UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, *et al*.,

Plaintiffs – Appellees,

v.

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

Defendants – Appellees,

and

JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA,

Intervenor-Defendants Appellants.

No. 23-35595

D.C. No. 3:22-cv-05035-RSL
U.S. District Court for Western Washington, Tacoma

APPELLANTS' MOTION TO STAY INJUNCTION AND LOWER COURT PROCEEDINGS

Relief Requested by: December 22, 2023

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INTRODUCTION

Blazing a new trail, the court below concluded that a majority-Hispanic state legislative district that recently elected a female Hispanic candidate by 35-points must be redrawn with a *higher* Hispanic Voting Age Population. This augmentation of the Voting Rights Act cannot be squared with any previous VRA jurisprudence (or with the Equal Protection Clause). To avoid irreparable harm—and under Ninth Circuit Rule 27-1(3)—Appellants seek a stay of remedial proceedings below and **request relief by December 22, 2023.**

RELIEF REQUESTED

By virtue of Federal Rule of Appellate Procedure 8, Intervenor-Defendants-Appellants Jose A. Trevino, Ismael G. Campos, and Alex Ybarra ("Appellants") respectfully move the Court to stay all proceedings in this case, both in the merits appeal at this Court and the remedial proceedings below, pending resolution of *Garcia v. Hobbs*, No. 23-467 (jurisdictional statement filed Oct. 31, 2023), and the related *Trevino v. Soto Palmer*, No. 23-484 (petition for writ of certiorari before judgment filed Nov. 3, 2023), both of which are currently pending in the Supreme Court of the United States.[1]

[1] A partial extension for a response was granted in *Garcia*. While the State asked for a 60-day extension, the Responses are to be filed December 27, 2023. *Trevino*, meanwhile, has been distributed for conference of December 8, 2023.

STATEMENT OF THE CASE & FACTS

On August 10, 2023, the district court found that the boundaries of Washington Legislative District 15 ("LD-15") "violate[d] Section 2's prohibition on discriminatory results." (*Soto Palmer* ECF No. 218 at 3.)[2] The district court entered judgment for Plaintiffs-Appellees on August 11, 2023, (*Soto Palmer* ECF No. 219), and Appellants filed their Notice of Appeal to this Court on September 8, 2023. (*Soto Palmer* ECF No. 222.)

The same day that Appellants appealed the *Soto Palmer* decision, the *Garcia* Court issued its decision in *Garcia v. Hobbs*, No. 3:22-cv-05152, 2023 U.S. Dist. LEXIS 159427 (W.D. Wash. Sept. 8, 2023), a case that challenged the same legislative district as a racial gerrymander in violation of the Fourteenth Amendment. (*See Garcia* ECF No. 81.) Because the district court had entered final judgment in *Soto-Palmer*, the *Garcia* panel majority held that Mr. Garcia's Equal Protection claim was moot. (*Id.* at 1–2.) Judge VanDyke dissented, explaining not only that he would have reached the merits, but that he would have found that LD-15 violated the Equal Protection Clause. (*Garcia* ECF No. 81-1.)

[2] Citation to the docket in *Soto Palmer v. Hobbs*, No. 3:22-cv-05035-RSL appear here as "*Soto Palmer* ECF No. ##," and citations to docket of the related case *Garcia v. Hobbs*, No. 3:22-cv-05152-RSL-DGE-LJCV appear here as "*Garcia* ECF No. ##." Both cases originated in the United States District Court for the Western District of Washington. All cited record materials from the *Soto Palmer* and *Garcia* district court dockets are included in an appendix attached to this filing.

Garcia (which was heard by a three-judge court pursuant to 28 U.S.C. § 2284) and *Soto Palmer* (which was heard by a single district court judge) proceeded on separate appellate tracks. *See* Juris. Statement, *Garcia v. Hobbs*, No. 23-467 (Oct. 31, 2023); (*Soto Palmer* ECF No. 222) (filing a notice of appeal to the United States Court of Appeals for the Ninth Circuit in *Soto Palmer*).

