UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellees,

and

JOSE TREVINO, ISMAEL CAMPOS, and ALEX YBARRA,

Intervenor-Defendants – Appellants.

No. 23-35595

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

PLAINTIFFS-APPELLEES' BRIEF IN OPPOSITION TO INTERVENOR-APPELLANTS' MOTION TO STAY INJUNCTION AND LOWER COURT PROCEEDINGS

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INTRODUCTION

This Court should deny Intervenor-Appellants' ("Intervenors") motion to stay the injunction and remedial proceedings ordered by the district court. Intervenors, three individuals in this case by permissive intervention only, lack standing to appeal and would suffer no harm in the absence of a stay. Moreover, they waited *three months* after the issuance of the judgment below and *two months* after appealing to this Court to request a stay. Despite this inexcusable delay, Intervenors now boldly demand that this Court issue relief by December 22, even though the remedial process in the case has been underway for over a month. The Court lacks jurisdiction to grant a stay, and Intervenors are in any event not entitled to it as shown below.

FACTS

On August 10, 2023, after a year and half of litigation and a four-day trial, the district court found that Washington's 15th Legislative District (LD15) violated Section 2 of the Voting Rights Act. Int. App. 66.[1] Intervenors filed a Notice of Appeal to this Court on September 8, but Secretary Hobbs and the State of Washington—the defendants below—did not appeal. Int. App. 99. On October 31, Intervenors' counsel (representing Mr. Garcia), filed a Jurisdictional Statement with the U.S.

[1] Citations to the *Soto Palmer v. Hobbs* district court docket that appear in Intervenor-Appellants' Appendix, ECF No. 34-2, are cited as "Int. App." Citations to additional documents included in Plaintiff-Appellees' Appendix are cited as "Pl. App."

Supreme Court appealing the dismissal of *Garcia* as moot.[2] No. 23-467. On November 3, Intervenors filed a petition for writ of certiorari before judgment in this case. No. 23-484. On November 8, *three months* after the district court issued its opinion and two months after their appeal to this Court, Intervenors asked the district court for a stay.

Pursuant to the district court's orders, the remedial process is well underway to ensure that a new map will be in place by March 25, 2024. Int. App. 97; Pl. App. 102. The parties held a meet and confer on remedial matters on November 16, 2023, and submitted proposed maps, expert reports, and special master proposals on December 1; responses are due December 22, and replies January 5.

The district court properly denied Intervenors' stay request on November 27. Int. App. 108. Intervenors waited *another eight days*—until after the first round of remedial briefing in the district court, Pl. App. 1—to ask this Court to grant a stay.

ARGUMENT

Intervenors lack standing to appeal and regardless fail all four stay factors. In evaluating an application for a stay pending appeal, this Court must assess whether (1) Intervenors have made a strong showing of likelihood of success on the merits; (2) Intervenors will be irreparably injured absent a stay; (3) a stay will substantially

[2] The *Garcia* case involves a claim that LD15 was an unconstitutional racial gerrymander. Intervenors' counsel also represent Mr. Garcia.

injure other parties; and (4) where the public interest lies. *Flores v. Barr*, 977 F.3d 742, 745-46 (9th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). A stay pending appeal is "extraordinary relief" and requires the applicant to satisfy a "heavy burden." *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J. chambers). In deciding whether to stay this matter pending a separate related action, this Court should also balance what best serves "the orderly course of justice." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005). Each factor weighs decisively against granting a stay.

I. Intervenors lack standing to appeal.

Intervenors, individuals with no legally cognizable interest, lack standing to appeal this case, let alone stay the entire remedial phase pending appeal. For this reason alone, Intervenors' motion fails. For standing, a litigant must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations omitted). Appellants seeking to defend on appeal must also meet this Article III requirement. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) ("[S]tanding 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance'") (internal citation omitted); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (citing *Wittman v. Personhuballah*, 578 U.S. 539 (2016)); *Diamond v. Charles*, 476 U.S.

