No. 23A862

In the Supreme Court of the United States

JOSE TREVINO, ET AL.,

APPLICANTS,

v.

SUSAN SOTO PALMER, ET AL.,

RESPONDENTS.

STATE OF WASHINGTON'S AND SECRETARY OF STATE STEVE HOBBS'S RESPONSE TO THE EMERGENCY APPLICATION FOR A STAY OF JUDGMENT AND INJUNCTION

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PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

Applicants are Jose Trevino, Alex Ybarra, and Ismael G. Campos—three individual voters who permissively intervened while this case was before the district court. They are Intervenor-Defendants-Appellants in the appeals below.

Respondents are:

1. Susan Soto Palmer, Alberto Macias, Fabiola Lopez, Caty Padilla, Heliodora Morfin, Plaintiffs-Appellees in the appeals below.

2. Steve Hobbs, in his official capacity as Secretary of State for the State of Washington, Defendant-Appellee in the appeals below.

3. The State of Washington, Defendant-Appellee in the appeals below.

The proceedings below were *Susan Soto Palmer, et al. v. Steve Hobbs, et al.*, No. 3:22-cv-05035-RSL (W.D. Wash.). The district court issued its order holding Legislative District 15 violates Section 2 of the Voting Rights Act on August 10, 2023. Appl. Add. 1-32. The Ninth Circuit denied Intervenors' motion to stay that order and the district court's remedial proceedings on December 21, 2023. Order, DktEntry 45, *Soto Palmer v. Hobbs*, No. 23-35595 (9th Cir. Dec. 21, 2023). This Court denied Intervenors' petition for certiorari before judgment on February 20, 2024. *Trevino v. Soto Palmer*, No. 23-484 (U.S. Feb. 20, 2024). The district court subsequently entered a remedial map on March 8, 2024. Appl. Add. 33-43. The Ninth Circuit denied Intervenors' motion to stay the remedial order March 22, 2024. DktEntry 18.1, No. 24-1602 (9th Cir. Mar. 22, 2024). Neither appeal has yet been briefed before the Ninth Circuit.

There is one related case: *Benancio Garcia v. Steve Hobbs, et al.*, No. 3:22-cv-05152-RSL-DGE-LJCV (W.D. Wash.). *Garcia* is an Equal Protection challenge to Legislative District 15 that was assigned to a three-judge district court. After the district court in *Soto Palmer* issued its Section 2 order, the *Garcia* district court dismissed the *Garcia* case as moot. *Garcia v. Hobbs*, No. 3:22-CV-05152-RSL-DGE-LJCV, 2023 WL 5822461 (W.D. Wash. Sept. 8, 2023). Mr. Garcia appealed to this Court, and this Court declined to hear the case on the merits and instead vacated the district court's order with instructions to enter a fresh judgment so that Mr. Garcia could appeal to the Ninth Circuit. *Garcia v. Hobbs*, No. 23-467 (U.S. Feb. 20, 2024). On March 25, 2024, the district court entered an amended judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

INTRODUCTION

This Court already denied applicants' extraordinary request for certiorari before judgment, and the Court should do the same now as to their extraordinary request for a stay. They come nowhere close to meeting the high standard necessary to warrant that rare relief. After Washington adopted its 2020 legislative redistricting plan, a group of plaintiffs filed suit, arguing that Legislative District 15 in the plan violated Section 2 of the Voting Rights Act by denying Hispanic voters an equal opportunity to elect candidates of their choice. Three individuals—the stay applicants here—sought to intervene to defend LD 15. The district court denied mandatory intervention, finding that they had no special interest in the district's boundaries that differed from that of any other voter, but allowed permissive intervention. The State initially defended against the plaintiffs' claims, but after the State's expert concluded that the *Gingles* preconditions were met, and in light of multiple recent lawsuits in the same area finding VRA violations, the State ultimately conceded that it had no basis to dispute the plaintiffs' Section 2 claim.

Following a trial and careful review of the evidence, the district court ruled for the plaintiffs and ordered that a remedial map be drawn. The stay applicants asked this Court to grant certiorari before judgment as to that decision, and this Court declined. *Trevino v. Soto Palmer*, No. 23-484 (U.S. Feb. 20, 2024). Meanwhile, all parties had stipulated that a remedial map had to be transmitted by March 25, 2024, to be used in Washington's 2024 elections. The district court gave the Washington Legislature an opportunity to enact a revised map, but it declined. The court then

invited the parties to submit proposed maps, ultimately adopting a revised version of a map proposed by the plaintiffs on March 15, 2024. The stay applicants asked the Ninth Circuit to stay the remedial map, but the court denied the motion, finding that the applicants likely lack standing to appeal. The applicants now ask this Court to step in and grant a stay. Their request fails on multiple grounds.

First, the applicants cannot show a likelihood of success. To begin with, they lack standing to appeal. This Court has held that private parties lack standing to appeal a judgment invalidating a state law that they have no role in enforcing or implementing. The applicants have no such role as to LD 15, so they have no interest in the district's boundaries that differs from that of any other resident.

Even if the applicants had standing, they cannot show a likelihood that this Court will ultimately grant certiorari and rule in their favor. They allege no circuit split or plausible conflict with precedent on any issue. Their hodgepodge of arguments amount to meritless fact-bound disagreements with the district court, reviewed for clear error. The crux of their factual argument is that LD 15 is already majority Hispanic and recently elected a Hispanic candidate, so it must satisfy the VRA. But courts uniformly agree that majority-minority districts do not automatically comply with the VRA—results matter. And here, the district court found, based on extensive evidence, that candidates preferred by Hispanic voters would usually lose in LD 15. The recent election of one Hispanic candidate did not contradict that finding because all of the evidence—including the applicants' own expert report—showed that the Hispanic candidate was not preferred by Hispanic voters in LD 15. Contrary to

the applicants' implication, just because a candidate belongs to a racial group does not mean that they are preferred by that group.

The balance of equities and public interest also tip decisively against the stay applicants here. The district court reached the amply supported conclusion that LD 15 violates the VRA, yet the applicants ask this Court to order another election under that illegal map. There is no basis to do so. They claim that allowing the election to go forward will harm the State, but the State itself is here rejecting that contention; there is no harm in holding an election under the lawful remedial map that the district court adopted before the deadline the parties agreed upon. By contrast, voters suffer real harm from voting in a district in which they have been denied the equal opportunity to elect candidates of their choice.

In short, the applicants lack standing, they allege no conflict in the lower courts, their legal and factual arguments are meritless, and the balance of equities tips against them. The Court should deny their request for a stay.[1]

STATEMENT OF THE CASE

A. Plaintiffs' Lawsuit and the Liability Proceedings

Shortly after Washington's bipartisan Redistricting Commission adopted and the Legislature approved the state's legislative redistricting plan, Plaintiffs-Respondents brought suit. They alleged two claims under the Voting Rights Act: that

[1] Consistent with his position throughout this litigation, Washington Secretary of State Steve Hobbs takes no position on the merits of Intervenors' stay application. The Secretary's interest in this litigation is to ensure that election officials are able to meet election deadlines. Apart from the argument regarding the appropriate application of the *Purcell* principle and the harms to Washington voters, *infra* at 21-23, the Secretary takes no further position on the State of Washington's opposition to Intervenors' stay application.

Legislative District 15 diluted Hispanic votes in violation of Section 2, and that the Redistricting Commissioners intentionally diluted Hispanic votes. ECF No. 1, *Soto Palmer v. Hobbs*, No. 22-cv-5035-RSL (W.D. Wash. Jan. 19, 2022).[2] The case was assigned to Judge Lasnik of the Western District of Washington.

Around two months later, three individuals moved to intervene to defend LD 15 against Plaintiffs' Section 2 claims. The district court allowed Intervenors to permissively intervene and defend the map, despite determining they "ha[d] no right or protectable interest in any particular redistricting plan or boundary lines[,]" because at the time there were no truly adverse parties. ECF No. 69, at 4. Around the same time, the district court separately ordered that the State of Washington be joined as a defendant to ensure that, if Plaintiffs were able to prove their claims, the court would have the power to provide all of the relief requested, particularly the development and adoption of a VRA-compliant redistricting plan. ECF No. 68.

