No. 23-484

In the Supreme Court of the United States

JOSE TREVINO, ET AL., *Petitioners*,

v.

SUSAN SOTO PALMER, ET AL., *Respondents.*

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SUSAN SOTO PALMER, ET AL.

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QUESTIONS PRESENTED

1. Is a grant of certiorari before judgment warranted where petitioners lack standing and the petition is premised on a pending jurisdictional statement in a separate case where this Court lacks jurisdiction?

2. Should principles of constitutional avoidance, docket management discretion, and settled law on three-judge district courts be abandoned where a constitutional claim was brought in a separate case by a different party months after a statutory claim?

3. Was the district court's finding that the *Gingles* preconditions were satisfied clearly erroneous when it was based on unrebutted expert and lay witness testimony about the compactness and cohesiveness of the minority community?

4. Was the district court's finding that the totality of the circumstances do not afford an equal opportunity for Latino voters to elect candidates of choice clearly erroneous when it was based on unrebutted expert and lay testimony about past and current discrimination?

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny Petitioners' ("Intervenors")[1] invitation to bypass the normal appeals process and grant certiorari before judgment. This case falls far short of the extraordinary circumstances that would warrant such a step.

First, the Court lacks jurisdiction to entertain Intervenors' appeal on the merits because they lack standing to appeal. Neither the State of Washington nor the Secretary of State—the governmental defendants in the case—has appealed the district court's judgment. Only Intervenors—three citizens who were granted permissive intervention and whom the district court found have no legally protectable interest—have appealed. Only one resides in the district, and none has any role in implementing elections.

Second, Intervenors ask this Court to bypass the Ninth Circuit based solely on their counsel's filing of a direct appeal in this Court in the *Garcia* case. But this Court lacks jurisdiction to hear that appeal because it did not involve the grant or denial of an injunction. With the premise for their request for certiorari before judgment incorrect, Intervenors' request is groundless.

Third, Intervenors' contention that the district court was required to decide the constitutional claim raised in the *Garcia* matter before the *Soto Palmer* Section 2 Voting Rights Act claim is meritless. The

[1] Petitioners were intervenors-defendants in the district court.

district court properly applied constitutional avoidance to decide this case first, and Intervenors specifically requested that it do so.

Fourth, Intervenors have not shown any clear error in the district court's analysis of the merits of Plaintiffs' Section 2 claim. Their objections to the *Gingles* analysis are belied by the record evidence and their own expert's testimony. Their attempt to make this case about partisan politics is contrary to the evidence and the district court's factual findings. And their totality of circumstances objections are likewise unfounded.

Intervenors' kitchen-sink approach to their petition reveals the fundamental reality that the district court adhered to this Court's precedent and issued findings of fact that are not clearly erroneous. Intervenors have no standing to appeal its decision, and their petition should be denied.

STATEMENT OF THE CASE

I. Redistricting in Washington State.

Article II, section 43 of the Washington Constitution assigns redistricting to a bipartisan Commission consisting of four voting Commissioners and one non-voting chair. The majority and minority leaders in both legislative houses each appoint one of the four voting Commissioners, who in turn vote to appoint a chair. Wash. Const. art. II, § 43(2).

At least three Commissioners must approve state legislative and congressional redistricting plans and submit them to the Legislature no later than November 15th of the redistricting year. Wash. Const.

art. II, § 43(6). The Legislature then has 30 days during the next regular or special session to adopt, by two-thirds vote, amendments affecting no more than two percent of the population of any district. *Id.* § 43(7). The plans take effect upon amendment (if any) or after the 30-day period expires, whichever comes first. *Id.*; RCW 44.05.100.

II. Washington enacts LD15 in violation of § 2 of the Voting Rights Act.

The 2021 Commission included April Sims (appointed by the House Democratic Caucus), Brady Piñero Walkinshaw (appointed by the Senate Democratic Caucus), Paul Graves (appointed by the House Republican Caucus), and Joe Fain (appointed by Senate Republican Caucus).

In June 2021, the state Attorney General's office educated the Commissioners about § 2's requirements and recommended they consult a statistical expert to assess racially polarized voting and identify minority-preferred candidates to aid in drawing an opportunity district where required. Ex.55 at 3:50, 39:12-45:7. After the release of the Census Bureau's P.L. 94-171 data, the four Commissioners began drawing legislative districts and announced their first public map proposals in September 2021.

Soon thereafter, the Senate Democratic Caucus hired Dr. Matt Barreto to conduct a statistical assessment of the *Gingles* preconditions. Doc.208 at 620:2-23. Dr. Barreto identified a large geographic concentration of Latino voters in the Yakima Valley region and ran ecological inference analyses of a dozen prior election contests in the region from 2012 to

2020—all showing significantly polarized voting between white and Latino voters. Ex.178 at 2-4, 18-30. In every contest he analyzed, Dr. Barreto identified the candidate preferred by Latino voters. *Id.* at 31. He also offered four reasonably configured maps that would give Yakima Valley Latinos a real opportunity to elect candidates of their choice. *Id.* at 8, 35-38.

Every Commissioner received Dr. Barreto's analysis. Ex.214. In response, Commissioners Sims and Walkinshaw released new public map proposals that would have provided Latinos equal opportunity to elect their preferred candidates. Exs.515-16. Although Commissioners Sims and Walkinshaw publicly encouraged their Republican counterparts to agree to a VRA-compliant district in the Yakima Valley region, they abandoned the effort privately as "it became very clear, very quickly, that was not going to happen." Doc.209 at 790:10-14. More concerned with securing partisan advantage elsewhere in the state, the two Democratic Commissioners instead gave Republican Commissioner Paul Graves the pen to draw the Yakima Valley districts however he pleased and assured him they would vote for whatever districts he drew, regardless of racial makeup or compliance with § 2. *Id.* at 790:15-20, 791:7-16.

Commissioner Graves set out to draw a district in the Yakima Valley region that had a very slight majority Hispanic citizen voting age population (HCVAP) but would not in fact perform to elect Latino candidates of choice—a scheme he hoped would "protect against any lawsuit" brought under § 2.

