

241. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

242. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

243. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

244. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

245. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

246. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

247. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

248. Intervenors admit that Melissa Reyes, an individual, League of United Latin American Citizens, a Texas nonprofit corporation, and Latino Community Fund of Washington State, a Washington nonprofit corporation, are plaintiffs in the case *Reyes v. Chilton*, No. 4:21-cv-05075 (E.D. Wash. filed May 7, 2021). Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

249. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

250. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

251. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

252. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

253. Intervenors admit that Jose Trevino is the Mayor of the City of Granger, but are otherwise without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

254. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

255. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

256. Admitted.

257. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

258. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

259. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

260. Intervenors admit that Pablo Gonzalez, Teodora Martinez-Chavez and Bengie Aguilar have been unsuccessful candidates for state legislative offices in Legislative District 15 during the past decade. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

261. Intervenors admit that Representatives Bruce Chandler and Jeremie Dufault currently serve as State Representatives from Legislative District 15 and that Senator Jim Honeyford currently serves as State Senator from Legislative District 15. Otherwise, Intervenors are without information sufficient to form

a belief as to the truth of the allegations in the remainder of this paragraph, and therefore deny.

262. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

263. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

264. Intervenors admit only that in the November 2016 general election for State Representative, Position 1 in Legislative District 14, then-Representative Norm Johnson defeated a challenger named Susan Soto Palmer. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

265. Intervenors admit that Representatives Gina Mosbrucker and Chris Corry currently serve as State Representatives from Legislative District 14 and that Senator Curtis King currently serves as State Senator from Legislative District 14. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

266. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

267. Intervenors admit that former Commissioner Jesse Palacios was elected to the Yakima County Board of Commissioners in 2002. Otherwise, Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

268. Intervenors are without information sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore deny.

269. Denied. Intervenor Trevino, who is Hispanic and resides in the Yakima Valley in Legislative Districts 15, believes that his state legislators and other elected officials in the region are responsive to his needs and those of other Hispanic/Latino residents. Intervenor Campos, who is Hispanic and resides in Kennewick in Legislative District 8, denies that the Tri-Cities are part of the Yakima Valley but also believes that his state legislators and other elected officials in the Tri-Cities are responsive to his needs and those of other Hispanic/Latino residents there. Intervenor Representative Ybarra, who is Hispanic and represents Legislative District 13 in the State House of Representatives, believes he is responsive to the needs of his Hispanic/Latino constituents.

270. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

271. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

CLAIMS FOR RELIEF

272. Intervenors repeat and incorporate by reference their responses to all allegations in the Amended Complaint.

273. This paragraph states a legal conclusion and contains legal arguments to which no response is

required. To the extent a further response is required, denied.

274. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

275. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

276. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

277. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

278. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

279. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

280. This paragraph states a legal conclusion and contains legal arguments to which no response is required. To the extent a further response is required, denied.

281. Intervenors repeat and incorporate by reference their responses to all allegations in the Amended Complaint.

282. This paragraph states a legal conclusion and contains legal arguments to which no response is

required. To the extent a further response is required, denied.

PRAYER FOR RELIEF

Intervenors deny that Plaintiffs are entitled to any relief.

GENERAL DENIAL

Intervenors deny each and every allegation in Plaintiffs' Amended Complaint that is not expressly admitted above.

INTERVENORS' AFFIRMATIVE DEFENSES

Intervenors' affirmative defenses to the Amended Complaint are set forth below. By setting forth the following defenses, Intervenors do not assume the burden of proof on the matter and issue other than those in which they have the burden of proof as a matter of law. Intervenors reserve the right to supplement these defenses.

FIRST AFFIRMATIVE DEFENSE

1. Plaintiffs have failed to file "a short and plain statement of the claim showing that that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

SECOND AFFIRMATIVE DEFENSE

2. Plaintiffs' Amended Complaint includes multiple conclusory allegations without supporting factual allegations showing an entitlement to relief.

THIRD AFFIRMATIVE DEFENSE

3. Plaintiffs fail to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

FOURTH AFFIRMATIVE DEFENSE

4. This Court lacks subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

FIFTH AFFIRMATIVE DEFENSE

5. Plaintiffs lack standing to bring their claims and request relief.

SIXTH AFFIRMATIVE DEFENSE

6. "[Section] 2 of the Voting Rights Act of 1965 does not apply to redistricting." *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (Thomas, J. concurring).

SEVENTH AFFIRMATIVE

7. Plaintiffs have no lawful remedy. Specifically, Plaintiffs seek a remedy that violates the Fourteenth Amendment to the U.S. Constitution by requiring a map drawn on the basis of race.

EIGHTH AFFIRMATIVE

8. Plaintiffs are unable to establish the elements required for injunctive relief.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiffs seek inappropriate relief, including relief that is not within Intervenors or any of the present Defendants' authority to accomplish.

PRELIMINARY STATEMENT TO CROSSCLAIM

1. In an attempt to create a Voting Rights Act ("VRA")-compliant, majority-minority district—which the VRA did not require here—the Washington State Redistricting Commission ("Commission") engaged in open racial gerrymandering in violation of the Fourteenth Amendment.

2. Here, the Commission had a specific racial target for the Hispanic citizen voting age population ("HCVAP") in Legislative District 15.

3. The Equal Protection Clause of the Fourteenth Amendment's mandates race neutrality in governmental decision-making, including a state's drawing of its legislative districts.

4. When race is the predominant factor motivating the creation of a legislative district, that district cannot be upheld unless it satisfies strict scrutiny.

5. Thus, the burden is on Defendants to demonstrate that the creation of District 15 was narrowly tailored to serve a compelling state interest.

6. Section 2 of the VRA did not and does not require the creation of a majority-minority district because there was no legally significant racially polarized voting at the time District 15 was drawn.

7. Consequently, the Commission's predominant use of race when drawing District 15

could have only one result: racial discrimination in violation of the Fourteenth Amendment.

CROSSCLAIM[3]

8. Intervenor Defendant/Cross-Plaintiff Jose Trevino and Intervenor Defendant/Cross-Plaintiff Representative Alex Ybarra (together "Cross-Plaintiffs") bring this action to challenge the constitutionality of Washington State Legislative District 15 in the Yakima Valley as an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to Constitution of the United States.

9. As part of the 2021 redistricting process, the Commission approved, and the Washington State Legislature (the "Legislature") amended and ratified, a plan for the redistricting of state legislative districts in which Legislative District 15 was purposely drawn to have a Hispanic Citizen Voting Age Population ("HCVAP") of greater than 50%.

10. The Equal Protection Clause bars redistricting on the basis of race without sufficient legal justification—despite any Commissioners' mistaken good-faith belief that a VRA district was required in the Yakima Valley.

11. This new Legislative District 15 can only be explained by race.

12. The district's odd shape, which crosses five county lines, bisects two of the largest cities in Central and Eastern Washington, and divides certain communities of interest while combining other communities with divergent interests, flies in the face

[3] Paragraph numbering is continued from the Preliminary Statement.

of traditional districting principles (as well as Washington state constitutional and statutory requirements).

13. Contemporaneous public statements of the voting members of the Commission (each, a "Commissioner") provide further evidence that a majority HCVAP legislative district in Central and Eastern Washington was a precondition to the Commission's approval of any state legislative district plan.

14. Moreover, some Commissioners and Commission staffers have since admitted that they had an explicit racial target for District 15.

15. Because racial considerations predominated over others, the design of District 15 must be subjected to strict scrutiny.

16. Thus, the burden shifts to the State to prove that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end.

17. There was no compelling interest that justified using race as the predominant factor in creating Legislative District 15.

18. Although complying with Section 2 of the VRA is a compelling state interest, the State has the burden of showing that it had a strong basis in evidence to conclude that Section 2 required its action.

19. Two Commissioners stated that Section 2 of the Voting Rights Act compelled a safe Democrat, majority HCVAP district.

20. Their conclusion was based primarily on (1) a short presentation solicited by the State Senate Democratic Caucus and created by an interested advocacy organization, and (2) analysis performed in other litigation relating to different maps.

21. As an initial matter, a presentation by an interested party is not enough to create a compelling interest, as a group that wants a State to create a district with a particular design may favor an overly expansive understanding of what Section 2 demands.

22. Moreover, the advice provided to the Democratic Senate Caucus was incorrect.

23. *Thornburg v. Gingles*, 478 U.S. 30 (1986), lays out the three preconditions to finding a violation of the VRA and, by extension, the preconditions to finding that a majority-minority district is necessary to comply with the VRA.

24. Those conditions are: (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

25. None of the three preconditions were satisfied here.

26. Simply put, Section 2 did not require the creation of a majority-minority district.

27. Additionally, the state must prove its action was narrowly tailored, which the state cannot do if it does not carefully evaluate and consider race-neutral alternatives.

28. The Commissioners' stated prerequisite that creating a majority HCVAP district was necessary to obtaining the Commission's approval of any state legislative district plan necessarily means

the Commission did not consider race-neutral alternatives.

29. Because race was the predominant motivating factor in creating Legislative District 15, but such race-based sorting neither served a compelling government interest nor was narrowly tailored to that end, it violates the Equal Protection Clause of the Fourteenth Amendment.

30. Because the Commissioners subjected Cross-Plaintiffs to unconstitutional racial classifications through a racially gerrymandered district where they reside, Cross-Plaintiffs have suffered injury.

31. Cross-Plaintiffs therefore seek a declaration that Legislative District 15 is invalid and an injunction prohibiting the Defendant from calling, holding, supervising or taking any action with respect to State Legislative elections based on Legislative District 15 as it currently stands.

PARTIES

32. Intervenor Defendant/Cross-Plaintiff Jose Trevino is a United States citizen, over the age of eighteen, and a registered voter in the State of Washington. Cross-Plaintiff Trevino resides in Granger, Washington, and under the Commission-approved map, resides in Legislative District 15. He regularly voted in past elections and intends to vote in future elections. Cross-Plaintiff Trevino is harmed by the violation of his Fourteenth Amendment rights because Legislative District 15 is an illegal racial gerrymander, drawn with race as the predominant factor.

33. Intervenor Defendant/Cross-Plaintiff Alex Ybarra is a State Representative for the State of Washington, a United States citizen, over the age of eighteen, and a registered voter in the State of Washington. He has regularly voted in previous elections and intends to vote in future elections. Cross-Plaintiff Ybarra represents—and is running for reelection in—Legislative District 13, of the Washington House of Representatives. Because race predominated in the drawing of District 15, any change to District 15 will likely impact District 13. Any change to District 13 will affect Cross-Plaintiff Ybarra's protectable interest in avoiding delays in the election cycle and in knowing ahead of time which voters will be included in his district.

34. Cross-Defendant Steven Hobbs is being sued in his official capacity as the Secretary of State of Washington. Under state law, the Secretary of State is "the chief election officer for all federal, state, county, city, town, and district elections," RCW 29A.04.230, responsible for "the administration, canvassing, and certification of . . . state primaries, and state general elections,"[4] RCW 43.07.310. In addition, "declarations of candidacy for the state legislature . . . in a district comprised of voters from two or more counties"—such as Legislative District 15—are to be filed with the Secretary of State. RCW 29A.24.070.

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[4] "The plan approved by the commission . . . shall constitute the districting law applicable to this state for legislative . . . elections, beginning with the next elections held in the year ending in two." RCW 44.05.100(3). Thus, the Secretary of State administers legislative district elections based on the boundaries established by the Commission's redistricting plan.

35. Cross-Defendant State of Washington includes the respective governmental arms responsible for adopting redistricting plans and ensuring that elections are conducted in accordance with those plans in the State.

JURISDICTION AND VENUE

36. This Court has jurisdiction to hear Cross-Plaintiffs' claim pursuant to 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 2284, 1331, 1343(a)(3) and 1357. This Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction to award Cross-Plaintiffs' costs and attorneys' fees pursuant to 42 U.S.C. § 1988, and 52 U.S.C. § 10310(e). This Court only has jurisdiction over the Crossclaim after an appointment of a three-judge panel pursuant to 28 U.S.C. § 2284.

37. This Court has personal jurisdiction over the Cross-Defendants. Cross-Defendant Steve Hobbs is a state official who resides in Washington and performs his official duties in Olympia, Washington. Cross-Defendant State of Washington is a state of the United States of America.

38. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Cross-Plaintiffs' claims occurred and will occur in this judicial district. In addition, Cross-Defendant Steve Hobbs is a state official performing his official duties in the Western District of Washington.

THREE-JUDGE COURT

39. A three-judge district court is requested and required pursuant to 28 U.S.C. § 2284(a), which provides that a "district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."

40. Cross-Plaintiffs are challenging, via their Crossclaim asserted under the Fourteenth Amendment, the apportionment of Legislative District 15, which is a legislative district of the Washington State Legislature—a statewide legislative body.

41. Therefore, a three-judge court is required.

FACTS

Washington State Redistricting

42. The Washington state constitution directs that "[i]n January of each year ending in one, a commission shall be established to provide for the redistricting of state legislative and congressional districts." WASH. CONST. art. II, § 43(1); *see also* RCW 44.05.030.

43. The Commission is composed of five members. Each of the "leader[s] of the two largest political parties in each house of the legislature . . . appoint one voting member." These four voting members select a fifth, nonvoting member to serve as the Commission's chairperson WASH. CONST. art. II, § 43(2); *see also* RCW 44.05.030.

44. The Washington state constitution requires that "[e]ach district . . . contain a population . . . as nearly equal as practicable to the population of any other district" and that "[t]o the extent reasonable, each district . . . contain contiguous territory, . . . be compact and convenient, and . . . be separated from adjoining districts by natural geographic barriers, artificial barriers, or political subdivision boundaries." WASH. CONST. art. II, § 43(5).

45. In addition, the Commission's redistricting plan "shall not be drawn purposely to favor or discriminate against any political party or group." *Id.*

46. The Commission's redistricting plan must also, "insofar as practical," follow certain other traditional districting principles, including that "[d]istrict lines should be drawn so as to coincide with the boundaries of local political subdivisions and areas recognized as communities of interest" and that "[t]he number of counties and municipalities divided among more than one district should be as small as possible." RCW 44.05.090.

47. For a redistricting plan to be adopted, it must be approved by "[a]t least three of the voting members" of the Commission. WASH. CONST. art. II, § 43(6).

48. The Commission is required to "complete redistricting . . . no later than November 15th of each year ending in one." *Id.*; *see also* RCW 44.05.100.

49. "Upon approval of a redistricting plan," the Commission "shall submit the plan to the legislature," which may amend the Commission's plan within the first 30 days of the next regular or special legislative session by "an affirmative vote in each

house of two-thirds of the members elected or appointed thereto." RCW 44.05.100.

50. After such 30-day period, "[t]he plan approved by the commission, with any amendment approved by the legislature, shall be final . . . and shall constitute the districting law applicable to this state for legislative and congressional elections, beginning with the next elections held in the year ending in two." *Id.*

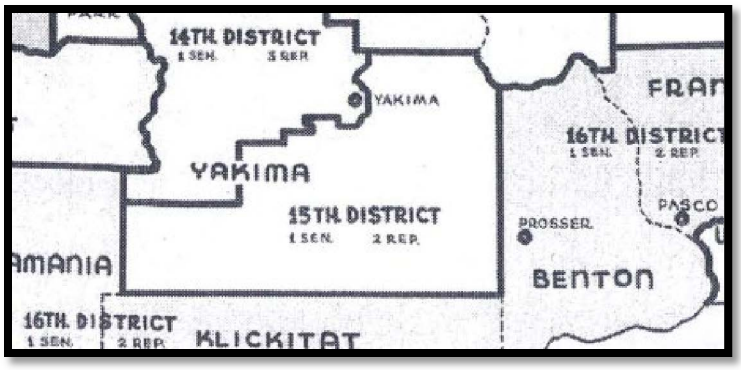
51. Following the Commission's adoption of a redistricting plan, it "shall take all necessary steps to conclude its business and cease operations . . . on July 1st of each year ending in two." RCW 44.05.110.

52. If the Commission has ceased to exist, the Legislature may "adopt legislation reconvening the commission for purposes of modifying the redistricting plan." RCW 44.05.120(1).

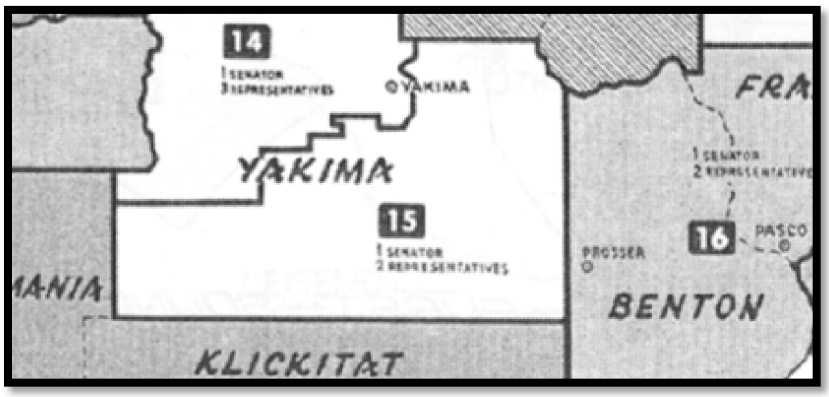
The History of Legislative District 15

53. Over the past 90 years, Legislative District 15 has changed during each round of redistricting, but never as drastically as between 2012 and 2022. Historically, the District has covered a substantial portion of Yakima County. (From 1982 through 2001, it also included portions of neighboring counties, but never as far northeast as Othello or as far east as Pasco).

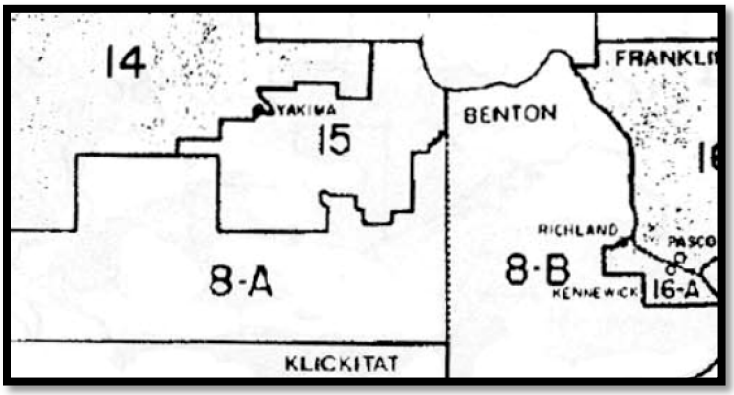
54. A map of Legislative District 15 from 1931 through 1957 is shown below. The district included only a portion of Yakima County. STATE OF WASH., MEMBERS OF THE LEGISLATURE 1889-2019 174 (2019).



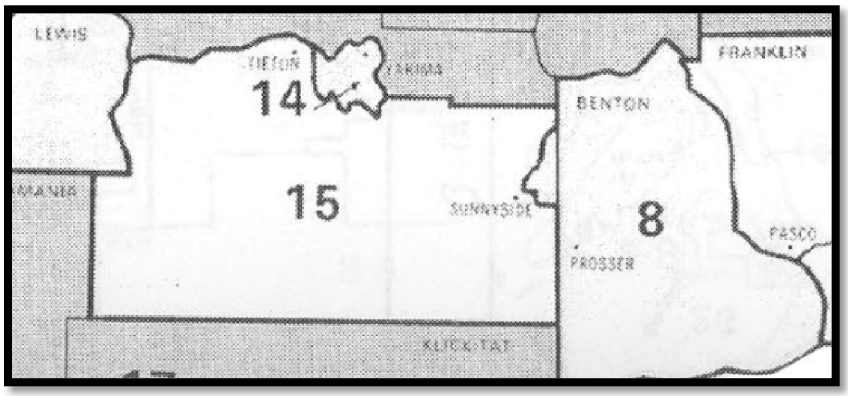
55. A map of Legislative District 15 from 1957 through 1965 is shown below. The district included only a portion of Yakima County. *Id.* at 177.



