Nos. 23-35595 & 24-1602

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, et al.,
Plaintiff-Appellees,
v.
STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,
Defendant-Appellees,
and
JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA,
Intervenor-Defendant-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:22-cv-05035
Hon. Robert S. Lasnik

INTERVENOR-APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

All three Appellants are individual natural persons.

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GLOSSARY

Term	Definition
Intervenors / Appellants	Three Hispanic voters who intervened as defendants in the district court (Jose Trevino, Alex Ybarra, and Ismael G. Campos), who are Appellants here.
Enacted Map	The permanently enjoined Washington State Legislative Map, as drawn by the Commission and adopted by the Legislature in February 2022
CVAP	Citizen Voting Age Population
HCVAP	Hispanic Citizen Voting Age Population
LD-15	Washington Legislative District 15 of the Enacted Map
Remedial Map	The new Washington State Legislative Map as ordered by the district court on March 15, 2024
State / Appellees	The State of Washington, as appearing in this litigation and represented by the Attorney General
Plaintiffs / Appellees	The group of voters who originally brought this Section 2 case and prevailed at the district court on the merits, who are Appellees here
Commission	Washington State's bipartisan, independent Redistricting Commission created by Wash. Const. art. II, § 43(2).
VRA	The Voting Rights Act, 52 U.S.C. § 10301 *et seq*.

INTRODUCTION

The decisions below represent drastic ruptures from all prior Voting Rights Act ("VRA") § 2 precedents and contort that landmark provision beyond recognition. Plaintiffs here brought a § 2 challenge asserting that Washington State's Legislative District 15 ("LD-15"), enacted by the unanimous vote of Washington's independent bipartisan Redistricting Commission, unlawfully diluted Hispanic voting strength. But it is undisputed that LD-15 was a *majority*-minority district, with a Hispanic Citizen Voting Act Population ("HCVAP") of 52.6% in 2021. No federal court considering a single-district challenge has ever held that a majority-minority district violates § 2 without also finding that the putative majority was in fact "hollow" or a "façade" without being reversed or vacated. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 428–29 (2006) (majority was "hollow" because it was adult population and not citizen-voting-age population ("CVAP")). Indeed, majority-minority districts are much more typically imposed to *remedy* § 2 vote-dilution violations, rather than being the targets of § 2 suits themselves.

The district court's holdings become even stranger when the results of the first (and heretofore only) contested election conducted under the original LD-15 map are considered: In 2022, a Hispanic candidate defeated a White candidate by a 2-1 margin. Nikki Torres prevailed with 67.7% of the vote, compared to 32.1% received by Lindsey Keesling. 3-ER-546. That landslide victory of a Hispanic candidate is

hardly indicative of unlawfully diluted Hispanic voting strength. To all except Plaintiffs and the district court, that is: They blithely discounted that real-world evidence as somehow consistent with Plaintiffs' models of unlawful vote dilution of Hispanic votes. In Plaintiffs' view, because Nikki Torres was a Hispanic Republican, her resounding electoral success in fact represented a triumph of voter suppression and subjugation of Hispanics by White voters.

Remarkably, this case turned stranger still when Plaintiffs unveiled their proposed remedial maps. Plaintiffs' proposed remedy to their alleged Hispanic vote dilution was *yet more dilution* of Hispanic votes. Specifically, Plaintiffs submitted five proposed remedial maps (and later revised versions of each, for a total of eleven)—and *every single one of them* would decrease the HCVAP of the opportunity district. While enacted LD-15 was 52.6% HCVAP, Plaintiffs' proposed "remedies" would affirmatively dilute that number to between 46.9% and 51.7% (all in 2021 numbers). 2-ER-155. The district court accepted Plaintiffs' invitation to remedy putative dilution with more dilution: Under the map it adopted (the "Remedial Map"), the district's HCVAP was reduced from 52.6% to 50.2%—even though a "bare" (though larger) majority was the putative § 2 violation. In doing so, the district court declared that its "fundamental goal" in drawing the Remedial Map was a race-based one: uniting Latino communities of interest. 1-ER-07 n.7. The district court's Remedial Map also needlessly made sweeping changes to the

legislative map, altering *thirteen* out of forty-nine districts to remedy a putative violation in just one district (LD-15).