Ex.388 at 5. The legislative redistricting plan he ultimately drew, which the Commission approved and the Legislature enacted, had no Latino opportunity district. That plan's LD15 had a HCVAP of about 50.02% (based on then-available CVAP estimates) with boundaries that cracked Latino communities along the Lower Yakima Valley, resulting in far less than equal opportunity for Latinos to elect their preferred candidates.

III. Plaintiffs sue to invalidate LD15 as a violation of § 2.

In January 2022, Plaintiffs sued to challenge LD15, which has the *façade* of an opportunity district but results in dilution of Latino electoral opportunity in violation of § 2.[2] Defendants included Secretary of State Steven Hobbs (who took no position on the merits) and the State's legislative leaders (who were dismissed). The State of Washington was later joined to defend the maps. Pet.App.1-2. Plaintiffs moved for a preliminary injunction to enjoin LD15's use in the 2022 state legislative elections, which District Court Judge Robert Lasnik denied on *Purcell* grounds. Doc.66.

[2] In addition to their discriminatory results claim, Plaintiffs also assert that LD15 was intentionally drawn to dilute Latino voting power in violation of § 2. The district court did not rule on this claim.

IV. Commissioner Graves recruits a plaintiff to challenge LD15, which he drew, as a racial gerrymander.

In March 2022, a third party, Benancio Garcia III, also filed suit against Secretary Hobbs to challenge LD15 as a racial gerrymander under the Fourteenth Amendment. The case was assigned to Judge Lasnik as a related matter before going to a three-judge district court per 28 U.S.C. § 2284. Pet.App.2. Secretary Hobbs took no position, and the State was joined as a defendant. Like Plaintiffs in this case, Mr. Garcia sought to invalidate LD15 and have a new valid plan enacted in its place. *Garcia* Doc.1 ¶¶72-77.

The circumstances surrounding Mr. Garcia's case, however, are unusual. His attorneys include Rep. Drew Stokesbary, a state house member who voted *for* the challenged legislative redistricting plan. Rep. Stokesbary is a friend and former colleague of Commissioner Graves. *See* Doc.209 at 719:1-15; Doc.127-3 at 204:25-205:2. The trial record shows that Commissioner Graves (who *drew* LD15) was also the chief architect of Mr. Garcia's claim *challenging* that district. He worked not only to line up potential counsel and raise funds to litigate the case but also recruited Mr. Garcia himself as its sole plaintiff. *See* Exs. 399-401. Despite testifying that he tried to "light the fire" to have this racial gerrymandering claim filed to forestall relief in Plaintiffs' § 2 action, he did not actually believe the claim was meritorious. Doc.127-3 at 287:4-6 ("Q: You don't believe the maps are a racial gerrymander, do you? A: No, I don't think so.").

V. Parties represented by Mr. Garcia's counsel intervene to defend LD15.

Two weeks after filing *Garcia* to challenge LD15, Rep. Stokesbary filed a motion to intervene in this case on behalf of Jose Trevino, Ismael Campos, and LD13 state representative Alex Ybarra ("Intervenors"), all seeking to *defend* LD15. Doc.57. The district court allowed permissive intervention, but denied all three individuals intervention as of right, finding that they lack a concrete interest in the litigation. Doc.69 at 5.

VI. LD15 elects no Latino-preferred candidates in 2022.

Discovery in *Soto Palmer* and *Garcia* proceeded in tandem throughout 2022. Meanwhile, the LD15 primary and general elections took place in August and November, respectively. No race was competitive. Doc.208 at 641:8-642:2. Republican candidates for the two open LD15 house seats ran entirely unopposed. *Id.* In the Senate, 23-year incumbent Sen. Honeyford waited until three days *after* the close of candidate filing to announce his retirement and endorse Republican Nikki Torres. Ex.407.

Sen. Torres also ran unopposed in the primary. She faced nominal opposition in the general only because someone managed to garner enough primary write-in votes to appear on the ballot. Doc.191-8 (Dep. of Adam Hall) at 255:15-256:25. That unserious Democratic candidate, Lindsay Keesling, ran an anemic campaign, spending $4,000 total, less than five percent of Sen. Torres's campaign. *Id.* at 247:23-

248:13, 249:6-250:3; Doc.208 at 604:6-605:21; 641:8-642:2;

Turnout among Latinos in the off-cycle election was also abysmal. Only 32.5% of voters who participated were Latino despite comprising about half the citizen voting age population, whereas 61.6% of the electorate was white. At trial, Drs. Barreto and Collingwood testified that the Latinos who did participate supported Ms. Keesling while white voters overwhelmingly preferred Sen. Torres. Doc.206 at 76:10-20; Doc.208 at 639:24-641:2; Ex.2; Ex.417. Although Sen. Torres is herself Latina, she was not the candidate of choice of Latinos in 2022.[3]

VII. District court hears substantial evidence that LD15 violates § 2.

After discovery closed, *Soto Palmer* was tried concurrently with *Garcia* in June 2023, except that this case's trial began one day before the start of the three-judge proceeding. Doc.136. The district 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, [and] admitted 548 exhibits into evidence"—all showing that LD15 results in less opportunity for Latinos to elect candidates of their choice. Pet.App.3.

[3] On December 22, 2023, Sen. Torres filed a post-judgment motion to intervene in the district court seeking no changes to her district. Doc.253. She is represented by the same attorneys simultaneously seeking to have the district invalidated in *Garcia*.

To meet *Gingles* I, Plaintiffs' expert Dr. Collingwood provided three illustrative plans showing it was easy to draw a "reasonably configured" majority-Latino district in the Yakima Valley region. Pet.App.12. Dr. John Alford, the State's expert, agreed, noting that they were "among the more compact demonstration districts [he'd] seen in thirty years." *Id.* Witnesses familiar with the region confirmed that Latinos there form a geographically compact community of interest. Doc.208 (Dr. Barreto) at 647:9-16, 658:4-24; Doc.209 (Gabriel Portugal) at 831:5-24, 847:24-848:16; Pet.App.13.