The State prepared to defend against Plaintiffs' challenge to LD 15. To that end, the State sought out a highly respected expert, Dr. John Alford, with a history primarily of working for government defendants in VRA cases, including as an expert witness in recent challenges to Texas' congressional and state legislative maps, Louisiana's congressional map, Georgia's congressional map, and Kansas' congressional map. *See* Trial Ex. 601.

After carefully reviewing the evidence, Dr. Alford submitted an expert report concluding that the three *Gingles* preconditions appeared to be met. Trial

[2] District court filings will be short cited as ECF No. __.

Ex. 601. He concluded that the first *Gingles* precondition was met because "the Hispanic Citizen Voting Age Population (HCVAP) exceeds 50%, both in the current Legislative District 15 as enacted, and in the alternative demonstrative configurations" propounded by Plaintiffs. Trial Ex. 601, at 4. He noted that these districts are compact both in terms of their "visual appearance" and "by the summary indicators for compactness" highlighted by Plaintiffs' expert, Dr. Loren Collingwood. Trial Ex. 601, at 4. Under the second *Gingles* precondition, Dr. Alford concluded that Hispanic "voter cohesion is stable in the 70 percent range across election types, suggesting consistent moderate cohesion." Trial Ex. 601, at 17-18. And under the third *Gingles* factor, Dr. Alford concluded that "non-Hispanic White voters demonstrate cohesive opposition to" Hispanic-preferred candidates in partisan elections, and that this "opposition is modestly elevated when those [Hispanic-preferred] candidates are also Hispanic[,]" although he also noted that "in contests without a party cue, non-Hispanic White voters do not exhibit cohesive opposition to Hispanic candidates." Trial Ex. 601, at 18. Finally, in examining electoral performance, Dr. Alford concluded Hispanic-preferred candidates would usually lose in LD 15, although they would sometimes prevail. Trial Ex. 601. In short, Dr. Alford concluded that for partisan elections, racially polarized voting exists such that white voters in LD 15 will generally vote as a bloc to defeat candidates preferred by Hispanic voters.

Dr. Alford's conclusions were bolstered by three recent cases finding violations of the federal Voting Rights Act or Washington Voting Rights Act related to local

elections in the Yakima Valley region, each of which found racially polarized voting between white and Hispanic voters that resulted in dilution of the Hispanic vote. *See Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) (concluding Yakima, Washington's at-large voting system for city council elections violated Section 2); *Glatt v. City of Pasco*, No. 4:16-CV-05108-LRS, ECF No. 40 (E.D. Wash. Jan. 27, 2017) (same for Pasco, Washington); *Aguilar v. Yakima County*, No. 20-2-0018019 (Kittitas Cnty. Super. Ct. 2020) (approving settlement of Washington Voting Rights Act challenge to at-large voting system used in Yakima County, Washington).

Based on Dr. Alford's conclusions, the factual findings in other cases in the Yakima Valley, and other record evidence, the State notified the parties and court that it had concluded it could no longer "dispute at trial that *Soto Palmer* Plaintiffs have satisfied the three *Gingles* preconditions for pursuing a claim under Section 2 of the VRA based on discriminatory results[,]" or "that the totality of the evidence test likewise favors the *Soto Palmer* Plaintiffs[.]" ECF No. 194, at 10. The State continued vigorously to defend against Plaintiffs' intentional discrimination claim. *See, e.g.*, ECF No. 194, at 16-19; ECF No. 212, at 20-26.[3]

After a bench trial, the district court issued a Memorandum of Decision on August 10, 2023, finding that LD 15 had the effect of discriminating against Hispanic voters by denying them the right to elect candidates of their choice. Appl. Add. 1-32.[4]

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[3] As explained in more detail below, the election of Senator Nikki Torres from LD 15 did not alter the State's conclusion because the evidence showed that Senator Torres was not the candidate of choice of Hispanic voters in LD 15. *Infra* at 26-27.

[4] The district court declined to reach the discriminatory intent claim in light of this finding. Appl. Add. 3.

Following this Court's reaffirmance of the *Gingles* framework in *Allen v. Milligan*, 599 U.S. 1 (2023), the district court analyzed the *Gingles* factors and concluded that Plaintiffs had satisfied them all. On the first *Gingles* factor, Judge Lasnik pointed to numerous "reasonably configured" districts presented by Plaintiffs that afforded Hispanic voters "a realistic chance of electing their preferred candidates[.]" Appl. Add. 9. On the second *Gingles* factor, Judge Lasnik noted that "[e]ach of the experts who addressed this issue, including Intervenors' expert, testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied[,]" with "statistical evidence show[ing] that Latino voter cohesion is stable in the 70% range across election types and election cycles over the last decade." Appl. Add. 11-12. And on the third *Gingles* factor, Judge Lasnik noted that both Plaintiffs' and the State's experts concluded "that white voters in the Yakima Valley region vote cohesively to block the Latino-preferred candidates in the majority of elections (approximately 70%)[,]" and that "Intervenors d[id] not dispute the data or the opinions offered by" either expert. Appl. Add. 12.

Turning to the totality-of-the-circumstances analysis, the district court found that seven of the nine Senate Factors "all support the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates." Appl. Add. 28. Thus, the court concluded, although "things are moving in the right direction . . . it remains the case that the candidates preferred by Latino voters in LD 15 usually go down in defeat given the racially polarized voting patterns in the area." Appl. Add. 28. The court entered judgment for Plaintiffs on

their Section 2 results claim and ordered the parties to engage in a remedial process to adopt a new legislative map. Appl. Add. 32.

Intervenors appealed the district court's decision on the merits in September 2023. Appl. Add. 45. Nearly three months later, Intervenors moved to stay that order and the remedial process, raising most of the arguments they raise here, including that the district court: improperly found vote dilution in a majority-minority district; considered only the compactness of Plaintiffs' proposed maps and failed to consider the compactness of the Hispanic population; failed to give due weight to the election of a particular state senator; failed to consider whether racially polarized voting was a product of partisanship, rather than race itself; and was wrongly subjecting the Intervenors to a race-based remedial process. DktEntry 34-1, *Soto Palmer v. Hobbs*, No. 23-35595 (9th Cir. Dec. 5, 2023). The Ninth Circuit unanimously denied the motion. DktEntry 45, *Soto Palmer v. Hobbs*, No. 23-35595 (9th Cir. Dec. 21, 2023).

Meanwhile, Intervenors petitioned this Court for certiorari before judgment. That petition raised essentially the same arguments as their prior stay motions and the instant stay application. Pet. at 21-35, *Trevino v. Soto Palmer*, U.S. No. 23-484 (U.S. Nov. 3, 2023). This Court denied their petition on February 20, 2024. *Trevino v. Soto Palmer*, No. 23-484 (U.S. Feb. 20, 2024).

B. The Remedial Proceedings

Under Washington law, modifying a legislative plan requires reconvening the Redistricting Commission, which in turn requires "an affirmative vote in each house of two-thirds of the members . . . ." Wash. Rev. Code § 44.05.120(1). And in this case,

because Washington's Legislature was not in session when the district court entered its order—and not scheduled to reconvene until January 2024—reconvening the Redistricting Commission would have required the additional step of calling a special session of the Legislature. *See* Wash. Rev. Code § 44.04.012.