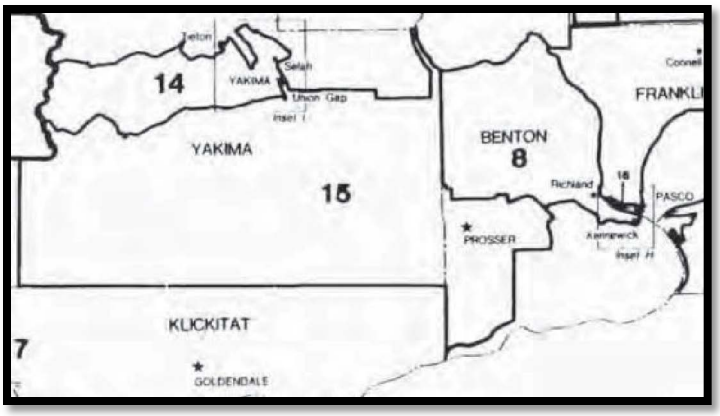
56. A map of Legislative District 15 from 1965 through 1972 is shown below. The district included only a portion of Yakima County. *Id.* at 180.



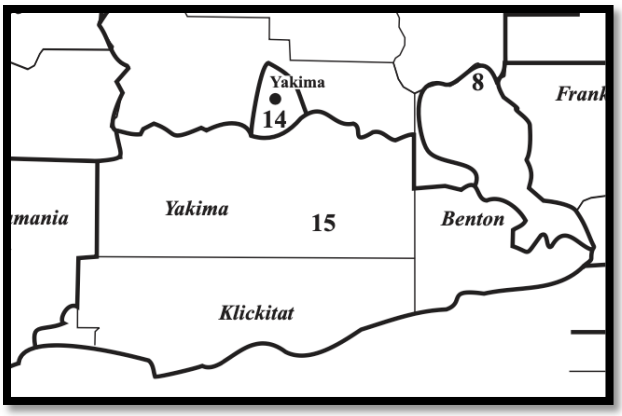
57. A map of Legislative District 15 from 1972 through 1981 is shown below. The district included only a portion of Yakima County. *Id.* at 182.



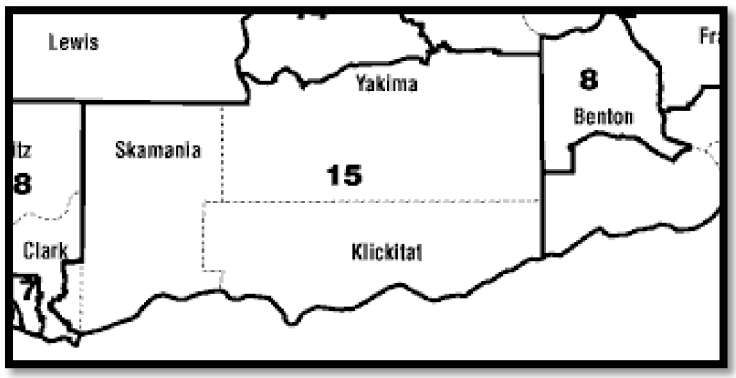
58. A map of Legislative District 15 from 1982 through 1991 is shown below. The district included portions of Yakima and Benton Counties. *Id.* at 184



59. A map of Legislative District 15 from 1991 through 2001 is shown below. The district included a portion of Yakima, Benton, Klickitat, and Skamania Counties. *Id.* at 186.

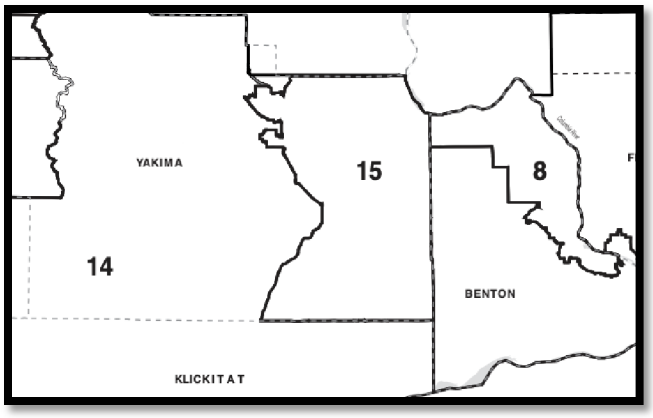


60. A map of Legislative District 15 from 2002 through 2011 is shown below. The district included a portion of Yakima, Klickitat, Skamania,



and Clark Counties. *Id.* at 188.

61. A map of the current version of Legislative District 15, in effect since 2012, is shown below. The district once again includes only a portion of Yakima County. *Id.* at 190.



The 2021 Redistricting Process

62. On December 10, 2020, the Speaker of the House of Representatives announced the appointment of April Sims as a Commissioner representing the House Democratic Caucus and the Senate Majority Leader announced the appointment of Brady Piñero Walkinshaw as a Commissioner representing the Senate Democratic Caucus. *E.g.*, Press Release, Washington State House Democrats, *House, Senate leaders announce their appointees for Redistricting Commission* (Dec. 10, 2020), https://housedemocrats.wa.gov/blog/2020/12/10/house-senate-leaders-announce-their-appointees-for-redistricting-commission/.

63. On January 15, 2021, the Senate Minority Leader announced the appointment of Joe Fain as a Commissioner representing the Senate Republican Caucus and the House Minority leader announced the appointment of Paul Graves as a Commissioner Representing the House Republican Caucus. *See, e.g.*, Eric Rosane, *Former Lawmakers Joe Fain, Paul Graves Tapped by Legislative GOP Leaders as Members of Redistricting Commission*, THE

CHRONICLE (Centralia), Jan. 15. 2021, *available at* https://www.chronline.com/stories/former-lawmakers-joe-fain-paul-graves-tapped-by-legislative-gop-leaders-as-members-of,260219.

64. On January 30, 2021, the four voting Commissioners appointed Sarah Augustine as the nonvoting, fifth member and Chair of the Commission. *E.g.*, Pat Muir, YAKIMA HERALD-REPUBLIC, *White Swan woman tapped to lead state Redistricting Commission*, Feb. 8, 2021, *available at* https://www.yakimaherald.com/news/local/white-swan-woman-tapped-to-lead-state-redistricting-commission/article_37671834-78c9-5cec-a5a5-d9d1aab30f72.html.

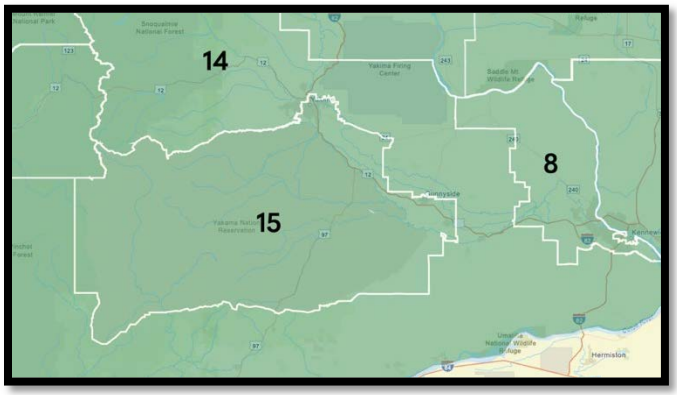
65. Between February 2021 and November 2021, the Commission held Special Business Meetings, Regular Business Meetings, and Public Outreach Meetings. *See, e.g.*, Washington State Redistricting Commission, Business Meetings, https://www.redistricting.wa.gov/commission-meetings; Washington State Redistricting Commission, Public Outreach Meetings, https://www.redistricting.wa.gov/outreach-meetings.

66. On September 21, 2021, each of the four voting Commissioners released a proposed legislative district map to the public. Washington State Redistricting Commission, Legislative Maps, https://www.redistricting.wa.gov/commissioner-proposed-maps.

67. No Commissioner proposed a version of Legislative District 15 that resembled the district as drawn by the Commission's final redistricting plan.

68. No proposal, for example, contained the cities of Pasco or Othello, and none contained a majority HCVAP. *See id.*

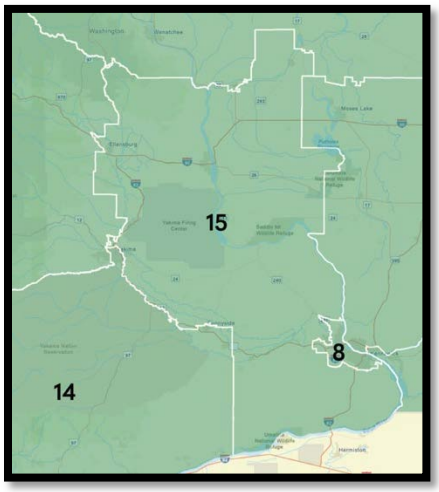
69. The map of Legislative District 15 initially proposed by Commissioner Sims is shown below. It combined the Yakama Indian Reservation with parts of Yakima and communities along Interstate 82 to Grandview. Commissioner Sims stated that her map "recognizes the responsibility to create districts that provide fair representation for communities of interest" and that "[m]aintaining and creating communities of interest" and "[c]entering and engaging communities that have been historically



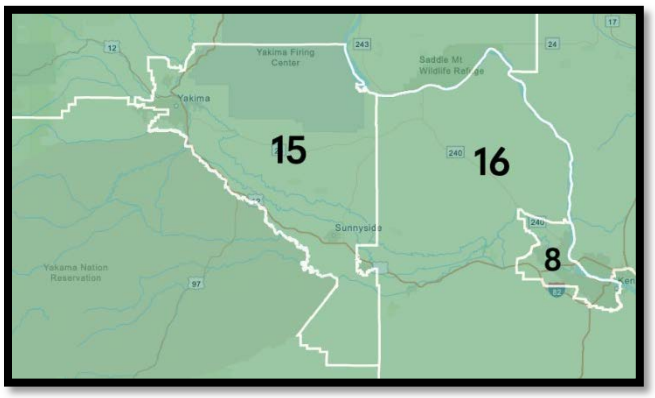
underrepresented" were "values guid[ing]" her efforts. *Id.*

70. The map of Legislative District 15 initially proposed by Commissioner Walkinshaw is shown below. It merged cities around Yakima into a district that stretched north beyond Ellensburg and south to the Columbia River. Commissioner Walkinshaw stated his goals were to "[m]aintain and unite communities of interest and reduce city splits" and "prioritize[e] the needs of . . . historically underrepresented communities." His plan also

"[c]reate[d] a majority-Hispanic/Latino district" in the neighboring Legislative District 14, which was "55.5% [Hispanic/Latino] by Voting Age Population (VAP)" and "65.5% people-of-color by VAP." *Id.*



71. The map of Legislative District 15 as proposed by Commissioner Fain is shown below. It included the City of Yakima and consisted of the eastern third of Yakima County. Commissioner Fain "place[d] existing school district boundaries at the cornerstone of his legislative framework." His plan also "create[d] seven majority-minority districts



statewide, and one additional majority-minority citizen voting age population (CVAP) district." *Id.*

72. The map of Legislative District 15 as proposed by Commissioner Graves is shown below. It combined the northeastern portion of Yakima County, including the cities along Interstate 82, with most of Benton County apart from Richland and Kennewick. Commissioner Graves's plan "focuses on communities of interest and is not drawn to favor either party or incumbents" and featured eight "majority-minority" districts. *Id.*

73. On October 19, 2021, the Washington State Senate Democratic Caucus circulated a presentation by Dr. Matt Barreto, a professor of political science and Chicana/o studies at UCLA and co-founder of the UCLA Voting Rights Project. *See* Presentation by Matt Barreto, Assessment of Voting Patterns in Central/Eastern Washington and Review of the Federal Voting Rights Act, Section 2 Issues, (Oct. 19, 2021), https://senatedemocrats.wa.gov/wp-content/uploads/2021/10/Barreto-WA-Redistricting-Public-Version.pdf.

74. Upon information and belief, Dr. Barreto was hired by the Washington Senate Democratic

Caucus, not by the Commission, the State of Washington or the Legislature.

75. The presentation argued that, to comply with Section 2 of the Voting Right Act, a majority HCVAP district in the Yakima Valley that voted for the Democratic Party's preferred candidates was required. *See id.*

76. The presentation included an analysis of voting patterns for just two statewide general elections, the 2012 U.S. Senate race between Maria Cantwell and Michael Baumgartner and the 2020 Governor race between Jay Inslee and Loren Culp. *See id.* Neither analysis included a Hispanic candidate.

77. The presentation did not include analysis of voting patterns in primary elections, or any other analysis exploring whether voting patterns could be explained by partisanship, rather than race. *See id.*

78. Importantly, the presentation also did not consider or suggest any race-neutral alternatives despite showing that the districts initially proposed by Commissioners Sims and Walkinshaw would have voted for the Latino bloc's preferred candidate over the majority bloc's preferred candidate in the 2020 President/Vice President race. *See id.*

79. Only two claimed "VRA Compliant" legislative district options were presented. One district contained a HCVAP of approximately 60% and the other contained a Latino CVAP of approximately 52%, without any explanation for why the different thresholds were chosen. *See id.*

80. Despite the brevity and potential bias of the analysis, Commissioner Walkinshaw issued a statement on October 21, 2021, two days after the

presentation, stating that he and Commissioner Sims "will be releasing new statewide legislative maps early next week." Press Release, Washington Senate Democrats, *New definitive analysis by UCLA Voting Rights Expert: final Washington state legislative plan must include VRA-compliant district in the Yakima Valley* (Oct. 21, 2021), https://senatedemocrats.wa.gov/blog/2021/10/21/new-definitive-analysis-by-ucla-voting-rights-expert-final-washington-state-legislative-plan-must-include-vra-compliant-district-in-the-yakima-valley/.

81. Commissioner Walkinshaw also stated that "as the first ever Latino commissioner, it has been extremely important for me to lift up and elevate Hispanic voters, and undo patterns of racially polarized voting, particularly in the Yakima Valley." Melissa Santos, *Proposed WA redistricting maps may violate Voting Rights Act*, CROSSCUT (Oct. 21, 2021), https://crosscut.com/politics/2021/10/proposed-wa-redistricting-maps-may-violate-voting-rights-act.

82. On October 25, 2021, Commissioners Sims and Walkinshaw released revised legislative plans, both of which incorporated the "Yakama Reservation" district option from Dr. Bareto's presentation, which achieved a 60% minority CVAP by combining Latino and Native populations. No presentation was made or evidence provided to the Commission showing that Latino voters and Native voters are cohesive.

83. On October 26, 2021, less than three weeks before the Commission's statutory deadline, Washington State Senate Democrats issued a press release holding out Dr. Bareto's presentation as "definitive," stipulating that "the final adopted map must include a majority-Hispanic district in the

Yakima Valley." Press Release, Washington Senate Democrats, *Walkinshaw releases new VRA-Compliant Legislative map* (Oct. 26, 2021), https://senatedemocrats.wa.gov/blog/2021/10/26/following-new-analysis-commissioner-walkinshaw-releases-new-legislative-map-compliant-with-voting-rights-act/.

Legislative District 15 under the 2021 Plan

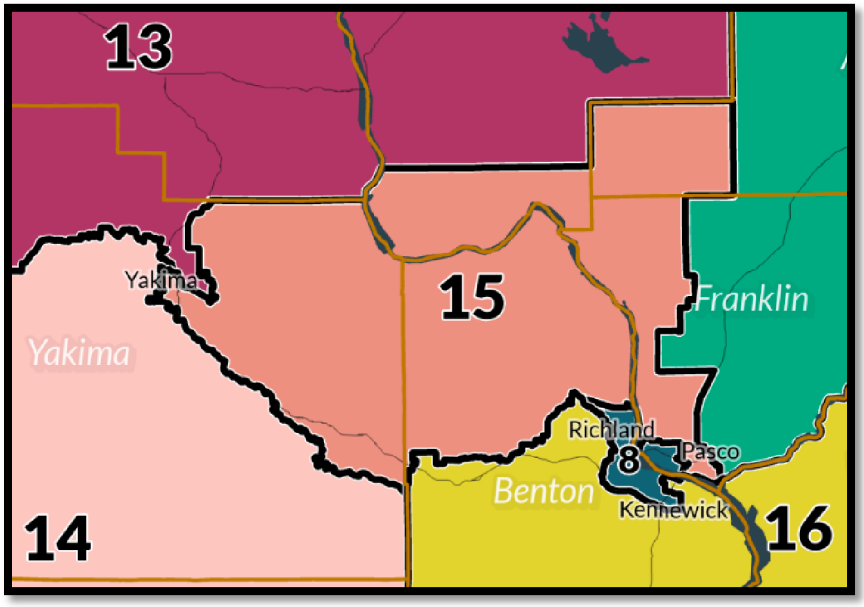
84. Shortly before midnight on November 15, 2021, the Commission "voted unanimously to approve a legislative redistricting plan." Order Regarding the Washington State Redistricting Commission's Letter to the Supreme Court on November 16, 2021, and the Commission Chair's November 21, 2021 Declaration (Redistricting Order), No. 25700-B-676, at 2 (Wash. Dec. 3, 2021).

85. Shortly after midnight on November 16, 2021, the Commission submitted "a formal resolution adopting the redistricting plan" and "a letter transmitting the plan" to the Legislature. *Id.*

86. The Legislature approved minor adjustments to the Commission's final plan. *See* H. Con. Res. 4407, 67th Leg., 2022 Reg. Sess. (Wash. 2022).

87. The redistricting plan approved by the Commission, together with the Legislature's amendments, constitutes Washington state's districting law for legislative elections, beginning with the upcoming 2022 elections. *See* WASH. CONST. art. II, § 43(7); RCW 44.05.100(3); *see also* Redistricting Order at 4.

88. The map of the new Legislative District 15 as defined by the Commission's approved plan is shown below. It disregards traditional districting principles such as compactness, maintaining communities of interest, and respecting political subdivisions or geographical boundaries.



89. The shape of Legislative District 15 is strained and noncompact. Its northwest and southeast corners are narrow slivers of land that reach into the cities of Yakima and Pasco respectively, where a substantial majority of the district's population resides. The district extends north to Mattawa and northeast to Othello, based upon information and belief, for the sole purpose of including those cities' substantial Latino populations. The central portion of the district is sparsely populated.

90. The odd shape of Legislative District 15 cannot be explained by political or natural

boundaries. It stretches into parts of five counties, yet does not contains a single whole county. Its western and eastern sections are divided by the Yakima Firing Center, Rattlesnake Hills, the Hanford Nuclear Site, and the Columbia River. Despite these geographic boundaries, Legislative District 15 does not follow major thoroughfares. To travel just from Sunnyside to Pasco via Interstate 82 and Interstate 182 would require crossing through both Legislative Districts 16 and 8 before reentering Legislative District 15 in Pasco.

91. The Commission ignored communities of interest in creating Legislative District 15. The district's boundaries not only split up urban communities like Yakima and Pasco, but smaller cities like Grandview, Moxee and Union Gap. And while Legislative District 15 divides communities of shared interest, it also groups together communities with distinctly different interests. For example, it extends to Pasco, Othello, Mattawa and the Hanford Nuclear Site, none of which have previously been placed in the same legislative district as the city of Yakima or any portion of Yakima County in the state's history.

92. The boundaries of the new Legislative District 15 approved by the Commission do not resemble prior Legislative District 15 boundaries or those of any publicly-proposed districts by any Commissioner during the 2021 redistricting process.

93. However, the new Legislative District 15 does contain a HCVAP of greater than 50%.

94. The boundaries of the new Legislative District 15 were clearly negotiated and approved predominantly on the basis of race, in order to create a majority HCVAP legislative district.