Every expert to have evaluated *Gingles* II, including Intervenor's expert Dr. Mark Owens, "testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied." Pet.App.14. Dr. Loren Collingwood used ecological inference to estimate the preferences of Latino and white voters in 26 separate election contexts from 2012 to the most recent LD15 election in 2022. Doc.206 at 65:7-66:8, 76:4-77:8. He found that Latinos voted cohesively for the same candidates in all 26 elections he analyzed and thus opined that there is a "high" level of cohesion among Latino voters in the Yakima Valley. Doc.206 at 66:9-24; Ex.1 at 14-15; Ex.2 at 1. The State's expert, Dr. Alford, replicated these results. Ex.601 at 13-15; Doc.209 at 853:5-14, 855:1-3, 867:9-868:3. Intervenors' expert, Dr. Owens, also found cohesion among Latino voters in 10 of the 11 elections he analyzed from 2018-2020. Ex.1001 at 9; Doc.208 at 583:5-589:2. Dr. Barreto's analysis also found that Latino voters consistently preferred the

same candidates in the 12 elections he analyzed from 2012-2020. Doc.208 at 632:10-19; Ex.214 at 7-15.

Other testimony confirmed these findings. Commissioner Graves' map-drawer, Anton Grose, testified that he would have had to "close[] [his] eyes" while drawing districts in the region to not see the clear pattern of strong cohesive Latino support for certain candidates, and white support for opposing candidates. Doc.207 at 381:8-15, 375:1-377:8, 380:16-23, 393:25-394:1. Mr. Portugal testified that Latinos in the region prefer the same candidates "because they think that they best represent . . . Latino concerns" and that Latinos in the region share experiences that explain their cohesive political preferences. Doc.209 at 828:13-15, 830:11-831:24, 832:11-13, 848:5-7, 849:14-16; 838:21. Plaintiffs' expert Dr. Josué Estrada similarly found that Latinos in the area have shared histories, migration patterns, working conditions, and political movements, further supporting a finding of Latino cohesion in the region. Ex.4 at 10-21.

The court also heard substantial evidence of white bloc voting, satisfying *Gingles* III. In 24 of the 26 elections he analyzed, Dr. Collingwood found levels of racially polarized voting "at the 70- to 80-percent level, on either side of the racial or ethnic divide," and that white voters bloc voted to defeat Latino-preferred candidates. Doc.206 at 66:15-17; Ex.1 at 1, 17; Ex.2 at 1. He also conducted a performance analysis of ten recent statewide elections and found that Latino-preferred candidates lose in seven out of ten elections (70%) in LD15. Ex.1 at 18-25; Doc.206 at 72:17-73:13.

Dr. Alford confirmed these results, finding white bloc voting. Doc.209 at 853:15-20, 867:20-23. Dr. Owens neither examined white bloc voting for any election beside the LD 15 senate contest in 2022 nor disputed these findings. Doc.208 at 578:1-579:13.

Finally, the court heard expert and lay witness testimony from several individuals familiar with the Yakima Valley region's history, political context, and past and present-day discrimination against Latino voters and candidates. This included Plaintiffs' expert Dr. Josué Estrada, a historian and specialist in Latino voter suppression in Washington State; state senator Rebecca Saldaña, who is regularly sought out by Yakima Valley voters; Plaintiff Susan Soto Palmer, former house candidate in LD14; Plaintiff Faviola Lopez; and Gabriel Portugal, President of Tri-Cities LULAC.

VIII. District court rules that LD15 violates § 2.

On August 10, 2023, the district court ruled that LD15 violates § 2 and enjoined its use in future elections. Pet.App.1. The court found all three *Gingles* preconditions satisfied based on undisputed or mostly consistent findings of Plaintiffs', the State's, and Intervenors' experts. Pet.App.12-16. The court also did a searching assessment of each relevant Senate Factor in the totality of the circumstances inquiry, finding each weighed in Plaintiffs' favor. *Id.* at 16-31. Based on the "extensive record" and an intensively local appraisal of "the distinct history of and economic/social conditions facing Latino voters in the Yakima Valley region," the court concluded that the

enacted LD15 fails to afford Latinos equal opportunity to elect their preferred candidates. Pet.App.30-31.

The remedial process is ongoing. The district court ordered the State to adopt revised legislative district maps for the Yakima Valley region by February 7, 2024. Pet.App.35-36. In case the State fails to do so, the court ordered the parties to submit remedial proposals by December 1 and appointed a special master to evaluate the submissions. Pet.App.41; Doc.246. The court has made clear that the goal of the remedial process is "to provide equal electoral opportunities for both white and Latino voters in the Yakima Valley region" keeping in mind the social, economic, and historical conditions discussed in the court's opinion and traditional redistricting principles. Doc.246.

On September 8, the three-judge court in *Garcia* issued an opinion and order dismissing the racial gerrymandering claim as moot given the *Soto Palmer* court's finding that LD15 violates § 2. Pet.App.43.

Intervenors did not file their Ninth Circuit appeal until September 8. Doc.222. Nor did they move for a stay until November 8, which the district court and Ninth Circuit have since denied. Doc.242, Doc.247. Intervenors filed their petition in this Court on November 3.

ARGUMENT

I. Intervenors lack standing to appeal.

Intervenors lack standing to appeal. To have 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) ("As the [Supreme] Court has repeatedly recognized, to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing") (internal citation omitted). This ensures that "the decision to seek review . . . is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (internal citation omitted).

Intervenors' appeal is such a vehicle. In granting only permissive intervention, the district court expressly found that "intervenors lack a significant protectable interest in this litigation." Doc.69 at 10. Two of the three, Ybarra and Campos, do not even reside or vote in LD15, and thus have no possible cognizable interest in the district's configuration. *United States v. Hays*, 515 U.S. 737, 744-45 (1995) (a voter who "resides in a racially gerrymandered district . . . has been denied equal treatment" but other voters "do[] not suffer those special harms").

Intervenors Campos and Trevino below 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." Doc.69 at 4. But neither has 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.

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 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.