54, 56, 68 (1986). This ensures that "the decision to seek review . . . is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond*, 476 U.S. at 62 (internal citation omitted).

Intervenors cannot establish standing to defend on appeal. In granting Intervenors only permissive intervention, the district court expressly found that "intervenors lack a significant protectable interest in this litigation." Pl. App. 120. Two of the three, Ybarra and Campos, *do not even reside or vote in LD15*, and thus have no cognizable interest in the district's configuration. *United States v. Hays*, 515 U.S. 737, 744-45 (1995) (a voter who "resides in a racially gerrymandered district . . . has been denied equal treatment" but other voters "do[] not suffer those special harms"); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015); Pl. App. 98-99.

Intervenors Campos and Trevino have asserted an interest "in ensuring that any changes to the boundaries of [their] districts do not violate their rights to 'the equal protection of the laws'" and "in ensuring that Legislative District 15 and its adjoining districts are drawn in a manner that complies with state and federal law." Pl. App. 114. But neither have alleged any improper racial classification—nor could they—and a blanket interest in "proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [the intervenors] than it

does the public at large[,] does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *Allen v. Wright*, 468 U.S. 737, 754-55 (1984).

Moreover, the district court has not ordered *Intervenors* "to do or refrain from doing anything." *Hollingsworth*, 570 U.S. at 705 (holding that non-governmental intervenor-defendants lack standing to appeal); *Republican Nat'l Comm. v. Common Cause of Rhode Island*, 141 S. Ct. 206 (2020) (Mem.) (denying stay of consent decree between state officials and plaintiffs because "no state official has expressed opposition" and intervenor "lack[s] a cognizable interest in the State's ability to enforce its duly enacted laws") (internal quotations omitted). Intervenors have no role in enforcing state statutes or implementing any remedial plan.[3] Thus, Intervenors' only interest in reversing the district court order is "to vindicate the [] validity of a generally applicable [Washington] law." *Hollingsworth*, 570 U.S. at 706. But the Supreme Court has repeatedly held that "such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Id.*

Intervenor Ybarra's status as a legislator also does not suffice to confer standing. Interests he has asserted in "avoiding delays in the election cycle and in knowing ahead of time which voters will be included in his district," Pl. App. 116,

[3] It is insufficient that Intervenors have an adversarial position despite the State not appealing. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond*, 476 U.S. at 62, 68. Indeed, intervenors did not even bother to submit a proposed remedial plan.

are not particularized enough for Article III standing—every party in this litigation (and the public) has an interest in an orderly election—and no legislator is entitled to advance notice of his constituents.[4] In addition, the district court's remedial schedule ensures that Rep. Ybarra will know his district's boundaries before the candidate filing date. Pl. App. 27. Indeed, given the interests he asserts, a *stay* would harm him. Nor does Rep. Ybarra have standing because of any argument that the remedial process *might* make his reelection campaign more difficult or costly. No official is guaranteed reelection (let alone an easy one) nor particular district lines, and to assert standing a litigant "must do more than simply allege a nonobvious harm." *Bethune-Hill*, 139 S. Ct. at 1951 (citing *Wittman*, 578 U.S. at 543-45). Similarly, individual legislators have "no standing unless their own institutional position" is affected. *Newdow v. United States Cong.*, 313 F.3d 495, 498-99 (9th Cir. 2002). Nothing in this litigation impacts Rep. Ybarra's institutional position or powers, and he is only one legislator of many, without the ability to assert harm on behalf of others. *Bethune-Hill*, 139 S. Ct. at 1953-54.