In its ruling enjoining the enacted plan, the district court provided the Legislature (and any reconvened Commission) approximately five months to complete this process. Appl. Add. 32. But following news reports that the House Speaker and Senate Majority Leader were declining to call a special session to reconvene the Redistricting Commission, the district court ordered the State to "file a status report . . . formally notifying the Court regarding the Legislature's position." ECF No. 224, at 2. Upon receiving conflicting reports—one from the State saying a special legislative session was unlikely (ECF No. 225) and another from non-party legislators expressing hope that it might yet occur (ECF No. 227), the court ordered the parties to begin a remedial process in parallel with the Legislature. As the court explained, "[i]f . . . the Legislature is able to adopt revised legislative maps for the Yakima Valley region in a timely manner, the Court's parallel process . . . will have been unnecessary." ECF No. 230, at 2. But "[g]iven the practical realities of the situation as revealed by the submissions of the interested parties," the district court elected to "not wait until the last minute to begin its own redistricting efforts[]" to "allow a more deliberate and informed evaluation of those proposals." ECF No. 230, at 2. This was prescient: the Legislature never reconvened the Commission.

As part of its parallel process, the district court directed the parties to submit

proposed remedial maps by December 1 and to identify candidates to serve as a special master. ECF No. 230, at 3. On December 1, 2023, Plaintiffs proposed five remedial maps to the district court, and the parties submitted special master candidates. ECF Nos. 230, 244, 245. Neither the State nor Intervenors submitted proposed remedial maps. In the State's case, as the State explained, this was because article II, section 43 of Washington's Constitution and Wash. Rev. Code § 44.05.120 provide a single mechanism for the State to propose redistricting plans: through the Redistricting Commission. It is unclear why Intervenors chose not to propose a map.

Over the following weeks, the district court appointed Karin Mac Donald, a respected, non-partisan redistricting expert to serve as the special master, and all parties had an opportunity to fully brief their positions on the proposed remedial maps. ECF Nos. 246, 248, 252, 254. As the State explained, because the State had no basis to "dispute Plaintiffs' assertion that each map 'is a complete and comprehensive remedy to Plaintiffs' Section 2 harms[,]' [it] defer[red] to the Court on which remedial map best provides Latino voters with an equal opportunity to elect candidates of their choice while also balancing traditional redistricting criteria and federal law." ECF No. 250, at 1 (quoting ECF No. 245, at 2). However, the State urged the district court to carefully consider any input from the Yakama Nation, whose reservation and historic lands lie within the affected area, should they choose to be heard on the matter. ECF No. 245, at 2.

While the remedial process was underway, Intervenors made further efforts to delay the proceedings. On January 19, they filed another motion to delay a

remedy, this time asserting that the district court lacked jurisdiction over the remedial phase because Intervenors had appealed the district court's liability finding. ECF No. 258. The district court properly denied that motion. ECF No. 265.

Turning back to the remedial phase, on February 9, the district court heard oral argument on Plaintiffs' remedial proposals and Intervenors' objections. ECF No. 265. Then, on February 23, nearly three months *after* the court-ordered due date for remedial proposals, Intervenors for the first time submitted their own proposed map. ECF No. 273. On March 8, at Intervenors' request, the district court held a half-day evidentiary hearing at which the parties presented testimony from their experts and other witnesses. Appl. Add. 34. "The Court also reached out to the Confederated Tribes and Bands of the Yakama Nation ('Yakama Nation'), soliciting their written input and participation at the March 8th evidentiary hearing." ECF No. 265.

On March 15, the district court ordered a new map, with a redrawn, newly labeled LD 14, in time for the March 25, 2024 deadline. In a detailed order, the court explained that the remedy it adopted was necessary to remedy the VRA violation it previously found. Appl. Add. 33-43. Although acknowledging that "the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district," the court explained that "the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature, especially with the shift into an even-numbered district, which ensures that state Senate elections will fall on a presidential year when Latino voter turnout is generally higher." Appl. Add. 36. Although Intervenors try to characterize this reduction in

Hispanic CVAP as "dilution," the unchallenged evidence was that enacted LD 15 did not permit Hispanic voters to elect candidates of their choice, while the new LD 14 will. *Compare* Appl. Add. 12-14, *with* ECF No. 278, at 2-3.

Following the district court's remedial order, Intervenors filed a second motion for a stay in the Ninth Circuit, raising arguments related not only to the remedial order, but to the district court's seven-month-old liability order that the Court already declined to stay. DktEntry 4.1, No. 24-1602 (9th Cir. Mar. 18, 2024). A second, separate Ninth Circuit motions panel again unanimously denied that motion, explaining that Intervenors had not "carried their burden to demonstrate they have the requisite standing to support jurisdiction at this stage of the proceedings." DktEntry 18.1, No. 24-1602 (9th Cir. Mar. 22, 2024).

Intervenors now come to this Court in a final effort to prevent Hispanic voters in the Yakima Valley from electing their candidate of choice in the upcoming 2024 elections.

C. The Process for Implementing Changes to Washington's Legislative Districts

Implementing changes to legislative districts is a complex and time-consuming process. Indeed, all parties have stipulated that if a new map was to be implemented for the 2024 election cycle, that map must have been finalized and transmitted to counties by March 25, 2024. *See* ECF No. 191, at 20 (admitted fact in parties' agreed proposed pretrial order).

In Washington, counties are primarily responsible for implementing changes to legislative districts. Wash. Rev. Code § 29A.16.040; ECF No. 179, at ¶¶ 11-12.

County election officials, who often have small staffs, are responsible for carrying out the preliminary tasks, which include adjusting precinct boundaries to reflect changes to legislative districts. ECF No. 51, at ¶¶ 4-8. The Washington Secretary of State coordinates and monitors the precinct mapping process. Wash. Rev. Code § 29A.76.040. Washington law imposes detailed requirements around the precinct-drawing process, Wash. Rev. Code § 29A.16.050, and the process takes weeks, ECF No. 51, at ¶ 11. The work is technical, requiring use of Geographic Information Services (GIS) data and mapping software, and counties with fewer staff and technical resources may require technical assistance from the Secretary's Office to complete the precinct drawing process. ECF No. 179, at ¶ 13.

Once county election officials have re-drawn precincts, county legislative authorities must approve the precinct boundary changes. Wash. Rev. Code § 29A.16.040. In doing so, county legislative authorities must comply with open public meetings laws, Wash. Rev. Code § 42.30.060, and many counties require a public comment period before approving precincts, ECF No. 179, at ¶ 14. After precinct boundaries are final, the Secretary's Office works with counties to validate the boundaries and incorporate them into the state's elections management system, VoteWA. ECF No. 179, at ¶¶ 15-16. Counties export the lines they've drawn into a "shapefile"—a file of geographic data from GIS software. Each county then provides the Secretary's Office with that shapefile, and the Secretary's Office consolidates the county files into its own software. ECF No. 179, at ¶ 17. The Secretary's Office then validates the precinct lines, making sure they do not inadvertently cross legislative

or congressional district boundaries, county lines, or other precinct lines, and making sure no address is assigned to multiple precincts or, on the other hand, no precinct at all. ECF No. 179, at ¶ 16.

The Secretary's Office then imports the new, consolidated shapefile into VoteWA, which connects the precinct boundary information to voter (and potential candidate) address information. ECF No. 179, at ¶ 17. The precinct assignment, and for some offices the specific segment of a precinct, is the means by which the VoteWA system verifies a candidate's eligibility for office when they file for candidacy online. ECF No. 179, at ¶ 21. For that reason, this process must be complete before candidates file to run for office, which this year occurs May 6-10, 2024. ECF No. 179, at ¶ 22.

In the four weeks between candidate filing and the mailing of overseas and military ballots, voters' pamphlets and the ballots themselves must be prepared, checked for accuracy, and printed. Because of the number of different districts and offices on the ballot, counties must design many different ballot combinations. ECF No. 179, at ¶ 30; ECF No. 51, at ¶¶ 17-28. Some counties have obligations under federal law to provide ballots in multiple languages. ECF No. 51, at ¶ 22. In one Washington county, ballot and voters' pamphlet preparation takes two full-time staff one month to complete. ECF No. 51, at ¶ 20. Because of the knowledge involved in designing, translating, and verifying ballots, and time and budget limitations, hiring additional staff during this period is not an option. ECF No. 51, at ¶ 28.