Intervenor Ybarra's status as a legislator (in an unchallenged district) does not confer standing. His asserted interests in avoiding delays in the election and knowing in advance which voters will be in his district 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. In addition, the district court's remedial schedule *guarantees* that Rep. Ybarra will know his district's boundaries before the candidate filing date. Doc.230. Nor does Rep. Ybarra have standing because of any argument that the remedial process *might* make his reelection more difficult or costly. No official is guaranteed reelection (let alone an easy one) or 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 (internal citation omitted). Similarly, individual legislators have "no standing unless 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) (emphasis added). 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, Intervenors have no concrete or imminent interest in any particular remedial map. The district court has not yet adopted a remedy—any allegation that Intervenors *may* be subject to racial classification or that race predominated are purely speculative. Doc.69 at 5 ("[I]t would be premature to litigate a hypothetical constitutional violation . . . when no such violative conduct has occurred"); *Hays*, 515 U.S. at 745 ("[A]bsent specific evidence" showing a voter has been subject to racial classification, the voter lacks standing). Most importantly, nothing about Plaintiffs' proposed remedial plans suggests

that race predominated. To the contrary, Plaintiffs' map expert "did not consider race or racial demographics in drawing the remedial plans." Doc.245-1 at 4. Thus, Plaintiffs' plans would not prompt, let alone fail, strict scrutiny. Intervenors cannot seek a stay of a § 2 liability determination because they anticipate disliking an as-yet-unknown remedy.

II. There are no exceptional circumstances warranting a grant of certiorari before judgment.

Intervenors cannot satisfy the "very demanding standard" for granting certiorari before judgment. *Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954, 954 (2014). Under Rule 11, a grant is appropriate "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination." Because Intervenors lack standing, there is no basis to justify certiorari before judgment and, more fundamentally, no exceptional urgency or emergency is present.

A grant of certiorari before judgment is an "extremely rare occurrence." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). Generally, such cases concern issues of national security or national importance. *See, e.g., United States v. Nixon*, 418 U.S. 683, 686-87 (1974) (Nixon tapes); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (nationalization of most U.S. steel mills); *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947) (nationwide coal

miner strike); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (presidential powers related to Iran hostage release). There is no exceptional urgency in this case that would favor a grant. Intervenors themselves waited *three months* after judgment below to file their petition with this Court (and to request a stay below). Their dilatory action bars them from now claiming a manufactured emergency.

Intervenors' sole justification for this Court's intervention is the pending jurisdictional statement in *Garcia*. While Rule 11 might be appropriate when the Court has accepted a similar case with similar issues, the mere filing of a jurisdictional statement in another case is insufficient. Moreover, *Garcia* is no basis for a grant here because this Court lacks jurisdiction to hear that appeal, and even if *Garcia* proceeds, it will fail on the merits.[4]

III. *Soto Palmer* and *Garcia* were properly considered and decided below.

A. The single-judge district court properly heard the § 2 challenge.

This case was properly tried before a single-judge district court. 28 U.S.C. § 2284(a) provides that a three-judge court shall be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the

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[4] *See* Brief of *Amici Curiae* Susan Soto Palmer et al., *Garcia v. Hobbs*, No.23-467, https://www.supremecourt.gov/DocketPDF/23/23-467/294009/20231221134251328_Garcia%20Amicus%20Brief%20PDFA.pdf.

apportionment of any statewide legislative body." A suit involving only a statutory claim, as here, does not trigger § 2284. *See, e.g.*, *Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1354 (N.D. Ala. 2019); *Johnson v. Ardoin*, 2019 WL 2329319, at *3 (M.D. La. May 31, 2019); *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Independent Redistricting Comm'n*, 366 F. Supp. 2d 887, 894-95 (D. Ariz. 2005). Courts have read § 2284 this way for good reason: it is what the text says.

Intervenors claim that this reading of § 2284 is wrong because the phrase "challenging the constitutionality of" applies only to congressional not legislative apportionment. Pet.19-20. In support, they present an abridged version of the statute and cite a single Fifth Circuit concurrence. Intervenors rely on the concurrence's use of a "series of interpretive canons" to conclude that *all* claims against state legislative districts trigger § 2284. Pet.20 (citing *Thomas v. Reeves*, 961 F.3d 800, 817 (5th Cir. 2020) (Willet, J., concurring)). But Judge Willet's analysis cannot bear that load, as Judge Costa explained in detail. *Id.* at 801-10 (Costa, J., concurring). Basic interpretation rules show that "challenging the constitutionality of" applies to legislative apportionment *and* congressional apportionment, and the presence of an extra "the" in the provision is irrelevant. This is so because of the "series-qualifier principle," which is "just a fancy label for describing how a normal person would understand § 2284(a)." *Id.* at 803.

This reading accords with the statute's history. It was enacted in the early 20th century to enable three-judge panels to hear *constitutional* challenges. *Id.* at 807. In 1976, to address the increasing burden on this Court's docket, Congress amended the statute by "vastly reduc[ing] the category of cases for which a three-judge court is mandated." *Kalson v. Paterson*, 542 F.3d 281, 287 (2d Cir. 2008). It would thus make little sense to interpret § 2284 to instead *expand* three-judge courts to statutory claims, and to suggest that Congress did so through an inartful deployment of the word "the." *Thomas*, 961 F.3d at 808.[5] Intervenors' "avant-garde view," *id.* at 802, would mean a three-judge court is required for *any* challenge to legislative districts, but only for a *constitutional* challenge to congressional districts. That strange result is nonsensical and contrary to the text and history of § 2284. Perhaps that is why Intervenors conceded below that Plaintiffs' § 2 claim should proceed only before a single-judge district court. *E.g.*, Doc.109 at 3.

[5] The only other authority Intervenors cite is a Third Circuit opinion where the court speculated in dicta about the history surrounding § 2284's adoption, and held that in a case featuring both statutory and non-frivolous constitutional challenges, they must be heard together by a three-judge court. *Page v. Bartels*, 248 F.3d 175, 189-92 (3d Cir. 2001), *as amended* (June 25, 2001). That is not the situation here.