Finally, for the reasons stated above, Intervenors have no concrete or imminent interest in an appeal of any remedy either. The district court has not yet

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

adopted any remedial plan—any allegations that Intervenors may be subject to racial classification or that race predominated are purely speculative. Pl. App. 115 ("[I]t would be premature to litigate a hypothetical constitutional violation…when no such violative conduct has occurred"); *Cooper v. Harris*, 581 U.S. 285, 290 (2017); *Hays*, 515 U.S. at 745 ("[A]bsent specific evidence" showing a voter has been subject to racial classification, the voter "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve" and lack standing). Moreover, nothing about Plaintiffs' proposed plans suggest that race predominated. To the contrary, Plaintiffs' mapping expert "did not consider race or racial demographics in drawing the remedial plans." Pl. App. 14. Thus, Plaintiffs' plans would not prompt, let alone fail, strict scrutiny. Intervenors cannot seek a stay of a Section 2 liability determination because they anticipate disliking an as-yet-unknown remedial district.

II. Intervenors are unlikely to succeed on the merits.

Even if Intervenors could appeal, they are unlikely to succeed on the merits. Likelihood of success "is the most important" factor for a stay pending appeal. *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 952 (9th Cir. 2020). On appeal, the district court's legal conclusions are reviewed *de novo* and its factual findings, "including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates §2" will be reviewed for clear error. *Gonzalez v. Arizona*, 677 F.3d

383, 406 (9th Cir. 2012) (en banc); *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). The district court applied the proper legal standards and did not clearly err in its findings regarding the *Gingles* preconditions and the totality of the circumstances. Intervenors' claims otherwise fail.

First, the district court did not err in finding that the Yakima Valley region's Latino population is sufficiently large and geographically compact to constitute a majority in a legislative district. The State's expert, Dr. Alford, testified that Plaintiffs' illustrative plans "are 'among the more compact demonstration districts [he's] seen' in thirty years." Int. App. 75. Intervenors falsely claim that the district court "considered only the compactness of the outer boundaries in Plaintiffs-Appellees' demonstrative maps, and not the compactness of Hispanic voters within those boundaries," ECF No. 34-1 at 6. But the district court heard expert and lay witness testimony establishing that "Yakima and Pasco," two Latino population centers, "are geographically connected by other, smaller, Latino population centers" and that "Latinos in the Yakima Valley region form a community of interest based on more than just race." Int. App. 75; Pl. App. 38, 46-52.[5] Moreover, Intervenors' expert stated at trial that he had no opinion on whether LD15 was compact, Pl. App. 81 and "acknowledged . . . that he does not know anything about the communities

[5] Intervenors' compactness argument is incorrect and irrelevant. Plaintiffs demonstrated it is possible to draw a performing majority-Latino district without combining Yakima and Pasco.

in the Yakima Valley region other than what the maps and data show." Int. App. 76. And contrary to Intervenors' arguments otherwise, ECF No. 34-1 at 7, Plaintiffs filed *five* proposed maps in their December 1 remedial briefings that perform to elect the Latino candidate of choice. Pl. App. 3, 13. The record evidence contradicts Intervenors' claims and demonstrates failure on the merits of their appeal.

Second, the district court did not err in finding that voting in the Yakima Valley region is racially polarized. Contrary to Intervenors' assertions, the district court "conduct[ed] 'an intensely local appraisal' of the electoral mechanism at issue, as well as a 'searching practical evaluation of the past and present reality.'" *Allen v. Milligan*, 599 U.S. 1, 19 (2023) (internal citation omitted). The district court's findings are consistent with the opinions of all four quantitative experts, including Intervenors', that "Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied." Int. App. 76. For example, Intervenors' expert found cohesion among Latino voters in LD15 in 10 of the 11 elections he analyzed from 2018-2020. Pl. App. 110, 74-80. Further, the primary drawer of LD15 admitted he would have to "close [his] eyes" not to see the clear pattern of strong Latino support for and white bloc voting against the same candidates while drawing districts in the area. Pl. App. 90, 87-89. Additional qualitative evidence further established Latino cohesion. Pl. App. 37-38.

The same is true for *Gingles* 3. The data and opinions of Intervenors' and the State's experts, undisputed by Intervenors, established "that white voters in the Yakima Valley region vote cohesively to block the Latino-preferred candidates in the majority of elections." Int. App. 77; Pl. App. 38-41. This is particularly true when election contests featured Spanish-surnamed candidates, leading the State's expert to conclude there is "a real ethnic effect on voting in this area." Pl. App. 70-71.