Presently, the district court is proceeding with the remedial phase in *Soto Palmer*. (*See Soto Palmer* ECF No. 230.) The *Soto Palmer* Parties are required to "meet and confer with the goal of reaching a consensus on a legislative district map that will provide equal electoral opportunities for both white and Latino voters in the Yakima Valley regions, keeping in mind the social, economic, and historical conditions discussed in the Memorandum of Decision." (*Id.* at 2) If by December 1, 2023, the Parties had not reached an agreement, they were required to file alternative remedial proposals and jointly identify three candidates to serve as a special master. (*Id.* at 2–3.) Under this scenario, the Parties must then have their memoranda and exhibits submitted in response to the remedial proposals by December 22, 2023, and any reply submitted by January 5, 2024. (*Id.* at 3.)

Meanwhile, Appellants in this case filed a petition for writ of certiorari before judgment, *see Trevino v. Soto Palmer*, No. 23-484, and Mr. Garcia filed his jurisdictional statement, *see Garcia v. Hobbs*, No. 23-467. Mr. Garcia maintains that his case is not moot and should be decided on the merits. (*See id.*) *Soto Palmer*

Appellants argue that the Supreme Court should grant review of their case and hold it in abeyance pending the outcome in *Garcia*, which necessarily affects what (if any) remedy is available in *Soto Palmer*. *See* Pet. for Cert. before J., *Trevino v. Soto Palmer*, No 23-484 (Nov. 3, 2023). And *Soto Palmer* Plaintiffs-Appellees have sought to intervene in *Garcia*, arguing that the Supreme Court's decision in *Garcia* will affect the remedy available (if any) in *Soto Palmer*. *See* Susan Soto Palmer et al. Mot. for Leave to Intervene, *Garcia v. Hobbs*, No. 23-467 (Nov. 9, 2023).

Consequently, to further the important interests of judicial comity and efficiency, Appellants sought an emergency stay of the district court's remedial proceedings pending the result of the *Soto Palmer* and *Garcia* appeals that are presently before the Supreme Court. (*Soto Palmer* ECF No. 232.) Appellants requested that the district court rule by November 17, 2023. (*Id.* at 12.) The district court denied their motion on November 27, 2023. (*Soto Palmer* ECF No. 242.)

The district court has ordered the parties to meet and confer and propose a remedial plan (or alternative plans and three special master candidates) by December 1. This has created an avoidable time crunch in the court below that necessitates this time-sensitive Motion to Stay. If a stay is not granted here, Appellants will be irrevocably injured, and the parties and courts may waste considerable time and resources on a remedial plan that will ultimately prove pointless. Accordingly, this Court should grant Appellants' important Motion to Stay.

ARGUMENT

The power and discretion to stay a case "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254–55.

> When deciding whether to grant a stay pending appeal, a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Duncan v. Bonta, 83 F.4th 803 (9th Cir. 2023) (en banc) (quoting *Nken v. Holder*, 556 U.S. 418, 425–26 (2009)). Of the four factors, likelihood of success on the merits and irreparable injury to the applicant are "most critical." *Nken*, 556 U.S. at 434.

When considering whether to stay a matter pending resolution of a separate related action, this Court considers the following: (1) "the possible damage which may result from the granting of a stay"; (2) "the hardship or inequity which a party may suffer in being required to go forward"; and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398

F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

Here, because these tests—both for a stay pending appeal (1) of the instant case and (2) of the related *Garcia* case—weigh decisively in favor of a stay, the Court should grant Appellants' Motion.

A. Appellants will likely succeed on the merits of their appeal.

Multiple errors strongly suggest that Appellants will prevail, not least of which is the district court's novel conclusion that the Voting Rights Act requires a performing majority-minority district to be even *more* majority-minority. This conclusion flouts both the preconditions and totality of the circumstances analyses set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). More generally, this order is anathema to the purposes of Section 2.

The errors persist beyond that. Nearly two decades ago, the Supreme Court clarified that "[t]he first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district.'" *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (quoting *Bush v. Vera*, 517 U.S. 952 (1996)). The district court, however, considered only the compactness of the outer boundaries in Plaintiffs-Appellees' demonstrative maps, and not the compactness of Hispanic voters within those boundaries. (*See Soto Palmer* ECF No. 218 at 10.) Aside from Dr. Owens (Appellants' expert), not a single expert in this case considered the compactness of

the minority community. The court, nonetheless, errantly found this precondition satisfied. And, as to the first precondition, Plaintiffs-Appellees failed to provide any alternative map that would realistically succeed in doing what they want—electing what they consider the Hispanic-preferred candidate by defeating Nikki Torres in LD-15. *See Rose v. Raffensberger*, No. 22-12593 (11th Cir. Nov. 24, 2023) (slip op. at 20) (requiring Section 2 plaintiffs to provide a "viable" proposed remedy as part of the first precondition).