ARGUMENT

Intervenors do not meet their heavy burden of showing a stay of the district court's remedial order is warranted. "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted) (internal quotation marks omitted). In seeking this "extraordinary relief," Intervenors bear a "heavy burden." *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971); *see also Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) ("[T]he applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." (quoting *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975))).

"In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must 'try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302-03 (2006) (Kennedy, J., in chambers) (quoting *INS v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)). "This is always a difficult and speculative inquiry[.]" *Legalization Assistance Project*, 510 U.S. at 1304. "As is often

noted, '"a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted."'" *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1312 (1985) (Rehnquist, J., in chambers) (quoting *Atiyeh v. Capps*, 449 U.S. 1312, 1313 (1981) (Rehnquist, J., in chambers)). This is particularly so in cases seeking to stay the use of redistricting plans. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 914 (2019) (denying stay); *McCrory v. Harris*, 577 U.S. 1129 (2016) (same); *Wittman v. Personhuballah*, 577 U.S. 1125 (2016) (same); *League of United Latin Am. Citizens v. Perry*, 567 U.S. 966 (2012) (same).

Here, Intervenors have come nowhere close to establishing a circuit split or conflict with precedent on any issue that would justify a grant of certiorari. And even if this Court cast aside its normal certiorari standards and granted review, Intervenors have not demonstrated that the district court erred such that this Court would likely reverse. Instead, Intervenors press a hodgepodge of misrepresented, fact-bound disagreements with the district court, whose orders are reviewed for clear error. And even before reaching those problems, Intervenors' stay application fails out of the gate because they lack standing to press their appeals.

A. Intervenors Lack Standing

Intervenors' stay application should be denied because they lack standing to appeal the district court's judgment and remedy, which does not require them to do anything. As the district court found in denying mandatory intervention but granting only permissive intervention, "intervenors lack a significant protectable interest in this litigation[.]" ECF No. 69, at 10. Lacking a concrete interest in this suit, they lack

standing to appeal the district court's liability and remedial orders. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III").

Hollingsworth v. Perry, 570 U.S. 693 (2013), is dispositive. There, two couples challenged California's Proposition 8, which prohibited same-sex couples from marrying. *Id.* at 702. They sued state officials responsible for enforcing the law, but "[t]hose officials refused to defend the law[.]" *Id.* And so "[t]he District Court allowed petitioners—the official proponents of the initiative—to intervene to defend it." *Id.* (citation omitted). Following trial, the district court declared Proposition 8 unconstitutional and enjoined its enforcement. After the district court judgment, intervenors sought to continue their defense via an appeal. *Id.* But this Court dismissed the intervenors' appeal, holding that they lacked standing to challenge the injunction enjoining state officials from enforcing Proposition 8. *Id.* at 715.

As this Court explained, "standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* at 705 (internal quotation marks omitted). The district court's order only "enjoined the state officials named as defendants from enforcing" Proposition 8, but did "not order[]" intervenors "to do or refrain from doing anything." *Id.* Thus, intervenors "had no direct stake in the outcome of their appeal." *Id.* at 705-06 (internal quotation marks omitted). The Court likewise rejected intervenors' effort to claim standing on behalf of California, explaining that initiative sponsors had no authority under state

law to represent the state in court, and had "participated in this litigation solely as private parties." *Id.* at 710 (distinguishing *Karcher v. May*, 484 U.S. 72 (1987)).

This Court reached a similar result in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), holding that the Virginia House of Delegates, which had previously intervened and defended legislative redistricting, lacked standing to appeal after Virginia's Attorney General declined to do so. The Court reasoned that the House had "no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." *Id.* at 1950.

What was true for the initiative sponsors in *Hollingsworth* and the Virginia House of Delegates in *Bethune-Hill* is even more true for the three voters who intervened in this case. They "have no role—special or otherwise—in the enforcement of [new LD 14]. They therefore have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of" Washington. *Hollingsworth*, 570 U.S. at 707 (citation omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Nor, as the district court already found, do they have "standing in [their] own right" to defend the State's adoption of the now invalidated legislative maps. ECF No. 69, at 5.

Turning to the individual Intervenors, Mr. Trevino is the only one who even lives in the new LD 14, but he has no role in the district's implementation or enforcement. To the extent he might claim to have standing to appeal the Section 2 judgment because the remedy will supposedly result in a racial gerrymander of his district, this argument was correctly rejected by the district court. As the court

explained, Intervenors' asserted "interest in ensuring that any plan that comes out of this litigation complies with the Equal Protection Clause, state law, and federal law" no more affected Intervenors "'than it does the public at large[,]'" and thus "'does not state an Article III case or controversy[.]'" ECF No. 69, at 5 (first alteration in original).[5] Moreover, "it would be premature to litigate a hypothetical constitutional violation (*i.e.*, being subjected to a racial gerrymander through a remedial map established in this action) when no such violative conduct has occurred." ECF No. 69, at 5. Intervenors ask this Court to *presume* that the district court's entered remedy violates the Fourteenth Amendment, Appl. at 29-31, but there is no basis for such a presumption, especially since this Court has reiterated that race may be considered as a factor in remedying a Section 2 violation. *Allen*, 599 U.S. at 41 ("[T]his Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2."). So here, "absent specific evidence" showing the district court subjected Mr. Trevino to a racial classification in its remedial order, Mr. Trevino only asserts "a generalized grievance against governmental conduct of which he . . . does not approve" and, thus, lacks

[5] Nor can Mr. Trevino assert retroactive standing based on the district court's remedial plan. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed."); *Lujan*, 504 U.S. at 569 n.4 (rejecting the proposition that parties can retroactively create "redressability (and hence a jurisdiction) that did not exist at the outset"); *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1339 (11th Cir. 2007) ("The standing of a prospective intervenor, whether independent or piggyback, is properly measured at the time intervention is sought in the district court.").

standing. *United States v. Hays*, 515 U.S. 737, 745 (1995).[6]

The next Intervenor, Alex Ybarra, has no connection to the newly-drawn LD 14 or its enforcement. While he serves in Washington's Legislature from LD 13, Mr. Ybarra "has not identified any legal basis for [his] claimed authority to litigate on the State's behalf." *Bethune-Hill*, 139 S. Ct. at 1951. Nor has Mr. Ybarra ever sought to participate in this litigation in anything but his personal capacity. ECF No. 57, at 3, 6 (intervention motion describing Mr. Ybarra's interest as an elected official running for re-election in a separate district). *See Hollingsworth*, 570 U.S. at 713 ("When the proponents sought to intervene in this case, they did not purport to be agents of California."). He now attempts to premise his standing on the assumption that he will have to spend money and time to campaign in LD 13 based on altered boundaries—the natural consequence of remedying the neighboring district—but courts have consistently rejected the theory that incumbents have a legally cognizable interest in fending off unfavorable voters to their districts or adding favorable ones. *See, e.g.*, *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) (legislators suffered no cognizable injury when their district boundaries are adjusted); *League of United Latin Am. Citizens v. Abbott*, No. EP-21-cv-00259-DCG-JES-JVB, 2022 WL 4545757, at *5 (W.D. Tex. Sept. 28, 2022) ("plaintiff who pleads mere proximity to a diluted or gerrymandered district—or some connection between that district's boundaries and vote dilution or racial gerrymandering in [his] own

[6] Even if Mr. Trevino has standing to challenge the remedial map as a racial gerrymander in a separate, subsequent lawsuit, he still would not have standing to appeal from an order in a case in which he had no personal stake, and certainly does not have standing to challenge the district court's liability determination, which is currently subject to a separate appeal.

district—does not thereby have standing to challenge the neighboring district" (internal quotation marks omitted)). His argument about electoral harm is also wholly unsupported by the record. *See* Appl. Add. 136 (showing little change in disadvantage across historical races under enacted LD 13 and remedial LD 13).