Moreover, the district court did not "ignor[e]" the 2022 election of a Latina Republican, Nikki Torres, to LD15. ECF No. 34-1 at 13. Rather, the district court carefully weighed the testimony and analyses regarding that election, including testimony from Drs. Barreto and Collingwood that Latino voting in the election was cohesive at levels consistent with past elections in favor of Lindsey Keesling, the losing candidate, while white voters cohesively preferred Ms. Torres, the winning candidate. Int. App. 77-78; Pl. App. 93-94, 82-84. In addition, LD15's 2022 election is a "special circumstance" with less probative value as it took place during the pendency of VRA litigation and featured a severely underfunded Latino-preferred candidate nominated as a write-in. Pl. App. 40; *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557-58 (9th Cir. 1998) (elections "not representative of the typical way in which the electoral process functions" are less probative); *Gingles*, 478 U.S. at 75-76.

Third, the district court applied the proper legal standards and did not err in finding that the Yakima Valley region's Latino voters do not, under the totality of the

circumstances, have an equal opportunity to elect state legislative candidates of their choice. The district court made numerous findings related to the Senate Factors and other relevant regional factors. Int. App. 79-93. Intervenors do not establish that they are likely to show otherwise.

Intervenors contend that "the [district] court found that certain 'usual burdens of voting' evidenced an abridgment of the right to vote," ECF No. 34-1 at 8. Intervenors neglect to elaborate, but presumably take issue with the district court's findings regarding the "official discrimination that impacted and continues to impact [Latino voters'] rights to participate in the democratic process" as well as "unrebutted evidence of . . . electoral practices that may enhance the opportunity for discrimination against the minority group." Int. App. 82-83. But a long history of official, voting-related *racial discrimination* including English literacy tests, failure to comply with federal law and provide bilingual election materials, and dilutive at-large election systems are not "a usual burden of voting." Pl. App. 42-44. Nor are practices such as disparate signature rejection.[6] Indeed, due to this history, the State even admitted that under the totality of the circumstances, Hispanic voters in LD15

[6] In fact, disparate signature rejection for Latino voters is so unusual that Yakima and Benton counties agreed to settle claims regarding them and alter their signature verification processes. *Reyes v. Chilton*, 4:21-cv-05075 (E.D. Wash. 2023), ECF Nos. 195, 199.

are less able to participate in the political process and elect candidates of their choice than white voters. Pl. App. 96.

Next, Intervenors misunderstand the proper legal standard in asserting that the district court "failed to identify the required causal nexus . . . brushing aside the evidence that partisanship, not race, drives voting patterns in the Yakima Valley." ECF No. 34-1 at 8. The Ninth Circuit has rejected similar arguments, *see Old Person v. Cooney*, 230 F.3d 1113, 1128 (9th Cir. 2000), and *Gingles* makes clear that "[i]t is the difference between the choices made by [minorities] and whites—not the reasons for that difference—that results in [minorities] having less opportunity than whites to elect their preferred representatives." 478 U.S. at 62-63, 74 (plurality); *id.* at 100 (O'Connor, J., concurring). Even so, the district court weighed Intervenors' scant proof of partisanship as the driving force of Yakima Valley's voting patterns. Intervenors' bare assertions, however, simply did not outweigh Plaintiffs' substantial evidence that Latinos in the region "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." Int. App. 96. Moreover, Intervenor Trevino testified that Latino Republican candidates face racist incidents while campaigning for office in the Yakima Valley. Pl. App. 123. Finally, Mr. Garcia testified to racial discrimination he faced from the State Republican Party as a Latino candidate running for Congress in the Yakima

Valley. In Mr. Garcia's own words, this discrimination "greatly affected th[e] election, the outcome, and suppressed the Latino vote." Pl. App. 105-106.