The district court also erred in its racially polarized voting analysis, which considers whether a "minority group has expressed clear political preferences that are distinct from those of the majority." *Gomez v. Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988). For example, the district court's *Gingles II* analysis lasted all of one paragraph and was no "intensely local appraisal," flatly ignoring the "present reality" in the Yakima Valley—namely, the landslide election of a Hispanic Republican over a White Democrat. *See Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023) (quoting *Gingles*, 478 U.S. at 79). Put differently, the lower court's eschewal of the election results in the only contested election held under the challenged map was legal, reversible error. *Id.* Indeed, to undersigned Counsel's knowledge, the *Soto Palmer* court is the only court to ever find that a majority-minority citizen voting age population district, which resulted in the landslide election of a minority candidate,

somehow dilutes the voting power of that minority group. Such a novel result is not likely to survive the appellate process—either in this Court or in the Supreme Court.

Moreover, the district court's totality of the circumstances analysis failed to apply the correct legal standards in at least three ways. Specifically, (1) the court found that certain "usual burdens of voting" evidenced an abridgment of the right to vote, *contra Brnovich v. DNC*, 141 S. Ct. 2321, 2338 (2021) (internal citation omitted); (2) the court's appraisal was neither "intense[]" nor "local," nor did it take into account "past and present reality," *Milligan*, 143 S. Ct. at 1503, such as the recent election of Nikki Torres; and (3) the court continuously failed to identify the required causal nexus between the challenged map and the purported discriminatory result, brushing aside the evidence that partisanship, not race, drives voting patterns in the Yakima Valley, *see, e.g.*, *LULAC v. Clements*, 999 F.2d 831, 853–54 (5th Cir. 1993) ("Courts must undertake the additional inquiry into the reasons for, or causes of, these electoral losses in order to determine whether they were the product of 'partisan politics' *or* 'racial vote dilution,' 'political defeat' *or* 'built-in bias.'") (internal citation omitted); *see also Baird v. Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("[The VRA] does not guarantee that nominees of the Democratic Party will be elected, even if [minority] voters are likely to favor that party's candidates.").

These are the most likely-to-be-reversed errors in the *Soto Palmer* decision. Any one of them would result in vacatur of the injunction. Thus, Appellants are

likely to succeed on appeal, a "most critical" factor weighing heavily in favor of granting the stay. *See Nken*, 556 U.S. at 434.

B. Unconstitutional racial sorting of Appellants is imminent.

The Supreme Court permits *some* use of race in remedial mapmaking. *See Milligan*, 143 S. Ct. at 1507–08. And it has long "assume[d], without deciding, that the State's interest in complying with the Voting Rights Act" can qualify as "compelling." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017). But undisturbed precedent mandates that if a State *does* sort citizens into different voting districts on the basis of race, it must have "extraordinary justification" to do so. *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

"[A]ll 'racial classifications, however compelling their goals,' [a]re 'dangerous,'" thus all "race-based governmental action" is subject to strict scrutiny. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2165 (2023) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 341–42 (2003)) (emphasis added). Indeed, "[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." *Id.* at 2162 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). The "core purpose" of the Equal Protection Clause remains "do[ing] away with all governmentally imposed discrimination based on race." *Id.* at 2161 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). It is, after all, "a

sordid business, this divvying us up by race[,]" *Perry*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part), and "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race[,]" *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

Most relevant here, the Supreme Court has been clear for decades: racial classification in redistricting causes a "fundamental injury" to the individual rights of a person sorted by his race. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). Under the *Shaw II* reasoning, racial sorting causes an irreparable injury, *even if* it is justified. *Id*. In other words, unconstitutional racial sorting is undeniably irreparable harm, as Appellants have repeatedly explained. *See Soto Palmer* ECF No. 57 at 6–7; ECF No. 232 at 11.