95. No compelling interest justified the predominant consideration of race in creating Legislative District 15.

96. The Commission cannot justify its decision to use race as the predominant factor in drawing Legislative District 15's boundaries under Section 2 of the Voting Rights Act.

97. The Commission could not have a strong basis in evidence to believe that it was required to create a new Latino-opportunity district to avoid liability under Section 2 because the Commission did not conduct a proper analysis of racial voting patterns or of what Section 2 required.

98. Two Commissioners cited the presentation from the UCLA Voting Rights Project as justification for their racially-segregated maps, but one advocacy group's demands alone are insufficient to create a strong basis in evidence that justifies sorting voters by race.

99. Even if there were a compelling state interest in creating Legislative District 15 using race as the predominant factor (which there is not), Legislative District 15 is not narrowly tailored to achieve that interest.

100. The Commission did not perform sufficient analysis of race-neutral alternatives, including, for example, what percentage of Latino voters would be necessary to have the opportunity to elect their candidates of choice.

CROSSCLAIM

(Violation of the Equal Protection Clause of the United States Constitution)

101. Cross-Plaintiffs reallege and incorporate by reference the allegations in the above paragraphs.

102. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

103. Race was the predominant factor motivating the Commission's decision to draw the lines encompassing Legislative District 15.

104. The Voting Rights Act does not require a Hispanic majority-minority district in the Yakima Valley.

105. The Commission's race-based sorting of voters in Legislative District 15 neither served a compelling state interest nor was narrowly tailored to that end.

106. It did not serve a compelling interest because it was not required for compliance with Section 2 of the VRA, and therefore the Commission had no other compelling interest for sorting voters based on race.

107. Even if it was required for compliance with the VRA, it was not narrowly tailored because the Commission did not consider race-neutral alternative for VRA compliance.

108. Therefore, Legislative District 15 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

109. By subjecting Cross-Plaintiffs to the effects brought on by unconstitutional racial

classifications through a racially gerrymandered district, Cross-Plaintiffs have suffered injury.

110. Cross-Plaintiffs have no adequate remedy at law other than the judicial relief sought here.

111. The failure to temporarily and permanently enjoin the conduct of elections based on Legislative District 15 will irreparably harm Cross-Plaintiffs by violating their constitutional rights.

INTERVENORS/CROSS-PLAINTIFFS' PRAYER FOR RELIEF

Intervenors/Cross-Plaintiffs respectfully ask the Court for the following relief:

1. Convene a court of three judges pursuant to 28 U.S.C. § 2284(a);

2. Dismiss the Plaintiffs' Amended Complaint in its entirety and with prejudice;

3. Declare that Legislative District 15 is an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution;

4. Issue a permanent injunction enjoining Defendants from enforcing or giving any effect to the boundaries of Legislative District 15, including an injunction barring Defendant Secretary of State from conducting any further elections for the Legislature based on Legislative District 15;

5. Order the creation of a new, valid plan for legislative districts by Defendant State of Washington that does not violate the Equal Protection Clause;

6. Appoint a special master if Defendant State of Washington fails to timely comply with this

Court's order to redraw the legislative districts for the State of Washington;

7. Award Intervenors/Cross-Plaintiffs' reasonable attorneys' fees and costs incurred in this action in accordance with 42 U.S.C. § 1988, 52 U.S.C. § 10310(e) and any other applicable law or rule; and

8. Grant such other and further relief as the Court deems just and proper.

DATED this 2nd day of November, 2022.

Respectfully submitted,

s/ Andrew R. Stokesbary
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Counsel for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 2nd day of November, 2022.

Respectfully submitted,

s/ Andrew R. Stokesbary
Andrew R. Stokesbary, WSBA #46097

Counsel for Intervenor-Defendants

FILED 7/01/25

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-35595, 24-1602

SUSAN SOTO PALMER, et al.,
Appellees,
v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,
Appellants.

INTERVENOR-APPELLANTS' OPENING BRIEF

[*Disclosure Statement, Table of Contents, Table of Authorities, and Glossary omitted*]

*1 INTRODUCTION

The decisions below represent drastic ruptures from all prior Voting Rights Act ("VRA") § 2 precedents and contort that landmark provision beyond recognition. Plaintiffs here brought a § 2 challenge asserting that Washington State's Legislative District 15 ("LD-15"), enacted by the unanimous vote of Washington's independent bipartisan Redistricting Commission, unlawfully diluted Hispanic voting strength. But it is undisputed that LD-15 was a *majority-minority* district, with a Hispanic Citizen Voting Act Population ("HCVAP") of 52.6% in 2021. No federal court considering a single-district challenge has ever

held that a majority-minority district violates § 2 without also finding that the putative majority was in fact "hollow" or a "façade" without being reversed or vacated. *See, e.g., LULAC v. Perry*, 548 U.S. 399, 428-29 (2006) (majority was "hollow" because it was adult population and not citizen-voting-age population ("CVAP")). Indeed, majority-minority districts are much more typically imposed to *remedy* § 2 vote-dilution violations, rather than being the targets of § 2 suits themselves.

The district court's holdings become even stranger when the results of the first (and heretofore only) contested election conducted under the original LD-15 map are considered: In 2022, a Hispanic candidate defeated a White candidate by a 2-1 margin. Nikki Torres prevailed with 67.7% of the vote, compared to 32.1% received by Lindsey Keesling. 3-ER-549. That landslide victory of a Hispanic candidate is ***2** hardly indicative of unlawfully diluted Hispanic voting strength. To all except Plaintiffs and the district court, that is: They blithely discounted that real-world evidence as somehow consistent with Plaintiffs' models of unlawful vote dilution of Hispanic votes. In Plaintiffs' view, because Nikki Torres was a Hispanic Republican, her resounding electoral success in fact represented a triumph of voter suppression and subjugation of Hispanics by White voters.

Remarkably, this case turned stranger still when Plaintiffs unveiled their proposed remedial maps. Plaintiffs' proposed remedy to their alleged Hispanic vote dilution was *yet more dilution* of Hispanic votes. Specifically, Plaintiffs submitted five proposed remedial maps (and later revised versions of each, for

a total of eleven)--and *every single one of them* would decrease the HCVAP of the opportunity district. While enacted LD-15 was 52.6% HCVAP, Plaintiffs' proposed "remedies" would affirmatively dilute that number to between 46.9% and 51.7% (all in 2021 numbers). 2-ER-157. The district court accepted Plaintiffs' invitation to remedy putative dilution with more dilution: Under the map it adopted (the "Remedial Map"), the district's HCVAP was reduced from 52.6% to 50.2%--even though a "bare" (though larger) majority was the putative § 2 violation. In doing so, the district court declared that its "fundamental goal" in drawing the Remedial Map was a race-based one: uniting Latino communities of interest. 1-ER-08 n.7. The district court's Remedial Map also needlessly made sweeping changes to the ***3** legislative map, altering *thirteen* out of forty-nine districts to remedy a putative violation in just one district (LD-15).

In a nutshell: This case turns the VRA on its head. A typical VRA § 2 case challenges a district with a minority voting population below 50% and seeks to create a majority-minority district as a remedy for the alleged dilution. Not so here. Instead, Plaintiffs asserted that (1) a majority Hispanic CVAP district itself unlawfully dilutes Hispanic voting strength and (2) the appropriate "remedy" for that putative dilution is further dilution by reducing the district's Hispanic population--precisely the retrogression that the VRA is supposed to prohibit, not mandate.

Given just how far through the looking glass the VRA claims and remedies were here, the district court's acceptance of them rests on numerous--and manifest-

- legal errors. This appeal challenges seven such errors, any one of which independently requires reversal.

First, the originally enacted LD-15 is a non-façade working Hispanic citizen voting-age majority district in which that majority is not denied access to the polls or equal opportunity to vote. As a threshold matter of law, this case should have ended there, because Hispanic voters--a majority by CVAP-- necessarily possess at least an equal "opportunity ... to elect representatives of their choice" as other groups (whom they outnumber and can outvote outright). 52 U.S.C. § 10301(b).

***4** *Second*, the district court erred by analyzing the compactness of the districts' geographic boundaries rather than the compactness of the minority community. This was patent error. *See, e.g., Perry*, 548 U.S. at 433 (" 'The first *Gingles* condition refers to the compactness of the minority population, *not to the compactness of the contested district.*'" (emphasis added)).

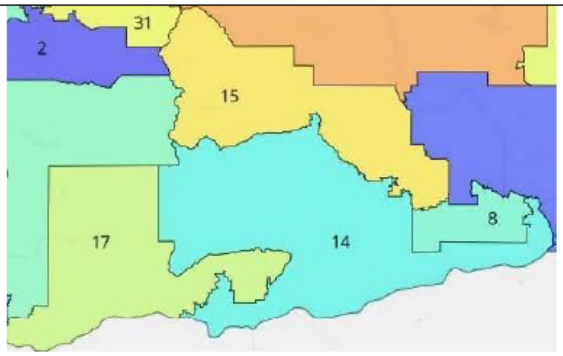
Third, the district court made no attempt to determine whether race or politics caused any alleged denial of electoral opportunity, a requirement under the *Gingles* preconditions or the totality of the circumstances.

Fourth, the totality of the circumstances shows that an ultimate finding of dilution was implausible considering the ubiquity of the facts upon which the district court relied.

Fifth, in an apparent first in the entire history of the VRA, the district court purported to remedy the alleged dilution that it found violated § 2 with yet more dilution, reducing the Hispanic CVAP of LD-15 from 52.6% to 50.2%. No party here has ever identified *any* court that has ever done that. And for good reason: If dilution is the VRA violation, it cannot also be the cure. Indeed, employing the VRA affirmatively to *dilute* minority voting strength makes a farce out of that landmark civil rights statute and dispenses entirely with the pretense that the VRA is being used for any purpose other than naked partisan gain.

***5** *Sixth*, the Remedial Map is an unconstitutional racial gerrymander. Remedial LD-14 (shown next) was aptly described as an "octopus slithering along the ocean floor." 2-ER-131. Like prior infamous racial gerrymanders, its bizarre shape reveals its unexplainable-except-by-racial-grounds nature--which the district court was completely explicit about in any case, declaring the map's "fundamental goal" to be race-based sorting. 1-ER-08 n.7. The resulting racial gerrymander belongs in the unconstitutional Hall of Shame every bit as much as the "sacred Mayan bird" and "bizarrely shaped tentacles" districts previously invalidated. *Allen v. Milligan*, 143 S. Ct. 1487, 1509 (2023).

Figure 1: Remedial Map Adopted (LD-14 is remedial district)



Seventh, the district court violated the Supreme Court's federalism-based mandate to craft a remedial map that minimizes changes to the districting plan ***6** enacted by the State. Instead, the district court made sweeping and gratuitous changes to a huge number of legislative districts: altering thirteen of Washington's forty-nine total districts and moving half a million Washingtonians into different districts. These changes were wanton, particularly, as Appellants' remedial expert made clear, because a remedy accomplishing the district court's stated goal of performing for a Democratic candidate could be effected by altering just three districts and moving only 87,230 people, while Plaintiffs themselves proposed a remedial map altering just four districts and moving only 190,745 people. 2-ER-75, 83-84; 2-ER-155. In *Upham v. Seamon*, the Supreme Court held that a district court abused its discretion by redrawing *four* out of twenty-seven districts to remedy objections to *only two*. 456 U.S. 37, 38, 40 (1982). But here the district court redrew *thirteen* districts to remedy a violation *in just one*.

For all these reasons, this Court should reverse the district court's judgment and order adopting the Remedial Map, or at the very least vacate the Remedial Map.

JURISDICTION

The single-judge district court lacked jurisdiction to hear this case, which required a three-judge court to be formed, as explained below (*infra §* I).

If it did have single-judge jurisdiction, the district court had federal question jurisdiction under 28 U.S.C. § 1331. The district court entered its final judgment on § 2 liability on August 11, 2023. 1-ER-02. Intervenor-Defendant-Appellants ***7** ("Intervenors") filed a timely notice of appeal on September 8, 2023. 3-ER-576. The district court entered its final remedial order on March 15, 2024. 1-ER-3-13. Intervenors filed a notice of appeal that day. 3-ER-575.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. As explained below (*infra §* II), Intervenors have standing to bring this appeal.

STATEMENT OF ISSUES

The overarching issue in the merits appeal is whether the district court erred in holding that LD-15 violated § 2 of the VRA. Included within that global issue are:

(1) Whether the district court erred in asserting

jurisdiction over this challenge to Washington's legislative maps when 28 U.S.C. § 2284(a) requires "[a] district court of three judges ... when an action is filed challenging ... the apportionment of any statewide legislative body."

(2) Whether the district court erred in holding that a viable § 2 claim could be asserted against a majority-minority district where the majority is not hollow or a façade.

(3) Whether the district court erred in holding that the first *Gingles* precondition was satisfied where the district court analyzed the compactness of the district's geographical lines, rather than the minority populations within the district, as Supreme Court precedent demands.

***8** (4) Whether the district court erred in holding that the second and third *Gingles* preconditions were satisfied where the district court failed to analyze whether polarization in voting was due to partisanship rather than race.

(5) Whether the district court erred in holding that Plaintiffs had established a violation of § 2 under the totality of circumstances.

Answering any one of these questions in the affirmative requires reversal of the merits judgment below and vacatur of the district court's Remedial Map.

The legal questions underlying the district court's Remedial Map are:

(6) Whether the district court erred in attempting to remedy a found Section 2 violation of Hispanic vote dilution by decreasing the Hispanic citizen voting age population of the district.

(7) Whether the district court's intentional use of race in drawing the Remedial Map violated the Equal Protection Clause.

(8) Whether the district court abused its discretion in the extent of changes it made to the State's Enacted Map when it redrew thirteen districts to remedy a violation it found in just one.

Answering any of these questions in the affirmative requires vacatur of the Remedial Map.

*9 STATUTORY ADDENDUM

Appellants' statutory addendum includes the text of VRA § 2.

STATEMENT OF THE CASE

Factual and Procedural Background

Under Washington law, congressional and legislative districts are supposed to be drawn exclusively by an independent and bipartisan redistricting commission (the "Commission"). *See* Wash. Const. art. II, § 43(1); U.S. Const. art II, § 2; 1-ER-16-18. The Commission consists of four voting members (each, a "Commissioner") and one non-voting member, with each voting member appointed by the legislative

House and Senate leaders of the two largest political parties. *See* Wash. Const. art. II, § 43(2). The four voting members in turn select the nonvoting chair. *Id.* Following the 2020 Census, the Commission's voting members were duly appointed, and they elected Sarah Augustine as the Chairwoman. 2-ER-251.

The Commissioners were required by statute to create compact and convenient districts with equal (as practicable) populations that respected communities of interest, minimized splitting of existing county and town boundaries, and encouraged electoral competition. *See* RCW 44.05.090. Also by law, the Commission needed to agree by majority vote on a map by November 15, 2021 and then transmit the proposed plan to the Legislature, which then had thirty days beginning the next legislative session to adopt limited amendments to the map by a ***10** two-thirds vote of both chambers or else the Commission's plan would become the final map. RCW 44.05.100(1)-(2).

The Commission unanimously agreed upon a map by the statutory deadline. 1-ER-18-19. The Legislature adopted the map, with limited amendments but no population changes to LD-15 (the "Enacted Map"), in February 2022. *Id.*

During map negotiations, and after each Commissioner released their respective opening map proposal, the Democratic-appointed Commissioners sought the assistance of Matt Barreto, a UCLA academic and advisor on VRA compliance. Dr. Barreto presented a PowerPoint slide deck to the two Democratic Commissioners that contained a

scatterplot of demographic figures and precinct-level results for some statewide races, and concluded that the VRA mandated a "VRA-Compliant" district in the Yakima Valley. 3-ER-435-459.

The Commissioners ultimately decided specifically to draw a majority-minority district in the Yakima Valley, *i.e.*, a district with a majority Hispanic Citizen Voting Age Population (HCVAP). 1-ER-18-19. The result was LD-15, with an estimated HCVAP of 51.5% using 2019 population figures. 1-ER-18-19.

The result from the first contested election conducted under the Enacted Map was not particularly competitive, however. Instead, a Hispanic Republican candidate, Nikki Torres, secured more than twice as many votes as her White Democrat opponent, a 35.6% margin of victory: 67.7% to 32.1%. 3-ER-549.

***11 Proceedings Below**

This suit followed shortly after the Commission's adoption of the redistricting plan it had transmitted to the Legislature and was filed originally on January 19, 2022 against Secretary of State of Washington Steve Hobbs (the "Secretary"), Senate Majority Leader Andy Billig and Speaker of the House Laurie Jinkins. ECF No. 1.[1] Plaintiffs' amended complaint was focused entirely on LD-15, which it alleged was a "façade" district that "results in vote dilution in violation of Section 2 of the Voting Rights Act by failing to draw an effective Latino-majority state legislative district." 2-ER-234, 272-73. Although LD-15 was already a majority HCVAP district, Plaintiffs demanded, in the district court's words, "that the

redistricting map of the Yakima Valley region be invalidated under Section 2 of the VRA and redrawn to include a majority-HCVAP district in which Latinos have a real opportunity to elect candidates of their choice." 1-ER-19. Plaintiffs further alleged that LD-15 was the product of intentional discrimination. 2-ER-272.[1]

The Senate Majority and House Speaker were dismissed as defendants ECF No. 66, and the State of Washington ("the State") was then joined, ECF No. 68. Three individuals, Jose Trevino, Ismael G. Campos, and Alex Ybarra, moved to intervene and were granted permissive intervention. 2-ER-276-285.

***12** Meanwhile, in March 2022, LD-15 voter Benancio Garcia III brought a separate action against the Secretary, contending that the Commission and the State (later joined) violated the Equal Protection Clause by sorting voters in LD-15 on the basis of their race without sufficient justification. *See Garcia v. Hobbs*, No. 3:22-cv-5152, ECF No. 1. That claim triggered 28 U.S.C. § 2284, and a three-judge district court, consisting of Ninth Circuit Judge Lawrence VanDyke, District Court Judge Robert Lasnik, and Chief Judge David Estudillo, was empaneled to hear the *Garcia* challenge. *Garcia* ECF No. 18.

The parties in *Soto Palmer* retained experts to create reports pertinent to the *Gingles* legal framework, which governs challenges under § 2 of the VRA. *See*

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[1] Unless otherwise specified, "ECF No." refers to entries in the district court in No. 3:22-cv-5035 and are included for cites to uncontested background information.

generally Thornburg v. Gingles, 478 U.S. 30 (1986). Dr. Loren Collingwood, Dr. John Alford, and Dr. Mark Owens were retained by Plaintiffs, the State, and Intervenors, respectively, the reports of whom were admitted at trial. 3-ER-394-427; 3-ER-460-512; 3-ER-513-37.

While this case was pending, a Hispanic candidate, Nikki Torres, was elected as State Senator for LD-15 by a lopsided margin. 3-ER-549. Drs. Collingwood and Owens both supplemented their reports based on the 2022 election results. 3-ER-428-34; 3-ER-538-47. They, respectively, estimated that Senator Torres won 32% and 48% of the Hispanic vote. 3-ER-431; 3-ER-543.

***13** The district court below and the *Garcia* three-judge district court set the two cases for a joint bench trial in June 2023. 1-ER-15-16. During the four-day trial, the district court heard testimony from the three *Gingles* preconditions experts, as well as testimony going to the totality of the circumstances concerning Hispanic participation in the political process in the Yakima Valley region.[2]

On August 10, 2023, the single-judge district court in *Soto Palmer* issued an opinion holding that "LD 15 violates Section 2's prohibition on discriminatory results" and accordingly did "not decide plaintiffs' discriminatory intent claim." 1-ER-16. Four weeks later, the three-judge *Garcia* court dismissed that case as moot in light of the decision in *Soto Palmer* over a dissent by Judge VanDyke. *Garcia v. Hobbs*,

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[2] The trial transcripts have been filed at ECF Nos. 206-09. Appellants include pertinent excerpts in the Excerpts of Record.