Finally, the district court joined many others in finding that a majority-minority CVAP district[7] can dilute the minority's voting power where, as here, they still cannot elect candidates of choice.[8] *See, e.g., Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017) ("[T]he existence of a majority HCVAP in a district does not, standing alone, establish that the district provides Latinos an opportunity to elect, nor does it prove non-dilution."); *Pope v. Cnty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012); *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 933 (8th Cir. 2018). Because the district court applied the proper legal standards and did not clearly err in its factual determinations, this "most important" factor weighs heavily *against* a stay.

III. Intervenors will suffer no harm absent a stay.

Irreparable harm absent a stay is the second of the two "most critical" factors in consideration of a stay pending appeal. *Mi Familia Vota*, 977 F.3d at 952 (citation

[7] When adopted LD15 was *50.02%* Hispanic CVAP. Pl. App. 100.

[8] Moreover, a minority *candidate*, like Nikki Torres, is not automatically the minority *candidate of choice*. *LULAC v. Perry*, 548 U.S. 399, 438-41 (2006) (redistricting diluted Latino voting strength because Latino voters were near ousting non-Latino-preferred Latino incumbent). Indeed, testimony from Drs. Barreto and Collingwood confirms that she was not. Int. App. 77-78.

omitted). The claimed irreparable harm must be "*likely* to occur;" the mere "possibility of irreparable injury" is insufficient to grant a stay. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018) (internal citations and quotations omitted) (emphasis in original). Intervenors admit the critical role of irreparable harm, ECF No. 34-1 at 5, but their attempts to demonstrate it with unsupported speculation about "racial sorting" fall flat. This failure dooms their stay application. *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011).

The remedial process Intervenors seek to stay already illustrates their argument is meritless. Plaintiffs proposed five plans, all created by a mapmaker who "did not consider race or racial demographics in drawing the remedial plans" and who "did not make visible, view, or otherwise consult any racial demographic data while drawing districts." Pl App. 14, 4. The purported threat that the district court's order would necessarily result in "racial targets," ECF No. 34-1 at 10, has not materialized and does not reflect the reality of the ongoing remedial process. Similarly, Intervenors' assertion that the district court "has ordered that a 'super' majority-minority district be drawn," *id.*, is fabricated and simply incorrect. Indeed, Intervenors can cite to no statement by the district court to support it. Moreover, none of Plaintiffs' remedial plans contain a "super majority-minority" district.[9]

[9] Further, a *remedy* for a VRA violation, unlike at the liability stage, does not require a majority-Latino district. Rather, the remedial district must simply provide a fair

Even if the Court were to adopt a remedial plan that considered race, a district is not an unconstitutional racial gerrymander if the VRA requires its race-conscious drawing, as Intervenors acknowledge. ECF No. 34-1 at 9. To the extent they now argue that any remedial plan ordered to comply with the VRA is a racial gerrymander, such an argument is flatly inconsistent with the Supreme Court's recent precedent. *See Allen*, 599 U.S. at 41. Intervenors' assertion that even where required for VRA compliance, consideration of race nevertheless causes an "irreparable injury" is nonsensical. Intervenors will not be harmed by a remedial process proceeding according to established precedent that may well result in a district in which they do not even reside. Consideration of race in fashioning a Section 2 remedy does not constitute harm. *Allen*, 599 U.S. at 30. Intervenors face no harm warranting a stay, let alone irreparable harm.

Finally, Intervenors' dilatory stay request in the district court significantly undermines the urgency of their motion. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (denying "emergency stay" pending appeal filed after "unexplained delay" of 56 days). Rather than moving for a stay when the district court issued its judgment—or in the *three months* that followed—Intervenors waited until three weeks before remedial plans and briefing were due to demand a stay. Intervenors

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"opportunity" for minority voters to "participate in the political process and . . . elect representatives of their choice." *Milligan*, 599 U.S. at 25; *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009).

offered no explanation for the *90 days* that elapsed between the issuance of the district court opinion and the filing of their stay application, strongly suggesting they face no impending harm. *See Valeo Intell. Prop., Inc. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D. Wash. 2005) (noting that a "three-month delay [was] inconsistent with [movant's] insistence that it faces irreparable harm"). After the district court denied their stay, they waited *another* eight days (and four days after Plaintiffs filed their remedial submission in the district court) before asking this Court to stay the proceedings, again demonstrating the lack of actual imminent harm.