As for the final Intervenor, Ismael Campos, he lives and votes in a different district and has no role in the implementation or enforcement of LD 14. Intervenors do not even attempt to argue Mr. Campos has standing.

In short, Intervenors "have no role—special or otherwise—in the enforcement of [LD 14]. They therefore have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of" Washington. *Hollingsworth*, 570 U.S. at 707 (citation omitted) (quoting *Lujan*, 504 U.S. at 560-61). This Court "ha[s] never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to." *Id.* at 715. It should "decline to do so for the first time here." *Id.*

B. With Each Passing Day, the *Purcell* Principle Counsels More Strongly Against a Stay

It is "a bedrock tenet of election law" that "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). "[S]tate and local election officials need substantial time to plan for elections. Running elections state-

wide is extraordinarily complicated and difficult." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). The record in this case illustrates the complexity in Washington, specifically as it relates to redistricting. *Supra* at 12-14.

Before trial, all parties to this litigation agreed that, "[s]hould the Court determine a new legislative district must be drawn as a remedy, March 25, 2024, is the latest date a finalized legislative district map must be transmitted to counties without significantly disrupting the 2024 election cycle." ECF No. 191, at 20. The district court did in fact determine that a new legislative district must be drawn as a remedy and adopted a remedial map that involves changes to legislative districts in twelve counties. As a result of multiple intervening deadlines, county election officials are already in the process of implementing the remedial map.

County election officials have already begun working to implement the remedial map adopted by the district court. While some changes will take weeks and require county legislative authority approval, other changes can be made immediately. *See* Wash. Rev. Code § 29A.16.040. For example, where precincts have been moved wholesale from one legislative district to another, counties can make those changes in Washington's VoteWA system without approval by the county legislative authority. That change will update voters' district and precinct assignments. There is no "undo" button in the VoteWA system; any changes that counties make as they implement the remedial map will have to be manually undone. As counties continue to make additional changes, that process will become more complicated and increase the risk of errors that could disrupt Washington's 2024

primary election. For example, voters could receive wrong or conflicting information about the legislative district in which they may file for office and will vote.

With each passing day, a stay by this Court presents increasing risk of voter confusion and disruption of Washington's 2024 primary election.

Further, if the Court issues a stay, counties will no longer be under a requirement to continue to take the steps necessary to implement the remedial map. The result would be that, even if this Court later lifts the stay, it will likely become impossible to implement the remedial map in time for the 2024 elections.

C. Intervenors Fail to Make a Strong Showing of a Likelihood of Success in Their Appeal of the District Court's Liability Order

Intervenors' arguments regarding the district court's liability finding all rehash objections that two different panels of the Ninth Circuit unanimously rejected in denying stays, and that this Court already concluded did not merit certiorari before judgment. Like milk, Intervenors' arguments have not gotten better with age.

Although Intervenors try to frame their arguments in legal terms, their stay application raises a passel of alleged factual errors unique to this case and subject to clear error review. *League of United Latin Am. Citizens* (*LULAC*) *v. Perry*, 548 U.S. 399, 427 (2006) ("The District Court's determination whether the § 2 requirements are satisfied must be upheld unless clearly erroneous."). None of their alleged errors is accurate or would merit review.

After receiving the findings of a renowned defense expert and reviewing the outcomes of other recent VRA litigation in the Yakima area, the State acknowledged before trial that it had no basis to dispute that Plaintiffs satisfied the *Gingles*

preconditions and the totality of circumstances inquiry, as the district court ultimately found. ECF No. 194, at 10. The State will leave it to Plaintiffs-Respondents to argue the evidence here as they deem fit.

Nonetheless, the State emphasizes a few points to highlight both the flaws in Intervenors' assertions of error and the extent to which their application falls woefully short of normal standards for this Court's review.

1. Although this Court has said "it may be possible for a citizen voting-age majority to lack real electoral opportunity," *LULAC*, 548 U.S. at 428, Intervenors argue that the district court erred in finding so here. Appl. 16-19. But the district court's finding was based on its detailed factual findings, and an analysis of the totality-of-circumstances factors. In particular, the district court concluded that "Senate Factors 1, 2, 3, 5, 6, 7, and 8"—that is: (1) a history of official discrimination in the Yakima region, (2) the extent of racially polarized voting, (3) voting practices that enhance the opportunity for discrimination, including off-year elections and nested districts, (5) the continuing effects of anti-Hispanic discrimination. (6) the use of racial appeals in political campaigns in the Yakima area, (7) the lack of success of Hispanic candidates in the Yakima area, and (8) the demonstrated lack of responsiveness of elected officials to Hispanic constituents—"all support the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates." Appl. Add. 28; *see also* Appl. Add. 29 ("[T]he evidence shows that . . . [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."). Intervenors make no effort to show why this conclusion was clearly erroneous.

Instead, Intervenors try to invent a rule of law limiting Section 2 claims in majority-minority districts to narrow circumstances. Appl. 16-18. But they don't cite any case for their proposed rule. And they simply ignore cases around the country to the contrary. *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017); *Moore v. Leflore Cnty. Bd. of Election Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974)); *Thomas v. Bryant*, 919 F.3d 298, 309 (5th Cir. 2019) ("Given the statutory mandate to focus on the 'totality of circumstances' . . . it is not surprising that numerous courts have found dilution of the voting power of a racial group in districts where they make up a majority of the voting population."), *vacated and dismissed as moot sub nom., Thomas v. Reeves*, 961 F.3d 800, 801 (5th Cir. 2020) (en banc). "This per se rule [Intervenors] advocate—a bar on vote dilution claims whenever the racial group crosses the 50% threshold[,]" *Thomas*, 919 F.3d at 308, has been repeatedly rejected by courts, including this one. *See LULAC*, 548 U.S. at 428; *see also Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1550 (5th Cir. 1992) ("[W]e hold that a protected class that is also a registered voter majority is not foreclosed, as a matter of law, from raising a vote dilution claim."); *Pope v. County of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934 (8th Cir. 2018). Intervenors are not likely to succeed on this point.

2. Intervenors badly miss the mark with their argument that the district court erred by failing to treat it as essentially dispositive that, in the first election in LD 15, Nikki Torres, a Hispanic candidate, won her race by a 35-point margin. Appl. 1-2, 3, 21. The Voting Rights Act guarantees the right of minority voters "to elect representatives *of their choice*." 52 U.S.C. § 10301 (emphasis added). It does not mean that any Hispanic elected official is good enough for Hispanic voters, regardless of the voters' actual preferences. *See LULAC*, 548 U.S. at 423-29, 442 (finding dilution of Hispanic vote in a district designed to protect Hispanic Republican incumbent who was not the candidate of choice of Hispanic voters).

Every *Gingles* expert in this case, *including Intervenors' own expert*, "testified that Latino voters [in LD 15] overwhelmingly favored the same candidate in the vast majority of the elections studied." Appl. Add. 11. But, because of white bloc voting in the other direction, Hispanic voters' preferred candidates rarely win. Appl. Add. 12-13. Senator Torres's election did not singlehandedly repudiate that trend. Rather, the evidence reflected that Senator Torres was not the candidate of choice of Hispanic voters, but was elected *in spite of* Hispanic voter preferences. Intervenors concede as much, noting that Plaintiffs' expert found that only 32% of Hispanic voters voted for Senator Torres—meaning Hispanic voters preferred her opponent by *over two-to-one*. *See* Appl. 8. Even Intervenors' own expert concluded that a majority of Hispanic voters in LD 15 voted *against* Senator Torres. Appl. 8. And this despite the fact that Senator Torres ran against a political novice who was a write-in candidate in the primary and spent less than five percent of what Senator

Torres spent. ECF No. 208, at 604:6-605:19. In light of the evidence, the district court did not clearly err in finding that the 2022 election demonstrated "moderate cohesion that was consistent with the overall pattern of racially polarized voting." Appl. Add. 11.