3:22-cv-05152, ECF No. 81.

The district court did not specifically address Plaintiffs' claim that LD-15 was a "façade" majority-minority district, *i.e.*, one where, as in *LULAC*, the district was drawn to have a nominal Latino voting-age majority "without a citizen voting-age majority." 548 U.S. at 441.

No district court has ever previously held that a majority-minority district violates the VRA without finding that the putative majority was in fact a "façade" or "hollow" and been upheld on appeal. Despite that, the district court proceeded to ***14** analyze LD-15 under the *Gingles* standard without addressing (or holding) that LD-15 was a façade/hollow majority-minority district.

The district court first analyzed the three *Gingles* preconditions. 1-ER-19. It held that the first *Gingles* precondition was satisfied because Plaintiffs had adduced at least one illustrative map in which the remedial district was geographically compact, crediting the testimonies of Drs. Collingwood, Barreto, and Alford. 1-ER-22-23. Because the "proposed maps ... evaluated for compactness" fared better than the Enacted Map, the court found that Plaintiffs had satisfied the first *Gingles* precondition. 1-ER-22-24.

The district court also held that Plaintiffs had established the second precondition because "Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied." 1-ER-24.

The district court further held that Plaintiffs had satisfied the third *Gingles* precondition, concluding that White voters voted cohesively (around 70%) to block Hispanic-preferred candidates. 1-ER-25. In so doing, the court declined to analyze the cause of any such cohesion (*e.g.*, partisan versus racial causation). 1-ER-25-27.

Concluding that Plaintiffs had established all three *Gingles* preconditions, the district court proceeded to the second step of the *Gingles* standard: *i.e.*, evaluating whether, under the totality of the circumstances, the political process is not equally open to Hispanic voters in the Yakima Valley. *See* 1-ER-20. The district court held ***15** that Plaintiffs prevailed under the totality-of-the-circumstances inquiry. 1-ER-27-40. The holding was predicated on: (i) the general history of discrimination in Washington's past, 1-ER-28-30; (ii) moderate polarized voting in one kind of election, 1-ER-30; (iii) voting practices of non-Presidential-year senate elections and at-large districts in the State of Washington, 1-ER-30-31; (iv) the socioeconomic disparities between Whites and Hispanics, 1-ER-32-33; (v) one instance of one candidate for local office invoking illegal immigration on a social media post, 1-ER-33; (vi) past Hispanic electoral success that is less than proportional to the Hispanic population in the Yakima Valley region, 1-ER-34-35; (vii) one-off instances of "white voter antipathy[,]" 1-ER-35; and (viii) elected legislative Republicans from the region not supporting all legislation endorsed by a single progressive self-anointed Hispanic advocacy group, 1-ER-35-37.

Collecting its holdings, the district court concluded that "the boundaries of LD 15, in combination with the social, economic, and historical conditions in the Yakima Valley, region, results in an inequality in the electoral opportunities enjoyed by white and Latino voters in the area." 1-ER-45. It then ordered judgment entered for Plaintiffs on their § 2 effects claim and enjoined LD-15 on August 10, 2023. 1-ER-45. The district court's injunction did not provide for any particular remedial maps to be used for future elections.

***16** The district court directed that the State, through the Commission, could adopt "revised legislative district maps for the Yakima Valley region." 1-ER-45. The district court also defined how it viewed "equal opportunity" that the VRA required: that Hispanic voters in the Yakima Valley have a "realistic chance of electing their preferred candidates if a legislative district were drawn with that goal in mind." 1-ER-22.

Although the district court's opinion engages in some circumlocution about what precisely Hispanic voters' "preferred candidates" means in practice, the district court's opinion cannot be coherently understood except as holding that "preferred candidates" means "Democratic candidates" in all relevant circumstances. Indeed, the district court specifically held that "Latino voters have cohesively preferred a particular candidate in almost every election in the last decade," *i.e.*, a Democrat candidate. 1-ER-25 n.8.

That conclusion was largely impervious to the actual 2022 election results in LD-15, in which a Hispanic Republican was overwhelmingly preferred by voters

in the district by a greater-than-2-to-1 margin. Although the district court acknowledged the electoral outcome, 1-ER-24, 35, it did not analyze it as the only endogenous election contested to date under the enacted LD-15. Indeed, while the district court did note Senator Torres's victory in passing, it did not disclose (let alone analyze) her margin of victory. 1-ER-35.

***17** Intervenors then appealed that judgment. 3-ER-576. Intervenors sought a stay of proceedings below pending appeal, which was denied on December 21, 2023. *Palmer v. Hobbs*, No. 23-35595, 2023 U.S. App. LEXIS 33985 (9th Cir. Dec. 21, 2023). Concurrently, Intervenors had filed a petition for writ of certiorari before judgment in the Supreme Court, arguing, *inter alia*, that the Court should hold the case in abeyance while adjudicating a separate appeal in *Garcia*. That petition was denied. *Trevino v. Palmer*, 218 L.Ed.2d 58 (U.S. Feb. 20, 2024). This Court placed merits briefing in No. 23-35595 in abeyance pending the remedial proceedings below. Dkt. No. 59.

In the meantime, the district court commenced remedial proceedings. After the district court read a newspaper article suggesting a possible legislative logjam on the drawing of a remedial map (the Governor has the power to convene a special session but declined), it issued an order that the court would "begin its own redistricting efforts." 2-ER-227. On December 1, 2023, Plaintiffs filed their initial brief on remedies, attaching the map files and expert declarations in support for review by the parties. 2-ER-182-225. Plaintiffs initially presented five remedial proposals. *Id.*

Although Plaintiffs' § 2 claim was that LD-15 unlawfully diluted Hispanic voting strength, each of Plaintiffs' proposals purported to remedy that alleged dilution by further diluting Hispanic voting strength. Under the Enacted Map, the ***18** HCVAP of LD-15 in 2021 was 52.6%, but under Plaintiffs' five proposed maps, the HCVAP of the remedial district would decline to between 46.9% and 51.7%. 2-ER-157.

Intervenors explained that it was not possible to draw a remedial map that complied with the VRA and the Constitution; they therefore did not submit a proposed map and instead argued that Plaintiffs' proposed maps were all unlawful. ECF No. 252. The State also elected not to submit a proposed map. ECF No. 250.

After the parties failed to reach consensus on a special master, the Court appointed the State's recommended expert, Karin Mac Donald. ECF Nos. 244, 246. On December 22, 2023, Intervenors, the State, and the Secretary all filed Responses to Plaintiffs' proposals. ECF Nos. 252, 250, 248. The district court held a half-day evidentiary hearing on March 8, 2024. ECF No. 297 (filed transcript). At that hearing, the two experts for Plaintiffs testified, as did Intervenors' expert. Amended versions of the various maps were received by the court on March 13, 2024. ECF Nos. 288; 289.

On March 15, 2024, the district court issued its remedial order adopting Plaintiffs' "Map 3B", finding that the map remedied the § 2 violation by (1) "unit[ing] the Latino community of interest in the region[,]" 1-ER-08; and (2) making it "substantially more Democratic than its LD 15 predecessor[,]" 1-ER-

12. The district court admitted that "the Latino citizen voting age population of LD 14 ***19** in the adopted map is less than that of the enacted district," but justified such dilution as necessary for Hispanic voters to "elect candidates of their choice to the state legislature" (*i.e.*, in the court's view, Democrats). 1-ER-06.

Intervenors filed a notice of appeal and moved in this Court for a stay pending appeal of the district court's mandatory injunction and order. This Court denied that request on March 22, 2024, stating: "Appellants have not carried their burden to demonstrate that they have the requisite standing to support jurisdiction at this stage of the proceedings. This denial is without prejudice to the parties renewing their respective arguments regarding appellants' standing, or to the parties making any other jurisdictional arguments, before the panel eventually assigned to decide the merits of this appeal." *Palmer v. Hobbs*, No. 24-1602, 2024 U.S. App. LEXIS 6939, at *3 (9th Cir. Mar. 22, 2024).

Intervenors then filed an application for a stay with the Supreme Court, which was denied on April 4. *Trevino v. Palmer*, 144 S. Ct. 1133 (2024).

The three-judge district court, meanwhile, had dismissed the *Garcia* case as moot based on the single-judge district court's decision in this Section 2 litigation. *Garcia v. Hobbs*, No. 3:22-cv-5152, ECF No. 81.

Mr. Garcia chose to appeal directly to the Supreme Court, filing a notice of appeal on September 18, 2023, *Garcia* ECF No. 83, and filing a jurisdictional ***20**

statement in the Supreme Court of the United States on October 31, 2023. *Garcia v. Hobbs*, No. 23-467 (U.S. Oct. 31, 2023).

After briefing, the Supreme Court directed the *Garcia* district court to enter a fresh judgment from which Mr. Garcia could appeal to this Court. *Garcia v. Hobbs*, 218 L.Ed.2d 16 (U.S. Feb. 20, 2024). As a result, Mr. Garcia's appeal is currently pending in this Court, No. 24-2603. This Court declined to consolidate *Garcia* with these consolidated appeals. No. 24-1602, Dkt. No. 37.

SUMMARY OF THE ARGUMENT

Although the State and Secretary have chosen not to defend the legality of the Enacted Map, Jose Trevino and Alex Ybarra each have a particularized stake in the ultimate outcome of this appeal. The Section 2 judgment and resulting Remedial Map harm Representative Ybarra by increasing financial cost and political difficulty of his reelection. Jose Trevino, meanwhile, is injured by the racial classification inherent to Section 2 remedies and the district court's explicit use of race-based criteria to redraw his district. As the Supreme Court recently reiterated, "[t]he racial classification itself is the relevant harm" in the racial redistricting context. *Alexander v. S.C. State Conference of the NAACP*, 144 S. Ct. 1221, 1252 (2024).

On the merits, Plaintiffs' Section 2 claim fails at the threshold. Because LD-15 is a working, non-façade majority-minority district, it cannot violate Section 2. By definition, if a racial group is an outright majority

in a district by CVAP, and the ***21** majority is not hollow or a mere façade, then that group cannot have "less opportunity than other members of the electorate ... to elect representatives of their choice" since the majority-minority group could literally just outvote the smaller White minority. 52 U.S.C. § 10301(b). Plaintiffs' claim thus faces an insurmountable threshold obstacle in Section 2's plain text.

On *Gingles* I, the district court focused errantly on the compactness of the district itself, not the minority community within it, utterly failing to make any particularized findings about the spatial distance between Hispanic communities in the Yakima Valley region, instead relying on generalized shared experiences--ubiquitous experiences that would connect most Hispanics across the country--to conclude that the community is "geographically compact." This was error. *LULAC*, 548 U.S. at 433 ("The first *Gingles* condition refers to the compactness of the minority population, *not to the compactness of the contested district."* (emphasis added)).

On the second and third *Gingles* preconditions, the district court failed to determine whether any polarized voting resulting in the minority-preferred candidate losing elections was on account of partisanship, rather than being "on account of race or color," 52 U.S.C. § 10301(a), as only the latter implicates the VRA.

The district court's ultimate conclusions on the totality of the circumstances are also infected by legal error and are otherwise clearly erroneous. In

particular, the ***22** paper-thin reasoning upon which the ultimate finding rests would establish a Section 2 violation in almost every jurisdiction in the country, *i.e.*: (i) the general history of discrimination in the State's past unconnected to the present reality; (ii) moderate polarized voting in one kind of election; (iii) some generalized burdens of voting; (iv) the admitted socioeconomic disparities between Whites and Hispanics; (v) one instance of one candidate invoking illegal immigration on a social media post; (vi) past Hispanic electoral success that is less than proportional to the Hispanic population in the region; (vii) one-off instances of "white voter antipathy"; and (viii) elected Republicans' declining to support all legislation the court considers Hispanic-supported (which has near exact overlap with generic Democrat priorities). If such ubiquitous and minimally probative evidence suffices to constitute a Section 2 violation under the totality standard, virtually every jurisdiction in America could have its electoral maps invalidated.

The factual paucity of the district court's totality conclusion is paired with reversible legal errors. The district court declined to follow this Court's requirement that courts make a finding on a causal nexus in for a Section 2 claim. In particular, the court never explained *how* Washington's past discrimination and current socioeconomic disparities actually work to deny Hispanics equal political opportunity in Yakima Valley's present reality. The district court further flouted the ***23** Supreme Court's admonitions to analyze and properly weigh the usual burdens of voting. *See Brnovich v. DNC.*, 594 U.S. 647, 668-69 (2021).

Even if the district court's § 2 merits analysis were tenable, its remedial decision is manifestly not. *First*, the district court attempted to create a remedy district that remedies putative vote dilution by lowering the CVAP of the minority group in question, a literal first in the history of the VRA. This goes against the text, purpose, and logic of the VRA and alone warrants vacatur of the map. *Second*, the map is a racial gerrymander that was not narrowly tailored, thereby violating the Equal Protection Clause. *Third*, the district court flouted precedent by making massive, gratuitous, and unnecessary changes to the map all across Washington, altering thirteen of Washington's forty-nine total districts and moving half a million Washingtonians into different districts.

For those reasons, the map should be vacated, regardless of this Court's views on the merits of the Section 2 claim.

STANDARDS OF REVIEW

In evaluating VRA § 2 claims, this Court "review[s] de novo the district court's legal determinations and mixed findings of law and fact." *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc). This Court "review[s] for clear error the district court's ...ultimate finding whether, under the totality of circumstances, the challenged [district] violates § 2." *Id.*

***24** "[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (cleaned up). The clear-error standard "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984).

A court-drawn remedial map is "held to higher standards than a State's own plan." *Chapman v. Meier*, 420 U.S. 1, 26 (1975). That heightened standard is "whether the District Court properly exercised its equitable discretion in reconciling the requirements of the [violated federal law] with the goals of state political policy." *Connor v. Finch*, 431 U.S. 407, 414 (1977). "In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness or discrimination." *Id.* at 415 (quotation marks and citation omitted).

"[A]n error of law ... constitutes an abuse of discretion." *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019). This Court also will find an abuse of discretion if the district court's application of the law was "1) illogical, (2) ***25** implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014).

ARGUMENT

I. THE SINGLE-JUDGE DISTRICT COURT LACKED JURISDICTION OVER THIS CASE

The three-judge panel statute, 28 U.S.C. § 2284(a) demands that "[a] district court of three judges shall be convened ... when an action is filed challenging ... the apportionment of any statewide legislative body." As five judges of the Fifth Circuit have noted, "[t]he most forthright, text-centric reading of 28 U.S.C. § 2284(a) is that a three-judge district court is required to decide apportionment challenges--both statutory and constitutional--to statewide legislative bodies." *Thomas v. Reeves*, 961 F.3d 800, 810 (5th Cir. 2020) (en banc) (Willett, J., concurring). The upshot of a single district judge's adjudication of a VRA challenge to a state legislative district is that "the district court lacked jurisdiction and that its judgment must be vacated." *Id.* at 827.

Plaintiffs' allegations under Section 2 of the VRA and the requested relief in the Amended Complaint constitute an action challenging "the apportionment of any statewide legislative body." *See* 28 U.S.C. § 2284(a); ECF No. 70. The single-judge district court therefore lacked power over this case.

***26** This Court should "vacate the judgment below, therefore, and remand the matter to the district court with directions to convene a three-judge court to hear" these matters in the first instance. *Lopez v. Butz*, 535 F.2d 1170, 1172 (9th Cir. 1976).

II. INTERVENORS HAVE STANDING TO BRING THIS APPEAL

In prior stay briefing, Appellees have challenged Intervenors' standing to appeal the district court's judgment holding that LD-15 violates § 2 and order adopting the Remedial Map. A motions panel of this Court indicated that "Appellants have not carried their burden to demonstrate that they have the requisite standing to support jurisdiction at this stage of the proceedings [,]" a statement it made "without prejudice to the parties renewing their respective arguments regarding appellants' standing." *Palmer v. Hobbs*, No. 24-1602, 2024 U.S. App. LEXIS 6939, at *3 (9th Cir. Mar. 22, 2024). Intervenors therefore begin by setting forth their standing to bring this appeal.

"[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). "When the original defendant does not appeal, 'the test is whether the intervenor's interests have been adversely affected by the judgment.'" *Organized Vill. of Kake v. United States Dep't of Agric.*, 795 F.3d 956, 963 (9th Cir. 2015) (en banc) (citation omitted). "[T]he presence of one party with standing is sufficient to ***27** satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).[3]

Mr. Garcia, who resides in the challenged district of

[3] Although Appellants do not here include a separate section on standing for Ismael Campos but need not under Rumsfeld, because Jose Trevino and Alex Ybarra each have standing.

the Enacted Map, has standing to challenge the Enacted Map as a racial gerrymander--standing which has never been questioned by the State, Secretary, or district court. Similarly, Jose Trevino, also a voter residing in LD-15, independently has Article III standing to appeal the race-based alterations to LD-15 effected by the district court's judgment and Remedial Map. And Alex Ybarra, as a Representative elected from adjacent LD-13, independently has standing to appeal based on the increased electoral challenges and costs that the district court's Remedial Map will occasion.

A. Jose Trevino Has Standing as an Individual Voter Classified on the Basis of His Race

As mentioned, Mr. Garcia's standing in his own challenge to the Enacted *Map*-- *i.e.*, that he was injured due to being sorted on the basis of race--was so obvious that no one ever questioned it. For good reason: "Voters in [racially gerrymandered] districts may suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 745 (1995). For that reason, "a plaintiff [that] resides in a racially gerrymandered ***28** district ... has standing to challenge" it. *Id.* at 744-45. Mr. Garcia, who resides in both the Enacted District LD-15 and the Remedial LD-14, inarguably has standing to challenge each district as a racial gerrymander--which no one ever disputed.

For the same essential reasons that Mr. Garcia's standing has gone unquestioned, Mr. Trevino has

standing to challenge the district court's judgment and order adopting the Remedial Map. Mr. Trevino is a resident and voter in Granger, which was in Enacted LD-15 and was moved into Remedial LD-14. The district court's rejiggering of his district was explicitly race-based and unquestionably involved race-based classifications. Indeed, the district court went so far as to declare that the "fundamental goal of the remedial process" was to redraw the district on race-based lines. 1-ER-08 n.7.

The Supreme Court has long held that such race-based redistricting inflicts "fundamental injury" to the "individual rights of a person," regardless of whether the racial classification is ultimately upheld. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (*Shaw II).* That is because "[t]he racial classification *itself is the relevant harm." Alexander*, 144 S. Ct. at 1252 (emphasis added); *see also North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (per curiam) ("[I]t is the segregation of the plaintiffs--not the [government's] line-drawing as such--that gives rise to their claims."). Here, the district court unambiguously engaged in "racial classification" ***29** in redrawing the district in which Mr. Trevino lived--which is the "relevant harm" that establishes standing here. *Alexander*, 144 S. Ct. at 1252.

The district court's race-based classification flowed from its VRA holding, illustrating how "compliance with the Voting Rights Act ... pulls in the opposite direction" of the Equal Protection Clause because it "insists that districts be created precisely because of race." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). Section 2 remedies are created for the purpose of

providing ethnic or racial minorities electoral opportunity. As such, Section 2 remedies inexorably require racial classifications, since they are "created precisely because of race," *id.*, that is to say, created precisely to remedy a race-based harm under Section 2. The district court's race-based redrawing of Mr. Trevino's district thus causes him "fundamental injury," *Shaw II*, 517 U.S. at 908, particularly as "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2162-63 (2023) (citation omitted).