IV. Plaintiffs will suffer irreparable harm if the district court's injunction and remedial proceedings are stayed.

Plaintiffs will be irreparably harmed and "substantially injure[d]" if the case is stayed. *Nken*, 556 U.S. at 434. It is well established that an infringement of voting rights constitutes irreparable injury. *See, e.g., Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1347-48 (N.D. Ga. 2015); *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). And there is no "adequate legal remedy" once that right is abridged in an election. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress.").

This is precisely the irreparable harm that Plaintiffs will suffer if this Court stays any part of this case. All parties, including Intervenors, agreed that "March 25,

2024 is the latest date a finalized legislative district map must be transmitted to counties without significantly disrupting the 2024 election cycle." Pl. App. 102. If a stay is granted, the appellate briefing schedules in this case and *Garcia* would make it virtually impossible for those matters to be resolved in time for the remedial process to restart, let alone complete, prior to the March 25 deadline. *See, e.g.,* ECF No. 1-1 (this Court setting Dec. 21, 2023, Jan. 22, 2024, and Feb. 12, 2024 deadlines for opening brief, response, and reply).

Intervenors fail to address the harm that Plaintiffs would face if a stay is granted. To say that Plaintiffs "have little prospect of being differently situated without a stay as with one," ECF No. 34-1 at 17, is nonsensical. Without a stay, Plaintiffs will vote in a lawful district that remedies the dilution of their voting strength proved at trial; with a stay, they will be forced to endure another election under discriminatory maps adjudged by a federal court to violate the law. As the district court noted in denying the stay below, Intervenors "provide no estimate of how long the requested stay would be in place, nor do they acknowledge that failure to create remedial maps in the next few months will, as plaintiffs proved at trial, deprive plaintiffs of their voting rights in the next election cycle" Int. App. 109. This substantial harm to Plaintiffs makes this factor weigh heavily against a stay.

V. A stay harms the orderly administration of justice and public interest.

Intervenors suggest that this case may be "easier to decide at some later date." ECF No. 34-1 at 15. But this case has already been decided. Intervenors lost. Intervenors also assert that the "likely result" of their last-ditch appeals to the Supreme Court will materially affect the remedial process already underway. *Id.* But delaying the remedial process is neither "prudent" nor "efficient," and orderly justice is served by denying the stay application.

Intervenors list several cases where district court proceedings were stayed pending action by the Supreme Court to suggest the same would be appropriate here. ECF No. 34-1 at 12 n.3. But in *all of them*, the Supreme Court had already granted review (or heard argument) in the case in question.[10] That is a far cry from the current situation where Intervenors have simply asked the Supreme Court to review this case without any indication that it will oblige. If filing a petition for certiorari were all it took to grind a district court's remedial proceedings to a halt, opposing parties would always file, stymying efforts to timely implement a remedy.

At minimum, an applicant for a stay pending certiorari must demonstrate "reasonable probability that [the Supreme] Court would eventually grant review and a fair prospect that the Court would reverse." *Merrill v. Milligan*, 142 S. Ct. 879, 880

[10] Intervenors also cite two instances of stays pending action by circuit courts in circumstances totally different than here, making them similarly unavailing.

(2022) (mem) (Kavanaugh, J., concurring). Intervenors make no such showing, and the Court's call for responses from Plaintiffs and the State is a routine procedural step that does not indicate otherwise. Moreover, after "declin[ing] to recast" Section 2 jurisprudence in *Allen v. Milligan*, the Supreme Court is unlikely to now upend "nearly forty years" of precedent not even a year later. *Allen*, 599 U.S. at 26.