At this point (starting on December 1), Appellants are being subjected to a map-drawing process that will not just "take into account" race—it will necessarily and inexorably fixate on particular racial targets that far exceed what the Equal Protection Clause permits or what Section 2 requires. That is because the court below, given its finding that a Section 2 violation occurred, has ordered that a "super" majority-minority district be drawn in the Yakima Valley that performs better for the Democrat Party's candidates. *See Perry*, 548 U.S. at 517 (Scalia, J., concurring in judgment in part and dissenting in part) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant

motivation and strict scrutiny is therefore triggered."). Compliance with that order will require the map drawers to put some citizens here, and others there, primarily based on their race, to achieve the desired percentage targets. No one disputes that this is court-ordered racial targeting.

Redrawing a majority Hispanic CVAP map to include a *greater* percentage of Hispanic CVAP is *not* justified by compliance with the VRA, as Appellants are likely to show on appeal. Therefore, any racial sorting that occurs in December will be unjustified and unconstitutional, thus irreparably harming Messrs. Trevino, Campos, and Ybarra.

Mr. Trevino lives in current LD-15 and will therefore be among those sorted based on race. But Messrs. Campos and Ybarra, as Hispanic voters in neighboring districts, are likely to be subjected to it as well in the same process. That is how map drawing operates. Intentionally increasing Hispanic CVAP in one district will necessarily involve moving in Hispanic voters from other neighboring districts because they are Hispanic.

For the reasons stated above, Appellants are likely to show that the Section 2 violation finding was erroneous. That reversal will eliminate the need for racial sorting in the imminent remedial phase. More basically, *Shaw II* stated that such racial sorting constitutes a "fundamental injury" to the individual, whether justified or not. 517 U.S. at 908.

Therefore, Appellants face irreparable harm now.

C. The Supreme Court's ruling in *Garcia* will affect (or foreclose) the remedy in this case.

This Circuit recognizes that a "court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of Ca.*, 593 F.2d 857, 863–64 (9th Cir. 1979). Others have likewise determined that "await[ing] a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in" a case is "at least a good . . . if not an excellent" reason to stay that case. *See, e.g.*, *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009).[3]

[3] *See also, e.g.*, *Nairne v. Ardoin*, No. 22-178-SDD-SDJ2022 U.S. Dist. LEXIS 155706, at *7 (M.D. La. Aug. 30, 2022) (staying case pending Supreme Court's decision in *Merrill* "in the interest of avoiding hardship and prejudice to the parties and in the interest of judicial economy"); *Johnson v. Ardoin*, No. 3:18-cv-625 (M.D. La. Oct. 17, 2019) (ECF No. 133) (granting stay pending en banc consideration of a Voting Rights Act issue); *United States v. Macon*, No. 1:14-CR-71, 2016 U.S. Dist. LEXIS 169380, at *4 (M.D. Pa. Dec. 7, 2016) (staying case pending Supreme Court resolution of similar issues); *Tel. Sci. Corp. v. Asset Recovery Sols., LLC*, No. 15 C 5182, 2016 U.S. Dist. LEXIS 581, at *8 (N.D. Ill. Jan. 5, 2016) (similar); *McGregory v. 21st Century Ins. & Fin. Servs., Inc.*, No. 1:15-cv-98, 2016 U.S. Dist. LEXIS 197541 at *12 (N.D. Miss. Feb. 2, 2016) (similar); *Bozeman v. United States*, No. 3:16-cv-1817-N-BN, 2016 U.S. Dist. LEXIS 140672, at *3 (N.D. Tex. Jul. 11, 2016) (similar); *Fernandez v. United States*, No. 4:16-CV-409-Y, 2016 U.S. Dist. LEXIS 140192, at *2 (N.D. Tex. Jul. 15, 2016) (similar); *Alford v. Moulder*, No. 3:16-CV-350-CWR-LRA, 2016 U.S. Dist. LEXIS 143292, at *7 (S.D. Miss. Oct. 17, 2016) (similar); *Kamal v. J. Crew Grp., Inc.*, Civil Action No. 15-0190 (WJM), 2015 U.S. Dist. LEXIS 172578, at *4 (D.N.J. Dec. 29, 2015) (staying action pending the

Here, the issues in *Soto Palmer* and *Garcia* are inextricably intertwined. Indeed, the majority's decision in *Garcia* assumed as much. (*See Garcia* ECF No. 81 at 2) (premising its mootness conclusion on the court's decision in *Soto Palmer*). So do Plaintiff-Appellees. *See* Reply in Supp. of Susan Soto Palmer et al. Mot. For Leave to Intervene, *Garcia v. Hobbs*, No. 23-467 (Nov. 20, 2023). Consequently, the issues and legal standards now pending before the Supreme Court in the related *Garcia* case are directly relevant to this case and will determine what (if any) remedy should be entered here. And the Supreme Court must render a decision on *Garcia* because of the appellate posture, increasing the likelihood that that case will directly affect this one, and soon.