What the district court actually did is a classic example of Section 2 race-based classification. The court labeled it a "fundamental goal of the remedial process" that the remedial district "unite the Latino community of interest in the region." 1-ER-08 n.7. It then defined the Hispanic communities referenced as those ***30** in "East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco." 1-ER-06. The primary line-drawer for the eventually-adopted map rightly believed that the district court had ordered segregation of those communities: "I was asked to draw maps that include an LD 14 that ... unifies the population centers from East Yakima to Pasco that form a community of interest, including cities in the Lower Yakima Valley like Wapato, Toppenish, *Granger*, Sunnyside, Mabton, and Grandview." 2-ER-194 (emphasis added). As a Hispanic voter in Granger, Mr. Trevino was, therefore, classified on the basis of his race.

Notably, neither Plaintiffs nor the State have disputed that Mr. Trevino would have had Article III standing to challenge LD-15 as approved by the Washington Legislature as an unconstitutional racial gerrymander (as Mr. Garcia has done). Indeed, Plaintiffs' own standing is specifically premised on their being voters within the Yakima Valley. *See* 2-ER-240-42. (The institutional Plaintiff terminated in December 2022.)

The injury that the Court recognized in *Shaw* does not disappear when the institution wielding the racial gerrymandering pen is a court rather than a commission or legislature. Article III standing exists to challenge the resulting racial gerrymandering, however it arises and "regardless of the motivations." *Alexander*, 144 S. Ct. at 1252. Being sorted into illegal districts either inflicts cognizable injury or it doesn't. If it does, Intervenors have standing to appeal and will suffer harm from ***31** the unlawful Remedial Map. If it does not, the judgment below must be vacated because *Plaintiffs* lack Article III standing.

Mr. Trevino is neither asserting an institutional injury nor attempting to "stand in for the State." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). There, the Supreme Court identified a fundamental distinction between "standing to represent the State's interests[,]" *id.* (citing *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013), and an intervenor's assertion of "standing in its own right[,]" *id.* at 1953. Here, Mr. Trevino is asserting his own rights not to be subject to the "sordid business [of] divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part). This ongoing effort

to vindicate his own individual rights establishes his standing, rather than any attempt to vindicate Washington's sovereign and generalized interest in the "constitutional validity" of the Enacted Map. *Hollingsworth*, 570 U.S. at 706. Unlike in *Hollingsworth*, Mr. Trevino *does indeed* have a " 'personal stake' in defending [the challenged law's] enforcement that is distinguishable from the general interest of every citizen" of the State. *Id.* at 707.

Neither *Hollingsworth* nor *Bethune-Hill* established the per se rule that both sets of Appellees have suggested in stay briefing, that an intervenor never has standing to defend a State law in the State's absence simply because an individual intervenor has no duty nor oath to defend/enforce a given law. Indeed, this Court has already rejected Appellees' "bright-line rule" that "[t]he only party with a cognizable ***32** interest in defending the constitutionality of a generally applicable law is the government, and the only persons permitted to assert that interest in federal court, accordingly, are the government's officials or other agents." *Atay v. Cnty. of Maui*, 842 F.3d 688, 696 (9th Cir. 2016). In that case, this Court held that such a bright-line rule "overlook[s] a key aspect of the Supreme Court's standing analysis": that "intervenors can establish standing if they can do so independently[,]" *i.e.*, when they have a "judicially cognizable interest *of their own." Id.* (quoting *Hollingsworth*, at 570 U.S. at 707) (emphasis in *Atay* opinion).

Accordingly, the fact that the intervenors in *Atay* had been ballot initiative proponents and intervenors below did not matter; what mattered is that they could

show independent harm to them as individuals--there, it was "economic harm" to the intervenors' farms. *Id.* Other circuits likewise reject the Appellees' per se rule that would never allow intervenors defending a law to assert individual standing. *See Kim v. Hanlon*, 99 F.4th 140, 154 n.8 (3d Cir. 2024); *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 793-94 (11th Cir. 2020); *Cooper v. Tex. Alcoholic Bev. Comm'n*, 820 F.3d 730, 738-39 (5th Cir. 2016); *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014).

Hollingsworth's holding that an individual does not have interest in implementation where the intervenor does not otherwise have a "personal stake" in the outcome of the suit is therefore no bar to standing here. 570 U.S. at 706. Although ***33** a generalized interest in seeing the laws of one's own state implemented does not *itself* support standing, an intervenor may assert a separate cognizable and individualized interest. Mr. Trevino does so here in the form of challenging use of racial classifications to redraw his electoral districts, which the Supreme Court has repeatedly recognized causes cognizable injury.

A critical distinction thus exists between (1) a generalized interest in the implementation/validity of a state law; and (2) a personal stake in vindicating one's own concrete individual rights. *Hollingsworth* did not address the latter at all. Indeed, removing that second possibility would entirely vitiate individual voters' ability to fight for their "personal stake," *i.e.*, their individual rights, in these types of voting rights cases. *Hollingsworth* and *Bethune-Hill* preclude

standing where intervenors assert only implementation/enforcement harms to the State or other public institution.

Finally, it is worth noting that accepting Plaintiffs' standing arguments ultimately would prove self-defeating for them. If voters in LD-15 truly lack standing to challenge the legal violations in constructing the district's configuration, then Plaintiffs' loss here necessarily follows since their standing is based entirely on being voters in enacted LD-15. If being drawn into illegal districts does not inflict cognizable harm--contra Hays-- Plaintiffs here lack standing and this Court should accordingly vacated the judgment below on that basis. *See* ***34** *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) ("We may resolve the question whether there remains a live case or controversy with respect to [original plaintiff's] claim without first determining whether [intervenor-defendant] has standing to appeal.").

B. Representative Ybarra Has Standing as an Individual Legislator

Individual legislators have standing when "their own institutional position, as opposed to their position as a member of the body politic, is affected." *Newdow v. United States Cong.*, 313 F.3d 495, 498-99 (9th Cir. 2002). That result follows from *Raines v. Byrd's* holding that standing is established where a legislator has "been singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies." 521 U.S. 811, 821 (1997). The dispositive question is whether the alleged harm

"zeroe[s] in on an [] individual Member." *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015).

That is just so for Representative Ybarra, who now faces a costlier and more difficult general election campaign because of the realignment of his district.

The Remedial Map certainly strengthens the reelection chances of many incumbents across Washington in the thirteen rejiggered districts, but Representative Ybarra is not one of them. Over 30,000 of Representative Ybarra's constituents, many of whom are Hispanic due to the racial resorting in the Remedial Map, have ***35** been moved out of his district, LD-13, and replaced with a comparable number of new voters, many of whom are White and Democrat-leaning. 2-ER-135, 139, 168.

Representative Ybarra is expending and will continue to expend additional resources to introduce himself to his new constituents and campaign for their votes on a highly expedited basis (having only discovered the identity of his constituents in March of an election year). Doing so will certainly cause and is currently causing Representative Ybarra to incur more than $3.76 in expenses--i.e., the amount of financial injury that this Court held sufficient to establish Article III standing in *Van v. LLR, Inc.*, 962 F.3d 1160, 1162 (9th Cir. 2020). And no one "dispute[s] that even one dollar's worth of harm is traditionally enough to qualify as concrete injury under Article III." *United States v. Texas*, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring) (cleaned up).

That harm is not conceivably a "generalized grievance" shared by the general public. *See Hollingsworth*, 570 U.S. at 706. Nor will all "member[s] of the body politic" in Washington share this harm; rather, only those legislators directly affected by the remedial map will face this particularized injury (though most affected are actually Democratic legislators whose reelection chances have been enhanced, not hindered). *See Newdow*, 313 F.3d at 498-99.

Similarly, the Remedial Map injures Representative Ybarra by making his reelection more difficult. Intervenors' expert for the remedial proceedings produced ***36** numbers showing the Remedial Map, as based on Plaintiffs' Proposals, does "not merely create a new, more heavily Democratic district in southern Washington. [It does] so by weakening several Republican incumbents in unrelated portions of the map." 2-ER-127-28, 144-48. The affected districts include Representative Ybarra's. 2-ER-166. He will therefore by definition face a more difficult reelection campaign.[4] This is not as in *Wittman v. Personhuballah*, where the legislators failed to submit "any evidence that an alternative to the Enacted Plan

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[4] The Supreme Court has not yet explicitly resolved whether "harms centered on costlier or more difficult election campaigns are cognizable." *Bethune-Hill*, 139 S. Ct. at 1956 (citing *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016)). But applying the Court's ordinary non-legislator standing precedents makes clear that they are: such increased difficulties necessarily result in additional campaign expenditures--a form of financial harm. And "monetary harms" are one of the "most obvious" and "traditional" forms of injury, which "readily qualify as concrete injuries under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

(including the Remedial Plan) will reduce the relevant intervenors' chances of reelection." 578 U.S. at 545. Here, Rep. Ybarra has submitted exactly that evidence.

C. A Denial of Standing Would Permit a Collusive End-Run around the Washington Constitution and Create Irreparable Harm to the Very Concept of Federalism

Under Washington law, **"**[l]egislative and congressional districts may not be changed or established except" by the Commission. Wash. Const. art. II, § 43(11). And "[a]t least three of the voting members [of the Commission] shall approve [the] redistricting plan." Wash. Const. art. II, § 43(6). Due to the Commission's consisting ***37** of two Republican-appointed and two Democrat-appointed Commissioners, *any* redistricting change must achieve at least some degree of bipartisan consensus.

However, when initiating this litigation, Plaintiffs sued only Democratic officials, such as the Secretary of State. *See* ECF No. 1; ECF No. 40 at 1; ECF No. 37 at 2. The Secretary of State has consistently "take[n] no position on the issue of whether the state legislative redistricting plan violates section 2," *e.g.*, ECF No. 40 at 1. Likewise, the later-joined State (represented by the Attorney General of Washington, also a Democrat and current leading candidate for Governor this cycle) announced on the eve of trial that it would "not dispute the merits of *Soto Palmer* Plaintiffs' discriminatory results claim," ECF No. 194 at 4, and Plaintiffs vigorously opposed Intervenors' motion to intervene below even despite the absence of

any other adverse party, *see* ECF No. 64.

To deny standing to Intervenor-Appellants is to no less than eliminate their ability to vindicate their Fourteenth Amendment protections against racial gerrymandering--at least without the contrivance of a separate suit. The danger of a State's officials' employing strategic surrender in litigation to achieve political ends that escaped their grasp in the political arena is not a novel one. This very issue of collusive conduct underlay two recent grants of certiorari by the Supreme Court to this Court in which government officials tried to obtain desired policy ends through the unseemly expedient of strategic capitulation. *See* ***38** *Arizona v. San Francisco*, 142 S. Ct. 1926 (2022); *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1312 (2023). In both cases, the Supreme Court did not reach the merits for thorny procedural or mootness-based reasons. But the issue of whether litigants' rights can be nullified by the surrender of governmental officials remains a critically important one. And it is particularly important here: the Equal Protection Clause is *supposed* to be an *individual right* that protects citizens *against* governmental race-based action--not a license for States to sell out the individual rights of their citizens. A denial of standing here would effectively allow Washington State officials to acquiesce in violations of the Equal Protection Clause rights of their citizens, thereby nullifying those rights by insulating violations of them from judicial review. That cannot be--and is not--the law.

III. THE DISTRICT COURT ERRED IN

HOLDING THAT A VIABLE § 2 CLAIM COULD BE BROUGHT AGAINST A NON-FAÇADE MAJORITY-MINORITY DISTRICT

Turning to the merits, the district court erred as a threshold matter by holding that a viable § 2 claim could be brought against a single majority-minority district without establishing that the majority is in fact a façade. LD-15 is a working majority-minority district--with a 52.6% Hispanic CVAP in 2021--and there was no evidence that the majority was not genuine. The district court accordingly erred by not dismissing Plaintiffs' claim at the threshold.

*39 A. Challenges to Single Majority-Majority Districts under Section 2 Fail unless the Majority Is Hollow

This case turns § 2 on its head: in a typical § 2 case, plaintiffs challenge a district that lacks a majority CVAP for a racial minority and seek the creation of a majority-minority (by CVAP) district as a *remedy* for that putative dilution. *See Milligan*, 143 S. Ct. 1487. But here Plaintiffs challenge a district that is *already* majority Hispanic by CVAP and allege that this *majority* somehow prevents Hispanic voters from "elect[ing] representatives of their choice." 52 U.S.C. § 10301(b). That claim cannot be squared with § 2, which precludes such a challenge unless the majority is a mere façade or a "hollow" majority. *LULAC*, 548 U.S. at 429; *see also Smith v. Brunswick County*, 984 F.2d 1393, 1402 (4th Cir. 1993) (citizen voting-age majority lacks real electoral opportunity when it lacks "equal access to the polls.").

The text of Section 2 makes this plain. It applies when racial minorities have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 thus focuses on the minority group's "opportunity ... to elect representatives of their choice" and disavows mandating particular electoral outcomes: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* Given this language, the Supreme Court has unsurprisingly held that "the ultimate right of § 2 is *equality of* ***40** *opportunity, not a guarantee of electoral success* for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994) (emphasis added).

By definition, if a group constitutes a majority of the citizen-age voting population, then it necessarily possesses *at least* an equal "opportunity... to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Indeed, that group possesses a better opportunity than all other groups, since it can simply outvote all other racial groups combined in that district. That much is just math. So unless the majority is a mere façade--as Plaintiffs alleged here, *see* 2-ER-234, but the district court *never* found (and Plaintiffs never proved)--then a § 2 challenge to that single *majority-minority* district is simply not viable under § 2's text.

This reading of § 2 is confirmed by *Gingles* itself, which demands as its first precondition for a voter-dilution claim that a "minority group must be able to demonstrate that it is sufficiently large and

geographically compact to *constitute a majority* in a single-member district." 478 U.S. at 50 (emphasis added). That precondition thus assumes the challenged district is *not* already a majority-minority district and examines whether such a *majority-minority* district can be drawn to remedy alleged vote dilution. *Id.* That standard becomes senseless where the racial ***41** minority group is *already a majority* in the district (and doubly nonsensical where, as here, Plaintiffs' proposed remedy for that putative dilution is more dilution).

Similarly, the third *Gingles* precondition expressly asks whether the *"white majority* votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." 478 U.S. at 51 (emphasis added). But this precondition *cannot* be satisfied in a majority-minority district because there is no "white majority" at all. *Id.* The district court's tortured reasoning illustrates that contradiction: It explained it was analyzing "whether the challenged district boundaries allow the *non-Hispanic white majority* to thwart the cohesive minority vote." 1-ER-25 (emphasis added). But no such "non-Hispanic white majority" existed in LD-15.

The purpose of the second and third *Gingles* preconditions likewise is that they "are needed to establish that the challenged districting thwarts a distinctive minority vote *by submerging it in a larger white voting population." Growe v. Emison*, 507 U.S. 25, 40 (1993) (emphasis added). But Hispanic voters cannot be "submerge[ed] [with] a larger white voting population" in a district where they are the majority and larger group themselves, who outnumber White

voters. *See id.*

For these reasons, "[n]o court has ever ruled that a majority-minority district violates § 2 in isolation"--without being vacated at least. *Thomas v. Bryant*, 938 F.3d 134, 181 (5th Cir. 2019) (Willett, J., dissenting) ("I am unaware of any court decision holding that a majority-minority district can violate § 2 in a vacuum, all by ***42** itself, unaccompanied by evidence--or even an allegation--of packing or cracking").[5]

To be sure, the principle that a § 2 violation cannot be established by a single majority-minority district is subject to two important limitations. The first is that the majority cannot be "hollow" or a mere "façade." *LULAC*, 548 U.S. at 429, 441. The Supreme Court thus invalidated a district where "Latinos ... [we]re a bare majority of the voting-age population," but not a majority of the *citizen* voting-age population. *LULAC*, 548 U.S. at 429; *id.* at 427 (Challenged district had an "Anglo citizen voting-age *majority* [that] w [ould] often, if not always, prevent Latinos from electing the candidate of their choice in the district." (emphasis added)); *id.* at 441 (State's drawing of a district to "have a nominal Latino voting-age majority (without a citizen voting-age majority)" constituted a "façade of a Latino district."). So for voting purposes, the putative "majority" in *LULAC* was in fact no majority at all, and merely a façade created by using voting-age population and not CVAP as the relevant metric. But no such issue exists here as it is undisputed that LD-

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[5] Though Judge Willett was in the dissent in *Thomas*, the Fifth Circuit subsequently granted a petition for rehearing en banc and then vacated the panel opinion and district court judgment as moot. *See Thomas*, 961 F.3d at 801 (en banc).

15 has a majority Hispanic *citizen* voting-age population, and the majority cannot be considered a façade on that basis.

***43** Similarly, a majority CVAP might be "hollow" where schemes such as literacy tests or barriers to registration may create a system where voting is not "equally open to participation" by minority voters, 52 U.S.C. § 10301(b), and the majority CVAP on paper is in fact not "working" in real life. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality op.) ("In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population."). But no such governmental barrier to poll access is even alleged here either, and the district court even acknowledged that "progress has been made towards making registration and voting more accessible to all Washington voters." 1-ER-29.[6]

Nor did the district court make any other findings that could justify concluding that the conceded *majority* HCVAP was a mere façade. Instead, it asserted that Hispanic voters in LD-15 constituted a "bare, ineffective majority." 1-ER-42. The only evidence cited for this putative ineffectiveness (which appears elsewhere in the opinion) was that the putative Hispanic-preferred candidates did not typically win. *See* 1-ER-25-26 ("A defeat is a defeat, regardless of the vote count."). But § 2 is "*not a guarantee of electoral success* for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11 (emphasis added). The district court thus ***44** erred by fixating

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[6] Even Plaintiffs' own witnesses testified at trial to the ease of voting in Washington elections. 3-ER-556-57.

on electoral results to conclude that an "ineffective majority" created a viable § 2 claim, rather than a hollow one or a façade. 1-ER-42.

The district court further reasoned that the majority-minority district was not "effective" because "past discrimination, current social/economic conditions, and a sense of hopelessness keep Latino voters from the polls in numbers significantly greater than white voters." 1-ER-42. But again, that erroneously demands that § 2 produce particular electoral outcomes, rather than guarantee equal "opportunity" and "open[ness] to participation." 52 U.S.C. § 10301(b). Whether voters avail themselves of the equal opportunities mandated by § 2 is a question of electoral *outcomes* that § 2 does not regulate.

Here, Washington State elections are incontestably equally *open* to voters of all races and all races have equal "opportunity" to avail themselves of the chance to vote, *id.*--*a* fact that no "sense of hopelessness" can change. 1-ER-42. Moreover, as explained next, the district court's complete refusal to attempt to reconcile this "sense of hopelessness" finding with the recent smashing electoral victory of a Hispanic candidate in the district is simply untenable and clearly erroneous.

There is also an important second caveat to the no-viable-§ 2-challenge-to-genuine-majority-minority-districts principle, but it too is inapplicable here. Specifically, while a bona fide majority-minority district may not violate § 2 in isolation, it might be part of a larger multi-district scheme to dilute minority voting ***45** strength through either

"cracking" or "packing." *See Gingles*, 478 U.S. at 46 n.11. That is, the majority-minority CVAP district could be part of a systemic violation as the product of intentional packing to dilute minority voting strength elsewhere. *See, e.g., Montes v. City of Yakima*, No. 12-cv-3108, 2015 U.S. Dist. LEXIS 194284, at *22-23 (E.D. Wash. Feb. 17, 2015) ("[T]he packing (concentration) of a minority population into one district can minimize the influence that minorities will have in neighboring districts."). But such cracking/packing dilutive tactics are necessarily multi-district in character, and the claim the district court accepted below was a single-district challenge to LD-15 in isolation.