Intervenors ignore all this, and instead engage in hypotheticals about how a series of unlikely rulings in their appeal of this case or *Garcia* could justify a stay. ECF No. 34-1 at 13-15. Intervenors claim that if the remedial process continues, a later decision by an appellate court *might* affect the new map or new elected officials resulting from a remedy. *Id.* at 16. But Intervenors fail to describe the alternate—more likely—outcome if a stay is granted: affirmance by the appellate courts would come too late to restart the remedial process and provide remedy before the election. While Intervenors "may prefer a particular order of resolution, they do not demonstrate the orderly course of justice would be better served through imposition of a stay." *Hunichen v. Atonomi LLC*, C19-0615-RAJ-SKV, 2021 WL 9567172, at *2 (W.D. Wash. May 25, 2021).[11] This case and *Garcia* are indeed "inextricably

[11] The Supreme Court often denies stay requests in similar circumstances. *See, e.g., Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J. in chambers) (refusing to stay remedial plan in vote dilution case); *Bethune-Hill*, 139 S. Ct. 914 (declining stay of injunction against state's plan); *McCrory v. Harris,* 577 U.S. 1129 (2016) (same); *Wittman,* 578 U.S. at 1125 (same); *LULAC v. Perry*, 567 U.S. 966 (2012) (declining to stay injunction adopting remedial plan in §2 case).

intertwined," ECF No. 34-1 at 13, but Intervenors have the argument exactly backwards—*Garcia* depends on the outcome in *Soto Palmer*. Intervenors' counsel admitted as much while litigating both cases. Pl. App. 109 (Intervenors admitting "resolution of the claim in *Garcia* ***necessarily turns on the claims in*** [*Soto Palmer*]."

Finally, the public interest would not be served by granting a stay. *Flores*, 977 F.3d at 745 (citing *Nken*, 556 U.S. at 434). Intervenors identify this as a factor to consider, ECF No. 34-1 at 5, but effectively neglect to address it. The interest of the public in having a finalized—and non-discriminatory—legislative district for the 2024 election is significant. When the defendant in the ongoing Louisiana redistricting challenge sought a stay of the remedial process pending appeal, it was denied because the litigation "should be resolved in advance of the 2024 [] elections." *Robinson v. Ardoin*, No. 23A281, 2023 WL 6886438, at *1 (U.S. Oct. 19, 2023) (Jackson, J., concurring). So too here.

CONCLUSION

For the foregoing reasons, Intervenors' motion to stay the injunction and lower court proceedings should be denied, and the remedial process should proceed so that a VRA-compliant legislative district can be in place for the 2024 election cycle.

Dated: December 15, 2023

Respectfully submitted,

/s/*Chad W. Dunn*

Chad W. Dunn
Sonni Waknin
UCLA VOTING RIGHTS PROJECT
3250 Public Affairs Building
Los Angeles, CA 90095
Telephone: 310-400-6019
Chad@uclavrp.org
Sonni@uclavrp.org

Edwardo Morfin
MORFIN LAW FIRM, PLLC
2602 N. Proctor Street, Suite 205
Tacoma, WA 98407
Telephone: 509-380-9999

Mark P. Gaber
Simone Leeper
Aseem Mulji
Benajmin Phillips
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
mgaber@campaignlegal.org
sleeper@campaignlegal.org
amulji@campaignlegal.org
bphillips@campaignlegal.org

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
55 W. Monroe St., Ste. 1925
Chicago, IL 60603
aharless@campaignlegal.org

Thomas A. Saenz
Ernest Herrera
Leticia M. Saucedo
Erika Cervantes
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
643 S. Spring St., 11th Fl.
Los Angeles, CA 90014
Telephone: (213) 629-2512
tsaenz@maldef.org
eherrera@maldef.org
lsaucedo@maldef.org
ecervantes@maldef.org

Counsel for Plaintiffs-Appellees

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 5018 words spanning 20 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 15, 2023

/s/Chad W. Dunn
Chad W. Dunn

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 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/Chad W. Dunn
Chad W. Dunn