3. Intervenors' argument that the district court failed to properly measure compactness has no legs. *Contra* Appl. 19-20. The district court made factual findings that Plaintiffs identified numerous demonstrative districts that united cohesive Hispanic communities along Interstate 82 from Yakima to Pasco and "that perform[ed] similarly or better than the enacted map when evaluated for compactness and adherence to traditional redistricting criteria." Appl. Add. 9-10. This closely parallels how this Court analyzed compactness in *Allen,* 599 U.S. at 20 (finding *Gingles I* satisfied where "the maps submitted by one of plaintiffs' experts . . . 'perform[ed] generally better on average than' did" the enacted map and "[p]laintiffs' maps also satisfied other traditional districting criteria" (first and third alterations ours)). Like the district court findings in *Allen*, the district court's findings here are consummately factual findings, reviewed for clear error. Intervenors make no serious efforts to rebut them, let alone to meet the high burden of clear error. Intervenors' unsupported factual disagreements do not merit review by this Court.

4. Intervenors' claim that the district court was required to, but did not, disentangle the effects of race and partisanship is doubly wrong. *Contra* Appl. 20-21. As a legal matter, "[i]t is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less

opportunity than whites to elect their preferred representatives. Consequently . . . only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters." *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986) (plurality opinion); *see also id.* at 100 (O'Connor, J., concurring) (opining that partisanship is irrelevant in the analysis of racially polarized voting under the *Gingles* factors, although it may be relevant in "the overall vote dilution inquiry").[7] As a factual matter, contrary to Intervenors' claims, the district court explicitly *did* consider partisanship as part of its totality-of-circumstances analysis. Appl. Add. 30 ("Especially in light of the evidence showing significant past discrimination against Latinos, on-going impacts of that discrimination, racial appeals in campaigns, and a lack of responsiveness on the part of elected officials, plaintiffs have shown inequality in electoral opportunities in the Yakima Valley region: they prefer candidates who are responsive to the needs of the Latino community whereas their white neighbors do not. The fact that the candidates identify with certain partisan labels does not detract from this finding."). Intervenors make no effort to explain why the district court's factual findings were wrong.

In a final bid to establish that certiorari might be appropriate here, Intervenors contend there is a circuit split between those circuits that consider partisanship as part of the *Gingles* racially polarized voting analysis and those who consider it as part of the totality-of-circumstances analysis, as the district court did

[7] *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586 (9th Cir. 1997), on which Intervenors rely (Application at 20), did not concern a dilution claim or racially polarized voting.

here. Appl. 35-36. Not quite. Every circuit that has addressed the question appears to handle it the same way the district court did here, with only the Fifth Circuit's opinion in *Clements* as the potential outlier. *See United States v. Charleston County, S.C.*, 365 F.3d 341, 348 (4th Cir. 2004) (collecting cases). And it's not at all clear that *Clements* is actually inconsistent with the opinions of the sister circuits. *See Lopez v. Abbott*, 339 F. Supp. 3d 589, 610-11 (S.D. Tex. 2018) (concluding that *Clements* "did not assign any racial bias issue to the three *Gingles* preconditions," but that evidence of racial bias is instead "part of the totality of the circumstances test"). But, in any event, even if there *were* a circuit split, this case is not the appropriate vehicle for addressing it. The district court did consider the effect of partisanship versus race as part of its totality-of-circumstances analysis, and found that vote dilution here was indeed on account of race. In other words, Intervenors lose under either analysis. There is no need for the Court to take up this issue at all, and certainly not here.

D. Intervenors Fail to Make a Strong Showing of a Likelihood of Success in Their Appeal of the Remedy

Intervenors also challenge the district court's remedy. They must show, but cannot, that they are likely to succeed on the merits of the argument that the district court clearly erred in adopting the remedial map. *See North Carolina v. Covington*, 585 U.S. 969, 979 (2018) (applying clear error review to court-adopted map).

1. The remedial map unquestionably remedies the VRA violation because, unlike its predecessor map, it empowers Hispanic voters to elect the candidates of their choice

Intervenors' repeated contention that the remedial map has the perverse effect of further diluting the Hispanic vote, Appl. 22-25, fails because it is contrary to the

evidence. Again, the Voting Rights Act guarantees the right of minority voters "to elect representatives of their choice." 52 U.S.C. § 10301. Here, the undisputed evidence showed that Hispanic voters in former LD 15 couldn't do that because of racially polarized voting: while they voted cohesively for particular candidates, non-Hispanic voters voted cohesively in the other direction, resulting in the Hispanic-preferred candidates losing. Appl. Add. 11-14. What's more, the evidence shows this racially polarized voting reflected and reinforced a longstanding (if slowly improving) pattern of discrimination against Hispanic voters in the Yakima Valley area, resulting in "less opportunity" for Hispanic voters "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301; Appl. Add. 14-29. This is the Section 2 violation the district court was tasked with remedying.

The undisputed evidence shows that the new LD 14 likely succeeds in remedying it. Plaintiffs' expert demonstrated that, in contrast to enacted LD 15, Hispanic-preferred candidates would likely win in the version of LD 14 ultimately adopted by the district court. ECF No. 278, at 2-3. And for all his criticisms of Plaintiffs' maps, Intervenors' expert agreed, finding that Hispanic-preferred candidates tended to lose in the enacted LD 15, but tended to win in the new LD 14. ECF No. 273, at 18.[8] The new LD 14 thus remedies the Section 2 violation.

Intervenors do not—and cannot—dispute this. Nor do they point to any authority to support their implied proposition that a remedy that nominally reduces

[8] Because Plaintiffs' (and ultimately the court's) remedial district changed the numbering of the relevant district from 15 to 14, interpreting Figure 11 in ECF No. 273, at 18, requires comparing enacted district 15 with remedial district 14.

minority CVAP, but increases minority voters' ability to elect candidates of their choice, is *per se* unacceptable. Lacking evidence or on-point authority, they instead try to analogize this case to *Bartlett v. Strickland*, 556 U.S. 1 (2009), and *Cooper v. Harris*, 581 U.S. 285 (2017). Appl. 24. Both are inapposite. The language Intervenors quote concerns whether the first *Gingles* precondition is satisfied—i.e., whether Section 2 liability may attach. *See Bartlett*, 556 U.S. at 12 ("This case turns on whether the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district."); *Cooper*, 581 U.S. at 305 (under "the first *Gingles* precondition . . . [w]hen a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply"). But neither case has anything to say about what remedies are appropriate once a violation is found, as here.[9]

2. Intervenors' objections that the remedial map allegedly made overbroad changes does not merit denying a remedy to Hispanic voters

As noted above, the sole manner for Washington to propose or modify legislative districts is through the Redistricting Commission. As such, while the State sincerely doubts that Intervenors can show the district court *clearly erred* in adopting the map it did, the State has not taken a position on whether any remedial map proposed by any party made changes more expansive than necessary to remedy the VRA violation. *See* ECF No. 250 (because the State had no basis to "dispute Plaintiffs'

[9] In this case, as detailed in the district court's order (and notwithstanding Intervenors' attempt to re-write *Gingles'* first precondition, *supra* at 30-31), it is essentially undisputed that Hispanic voters in the Yakima Valley are "sufficiently large to make up a majority in a reasonably shaped district . . . ." *Cooper*, 581 U.S. at 305.

assertion" that Plaintiffs' proposed maps remedies the Section 2 violation, the State "defer[red] to the Court on which remedial map best provides Latino voters with an equal opportunity to elect candidates of their choice while also balancing traditional redistricting criteria and federal law"). The sole concern from the State's perspective is that the new map remedied the Section 2 violation. ECF No. 250.[10] The map meets that goal.

Intervenors' effort to block that remedy should be rejected. Even if Intervenors could raise valid concerns regarding the magnitude of the changes ordered by the district court, this would not justify denying Hispanic voters in Washington the opportunity to elect representatives of their choice for another election cycle, as their stay application demands.