The upshot is that a challenge to a single majority-minority district in isolation necessarily fails to state a claim under § 2 unless the majority is a "hollow" one. *LULAC*, 548 U.S. at 429. Because Plaintiffs failed to prove as much, the district court erred in failing to reject their claim. And even if the district court's "ineffective" majority reasoning were otherwise sufficient, it was unlawfully predicated on electoral outcomes rather than equality of opportunity/openness, and thus misapplied § 2.

B. Even If § 2 Challenges to Single Majority-Minority Districts Were Generally Viable, This One Is Not

Even if § 2 could ever be used to challenge single majority-minority districts that do not feature hollow majorities, the district court erred in holding that LD-15 could be subject to such a challenge here. The district court never held that the ***46** existing

Hispanic majority in LD-15 was hollow or a mere façade, nor did it make any findings whatsoever regarding cracking or packing (though it mentioned "cracking" without making findings on cracking). The court simply assumed a viable claim based on Democrats' failure to win a sufficient number of elections. 1-ER-41. Compounding its sins of omission, the district court failed to grapple meaningfully with the only results that LD-15 as enacted has ever produced: those in 2022. In that election, a Hispanic candidate won by a 35.6% margin, defeating a White candidate 67.7% to 32.1%. 3-ER-549. That is hardly the sort of stuff of which § 2 violations are made.

The district court's only engagement with this remarkable fact consists of these two sentences: "State Senator Nikki Torres, one of the three Latino candidates elected to the state legislature, was elected from LD 15 under the challenged map. Her election is a welcome sign that the race-based bloc voting that prevails in the Yakima Valley region is not insurmountable." 1-ER-35. Notably, the district court failed even to mention--let alone *analyze--the* size of that victory. And the district court instead viewed that unacknowledged-landslide victory as being outweighed by the almost entirely hearsay testimony of a single witness about her own personal encounters involving elections and race. 1-ER-35. That is a quintessential example of missing the forest for the trees.

***47** Senator Torres's victory renders wholly untenable the district court's conclusion that the Hispanic majority in LD-15 is "bare, ineffective" one. 1-ER-42. Its effectiveness in producing a landslide victory for a

Hispanic candidate is an incontestable fact.[7] That victory further underscores that even a *large majority* Hispanic CVAP would not produce different outcome. Boosting the 52.6% HCVAP by a full ten percentage points, for example, could not possibly have changed the outcome of that 2022 election even if those added Hispanic voters *all* voted for Torres's opponent and the voters removed from the district had all voted for Torres. Even assuming 100% bloc voting by White and Hispanic voters (which bears little resemblance to reality), that would have reduced Senator Torres's margin of victory to a "mere" 15.6%.

Indeed, given the size of Senator Torres's victory, it is doubtful that the HCVAP of the district could be boosted sufficiently to produce a different outcome without violating the VRA through unlawful packing. For example, even assuming that a 75% HCVAP district could be drawn in the Yakima Valley and would have elected Ms. Keesling over Senator Torres, that district could *easily* be deemed to constitute illegal packing in violation of § 2--something that the district court failed to consider. *See, e.g., Montes*, ***48** No. 12-cv-3108, 2015 U.S. Dist. LEXIS 194284, at *22-23 (E.D. Wash. Feb. 17, 2015) (holding that an HCVAP as comparatively low as 53.46% constituted packing). It further would require the sort of intensive use of race that would create at least severe doubts as to whether it violated the Equal Protection Clause as applied.

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[7] Moreover, the average partisan lean of enacted LD-15 is about 2 percentage points, depending on which historical races are included. *See* 2-ER-145. Yet Nikki Torres over-performed this average baseline by *over 30-points.*

The virtual impossibility of drawing a lawful district with a larger HCVAP that would have sent Senator Torres's opponent to Olympia instead of her is presumably why Plaintiffs and the district court went the other direction: decreasing Hispanic vote share while increasing Democratic vote share to ensure Senator Torres's defeat. But a putative voter-dilution claim that requires yet-more dilution as the "remedy" is hardly what § 2 intends, requires, or even permits. *See infra* § VI.A.

Thus, even if a viable § 2 claim could theoretically be brought against a single district with a bona fide majority-minority CVAP, the § 2 challenge here to a majority-minority district that produced a landslide victory for a Hispanic candidate simply is not legally sound, especially when it was used to lower Hispanic voting strength to an even smaller majority CVAP.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE *GINGLES* PRECONDITIONS WERE SATISIFED

Section 2 vote dilution claims are governed by the *Gingles* standard. The *Gingles* standard has two main parts (and many sub-parts): first, Plaintiffs must satisfy three preconditions; second, the court must then determine under the totality ***49** of the circumstances whether minority voters are deprived of equal opportunity. *Milligan*, 143 S. Ct. at 1503.

The three *Gingles* preconditions are: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably

configured district (comporting with traditional districting criteria); (2) the minority group must be able to demonstrate it is politically cohesive; and (3) the minority group must be able to demonstrate that the White majority votes sufficiently as a bloc to enable the White majority to defeat the minority's preferred candidate. *Id.*

Although the district court held that all three preconditions were satisfied, those holdings were erroneous. As to the first precondition (*Gingles* I), the district court failed properly to analyze the compactness of the *minority population* of the district, rather than the district's geography itself. On the second and third, the district court utterly failed to determine whether partisanship, not race, was the aggregate cause of what limited voting polarization existed.

A. The District Court's Compactness Analysis Rests on Patent Legal Error

The first *Gingles* precondition requires plaintiffs to show the minority group in question is "sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Milligan*, 143 S. Ct. at 1503 (quoting *Wisc. Legis. v. Wisc. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam) ***50** (alterations in original)). This prerequisite is often referred to as the "compactness" requirement.

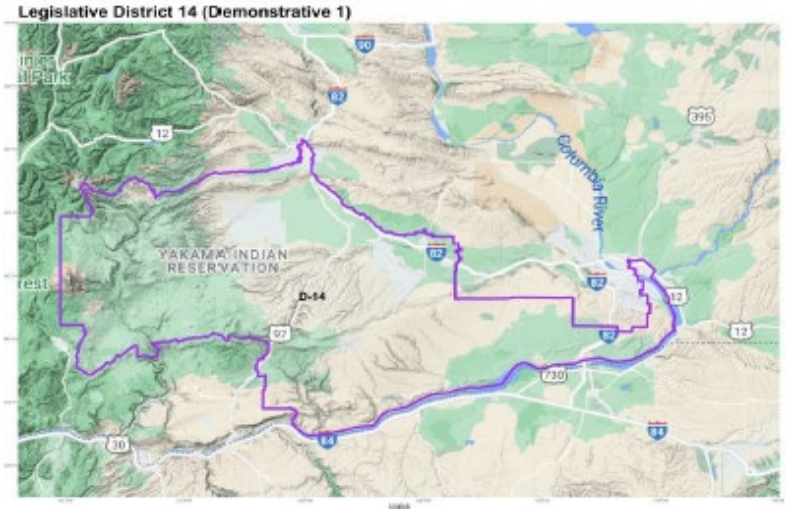
The Supreme Court has been perfectly clear as to how compactness *must* be analyzed: "The first *Gingles*

condition refers to the compactness of the minority population, *not to the compactness of the contested district." LULAC*, 548 U.S. at 433 (quoting *Bush v. Vera*, 517 U.S. 952, 997 (1996)) (emphasis added). In *LULAC*, the Supreme Court made clear that a district is not compact when multiple Hispanic communities within it are (1) distinct in terms of distance and (2) distinct in terms of their respective needs and interests. 548 U.S. at 435 ("We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations ... that renders [the district] noncompact for § 2 purposes.").

The district court flouted this requirement, however, and analyzed compactness solely in terms of the districts' geographic boundaries rather than the compactness of the minority populations in the area. The district court thus relied on Dr. Collingwood's analysis, which reasoned that the "proposed maps ... perform similarly or better than the enacted map when evaluated for compactness." 1-ER-22-23. But that analysis from Dr. Collingwood was expressly analyzing the compactness of the illustrative districts' geography and boundaries--not the minority population. 3-ER-419; *see also* 3-ER-569 (Q (Mr. Holt): "Did you perform ***51** any analysis to show these are cohesive communities, for purposes of the minority communities being compact, as a whole, in [Othello, Yakima, and Pasco]?" A (Dr. Collingwood): "[N]o, I didn't do that."). The district court similarly relied on Dr. Alford's reasoning that Plaintiffs' illustrative examples were "among the more compact demonstration districts he's seen." 1-ER-23.

(alteration omitted). But again, as he admitted at trial, that was analyzing the compactness of the *district*, not its minority population. *See* 3-ER-555 (Q (Mr. Acker): "[Y]ou're referring to the compactness of the district itself, as opposed to the compactness of the Latino community within it?" A (Dr. Alford): "Exactly.").

Reproduced here as an example is Plaintiffs' Demonstrative Map 1, which was the template for the eventual adopted Remedial Map featured two ungainly, reaching appendages, one in the north snaking up into the city of Yakima, and one in the southeast grabbing Hispanic-heavy neighborhoods in the city of Pasco:



***52** 3-ER-415.

This weird configuration is the direct result of trying to stitch together into a single district at least three

distinct, far-flung Hispanic communities--those in urban Yakima, those in suburban Pasco, and those in rural farming towns along the Yakima River. Those communities are bookended by two cities that are physically separated by more than eighty miles--roughly the distance between San Francisco and Sacramento, California, between Portland and Tillamook, Oregon, or between Seattle and Centralia, Washington. That approach is what the Supreme Court has made plain is not what Section 2 requires for compactness. *See LULAC*, 548 U.S. at 435 ("[T]he enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations ... renders District 25 noncompact for § 2 purposes.").

The district court's sole attempt to account for the compactness of the Hispanic population itself came with its observation that "Yakima and Pasco are geographically connected by other, smaller, Latino population centers." 1-ER-23. But the operative inquiry has never been whether there is a complete absence of minority voters in the interstitial space between the disparate population centers--and the district court certainly cited nothing for that proposition. To the contrary, the Supreme Court has made plain that compactness is lacking where the district ***53** "combines two farflung segments of a racial group with disparate interests." *LULAC*, 548 U.S. at 433. And that describes Plaintiffs' illustrative maps to a "T."

In the district court's attempt to sidestep the required *Gingles* I analysis, it focused on the communities of

interest factor. 1-ER-23. Under the court's errant view, any Hispanics in any jurisdiction are always "geographically compact," because Hispanics generally share culture, language, religion, and economic situations. The district court's findings about the similar needs and interests of the two communities were far too generalized to suffice. Some of the things on the list--language, religious and cultural practices, and significant immigrant populations--are ubiquitous, common to practically all Hispanic communities across the country. By the district court's reasoning, no Hispanic majority-minority district will *ever* fail to be compact, no matter how outrageous the geographic separations are. Indeed, by that extremely generalized logic, a district stitching together Hispanic communities along I-5 from San Diego all the way up to Redding (or even Seattle) would be a "compact" one.

Those are no specific connections between the Hispanic communities in Yakima and Pasco, or between either of those communities and the ones found in rural farming towns along I-84 the Yakima River. Second, the slightly less general connections alleged by the district court--rural, agricultural environment, similar industries, and common housing and labor concerns--are still at too high a level of ***54** abstraction to meet the Supreme Court's requirements for intensely local compactness findings about the actual "needs and interests" of the specific populations at issue. *See LULAC*, 548 U.S. at 435. The district court here "found" that the Hispanic communities in Yakima and Pasco share interests, without making any actual findings supporting that barest of conclusions. *See* 1-ER-23-24 (stating that

Hispanics in the Yakima Valley region "share many of the same experiences and concerns regardless of whether they live in Yakima, Pasco, or along the highways and rivers in between []" without making any findings to support that conclusion). In essence, the district court's view is that all Hispanics in any jurisdiction necessarily share language, culture, and similar experience that, by definition, make a Hispanic population geographically compact, no matter the geographic distance or political or other differences between them. That, of course, would apply to most Hispanic communities in every jurisdiction in America--and at the very least flirts with employing ethnic stereotypes in lieu of legal analysis. Furthermore, the district court's all-Hispanics-anywhere-are-alike approach would have upheld the three-hundred-mile-long majority-Hispanic District 25 in *LULAC*. But the Supreme Court did no such thing. *See* 548 U.S. at 432 ("Under the District Court's approach, a district would satisfy § 2 no matter how noncompact it was, so long as all the members of a racial group, added together, could control election outcomes.").

***55** Because the district court failed to conduct the operative compactness inquiry--i.e., genuinely analyzing the compactness of the minority populations in the district, rather than the districts' boundaries--the district court erred in concluding that Plaintiffs had satisfied the first *Gingles* precondition. This error is not harmless, because the district court made no specific findings on either (1) the distance between different clusters of Hispanic voters or (2) the specific needs and interests of those particular communities rather than all Hispanic citizens writ

large. Had it done so, it would have found the first precondition unsatisfied. This Court should hold that threadbare assertions that two Hispanic communities eighty miles apart are geographically compact on the basis that they "share many of the same experiences," without any findings substantiating that conclusion, are not sufficient to satisfy the "intensely local" requirements of *Gingles* I. Plaintiffs did not satisfy this precondition.

B. The District Court Erred in Holding the Second and Third *Gingles* Preconditions Satisfied without Analyzing Whether Polarization in Voting was Based on Partisanship instead of Race

The district court also erred in concluding that Plaintiffs had satisfied the latter two *Gingles* preconditions. Specifically, the district court failed to evaluate whether voting was polarized on the basis of partisanship rather than race.

This Court has expressly held that racially polarized voting ("RPV") exists when the "minority group has expressed *clear* political preferences that are distinct ***56** from those of the majority." *Gomez v. Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988) (emphasis added). This Court's requirement for "clear" political preferences, *id.*, flows from the Supreme Court's requirement that RPV must be "legally significant[,]" *see Gingles*, 478 U.S. at 55-56 (noting that that "the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district"). That is, racially polarized voting alone does not satisfy the preconditions; it needs more to meet the "clear"

and "legally significant" thresholds.

Courts therefore should "undertake the additional inquiry into the reasons for, or causes of," racial polarized voting "in order to determine whether they were the product of 'partisan politics' *or* 'racial vote dilution,' 'political defeat' *or* 'built-in bias.'" *LULAC v. Clements*, 999 F.2d 831, 853-54 (5th Cir. 1993) (en banc) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). This baseline causation requirement flows from the text of Section 2 itself, which prohibits only "standard[s], practice[s], or procedure[s] ... which result[] in a denial or abridgement of the right of any citizen of the United States...to vote *on account of race or color."* 52 U.S.C. § 10301(a) (emphasis added). Where challenged practices are caused by partisanship, rather than race, they necessarily are outside of § 2's scope. *See, e.g., Nipper v. Smith*, 39 F.3d 1494, 1525 (11th Cir. 1994) (" 'Electoral losses that are attributable to partisan politics ... do not implicate the protections of § 2.'" (quoting *Clements*, 999 F.2d at 863)).

***57** Thus, "to make out a § 2 claim ... [plaintiffs] must establish that the [challenged] requirement results in discrimination 'on account of race or color....' '[S]ection 2 plaintiffs must show a causal connection between the challenged voting practice and a prohibited discriminatory result.'" *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (quoting § 2(a) and *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 312 (3d Cir. 1994) (collecting § 2 cases rejecting claims based on failure to establish race-based causation)). Where "partisan affiliation, not race, best explains the

divergent voting patterns among minority and white citizens" the third *Gingles* precondition cannot be established. *Clements*, 999 F.2d at 850.[8]

This partisanship-vs-race causation issue does not require any inquiry into the subjective or individualized intent of minority or White voters but rather into whether the aggregate cause of differences in voting is the political identity of the minority-preferred candidate, defined by this Court as the "candidate who receives sufficient votes to be elected if the election were held only among the minority group in question[,]" *Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998).

***58** The district court erred by not undertaking this analysis. Had it done so, the record would have compelled it to conclude that the voting patterns at issue are caused by partisanship rather than race.

The trial established two truths about voting in the Yakima Valley region. First, polarized voting among ethnic groups only existed for one kind of election--partisan contests between a White Democrat and a White Republican.[9] It existed in no others. Such

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[8] Other circuits alternatively consider this partisan-versus-racial causation issue as part of the totality-of-the-circumstances inquiry. *See Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir. 1999); *United States. v. Charleston County, S.C.*, 365 F.3d 341 (4th Cir. 2004). Either way, where divergent results are caused by partisanship rather than race, the § 2 claim necessarily fails.

[9] In particular, Drs. Owens (Intervenors' expert) and Alford (State Defendants' expert), joined by Dr. Collingwood (Plaintiffs' expert) in a number of instances, concluded that racially polarized voting exists in the Yakima Valley only in races

cohesion is weak, or in the words of Dr. Alford, "less cohesive than not." 3-ER-554. Notably, when a Hispanic Republican faced a White Democrat in the district in 2022, she won in a 35-point landslide. RPV also disappeared in nonpartisan races, even when one of the candidates was Hispanic, and in races between two Democrats (a general election possibility under Washington's "top ***59** two" primary system). *See* 3-ER-570-71. Second, polarization was caused by the partisan identity of the candidate. Because the district court failed to adhere to Section 2's textual admonition to disentangle race from politics and because it characterized the polarization as legally significant when it was not, the court erred.

This differential is important not just because it shows that racial polarization in voting in LD-15 is intermittent at best, but also because that polarization only occurs when this Court has held it is *least probative*. Specifically, "[a]n election pitting a

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between a White Democrat and a White Republican. Change any of those two parties or races, and the observed racial polarization quickly melts away. *See* 3-ER-560 (in partisan races between two candidates from the same party (a phenomenon possible under Washington's "Top Two" primary system), Dr. Owens' analysis shows that the Hispanic vote splits evenly); 3-ER-560-61 (Dr. Owens: finding that when a partisan race involves a White Democrat and Hispanic Republican, Hispanic voters were much less supportive of the Democratic candidate); *accord* 3-ER-521; 3-ER-570-71 (Dr. Collingwood: reporting that racially polarized voting was not found in White Democrat vs. Hispanic Republican elections); 3-ER-558-59 (Dr. Owens: reporting that, in nonpartisan races, Hispanic voters were less cohesive); *accord* 3-ER-570-71 (Dr. Collingwood); 3-ER-552-54 (Dr. Alford: reporting his findings that in nonpartisan elections, Hispanic voters are "slightly less cohesive" and White voters show "essentially no evidence of cohesion at all.").

minority against a non-minority ... is considered more probative and accorded more weight." *Ruiz*, 160 F.3d at 552; *id.* at 553 (the "most probative evidence ... is derived from elections involving minority candidates" (alteration omitted)). In contrast, "non-minority elections ... do not fully demonstrate the degree of racially polarized voting in the community." *Id.* at 552-53. Indeed, "they may reveal little" and are "comparatively less important." *Id.* at 553. Thus, the *only* evidence of meaningful racial voting polarization in LD-15 occurs when it is *least important and probative.* But the district court did not account for this Court's holdings in *Ruiz* as to how to analyze polarization evidence and thus committed legal error.

Notably, the district court also did not dispute Dr. Owens's conclusion that polarization existed only in White-vs-White-candidate elections; rather, like the Plaintiffs' expert, the district court simply did not focus on such distinctions (and ***60** issued no specific findings on them) because it believed that partisan causation was not relevant. In its view, this issue was readily discounted--and need not be meaningfully analyzed--because "a minority [does not] waive[] its statutory protections simply because its needs and interests align with one partisan party over another." 1-ER-43. That refusal to analyze partisan versus racial causation was error, since § 2 explicitly requires causation "on account of race or color." 52 U.S.C. § 10301(a); *Gonzalez*, 677 F.3d at 405 (en banc) (Section 2 plaintiffs must show proof of "causal connection between the challenged voting practice and a prohibited discriminatory result.") (quoting *Salt River Project*, 109 F.3d at 595).