B. The *Soto Palmer* district court did not err in issuing its decision before the *Garcia* panel.

The district court did not err by deciding this case before *Garcia*. Intervenors assert that the *Garcia* constitutional claim should have been decided before the *Soto Palmer* § 2 claim—turning constitutional avoidance on its head—because they contend that a racial gerrymandering violation triggers an immediate injury while a § 2 violation does not cause any harm until the first election occurs under the challenged map. Pet.17. Not so.

A § 2 violation is ripe for adjudication upon the enactment of a dilutive districting plan. A claim is ripe when it is "not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (internal quotation marks omitted). There is no question as to *whether* an election will occur following enactment of a plan, and a § 2 violation is shown by, *inter alia*, analysis of past voting patterns and results. No authority supports the proposition that courts must refrain from adjudicating § 2 claims until the dilutive election occurs. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. 529, 537 (2013) (explaining that, under § 2, "injunctive relief is available in appropriate cases to block voting laws from going into effect"). And even if Intervenors contention were correct, the trial occurred *after* the 2022 election conducted under the challenged plan, and Intervenors cite no authority that would allow a court to dispense with adhering to

constitutional avoidance based upon the precise sequence in which the alleged harms occurred.

Intervenors' contention that the district court was required to decide the *Garcia* claim first (or that this Court should hold *Soto Palmer* in abeyance pending *Garcia*), Pet.15, is belied by their *opposite* position taken below. Intervenors asserted throughout this litigation that "resolution of the claim in *Garcia* necessarily turns on the claims in this case." Doc.109 at 3. This is so because a finding that the VRA requires the drawing of a minority opportunity district directly affects a racial gerrymandering challenge to the same district. *See Cooper v. Harris*, 581 U.S. 285, 285 (2017) ("This Court has long assumed that one compelling interest is compliance with the Voting Rights Act of 1965 (VRA or Act)."); *Allen*, 599 U.S. at 41; Pet.App.43-44. And as a practical matter, a constitutional challenge to a district already enjoined for violating the VRA need not be adjudicated. On this basis, Intervenors' counsel (on behalf of their other client, Mr. Garcia) even requested a scheduling order "extending all case dates [in *Garcia*] to approximately one month after the corresponding dates in *Soto Palmer*." *Garcia*, Doc.26 at 8. This Court should reject Intervenors' request, waived by their prior actions, to now step in and redo everything in the opposite order. Pet.15.[6]

[6] Intervenors' contention that empaneling a three-judge court for this case "would have forestalled any attempts by the *Soto Palmer* [c]ourt to divest the *Garcia* [c]ourt of jurisdiction," is meritless. Pet.21. Judge Lasnik did not "attempt" to "divest" the *Garcia* court of jurisdiction. And a three-judge court would lack jurisdiction, *see supra*, and constitutional avoidance principles

The Court should also reject Intervenors' curious claim that LD15 is a racial gerrymander. Pet.16-19. In the district court below and on appeal, Intervenors sought to *defend* the current map. They have testified in support of the enacted plan and at no point have indicated it is unlawful. *See* Doc.191-14 (Trevino Dep.) at 21:5-7 ("Q: And would it be your goal that the map, in fact, not change as a result of this litigation? A: Yes."); Doc.191-15 (Ybarra Dep.) at 121:4-10 ("Q: And you voted in favor of the plan; correct? A: Yes. Q: And can I assume that you stand by that vote? A: Yes. Q: So do you understand the map that you voted on to be an illegal racial gerrymander? A: No."). Rep. Stokesbary, one of their lawyers, *also* voted to adopt the Commission's map.[7] And while the *Garcia* district court properly declined to issue an advisory opinion in a case that was moot, it noted that the testimony on this issue "weigh[ed] heavily against finding that race predominated in the drawing of LD15," citing the testimony of every redistricting commissioner. Pet.App.46-47, n.4.

Having failed below, Intervenors' counsels' new goal appears to be to have LD15 reinstated so that their *other client* can have it overturned in a different

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would still apply even if that were not so. *See Hagans v. Lavine,* 415 U.S. 528, 544 (1974) ("[T]he coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel . . . ").

[7] Roll Calls on a Bill: HCR 4407, https://app.leg.wa.gov/bi/RollCallsOnABill/RollCall?biennium=2021-22&billNumber=4407.

case whose claim their clients in *this case* disclaim. But Intervenors and their counsel cannot have it both ways. The Court should decline their invitation to untangle a "Gordian Knot," Pet.8, of their own making.

IV. The district court did not err in finding a violation of § 2.

A. The district court did not clearly err in finding Gingles I satisfied.

The district court properly found that Plaintiffs satisfied both the numerosity and compactness requirements of the first *Gingles* precondition. Pet.App.8. Intervenors do not contest that Plaintiffs met the numerosity requirement and that their demonstrative districts are reasonably compact, Pet.12, but instead argue that "the court erred by considering only the compactness of the boundaries in Plaintiffs' demonstrative maps, and not the compactness of Hispanic voters within those boundaries." Pet.26. This argument has no merit.

In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), the Court held that a Texas congressional district stretching from the Mexican border to Austin was not reasonably compact for § 2 purposes because of the "enormous geographic distance" separating the two pockets of Latino communities and the "disparate needs and interests" of those communities. *Id.* at 435. In so doing, the Court "emphasize[d] it is the enormous geographic[] distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests in these populations—not either factor

alone—that renders District 25 noncompact for § 2 purposes." *Id.*; *see id.* at 424 (concluding that another district stretching 500 miles satisfied *Gingles* 1 where its Latino population had shared interests).

Here, neither factor is present. The district court concluded that the Latino population was geographically proximate and connected, Pet.App.13, unlike the 300 miles that separated the Latino communities in *LULAC*, 548 U.S. at 424. And the district court concluded, based upon the testimony at trial, that the communities had shared "socio-economic status, education, employment, health, and other characteristics." *Id.* at 424 (internal quotation marks omitted); Pet.App.13. Intervenors do not acknowledge this evidence, let alone show how the district court clearly erred. Indeed, they do not challenge the district court's conclusion that their expert, Dr. Owens, "acknowledged at trial that he does not know anything about the communities in the Yakima Valley region other than what the maps and data show," Pet.App.13 n.7, and testified that he had no opinion on whether LD15 was compact. Doc.208 at 599:10-15.