As argued in the *Garcia* and *Trevino* filings now pending before the Supreme Court, *Garcia* should have been decided on the merits before *Soto Palmer*. Juris. Statement, *Garcia v. Hobbs*, No. 23-467 (Oct. 31, 2023); *see also* Pet. For Cert. Before J., *Trevino v. Soto Palmer*, No. 23-484 (Nov. 3, 2023). Mr. Garcia requested that the Supreme Court reverse or vacate the *Garcia* majority's errant jurisdictional dismissal and remand that case to the three-judge district court for consideration of

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Supreme Court's decision in a separate but related action, and citing decision of nine federal district courts staying similar cases); *Couick v. Actavis, Inc.*, No. 3:09-CV-210-RJC-DSC, 2011 U.S. Dist. LEXIS 10094, at *4 (W.D.N.C. Jan. 25, 2011) (similar); *Homa v. Am. Express Co.*, Civil Action No. 06-2985 JAP, 2010 U.S. Dist. LEXIS 110518, at *22–26 (D.N.J. Oct. 18, 2010) (similar); *Michael v. Ghee*, 325 F. Supp. 2d 829, 831–33 (N.D. Ohio 2004) (similar).

the merits. Petitioners in *Trevino* (the *Soto Palmer* Appellants) requested that the Court grant Appellants' petition for writ of certiorari before judgment and hold the *Soto Palmer* case in abeyance pending the results of *Garcia*. *See* Pet. for Cert. Before J., *Trevino v. Soto Palmer*, No. 23-484; *see also Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022).

Should the Supreme Court follow this course of action and remand *Garcia*, one of two scenarios will likely result. First, if the *Garcia* district court reaches the correct decision, Mr. Garcia will be victorious, and the *Garcia* district court can order the State to redraw its legislative map without race as the predominant consideration for LD-15. If the State appeals, the Supreme Court could hear both *Soto Palmer* and *Garcia* together. If the State does not appeal, and the panel's order becomes final and conclusive, the Supreme Court could then vacate the *Soto Palmer* decision and remand to the district court here to dismiss this proceeding as moot because the map enacted by the Redistricting Commission would be void, thereby eliminating the map that *Soto Palmer* Plaintiffs-Appellees challenged. (*See Garcia* ECF No. 81-1 at 11–12.)

Alternatively, if the *Garcia* district court follows through on what the panel majority telegraphed and finds that LD-15 was not a racial gerrymander, the result would likely be an immediate appeal of the three-judge district court's merits decision to the Supreme Court. At that point, the Supreme Court could—as in the

alternative scenario above—consider both cases simultaneously and issue a ruling that resolves the clash between the Equal Protection and Section 2 claims.

In either eventuality, it makes little sense for the remedial proceedings in *Soto Palmer* to continue. Surely, the proceedings above will have a bearing on the outcome of the remedial process below. Most directly, if the Supreme Court agrees that the *Soto Palmer* decision should be vacated and the case mooted, the current remedial process—in which the parties are now engaged—would be rendered a nullity. This alone warrants waiting to see how the Supreme Court addresses the issues now pending before it.

D. The interests of judicial economy favor granting a stay.

The "orderly course of justice" factor is synonymous with the interests of "judicial economy." *Naini v. King Cnty. Pub. Hosp. Dist. No. 2.*, No. C19-0886-JCC, 2020 U.S. Dist. LEXIS 15015, at *7 (W.D. Wash. Jan. 29, 2020). This factor is satisfied in cases that "will be easier to decide at some later date." *Sarkar v. Garland*, 39 F.4th 611, 619 (9th Cir. 2022). "[E]ven if a stay is not necessary to avoid hardship, a stay can be appropriate if it serves the interests of judicial economy." *Naini*, 2020 U.S. Dist. LEXIS 15015, at *7.