The district court also erred in its (non-)consideration of Senator Torres's 35-point victory in LD-15. This is an independent ground for reversal, because such a result, involving an election with a minority candidate, is precisely the sort that this Court has made plain provides the "most probative evidence." *Ruiz*, 160 F.3d at 553. Similarly, actual endogenous election results are more probative than exogenous hypotheticals constructed by experts. *See, e.g., Milligan*, 143 S. Ct. at 1513 n.8 ("[C]ourts should exercise caution before treating results produced by algorithms as all but dispositive of a § 2 claim.").

But the district court failed to consider the 2022 election results as part of the *Gingles* preconditions analysis at all. 1-ER-19-27. And it further failed completely to *acknowledge--let* alone *analyze--the* actual vote margins from 2022, rather than ***61** the bare outcome. *See* 1-ER-35. Indeed, reading only the district court's opinion, one could easily be left with the impression that Senator Torres won in a squeaker, rather than a landslide. To the extent the court wrote off the election as one of "special circumstance," that too was error. There was no "absence of an opponent, incumbency, or the utilization of bullet voting." *Gingles*, 478 U.S. at 57. And the Democrat opponent's poor fundraising and write-in campaign in the Democrat primary are "representative of the typical way in which the electoral process functions," *Ruiz*, 160 F.3d at 557.

The district court thus erred by giving scant-to-no attention to what this Court has held is "[t]he most probative evidence." *Ruiz*, 160 F.3d at 553. That is particularly problematic as this is the exact scenario

that Justice White thought would indicate that partisanship, not race, was the underlying cause of voting patterns such that Section 2 was not violated. *See Gingles*, 478 U.S. at 83 (White, J., concurring) (ignoring the "race of the candidate" in analyzing polarization would make § 2 regulate "interest-group politics rather than a rule hedging against racial discrimination").

Rather than focusing on the crucial partisan-vs-racial causation issue in light of real-world election results, the district court fixated on the binary results of ten exogenous elections (cherry-picked by Plaintiffs' expert), relying on "Dr. Collingwood conclu[sions] ... that white voters in the Yakima Valley region vote ***62** cohesively to block the Latino-preferred candidates in the majority of elections (approximately 70% [of the elections considered][10])," waving away the elections where "the margins ... [were] quite small []" because "[a] defeat is a defeat, regardless of the vote count." 1-ER-25-26; *see also* 3-ER-475 (two of those seven projected defeats "are very close" and were well within a margin of error).

This too was error. Because partisanship (or other factors like individual candidate quality or campaign strategy) rather than race-based causes could easily be dispositive in close races, the virtual toss-ups that Plaintiffs' expert hand-picked made the necessity of analyzing partisan-versus-racial causation particularly acute. Where elections are close, any number of non-racial factors could easily swing the

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[10] Of the ten elections Dr. Collingwood analyzed, five were won or narrowly lost by the Hispanic-preferred candidate, and a sixth was within 1.7 points.

outcome. But the district court blithely and erroneously dispensed with any analysis of racial causation that this Court (and § 2's text) mandate based on little more than a catchphrase that "a defeat is a defeat." 1-ER-25. Section § 2 begs to differ, and demands analysis of whether that conjectured defeat was "on account of race or color" or not. 52 U.S.C. § 10301(a).

Because the district court failed to analyze whether the electoral defeats central to Plaintiffs' claims were caused by partisanship rather than racial polarization, its § 2 liability judgment rests on reversible legal error.

*63 V. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS HAD ESTABLISHED A VIOLATION OF § 2 UNDER THE TOTALITY OF CIRCUMSTANCES

The end purpose of the Section 2 analysis is to determine whether, under the "totality of the circumstances," Hispanic voters in the greater Yakima region have less or equal opportunity to participate in the political process. *See Earl Old Person v. Brown*, 312 F.3d 1036, 1040-41 (9th Cir. 2002) (applying the factors identified in the Senate Judiciary Committee Majority Report accompanying the 1982 bill amending Section 2). This final, conclusive analysis is no afterthought, and this Court has in the past found the absence of a Section 2 violation where the three *Gingles* preconditions were nonetheless met. *See id.* at 1051; *see also Clark v. Calhoun Cty.*, 88 F.3d 1393, 1397 (5th Cir. 1996) (The totality of the circumstances inquiry is no "empty

formalism" and can be "powerful indeed."). The Supreme Court has identified nine relevant factors. *See Feldman v. Reagan*, 843 F.3d 366, 378 n.9 (9th Cir. 2016) (citing *Gingles*, 478 U.S. at 36-37 (quotation marks omitted) (listing factors)).

The Supreme Court has singled out Factors 2 and 7--the "extent" of racially polarized voting and the "extent" of minority electoral success in the jurisdiction--as "the most important." *Gingles*, 478 U.S. at 48 n.15.

***64** The district court committed a myriad of errors, both legal and mixed, in its rapid march through the Senate factors.[11] Those legal errors are important because, as here, "[i]f a trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Alexander*, 144 S. Ct. at 1240 (cleaned up).

Some of the legal errors across various factors can be put into two groups: (i) causation errors; and (ii) failing to account for the usual burdens of voting. And the overall piecemeal approach resulted in a faulty overemphasis on about half a dozen issues, instead of considering the true totality of the circumstances. In the end, the district court found a Section 2 violation based on *ipso facto* conclusions that would render every jurisdiction in America violative of the VRA.

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[11] The district court credited Senate Factor 9, Justification for Challenged Electoral Practice, to the defense, and Senate Factor 4, Access to Candidate Slating Process, was not at issue.

A. The District Court Failed to Analyze Causation as Section 2 Requires

This Court has held that Section 2 contains a causation element; that is, plaintiffs must show proof of "causal connection between the challenged voting practice and a prohibited discriminatory result." *Gonzalez*, 677 F.3d at 405 (en banc) (quoting *Salt River Project*, 109 F.3d at 595). Therefore, a "bare statistical showing ***65** of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry."). *Id.*

Given this textual mandate, the causation requirement applies to the Senate Factors that discuss disparities between racial and ethnic groups: history of official discrimination (Senate Factor 1) and socioeconomic disparities (Senate Factor 5). Plaintiffs thus had the burden to show how the history of official discrimination contributorily "resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice." *Gonzalez*, 677 F.3d at 407. Other appellate courts are in accord. *See NAACP v. Fordice*, 252 F.3d 361, 367 (5th Cir. 2011) ("Absent an indication that these facts actually hamper the ability of minorities to participate, they are, however, insufficient to support a finding that minorities suffer from unequal access to Mississippi's political process.") (cleaned up); *Clements*, 999 F.2d at 866 ("Texas' long history of discrimination [is] insufficient to support the district court's 'finding' that minorities do not enjoy equal access to the political process absent some indication that these effects of past discrimination actually hamper the ability of minorities to participate.");

Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1561 (11th Cir. 1987) ("[A] history of official discrimination did exist in Carroll County but... the plaintiffs failed to establish there was a lack of ability of blacks to participate in the political process."). ***66** Plaintiffs did not carry that burden, and the district court repeatedly failed to hold Plaintiffs to their burden when analyzing the Senate Factors.

Factor 1. The district court pointed to *Montes v. City of Yakima*, 40 F. Supp.3d 1377 (E.D. Wash. 2014), which concerned the *City* of Yakima, as well as a 2004 consent agreement between Yakima *County* and the DOJ, and then proceeded to state that those instances indicated official discrimination contributing to inequal access today. *See* 1-ER-28-29. Causation would, in reality, go the other way--the court decision and consent agreement have ameliorative effects, and contribute to protecting Hispanic political access. Washington has made legislative efforts at the same time and in the same vein. *See, e.g.*, 1-ER-29 (district court acknowledging that "progress has been made toward making registration and voting more accessible to all Washington Voters"); Washington Voting Rights Act of 2018, Wash. Laws of 2018, ch. 113; *see also Butts v. City of New York*, 779 F.2d 141, 150 (2d Cir. 1985) ("[M]itigating factors [like steps to encourage minority voting, mail registration, and a registration task force] further diminish the force of this showing [of past discrimination]."). The district court waved away these inconvenient facts, instead pointing to past problems as controlling the present reality, without explaining how. But "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself

unlawful." *Mobile v. Bolden*, 446 U.S. 55, 74 (1980).

***67** *Factor 5.* The district court failed to require of Plaintiffs or find for itself a causal nexus that could connect how socioeconomic disparities actually work to "hinder [the minority group's] ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37. The bare assertion of Plaintiffs' expert that Hispanic political participation is hindered by disparities is a conclusion, not an explanation. *See* 1-ER-32. (Dr. Estrada "observed disparities hinder and limit the ability of Latino voters to participate fully in the electoral process"). A mere conclusion is not itself evidence of a causal connection, and the district court did not identify any other evidence that could support causation. Plaintiffs' expert certainly gave examples of discrimination in the past and examples of Hispanic-White social disparities in the present. But at no point did he provide, nor did the court below rely on, that required link that the disparities "hinder Latinos' ability to participate in the political process." *Gingles*, 478 U.S. at 37.

And even if no formal causal nexus is required, the district court still failed to satisfactorily explain how the factor applies. The conclusory paragraph simply asserts what ("all these barriers compounded... hinder Latinos' ability to participate in the political process") instead of *how*. 1-ER-32.

The court's finding of facts on these factors, then, was "predicated on a misunderstanding of the governing rule of law." *Old Person v. Cooney*, 230 F.3d 1113, 1119 (9th Cir. 2000) (citation omitted).

*68 B. The District Court Legally Erred by Factoring the Usual Burdens of Voting in the Plaintiffs' Favor (Factor 3)

In performing a Section 2 analysis on totality of the circumstances, district courts have an affirmative duty to analyze the size of the burden-- which "every voting rule imposes." *Brnovich*, 141 S. Ct. at 2338. District courts must recognize that "the concept of a voting system that is 'equally open' and that furnishes an equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'" *Id.* (quoting *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.)). The district court below made no such inquiry, instead assuming that run-of-the-mill voting procedures, including holding non-presidential year elections for state senate in LD-15,[12] at-large districts, and ballot signature verification,[13] all work to "enhance the opportunity for

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[12] Twenty-four of Washington's 49 state senate positions are elected in non-presidential year elections, 25 senators are elected in presidential year elections, and all 98 state representative positions are elected in both presidential and non-presidential election years. Nearly every state in the Ninth Circuit--Alaska, California, Montana, Nevada and Oregon-- follows this same pattern. Only Idaho and Arizona, whose state senate terms last for two years, have senate elections in both presidential and non-presidential election years. Hawaii's state senate utilizes a "2-4-4" system, so it mostly follows Washington's pattern of electing half of its senators every two years, except once per decade, when all 25 of its senate positions are on the ballot.

[13] Despite invoking an ongoing lawsuit about ballot signature verification in Yakima County, which has since been dismissed with prejudice upon a settlement by county officials who agreed to additional signature verification training, cultural competency training, and displaying information about signature verification and cure process more prominently, but with no finding or admission of liability, *see Reyes v. Chilton*, No. 4:21-cv-5075 (E.D.

discrimination" against ***69** Hispanics. *See Gingles*, 478 U.S. at 37. But it is doubtful that any of these even amount to the "usual burdens of voting," *Brnovich*, 141 S. Ct. at 2338--let alone burdens that violate § 2.

The district court expressly reasoned, however, that the mere election of state legislators in a non-presidential year puts this factor on the side of finding a Section 2 violation. *See* 1-ER-30. But if electing state legislators in non-presidential years is powerful evidence of a § 2 violation, as the district court reasoned, 1-ER-30, then *most* states are violating the VRA. Indeed, the biannual elections to the U.S. House would only be saved from invalidation under § 2 because they are expressly mandated by the Constitution itself.

The district court similarly fixated on ubiquitous electoral practices as somehow supporting a § 2 violation by reasoning that some at-large voting schemes "may" dilute minority strength, again without explaining *how* they would do so. 1-ER-30. By relying on the "usual burdens of voting"--such as electing state legislators in non-presidential years and electing two representatives per district--as evidence that supported a § 2 violation, the district court both committed legal error and engaged in factual analysis that cannot withstand appellate scrutiny. Even ***70** worse, the district court's reasoning that such ubiquitous, nonburdensome electoral practices impose uniquely burdensome

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Wash.). The district court seemingly retreated from relying on that voting practice, conceding that Plaintiffs' expert's conclusion of disparate impact was "based entirely on an article published on Crosscut.com which summarized two other articles." 1-ER-31.

barriers to Hispanic voters infantilizes the very voters that Section 2 is supposed to protect.

C. The District Court Erred on the Totality of the Circumstances

The district court's overall analysis of the facts and application of the Senate Factors to them was faulty. Whether characterized as legal, mixed, or factual, the errors go to the heart of the Section 2 question--whether Hispanics in the Yakima Valley region are excluded from equal participation in the political process. In the totality analysis, Factors 2 and 7--the "extent" of racially polarized voting and the "extent" of minority electoral success in the jurisdiction--are "the most important." *Gingles*, 478 U.S. at 48 n.15.

Factor 2. As explained above in § IV.B., racially polarized voting in the region is limited to White Democrat versus White Republican partisan elections and is caused by partisan signal, not racial polarization. And even if this Court finds the preconditions satisfied, it should still conclude from the evidence presented at trial that the "extent" of the racially polarized voting in the region is quite limited. The district court legally erred by failing to analyze the "extent" of RPV, instead simply stating the bare conclusion that "voting in the Yakima Valley region is racially polarized." 1-ER-30. Had the district court engaged in the correct analysis on the *extent* of the polarization, it would have found that any racially polarized voting was ***71** cabined to one particular kind of partisan election and thus driven by partisan politics. Dr. Alford, the State's expert, concluded that any minority cohesion in the Yakima Valley was "less

cohesive than not." 3-ER-551.

Factor 7. This factor looks at "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37. In analyzing the seventh factor, the district court equated Nikki Torres's victory with Ms. Soto Palmer's testimony about out-of-court statements she allegedly heard while door-knocking for a Democrat Hispanic candidate. The latter has nothing to do with this factor, but even if it did, the two are not equivalent. Ms. Soto Palmer testified to the hearsay statement of one White individual concerning a Hispanic candidate: "I'm not voting for him, I'm racist." 3-ER-565. The district court weighed this one-off alleged comment of one individual voter *equally* with Senator Torres's 35-point victory (the product of thousands of voters), a jaw-dropping abuse of its discretion. The district court also failed to credit the electoral success of others in the Yakima Valley region, including area legislators like Mary Skinner and Intervenor Alex Ybarra, and the numerous cities in Yakima County with Hispanic mayors and city councilmembers. *See* 3-ER-566. The district court presented a skewed picture that sets up an imperfect past as a strawman instead of looking at the "present reality." That blinkered, one-sided analysis produced a clearly erroneous finding of a Section 2 violation.

72** ***Factor 6. The district court pointed to a single incident of a candidate's campaigning against birthright citizenship (a *Facebook* post, the nature of which the district court elided). 1-ER-33. The court further alluded to "race-based appeals" in campaigns but gave no examples. *Id.* At no point did the court

even attempt to support its assertion that candidates were "making race an issue on the campaign trail... in a way that demonizes the minority community." 1-ER-34. What the factor actually requires of district courts is to determine "whether political campaigns have been *characterized* by overt or subtle racial appeals." *Gingles*, 478 U.S. at 37 (emphasis added). The Plaintiffs and the district court had no basis whatsoever to argue that campaigns are "characterized" by racial appeals. Instead, the district court engaged in "nutpicking"--taking a single extreme negative example, then trying to impute that one candidate's alleged subtle appeal to supposed racial animus of *every other* White candidate in the Yakima Valley. In the true present reality, the dozens of other, normal campaigns in the Yakima Valley region are not characterized by racial appeals. At most,[14] one out of the total number of campaigns in the Yakima Valley included one racial appeal. It was clear error to find that political campaigning is "characterized" by racial appeals in that area.

***73** *Factor 8.* The district court found a "significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," *see Gingles*, 478 U.S. at 37, because it credited the testimony of Senator Saldaña and Dr. Estrada that a single progressive Hispanic advocacy organization supported legislation that Republican representatives did not. Beyond that, the court relied on the hearsay testimony of Sen. Saldaña (who represents Seattle, not the Yakima Valley, and who

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[14] The district court's implication that campaigning against birthright citizenship is per se racist is itself fallacious and thus clearly erroneous.

admitted at trial she had never even lived in the Yakima Valley) about the out-of-court opinions of Hispanic individuals. At no point did the district court explain how the political differences amount to a "significant lack of responsiveness." The district court also ignored contrary evidence, such as the fact that incumbent Republican legislators from LD-14 and LD-15 helped secure $3.5 million in state budget appropriations for KDNA, a Spanish-language radio station in the Yakima Valley, *see* 3-ER-567-68, or that Ms. Soto Palmer's state senator and both state representatives both voted for the "Real Hope Act," a measure that extended in-state tuition at Washington's colleges and universities to undocumented students and which Ms. Soto Palmer had lobbied her legislators to support, *see* 3-ER-563-64.

In the end, the district court found that the Yakima Valley region denies Hispanics equal access to the political process because of the following: (i) the general history of discrimination in Washington's past unconnected to the present ***74** reality; (ii) moderate polarized voting in one kind of election; (iii) some regular burdens of voting; (iv) the admitted socioeconomic disparities between Whites and Hispanics; (v) one instance of one candidate invoking illegal immigration; (vi) past Hispanic electoral success that is not quite proportional to the Hispanic population in the Yakima Valley region; (vii) one-off instances of "white voter antipathy"; and (viii) elected Republicans' not supporting all legislation the court considered Hispanic-supported based on one organization's opinion. That is all upon which the court relied--nothing more.

The above list would apply to almost every single jurisdiction in America with a modestly sizeable Hispanic population. Nothing in the district court's analysis is specific or "intensely local" to the Yakima Valley region. It is far too generalized. If Hispanics are denied equal access to the political process here based on the above facts, then they would be denied the same anywhere in America. Section 2 violations would exist in any place where the preconditions are met, rendering the totality prong superfluous. (Also, the preconditions too would always be met under the district court's regime for similar reasons, because, in the district court's errant and stereotyping view, any Hispanics in any jurisdiction are always "geographically compact," because Hispanics generally share culture, language, religion, and economic situations, *see supra §* IV.A.

***75** By grounding its § 2 finding overwhelmingly on ubiquitous generalities that apply virtually *everywhere* in the United States, the district court both committed legal error and made clearly erroneous factual findings. This Court should accordingly reverse its totality-of-the-circumstances determination.

VI. THE DISTRICT COURT'S REMEDIAL MAP IS ILLEGAL

The district court's mandatory injunction, imposing its Remedial Map, is riddled with even more and even worse legal errors. Three stand out. *First*, the order purported to remedy alleged dilution of Hispanic

voting strength by purposely decreasing the HCVAP of the remedial remedy, a novel and illegal undertaking. That cure-dilution-with-dilution "remedy" is utterly unprecedented in the entire history of the VRA. And for good reason: Section 2 is supposed to *prevent* dilution of minority voting strength, not *inflict* it.

Second, the district court's Remedial Map is itself an unconstitutional gerrymander. In particular, the district's shape--rightly likened to an octopus slithering on the ocean floor--can only be explained by the unconstitutional use of race. But here there is no need to infer the district court's race-based motives, because that court was disarmingly open about its race-based objectives, declaring forthrightly that its "fundamental goal" in drawing the Remedial Map was race-based redistribution of voters along racial lines.