B. The district court did not clearly err in finding *Gingles* II satisfied.

The district court did not clearly err in concluding that Plaintiffs had satisfied *Gingles* prong two by demonstrating political cohesion among the Yakima Valley Latino voters.

To demonstrate that Latino voters are politically cohesive, Plaintiffs must show that "a significant number of minority group members usually vote for the same candidates." *Gingles*, 478 U.S. at 56.

Plaintiffs met this burden, establishing that "Latino voter cohesion is stable" over "election types and election cycles over the last decade." Corr.Pet.App.

In contending otherwise, Intervenors omit that "each of the experts who addressed [cohesion], *including Intervenors' expert*, testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied." Pet.App.14 (emphasis added). Plaintiffs' expert, Dr. Collingwood, found high levels of cohesion among Latino voters in every one of the 26 elections he analyzed. Doc.206 at 66:9-24. The State's expert, Dr. Alford, replicated the analysis and got the same result, as had Dr. Barretto in his own ecological inference analysis. Intervenor's expert Dr. Owens likewise found high levels of Latino cohesion in 10 of the 11 elections he analyzed. Despite Intervenors' representation otherwise, Pet.29-30, this pattern held true in partisan and nonpartisan contests, general and primary elections, statewide, state legislative, and local elections, and in races with and without Spanish-surname candidates.

Abundant qualitative evidence, *supra* pp. 10-11, confirmed these findings. *See Sanchez v. Bond*, 875 F.2d 1488, 1494 (10th Cir. 1989) ("The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive").

Intervenors call the district court's cohesion analysis "woefully short." Pet.27. But where as here the evidence is essentially uncontested, it is no surprise that the district court did not belabor the point.

C. The district court did not clearly err in finding *Gingles* III satisfied.

The district court did not clearly err in concluding that Plaintiffs satisfied *Gingles* III. Under the third precondition, the court inquires whether "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances…—to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. Bloc voting is demonstrated by statistical analysis of historical election data. *Id.* at 46. Intervenors did not seriously dispute *Gingles* III, and the district court properly found that Plaintiffs met their burden. Corr.Pet.App; Pet.App.14-16.

The record established that white bloc voting in the Yakima Valley region usually results in the defeat of Latino-preferred candidates. Using multiple statistical methods to validate his results, Dr. Collingwood found that the region has a "very sustained pattern of racially polarized voting." Doc.206 at 68:11-69:3. Indeed, white voters defeated the Latino-preferred candidate in every state legislative contest, local contest, and statewide partisan contest he analyzed. Ex.1 at 7-8; Ex.2. Dr. Collingwood's performance analysis also revealed that Latino-preferred candidates lose 7 of 10 elections in LD15, which is "strong evidence of white bloc voting." Ex.1 at 18-25; Doc.206 at 72:17-73:13. Dr. Alford's analysis confirmed these results, finding that white bloc voting defeats Latino-preferred candidates in partisan contests (the type of contest that takes place in LD15). Doc.209 at 853:15-20, 867:20-23. The district court credited the analysis of Drs. Collingwood

and Alford and noted that Intervenors did not dispute their data or opinions. Corr.Pet.App. Indeed, Intervenors expert Dr. Owens did no analysis of white voting patterns except for a single election contest, Doc.208 at 579:10-13, and admitted he had no reason to doubt that white voters overwhelm the preferences of Hispanic voters. *Id*. at 601:4-11. Dr. Barreto testified that the question of whether there is racially polarized voting in the Yakima Valley is "not at all" close. *Id*. at 646:15-647:8.

In response, Intervenors claim that the district court "dismiss[ed] the election results in the only contested election held in LD15," referring to the 2022 Senate election between Nikki Torres and Lindsey Keesling. Pet.27. But the district court considered the 2022 election in its analysis, and found that it confirmed the overall statistical evidence, which "shows that Latino voter cohesion is stable in the 70% range across election types and election cycles over the last decade." Corr.Pet.App. This conclusion is supported by the analysis of Drs. Collingwood and Barreto, who found that voting in the 2022 Senate election was racially polarized at levels consistent with past elections. Doc.206 at 76:10-20; Doc.208 at 639:24-641:2, Ex.2; Ex.417. Both experts testified that Latinos voted cohesively for Ms. Keesling, the *losing* candidate, while white voters cohesively preferred Ms. Torres, the winner. *Id*. Therefore, Intervenors' constant refrain that Ms. Torres won by 35 points simply highlights *the harm*—white bloc voting, combined with an unequal opportunity to participate in the political process, continues to deny cohesive Latino voters an equal opportunity to elect a

candidate of choice in the Yakima Valley.[8] As this Court recently held, the purpose of the *Gingles* preconditions is to "show[] that a representative of [the minority group's] choice would in fact be elected." *Allen*, 599 U.S. at 19. That is not the case here.

More fundamentally, even if the 2022 election did not confirm the pattern of racially polarized voting, it is only *one election*. One contest cannot outweigh the findings of all four experts in the case that Latino voters cohesively prefer the same candidates, and that those candidates are continually defeated by white bloc voting over a decade of elections in the region. *See, e.g., Gingles*, 478 U.S. at 57 ("a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election").

This is particularly so because the 2022 election in LD15 is subject to the "special circumstances" doctrine, under which courts discount the probative value of elections that are "not representative of the typical way in which the electoral process functions." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557-58 (9th Cir. 1998); *Gingles*, 478 U.S. at 75-76. The 2022

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

election in LD15 took place during the pendency of VRA litigation and featured a severely underfunded Latino-preferred candidate nominated as a write-in. *Gingles*, 478 U.S. at 75-76 (finding such elections can "work[] a one-time advantage . . . in the form of unusual organized political support by white leaders").[9] Ms. Keesling, the write-in candidate in the primary, spent only $4,000 in the general election, less than five percent of what Sen. Torres spent on her campaign. Doc.208 at 604:6-605:21, 641:8-642:2; Doc.191-8 (Dep. of Adam Hall) at 247:23-248:13, 249:6-250:3, 255:15-256:25. Both house races in LD15 were also uncontested. Doc.208 at 641:8-642:2. As Dr. Barreto testified, "when you see uncontested races, or underfunded candidates, it's because those elections are not winnable for that [group]." *Id.* at 641:22-642:2.