3. Intervenors waived the argument that the remedial LD 14 is a racial gerrymander, and even if they had not, considerations of race did not predominate in the district court's remedy

During the remedial process, Intervenors never raised concerns that any of Plaintiffs' proposed maps or the remedial map adopted by the district court would be an unconstitutional racial gerrymander. Instead, Intervenors complained that the maps were overtly partisan and further *diluted* Hispanic voting strength. *See, e.g.*, ECF No. 252. They lodged their racial gerrymandering criticism of the adopted map

[10] In light of the State's consistent position, Intervenors' barb "that the Attorney General was unable to offer a *single word* defending the sweeping changes in opposing a stay" below, Appl. 34, willfully misreads the record.

for the first time in the stay briefing to the Ninth Circuit.[11] They have inadequately preserved this issue and thus waived it. *Cf. Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("[A]ppellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance.").

But even had Intervenors preserved this argument by raising it below, they fall woefully short of the high bar they must clear to stay the district court's injunction. To allege, let alone prove, a racial gerrymandering claim, "the burden of proof . . . is a demanding one." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (internal quotation marks omitted). And courts apply a presumption of good faith, given that "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Intervenors' argument requires a "two-step analysis." *Cooper*, 581 U.S. at 291.[12] "First, [they] must prove that race was the predominant factor motivating the [court's] decision to place a significant number of voters within or without a particular district." *Id.* (internal quotation marks omitted). To make this showing, they would have to show the district court "subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id.* (internal quotation marks omitted). It is not enough that race played a role in

[11] As noted above in the standing section, Intervenors raised the specter of racial gerrymandering in a single paragraph in their motion to intervene filed back in March 2022. ECF No. 57, at 6. But they did not raise a gerrymandering argument in opposition to Plaintiffs' multiple proposed maps.

[12] The State is not aware of any case scrutinizing whether a court-crafted remedial map was a racial gerrymander that violated equal protection. Nonetheless, for purposes of this response, the State assumes the same analysis applies as when a legislature or commission enacts a redistricting plan in the first instance.

decision-making—it must overwhelm other factors. *See Easley*, 532 U.S. at 253 (finding no evidence of racial predominance in a legislator's statement that a map provided "geographic, racial and partisan balance" because at worst "the phrase shows that the legislature considered race, along with other partisan and geographic considerations"). "Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Cooper*, 581 U.S. at 292. At this stage in the inquiry, the burden "shifts to the" party defending the map to establish that any "race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Id.* (internal quotation marks omitted). Courts have long considered compliance with the VRA to be a compelling interest. *Id.*

Intervenors ignore this demanding standard, and make essentially no effort to satisfy it. Instead, their argument is based on two things: their hired expert's characterization of the new LD 14's shape as octopus-like and the district court's conclusion that the district's shape was necessary to remedy the enacted map's division of a Hispanic community of interest in the Yakima Valley area.

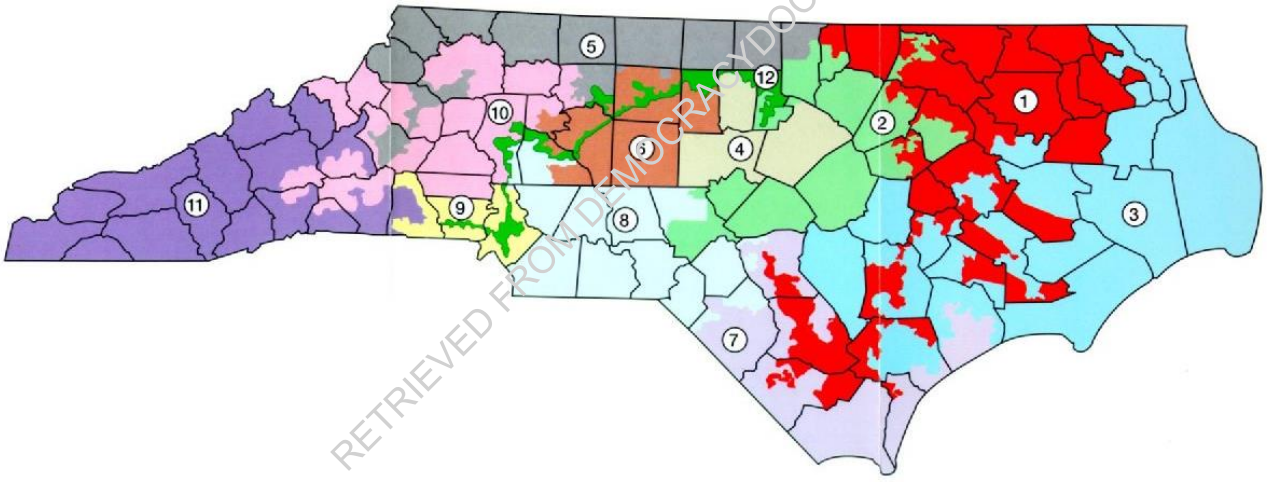
Intervenors not only vastly overstate the strangeness of the district's shape, they also ignore obvious, non-racial explanations for its shape. For example, both the northwest and southwest legs are necessary to keep together Reservation and Off-Reservation Trust Land of the Yakama Nation—a recognized community of interest whose preservation in a single district all parties agreed was a critical goal. Appl. Add. 37. And the small appendage at the northernmost point of the district goes into the City of Yakima, the population center of the district, and is necessary to grab

enough population for the district. Similarly, Intervenors not only disregard that uniting communities of interest is a well-recognized—indeed, *statutorily mandated*—redistricting criterion, Wash. Rev. Code § 44.05.090, they also simply ignore evidence and testimony that the district was reasonably compact and initially drawn by Plaintiffs' map drawing expert without considering race or racial demographics. *See, e.g.*, ECF No. 277, at 10; ECF No. 245-1, at 4-5.[13] Moreover, their central premise—that considering race is verboten in remedying a VRA violation—has been definitively rejected by this Court. *See Allen*, 599 U.S. at 32-33 ("The contention that mapmakers must be entirely 'blind' to race has no footing in our § 2 case law."); *id.* at 30 ("When it comes to considering race in the context of districting, we have made clear that there is a difference 'between being aware of racial considerations and being motivated by them.'" (quoting *Miller*, 515 U.S. at 916)). Further, Intervenors actively undermine their own argument, asserting that partisanship was the driving force behind the district court's decision-making. *See, e.g.*, Appl. 26 ("[T]he district court had an unstated—but unmistakable—appetite for partisan changes[.]"). Intervenors come nowhere near showing that race predominated over other redistricting criteria in Judge Lasnik's mind.

Intervenors attempt to compare this case to *Shaw v. Reno*, 509 U.S. 630, 642 (1993), where North Carolina's congressional map was "so extremely irregular on its