As explained above, the likely result of the *Garcia* and *Soto Palmer* appeals (including the *Trevino* Petition) is that the current *Soto Palmer* remedial phase will be an exercise in futility. Judicial economy disfavors proceeding with an intensive

remedial process—likely involving a special master and competing expert analyses—when that entire process will be rendered unnecessary by the Supreme Court's decision in *Garcia*.

Regardless of where this Court (or the trial court) stands on the merits of this case (or on any of the pending appellate proceedings), the prudent and efficient way to handle the present situation is to pause the remedial proceedings before the *Soto Palmer* district court, stay the merits appeal before this Court, and let the Supreme Court sort through and decide the myriad of related legal questions that affect both *Soto Palmer* and *Garcia*. To have the presently pending remedial process in *Soto Palmer* lead to a new map and potentially new elected representatives, only to have those changes quickly reversed in either the appellate proceedings of this case or *Garcia*, would lead to voter confusion and increased costs and burdens on the State. To avoid this confusion, the Court should stay the *Soto Palmer* remedial proceedings and merits appeal while the appellate process plays out in the Supreme Court.

E. The likely hardship to all parties from having to litigate a fact-intensive remedial process favors granting a stay.

Section 2 claims are fact- and resource-intensive inquiries. *Milligan*, 143 S. Ct. at 1503 ("Before courts can find a violation of § 2, . . . they must conduct 'an intensely local appraisal' of the electoral mechanism at issue, as well as a 'searching practical evaluation of the "past and present reality."'") (citation omitted). It would be a hardship on all parties to participate in a fact- and resource-intensive remedial

process that may likely be unnecessary. What's more, imposing a map that requires more racial sorting, where none is required by Section 2 (which Appellants, if proceeding to the merits, would be likely to show on appeal), is per se harm to Intervenors. *See Cooper v. Harris*, 581 U.S. 285, 292–93 (2017).

Furthermore, a denial of stay would put the voters of the greater Yakima Valley region at a grave risk that this Court may impose a remedial map that is then vacated by the Supreme Court (or even this Court). Going through a remedial process, only to later learn that it was all for nothing, would result in an extreme (and harmful) waste of party and judicial resources, and risk increasing voter mistrust in elections. Such a waste would necessarily harm all parties.

F. A stay will not harm Plaintiffs-Appellees.

By contrast, Plaintiffs-Appellees are unlikely to suffer harm or prejudice from a stay because they are likely to be in the same position either way. Until *Garcia* is resolved, Plaintiffs-Appellees will have no basis for assurance that—even if they are 100 percent satisfied with the result of the remedial process—this Court's or the *Garcia* district court's rulings will withstand appeal. Any remedial plan enacted based on an errant decision in this matter or *Garcia* would be doomed post-appeal. That means Plaintiffs-Appellees have little prospect of being differently situated without a stay as with one—except that, without one, they will have exhausted an enormous amount of resources, including in legal fees. Either way, the path to any

enduring victory for them will inevitably be *through* whatever decisions are reached in the pending appeals.

It also must be emphasized that "[t]he harms that flow from racial sorting include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Bethune-Hill*, 580 U.S. at 187 (internal quotation omitted). That harm works against all Washingtonians, including Plaintiffs-Appellees.

Therefore, the balance of the equities also weighs in favor of staying this case.

CONCLUSION

Because the standard for granting a stay pending decisions in the appeals of this case and *Garcia* to the Supreme Court favors granting the stay, this Court should (1) stay the *Soto Palmer* district court's remedial process pending all appeals and (2) stay the *Soto Palmer* merits appeal before this Court pending resolution of the *Trevino* appeal and the *Garcia* case by the Supreme Court.

Given the time-sensitive nature of this stay, the expedited remedial timeline, and the appeals pending before the Supreme Court, Appellants request that Plaintiffs respond to this motion by December 15 (i.e., the ordinary time permitted by Federal Rule of Appellate Procedure 27(a)(3)(A) without extension). Appellants will then

file a reply the next business day on December 18 and request a ruling from this Court by December 22, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(B) and Circuit Rule 27-1(1)(d) because this motion contains 4,616 words spanning 19 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font with Microsoft Word.

Dated: December 5, 2023

/s/ Jason Torchinsky
Jason Torchinsky

CERTIFICE OF SERVICE

I hereby certify that on December 5, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will notify all registered counsel.

/s/ Jason Torchinsky
Jason Torchinsky