Intervenors do not show how the district court erred, much less clearly so, in its *Gingles* III analysis.

D. The stark level of racially polarized voting in the Yakima Valley region is not attributable to partisanship.

The district court did not clearly err in rejecting Intervenors' contention that partisanship, not race,

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

explained the racially polarized voting in the region. Pet.28; *see* Pet.App.15-16, 33-35. A majority of this Court has concluded that this type of causation argument is not pertinent to assessing racially polarized voting. *Gingles*, 478 U.S. at 51, 62-63, 74 (plurality) (the "legal concept of racially polarized voting incorporates neither causation nor intent" and "the reasons [Latino] and white voters vote differently have no relevance to the central inquiry of § 2"); *id*. at 100 (O'Connor concurring) (agreeing, along with three other justices, that where statistical evidence shows minority political cohesion and assesses prospects of winning, "defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race"); *see also Allen*, 599 U.S. at 19 (explaining that the third *Gingles* precondition "establish[es] that the challenged districting thwarts a distinctive minority vote at least plausibly on account of race" (internal quotation marks omitted) (bracket in original)).

Intervenors provide no support for their contention that that § 2 requires proof that a "*candidate's race* must be the causal factor for the purported discrimination." Pet.28 (emphasis added). Indeed, § 2 is designed to determine whether an electoral structure results in *voters* (not candidates) of a protected class "having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 63.

In any event, the district court found that Intervenors' argument was factually incorrect, Pet.App.34-35, and the Intervenors identify no clear error in that conclusion. Indeed, Dr. Alford persuasively testified that the electoral data reveals that the racial polarization increases perceptibly in the Yakima Valley when the candidates are themselves Latino. Doc.209 at 853:21-854:15; Ex.601 at 13-14. And Dr. Collingwood's analysis demonstrates, for example, that Latino-preferred candidates with Spanish surnames also lose in nonpartisan races. Doc.206 at 65:21-66:24; Ex.1 at 14-15; Ex.2 at 1; *see also* Doc.208 at 590:15-592:14 (Dr. Owens disclaiming evidence of partisan explanation for polarization). And Intervenors' counsels' other client, Mr. Garcia, testified to racial discrimination he faced from the Washington State Republican Party as a Latino candidate running for Congress in the Yakima Valley. In Mr. Garcia's own words, this discrimination "greatly affected th[e] election, the outcome, and suppressed the Latino vote." Doc.197-1 at 75:2-79:7; 90:12-91:13.[10] The district court did not clearly err in rejecting Intervenors' partisanship argument. Intervenors' partisan fixation, which ignores the "inequality in electoral opportunities in the Yakima Valley region" for Latino voters, Pet.App.35, rings hollow.

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

E. The district court did not clearly err in its totality of the circumstances analysis.

The district court's totality of the circumstances analysis was not clear error. In *Allen*, this Court reasserted that the "essence of a § 2 claim" is when "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." *Id*. at 17 (internal quotation marks and citation omitted). The district court conducted a thorough analysis and applied the proper legal standards in finding that the Yakima Valley region's Latino voters do not have an equal opportunity to elect state legislative candidates of their choice.

Intervenors argue that the district court "failed to identify the required causal connection between the challenged map and the purported discriminatory result." Pet.33. They are wrong that Plaintiffs must prove such a causal connection, but even so, Plaintiffs did. Pet.App.33-35. Intervenors also argue that Plaintiffs must demonstrate a causal connection between certain Senate Factors and the ability of the minority group to participate in the political process. Pet.32-34. They are wrong again. *See, e.g., LULAC v. Clements*, 986 F.2d 728, 750 (5th Cir. 1993) ("[P]laintiffs must demonstrate both depressed political participation and socioeconomic inequality, but need not prove any causal nexus between the two"); *Marengo Cnty. Comm'n*, 731 F.2d at 1567-69 (same for Senate Factors 1 and 5). However, Plaintiffs met this burden anyway, and the district court issued findings to that effect, conducting "an intensely local

appraisal" and a "searching practical evaluation of the past and present reality" in the Yakima Valley. *Allen*, 599 U.S. at 19 (quoting *Gingles*, 478 U.S. at 79) (internal quotation marks omitted). Pet.App.16–31. Intervenors' arguments otherwise lack merit.[11]

For example, Intervenors complain that the court's analysis of the history of official discrimination in the region considered only "usual burdens of voting." Pet.33. But the district court considered extensive expert and lay testimony from multiple witnesses, Doc.206 at 131–33; Ex.4 at 21–42, establishing a long history of official, voting-related racial discrimination including English literacy tests, failure to provide federally-required bilingual election materials, and dilutive at-large election systems. None of these is "a usual burden of voting." Pet.App.17–19. The court catalogued these examples, and explicitly rejected Intervenors argument that causation is lacking, finding the evidence illustrated "that historic barriers to voting have continuing effects on the Latino population" and "prevent full access to the electoral process." Pet.App.18-19.

Or take Senate Factor 3—which intervenors again claim focuses on "usual burdens on the right to vote." Pet.34. However, none of these are "usual burdens," nor are plaintiffs separately challenging these practices. Rather, Factor 3 requires analysis regarding "voting procedures which *may* enhance the

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[11] Intervenors cite *NAACP v. Fordice*, 252 F.3d 361 (5th Cir. 2001), as requiring a causal nexus. But *Fordice* simply required a showing of depressed political participation, not causation. *See id*. at 367-68.

opportunity for discrimination against Latino voters in the Yakima Valley." Pet.App.19-21. The court also did not find that "off-year elections are per se hindering the franchise." Pet.34. Undisputed evidence demonstrated that "Latino voter turnout is at its lowest in off-year elections, enlarging the turnout gap between Latino and white voters in the area." Pet.App.20. The court found that the state's use of at-large districts to elect two state representatives can "further dilute minority voting strength" and cited to *Gingles*' explanation of the harm of at-large districts. Pet.App.20.