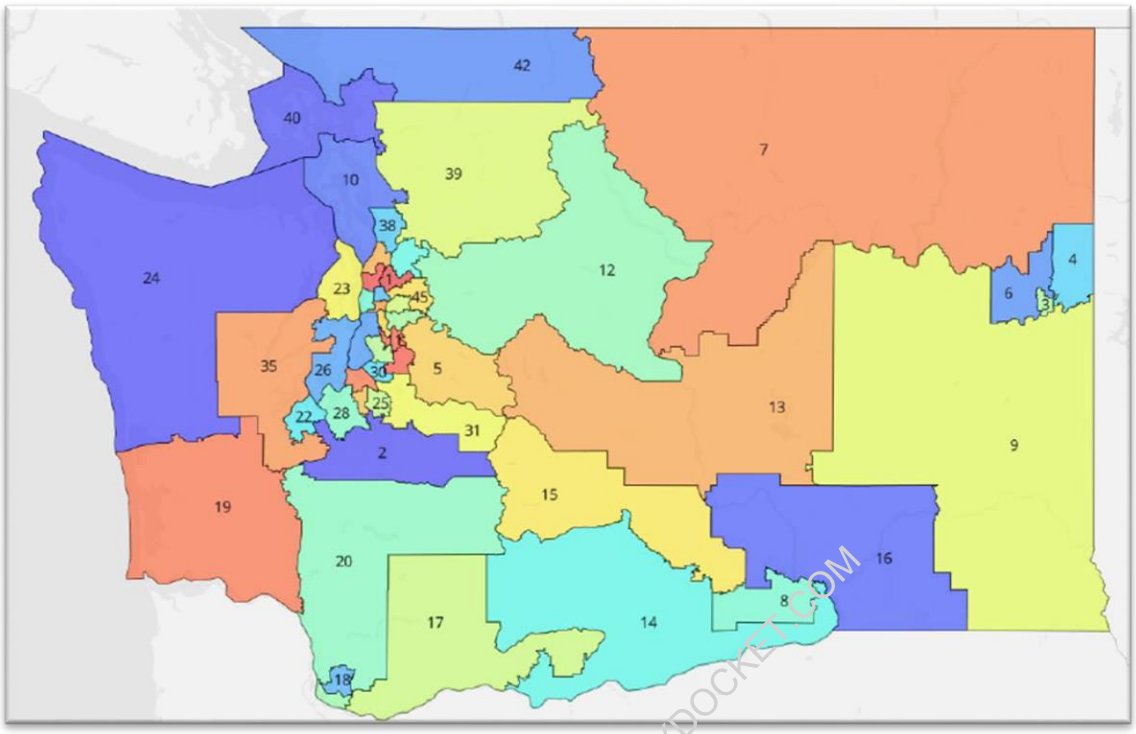
[13] Intervenors' claim that "the district court . . . admitted that its 'fundamental goal' in adopting the Remedial Map was a race-based[,]" Appl. 5 (quoting Appl. Add. 38), badly misreads the order. Plaintiffs' claim was that enacted LD 15 violated Section 2 of the VRA by, in part, dividing a Hispanic community of interest in the Yakima Valley. Appl. Add. 1-2. Having found a violation, remedying it—including by uniting the Hispanic community of interest proved at trial—was obviously and appropriately a fundamental goal of the remedial map.

face" that plaintiffs could state an equal protection violation, and to *Bush v. Vera*, 517 U.S. 952, 974 (1996), in which the Court found that district shapes, likened to, *inter alia*, "a sacred Mayan bird" (internal quotation marks omitted), were evidence (although not proof) of racial predominance. *See also Bush*, 517 at 974 ("Not only are the shapes of the districts bizarre; they also exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines."). But even the quickest glance at District 12, a majority-minority district at issue in *Shaw*; Districts 18, 29, and 30 in *Bush*; and LD 14 adopted by the district court here, show why Intervenors cannot meet the extraordinarily high burden of establishing that race predominated here:



Shaw, 509 U.S. at 659 (App'x) (District 12 shaded in green).

Bush, 517 U.S. at 986 (App'x A-C) (Districts 18, 29, and 30).



ECF No. 288-3 (LD 14).

Intervenors' criticism of LD 14's boundaries further ignores this Court's recognition that "[t]he Constitution does not mandate regularity of district shape," and "the neglect of traditional districting criteria is merely necessary, not sufficient." *Bush*, 517 U.S. at 962. Instead, Intervenors must show that the district court subordinated traditional districting criteria to race. *See id.*; *Miller*, 515 U.S. at 928 (O'Connor, J., concurring) ("plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices"). This is a showing Intervenors have not even tried to make.

But even if they could, that still wouldn't prove Judge Lasnik violated the Constitution. Instead, it would just mean the remedial map is subject to strict scrutiny. *Cooper*, 581 U.S. at 292. And if strict scrutiny did apply, the district court's remedial map would satisfy it. The new LD 14 serves the undeniably compelling

interest of remedying a VRA violation, and, for the reasons detailed in his order, the new district is narrowly tailored to remedy the violation. *See* Appl. Add. 38-41.

E. The Balance of Harms and the Public Interest Tip Decisively Against Denying Hispanic Voters Relief for the Upcoming Election Cycle

Intervenors cannot show that the balance of harms or the public interest favor a stay. Most fundamentally, a stay of the remedial process will harm the public interest. A stay will force voters in the Yakima Valley area to vote in a legislative district the district court determined discriminates against Latino voters in violation of federal law. No subsequent relief could redress that harm. Intervenors make no serious effort to justify this harm. *See Merrill*, 142 S. Ct. at 883 (Kagan, J., dissenting from grant of applications for stays) ("Staying [the district court's] decision forces Black Alabamians to suffer what under that law is clear vote dilution.").

Intervenors' contention that they are injured absent a stay relies on their thinly argued and unproven claim that the new LD 14 is a racial gerrymander. Appl. 37. For the reasons detailed above, they have fallen far short of meeting their high burden of showing a racial gerrymander. *Easley*, 532 U.S. at 241. And to the extent Intervenors hinge their stay request on inconvenience to one incumbent seeking reelection, they cannot seriously contend that any (voluntarily assumed) inconvenience justifies denying voters their rights under the VRA.

Intervenors assert that a stay will not impose substantial harm on the Secretary of State. Appl. 38. But for the reasons described above, the risk of creating voter confusion and disrupting Washington's 2024 primary election increases with each passing day.

Intervenors also argue the State will be harmed absent a stay. Appl. 38-39. The State disagrees. The State declined to propose a remedial map, the Secretary of State made clear the deadlines by which it needed the district court to adopt a revised map in order to hold elections in an orderly manner, and the district court met that deadline and adopted a remedial map that complies with the VRA. *Cf. Republican Nat'l Comm. v. Common Cause Rhode Island*, 141 S. Ct. 206 (2020) (denying stay application where applicants lacked a cognizable interest in the state's ability to enforce its duly enacted laws). To be clear, the State does not assert that it will be harmed in conducting the 2024 election under a legislative map it had no basis to dispute violated Section 2. Instead, the State recognizes that the Voting Rights Act is a critical tool "to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of [its] citizens: the right to vote." *Bartlett*, 556 U.S. at 10. Thus, it is no undue hardship to conduct elections in compliance with the Voting Rights Act—particularly under a timeline that gives election officials sufficient time to implement the remedial map.

Finally, Intervenors' seething accusations about the allegedly "collusive" nature of the Attorney General's litigation strategy, Appl. 34-35, 39, are, to use the legal term, a bunch of hooey. The Attorney General's Office has represented multiple state parties over the course of this suit, including the Secretary of State and state legislative leaders (for whom the Attorney General's Office successfully secured dismissal). ECF No. 66. Once the State of Washington itself was joined as a party, it diligently worked to evaluate Plaintiffs' claims and any potential defenses, including

by hiring a renowned VRA defense expert. In the end, the State declined to defend LD 15 at trial after the evidence—including all parties' expert reports—showed that enacted LD 15 likely did dilute Hispanic votes.[14] And the State was correct, as the district court found. This is precisely what parties should do—particularly those charged with representing the public's interest.

Nor is it evidence of collusion that the State—after concluding that Plaintiffs' proposed remedial maps remedied the VRA violation—deferred to the district court to adopt the remedy it deemed appropriate, aided by a non-partisan special master (whom the State nominated largely because she was "strictly non-partisan," ECF No. 244 at 4). Instead, as repeatedly explained, the State did not propose its own remedial map because the Legislature opted not to. And contrary to the Intervenors' assertions of bias, the State declined to provide substantive revisions to *either* sides' proposed maps. In short, Intervenors' insinuation that the State is somehow part of a conspiracy with Plaintiffs is not a serious argument.

CONCLUSION

To ensure that voters have the opportunity to elect the candidates of their choice, as required by Section 2 of the Voting Rights Act, and to minimize disruption to the upcoming election cycle, the State of Washington respectfully requests the Court deny Intervenors' application for a stay of the district court's remedy.

[14] While the State declined to defend against Plaintiffs' Section 2 "effects" claim, it successfully defended against Plaintiffs' Section 2 "intent" claim.

RESPECTFULLY SUBMITTED, March 29, 2024.

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