***76** *Third*, the Remedial Map made gratuitous, sweeping, and unnecessary disruptions to the Enacted Map, changing thirteen out of forty-nine districts in a one-sided partisan way. The Supreme Court has held that redrawing four out of twenty-seven districts to remedy VRA violations found in two of those districts was an unlawful abuse of discretion. *Upham*, 456 U.S. at 38, 40. The district court's transgressions *are far* broader here: *redrawing thirteen out of forty-nine districts* to remedy a putative violation *in just one*. Reversal is mandated here under *Upham*.

All together, the errors comprise an egregious violation of the most basic tenets of our federalist system: A federal district court, with the collusive

support of Washington's Attorney General, usurped a State's independent bipartisan redistricting Commission to use race-based districting to redraw a quarter of the entire statewide legislative map, all favoring one political party, premised on a finding of a VRA violation in just one legislative district. And the resulting remedial map is a paradigmatic example of the sorts of Lovecraftian horrors that the Supreme Court has repeatedly invalidated as racial gerrymanders.

A. The District Court Erred by Purporting to Cure Dilution of Hispanic Voting Strength by Diluting It Further

The district court debuted a never-before-seen VRA remedy: purporting to cure dilution of minority voting strength by affirmatively lowering their CVAP. Specifically, the district court's remedy for allegedly diluted Hispanic voting strength in LD-15 was to *lower* the HCVAP from 52.6% to 50.2% in 2021 ***77** population numbers. 2-ER-75. In a nutshell: the district court purported to cure vote dilution with yet more dilution. *See Alexander*, 144 S. Ct. at 1264 (Thomas, J., concurring in part) ("The *[Soto Palmer]* court later purported to correct the lack of Hispanic opportunity by imposing a remedial map that made the district 'substantially more Democratic,' but slightly less Hispanic.").

In the stay briefings at this Court and the Supreme Court, neither Intervenors nor either set of Appellees could identity a *single instance* in the entire history of the Voting Rights Act where a court has previously purported to "remedy" a § 2 vote-dilution violation by

affirmatively diluting the CVAP of the relevant minority group. In fact, no Appellee has even pointed to an example of a party's *ever even asking* for such a VRA "remedy." But even if such a precedent existed, it would be obviously wrong. Such a remedy is akin to a district "remedying" a malapportioned electoral map to ordering *greater* malapportionment to "cure" the equal-population violation.

To state the obvious: the VRA prohibits dilution of minority voting strength rather than promoting it. Injunctions must provide "relief in light of the statutory purposes." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). But here the district court's Remedial Map twists the VRA into its antithesis: a tool for *affirmatively diluting* minority voting strength. That is patent legal error.

But even assuming that a cure-dilution-with-dilution remedy could *ever* be appropriate, it would require some persuasive rationale for why it was appropriate ***78** under the particular circumstances. The district court manifestly failed to provide any such rationale when it lowered the HCVAP from 52.6% to 50.2%. In support of this drastic and novel undertaking the court below offered just one sentence: "Although the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district, the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature." 1-ER-06. This single sentence alone cannot suffice to justify this completely unprecedented remedy.

Further, the HCVAP-lowering remedy was

accomplished by injecting non-Hispanic Democrats, mostly Native American voters, into the new district while attempting to replace Republican-leaning White voters with more Democrat-leaning voters. 2-ER-87. Whether this new district is characterized as a species of coalition district or crossover district, it performs for Democrats in all hypothetical matchups run by Plaintiffs' expert. *Id.* The only way to understand the district court's remedial theory is that the lowering of the HCVAP was justified because the injection of voters of other ethnicities and races allowed the minority voters to together form an effective coalition with other groups. *See* Plaintiffs-Appellees' Opp. to Appellants' Emergency Mot. for a Stay Pending Appeal, No. 24-1602, Dkt. No. 12.1 at 22-24; State-Appellee's Opp. to Appellants' Emergency Mot. for a Stay Pending Appeal, No. 24-1602, Dkt. No. 11.1 at 22-23; *see also Alexander*, 144 S. Ct. at 1264 ***79** (Thomas, J., concurring in part) ("In short, the *[Soto Palmer]* court concluded that securing the rights of Hispanic voters required replacing some of those voters with non-Hispanic Democrats"). But "nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 556 U.S. at 15 (plurality and controlling opinion under *Marks v. United States*, 430 U.S. 188, 193 (1977)). On the contrary, for the purposes of Section 2, "[t]here is a difference between a racial minority group's 'own choice' and the choice made by a coalition," *id.--a* difference that the district court's opinion flatly flouts.[15] The district court's approach interpreted

[15] Moreover, at no point during trial or briefing did Plaintiffs even attempt to explain why Native American voters should be combined with Hispanic voters, or what they have in common with each other.

Section 2 to compel inclusion of crossover votes--at the very cost of decreasing HCVAP--"would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* at 21 (quotation marks and citation omitted).

Bartlett is not the only Supreme Court case contravened by the district court. In *Cooper v. Harris*, the Court held that "[w]hen a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply." 581 U.S. 285, 305 (2017) (citation omitted). Plaintiffs' claim is that the existing Hispanic majority in LD-15 is too small to be an effective one. But Plaintiffs did not even attempt to offer a remedial map in which increased Hispanic voting ***80** strength would provide an effective majority, instead relying on injection of other racial groups to assist Hispanic voters with electing a candidate of "their choice." Accordingly, Plaintiffs' proposed remedies, realized in the adopted Remedial Map, concede that the minority group was not sufficiently large enough to make up a *working* majority in a remedial district (which is further evidence *Gingles* I was never met to begin with).

The district court's attempt to employ § 2 to mandate creation of a *de facto* coalition district violates *Bartlett* and *Cooper* and requires reversal.

B. The Remedial Map Is an Unconstitutional Racial Gerrymander

The district court also erred in adopting the Remedial Map because that map violates the Equal Protection

Clause as a racial gerrymander. It seems an obvious point, but "federal judges are equally bound to follow the dictates of the Constitution." *Johnson v. Mortham*, 915 F. Supp. 1529, 1545 (N.D. Fla. 1995) (three-judge court). Like prior infamous racial gerrymanders, Remedial LD-14's bizarre shape reveals its unexplainable-except-by-racial-grounds nature--which the district court was completely explicit about in any case, declaring the map's "fundamental goal" to be race-based sorting. 1-ER-08 n.7. Here, the Remedial Map's revised district was aptly described as an "octopus slithering along the ocean floor." 2-ER-131. The shape calls to mind descriptions like the "sacred Mayan bird" ***81** and "bizarrely shaped tentacles" descriptions of maps previously invalidated. *See Milligan*, 143 S. Ct. at 1509.

The Supreme Court has held that, under its aesthetic test, "appearances do matter" for districts, so a bizarre shape is powerful evidence that boundaries are "unexplainable" but by race-based criteria. *Shaw v. Reno*, 509 U.S. 630, 647, 644 (1993) (*Shaw* I*); see also*

Milligan, 143 S. Ct. at 1509 (listing as unlawful examples districts with "bizarrely shaped tentacles" and a shape like "a sacred Mayan bird"). Race-motivated district lines with "bizarre shapes" are typically subject to strict scrutiny and presumptively unconstitutional. *Vera*, 517 U.S. at 975.

The reality, however, is that *Shaw's* implicit res ipsa loquitur approach to racial gerrymandering need not be applied here. The district court, after all, expressly declared it a "fundamental goal of the remedial process" that the remedial district *"unite the Latino community* of interest in the region." 1-ER-08 n.7 (emphasis ***82** added). The district court further made it clear that the Hispanic communities referenced are those in "East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco." 1-ER-06.

Further evidence of the racial gerrymandering is the district court's choosing of Map 3 over Plaintiffs' Map 5 and Intervenors' proof-of-concept Map. The district court rejected both because neither segregated the Hispanic voters among the East Yakima-Pasco corridor into one district, the fundamental goal of the district court. 1-ER-08 n.7.

These race-based motivations wrought the sauntering cephalopod. The eastern tentacle, along with the abscess atop the octopus's head, are the direct result of ethnic sorting to unite those far-flung Hispanic communities. It is simply "unexplainable" on any other grounds. The map even has a "northernmost hook ... [that] is tailored perfectly to" capture minority population. *See Vera*, 517 U.S. at 971.

"The mere fact" that the Remedial District was "created by a federal court does not change" the analysis because "federal judges are equally bound to follow the dictates of the Constitution." *Johnson*, 915 F. Supp. at 1544-45. "To hold otherwise ... would be akin to holding that the Equal Protection Clause of the Fourteenth Amendment does not apply to federal courts." *Id.* at 1545 n.26.

Lack of Narrow Tailoring. Because race predominated in the drawing of the Remedial Map--seen in both its bizarre shape and by the district court's explicit ***83** admission--the Remedial Map violates the Constitution unless it satisfies strict scrutiny. *See Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 188-89 (2017). For the reasons explained immediately below in Section C., the Remedial Map made sweeping, gratuitous changes to the Enacted Map. These changes were unnecessary. Accordingly, were the Court to find that Section 2 required a racial remedy in this case, the Map is not narrowly tailored to its racial ends. *See Johnson v. Mortham*, 926 F. Supp. 1460, 1484 (N.D. Fla. 1996) (three-judge court) ("Assuming it had been established that a compelling interest requires race-based redistricting under a correct reading of the Voting Rights Act statute, any remedial plan must still be narrowly tailored") (cleaned up). On the contrary, it was crafted to effect expansive changes throughout the statewide map. The district court in this way took a "shortsighted and unauthorized view of the Voting Rights Act," which resulted in drawing an ugly, unconstitutional district. *See Miller v. Johnson, 515* U.S. 900, 927-28 (1995). For these reasons, the Remedial Map violates the

Equal Protection Clause.

C. The District Court Exceeded Its Authority and Abused Its Discretion by Adopting Sweeping and Gratuitous Changes to the Enacted Map

The district court's merits order called for "revised legislative district maps for the Yakima Valley region." 1-ER-45. But the Remedial Map does not reflect this putatively humble ambition of merely drawing districts in the "Yakima Valley ***84** region." Instead, it makes changes to a whopping thirteen out of forty-nine districts, sweeping far, far outside the Yakima Valley region to populations, partisan makeups, and district shapes. The district court's cascading disruptions to Washington's maps are gratuitous, offend basic principles of federalism, and, most damning of all, were entirely unnecessary by the Plaintiffs'--and the district court's--own reasoning.

Remedial "court-ordered reapportionment plans are subject ... to stricter standards than are plans developed by a state legislature." *Upham*, 456 U.S. at 42. When drawing a Section 2 remedy map of its own accord, "a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed ... in the reapportionment plans proposed by the state legislature." *Id.* at 41. Any revisions should be "to the extent" necessary to comply with the VRA, and no further. *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). The north star must be "the State's recently enacted plan[,]" which "reflects the State's policy judgments on

where to place new districts and how to shift existing ones in response to massive population growth." *Perry v. Perez*, 565 U.S. 388, 393 (2012). This is true even when replacing a plan held to violate the law. *Id.*

In *Upham*, the district court's error was its redrawing four out of twenty-seven districts to remedy VRA violations found in two of those districts. In other words, the *Upham* court changed districts at a 2-1 revision-to-violation ratio, changing a ***85** total of 4/27 districts (~15%) statewide. The Supreme Court vacated that remedy. In the present case, the district court changed thirteen districts for a violation found in a single one, a *13-1 revision-to-violation* ratio, changing a total of 13/49 (~27%) districts statewide.

The district court adopted a revised form of Plaintiffs' Proposed Map 3A. As mentioned, pursuant to the district court's finding of a VRA violation in one district only, the Remedial Map changes thirteen districts, including some in Western, North Central, and Eastern Washington. 2-ER-71-72. A cool half-a-million Washingtonians are moved into new districts, and over two million live in districts altered by the Remedial Map. *Id.* Multiple incumbents were displaced, forcing them to decide whether to move to remain in their districts or choose early retirement. 2-ER-80.

Furthermore, instead of cleaving to the "State's policy judgments" expressed in Washington law that the districts "provide fair and effective representation and [] encourage electoral competition" and "not be drawn purposely to favor or discriminate against any political party or group[,]" RCW 44.05.090(5), the

district court brazenly changed the partisan composition of *ten* districts-- almost uniformly benefiting one political party. Most egregiously, the district court flipped LD-12, far away in North Central Washington, from a district carried by former President Trump into one carried by President Biden, and it flipped LD-17--in the Portland ***86** suburbs of Southwest Washington--from one where Republicans won by 0.9% on average to one where Democrats would have a 2.0% advantage on average. 2-ER-144-48; 2-ER-83.

All of this was unnecessary on the Plaintiffs' own terms. Plaintiffs submitted five proposed maps (one of which was the Map 3 that would be adopted as modified) and affirmatively averred each was "a *complete and comprehensive remedy* to Plaintiffs' Section 2 harms that aligns with both traditional redistricting principles and federal law." 2-ER-183 (emphasis added). The State further agreed that "each map [of Plaintiffs' five proposed remedial maps] '[wa]s a complete and comprehensive remedy to Plaintiffs' Section 2 harms.'" 2-ER-170. No expert disagreed with Plaintiff's expert's performance analysis that showed that "in nine of the nine elections considered, the Latino-preferred candidate would win in LD 14" in each of the proposals. 2-ER-186-88.

Plaintiffs' own remedial maps affirmatively demonstrated that it was possible to achieve Plaintiffs' aims without the sweeping changes made by the district court--illustrating the gratuitous and wonton nature of those changes to *thirteen* districts.

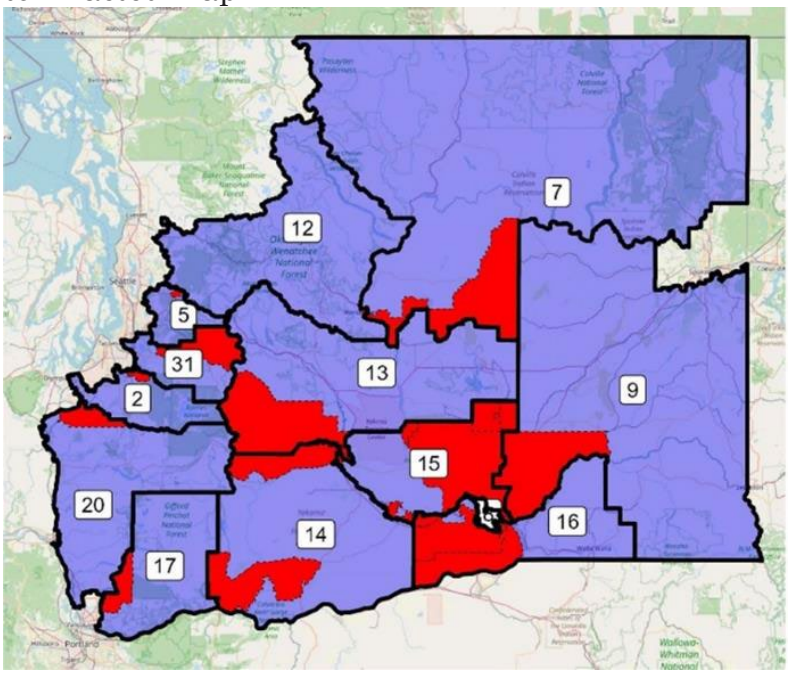
Consider Plaintiffs' Proposal 4. That map had "ha[d]

an identical configuration to LD 14 in Plaintiffs' Remedial Proposal 3," 2-ER-187, octopoid shape and all. Map 4 (and its revised version, 4A), however, altered three fewer ***87** districts, moved 50,000 fewer people, and did not transform the partisan nature of LD-12, which crosses over into the distant Seattle suburbs, 2-ER-138-39; 2-ER-144. If partisan changes through Washington were not the point, it is simply incomprehensible why the district court adopted a Map 3 variant. After all, Map 4, which has the same exact HCVAP and shape as Map 3, was far less disruptive, and Plaintiffs had conceded it was "a complete and comprehensive remedy." 2-ER-183.

The bizarreness does not stop there. Consider next Plaintiffs' Proposal 5/5A, which was the most modest of the proposed maps and was, in their words, "a complete and comprehensive remedy." Map 5 and its variants: (1) moved only 190,745 people, (2) *changed only four districts* (as opposed to thirteen (in Map 3) and ten (in Map 4)), (3) only redrew districts in the Yakima Valley region, not Western and North Central Washington, (4) impacted no new counties, (5) made very few changes to partisanship, and (6) did not pair any Senate incumbents in primary fights whatsoever. 2-ER-155-56. Under the principles of federalism that necessarily govern federal courts usurping States' roles in drawing districts, Map 5 was superior in essentially every conceivable way. Yet the district court rejected it in favor of making far more sweeping changes that were wholly unnecessary given Plaintiffs' concession that Map 5 was "a complete and comprehensive remedy[,]" 2-ER-183. The district court thus gravely erred in adopting the Remedial Map.

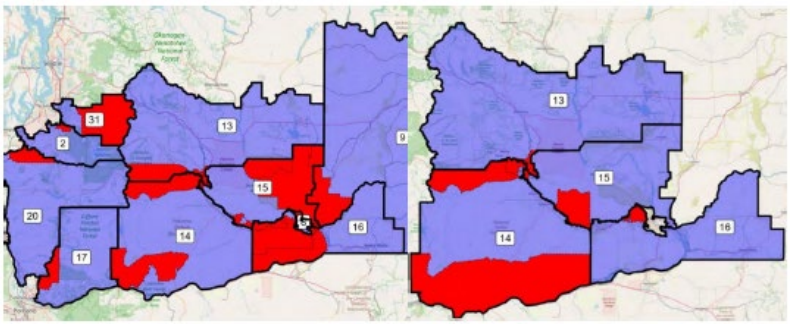
***88** Intervenors' expert provided the following visual comparisons. Again, Plaintiffs and the State avowed that all of these were complete remedies:

Plaintiffs' Map 3 (adopted as Remedial Map) Changes to Enacted Map



Plaintiffs' Maps 4 and 5 Changes to Enacted Map

Map 4 Map 5



***89** 2-ER-134, 138, 155.

If Plaintiffs' own maps weren't enough, Intervenors' expert introduced a proof-of-concept map himself to show that a Democrat-performing map in the Yakima Valley was entirely possible without the wanton disruption of Map 3. Appellants' map created a majority-HCVAP district in the Valley that performed for Democrats, all the while keeping the Yakama Nation and its traditional lands together in the next district over, yet changing only three districts total, moving only 87,230 people total, changing the partisan nature of only two districts total, and displacing zero incumbents. 2-ER-75, 83-84.

But instead the district court opted for maximum disruption, making no effort to comply with the Supreme Court's clear rules in *Upham, Abrams*, and *Perry*, or with one of the most fundamental mandates of federalism: maximizing State ability to draw their own maps to the extent possible. And if the district court's wanton changes were actually no "more than necessary," *Upham*, 456 U.S. at 41-42, then *Upham* means nothing. *Upham* remains binding precedent, so

the district court's egregious violations of its minimization mandate require reversal.

CONCLUSION

The district court's decision that the enacted Washington legislative map violates § 2 of the VRA should be reversed and the district court's order enacting the Remedial Map should be vacated regardless.

***90** If the Court agrees that the district court lacked jurisdiction to hear this case on its own, the Court should vacate and remand the matter to the district court with directions to convene a three-judge court to hear these matters in the first instance.

***91** Respectfully submitted,

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***92 STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, Appellants list the *Garcia v. Hobbs et al.*, No. 24-2603 case as a

related case, for the reasons set forth throughout this brief and in the joint motion to consolidate filed in both these appeals in in the *Garcia* appeal. This Court has ordered that these consolidated appeals "will be calendared before the panel assigned to consider the merits of appeal No. 24-2603." No. 24-1602, Dkt. No. 37.