Next, Intervenors complain that witness testimony on Factor 5 was "hearsay" and that a "causal connection" between disparities and participation in the political process is missing. Pet.34. But Intervenors lodged no such hearsay objection at trial, and cannot now claim error.[12] Myriad witnesses, including expert Dr. Estrada, state senator Saldaña, Plaintiff Susan Soto Palmer, and Gabriel Portugal testified to the continuing effects of past discrimination in the region, establishing "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" and that these "disparities hinder and limit the ability of Latino voters to participate fully in the electoral process." Pet.App.21-22; Ex.4 at 46–63; Doc.207 at 296:9–17,

[12] *See* Doc.206 at 22:8–23:24; 26:6–25; 198:20–199:14; 201:1–14, Doc.207 at 293:15–25.

307:12–18; Doc.206 at 199:5–14; Doc.209 at 835:11–19; Doc.209 at 840:18-841:14. Nor did Intervenors dispute this evidence at trial. Pet.App.21. The court thus concluded Intervenors' causation argument was "belied by the record," and the factor "weighs heavily in plaintiffs' favor." Pet.App.21-22.

In addition to past discrimination and existing disparities, trial testimony from multiple witnesses demonstrated that the region's Latino population participates in the political process at significantly lower rates than the white population, as indicated by lower voter turnout and registration rates. *See, e.g.,* Doc.206 (Dr. Collingwood) at 50:2–4 ("[V]oter turnout was also massively depressed among the Latino population, relative to the white population."); Doc.206 (Dr. Estrada) at 134:12-135:4 ("[T]he Latino voter registration numbers there are lower, compared to white…So in elections where…the Latino turnout is already low…compounded with low voter registration rates…this just adds to that effect of lower voter turnout."); Ex.1 at 29–32; Ex.4 at 43–45; Pet.App.17-22. This evidence was undisputed.

Turning to Senate Factor 6, Intervenors take issue with a racist incident that a Latino candidate experienced while campaigning for votes. Pet.35. But Intervenors ignore the court's finding that numerous *candidates* in the region have employed racial appeals, using "dog-whistles," which "avoid naming race directly but manipulate racial concepts and stereotypes to invoke negative reactions in and garner support from the audience." Pet.App.22-23. The court noted that candidates utilized these racial appeals "to

equate 'immigrant' or 'non-citizen' with the derogatory term 'illegal'" and that the appeals "ma[de] race an issue on the campaign trail" and increased "the possibility of inequality in electoral opportunities." *Id.* The court credited evidence offered by multiple witnesses regarding racial appeals by candidates and elected officials at the county and state levels in the region. Doc.206 at 142:23–144:14; Ex.4 at 63–69; Pet.App.22-23.

Ultimately, the district court directly tied the presence of the Senate Factors in the region to the racially discriminatory impact of LD15, finding that "[e]specially 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." Pet.App.35. And even the State admitted "that under the totality of the circumstances, Hispanic voters in LD15 are less able to participate in the political process and elect candidates of their choice than white voters." Doc.194 at 13–14. As such, Intervenors' arguments are meritless, and the district court did not err in its "intensely local appraisal" of the political process in the Yakima Valley region. *Allen*, 599 U.S. at 19.[13]

[13] Intervenors do not dispute the district court's findings regarding Senate Factors 7 or 8. Pet.App.24–27.

F. The district court did not err in finding that LD15 violated § 2 despite having a majority HCVAP.

It is well established that a majority-minority district can dilute the minority's voting power where, as here, the minority lacks a real opportunity to elect their candidates of choice.[14] *See, e.g., Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017) ("[T]he existence of a majority HCVAP in a district does not, standing alone, establish that the district provides Latinos an opportunity to elect, nor does it prove non-dilution."); *Pope v. Cnty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) ("[T]he law allows plaintiffs to challenge legislatively created bare majority-minority districts on the ground that they do not present the 'real electoral opportunity' protected by § 2"); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 933 (8th Cir. 2018); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989). The district court's finding regarding LD15 accords with this Court's recognition that it is "possible for a citizen voting-age majority to lack real electoral opportunity." *LULAC*, 548 U.S. at 428.

Intervenors' asserted "mathematical reality" that a majority HCVAP district necessarily provides Latinos with equal opportunity ignores this precedent, as well as the court's VRA-required

[14] When adopted, LD15 was *50.02%* Hispanic CVAP. Doc.191 at 14.

"searching practical evaluation of the past and present reality" in the Yakima Valley. *Gingles*, 478 U.S. at 79 (internal quotations omitted). As a part of that evaluation, the court clearly explained that, in the configured LD15, "[a] majority Latino CVAP of slightly more than 50% is insufficient to provide equal electoral opportunity where past discrimination, current social/economic conditions, and a sense of hopelessness keep Latino voters from the polls in numbers significantly greater than white voters." Pet.App.35.[15] This finding accords with expansive evidence presented at trial. Pet.App.32-33; Ex. 1; Ex. 2. Nor does the 2022 election of a non-Latino-preferred candidate in LD15 equate to equal opportunity; that election, to the extent it is probative, *confirms* that LD15 fails to provide the region's Latinos with an equal opportunity to elect candidates of their choice. *Supra* IV.C.

The district court faithfully applied this Court's precedent and, in light of extensive and largely undisputed evidence, did not err in finding that LD15 fails to afford Latino voters equal opportunity to elect candidates of their choice under the totality of the circumstances. The lower court's decision is correct and should be affirmed.

[15] Intervenors' assertion that Plaintiffs ought to have challenged low Latino turnout under the *Anderson-Burdick* doctrine is puzzling and ignores well-established precedent that voter turnout should be considered in assessing the totality of the circumstances. *See supra* IV.C.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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