In a nutshell: This case turns the VRA on its head. A typical VRA § 2 case challenges a district with a minority voting population below 50% and seeks to create a majority-minority district as a remedy for the alleged dilution. Not so here. Instead, Plaintiffs asserted that (1) a majority Hispanic CVAP district itself unlawfully dilutes Hispanic voting strength and (2) the appropriate "remedy" for that putative dilution is further dilution by reducing the district's Hispanic population—precisely the retrogression that the VRA is supposed to prohibit, not mandate.

Given just how far through the looking glass the VRA claims and remedies were here, the district court's acceptance of them rests on numerous—and manifest—legal errors. This appeal challenges seven such errors, any one of which independently requires reversal.

First, the originally enacted LD-15 is a non-façade working Hispanic citizen voting-age majority district in which that majority is not denied access to the polls or equal opportunity to vote. As a threshold matter of law, this case should have ended there, because Hispanic voters—a majority by CVAP—necessarily possess at least an equal "opportunity … to elect representatives of their choice" as other groups (whom they outnumber and can outvote outright). 52 U.S.C. § 10301(b).

Second, the district court erred by analyzing the compactness of the districts' geographic boundaries rather than the compactness of the minority community. This was patent error. *See*, *e.g.*, *Perry*, 548 U.S. at 433 ("'The first *Gingles* condition refers to the compactness of the minority population, *not to the compactness of the contested district*.'" (emphasis added)).

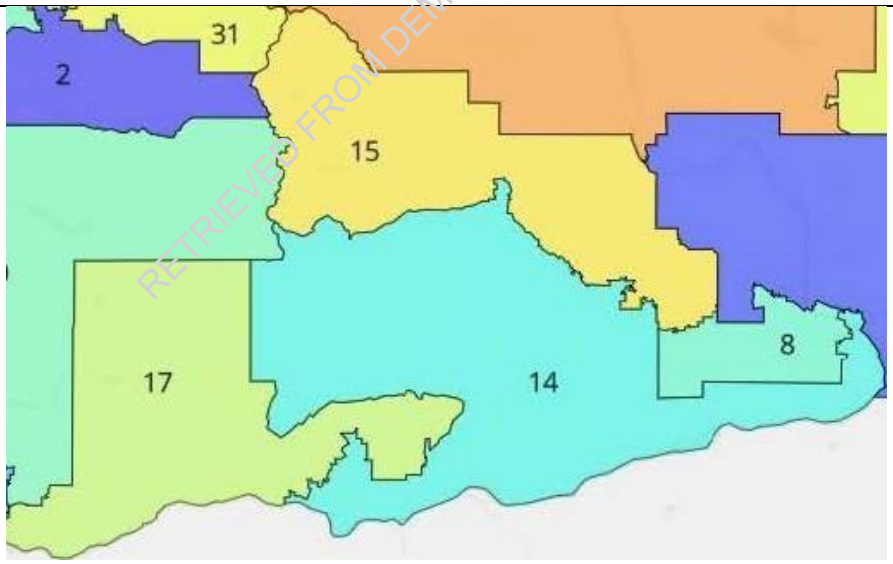
Third, the district court made no attempt to determine whether race or politics caused any alleged denial of electoral opportunity, a requirement under the *Gingles* preconditions or the totality of the circumstances.

Fourth, the totality of the circumstances shows that an ultimate finding of dilution was implausible considering the ubiquity of the facts upon which the district court relied.

Fifth, in an apparent first in the entire history of the VRA, the district court purported to remedy the alleged dilution that it found violated § 2 with yet more dilution, reducing the Hispanic CVAP of LD-15 from 52.6% to 50.2%. No party here has ever identified *any* court that has ever done that. And for good reason: If dilution is the VRA violation, it cannot also be the cure. Indeed, employing the VRA affirmatively to *dilute* minority voting strength makes a farce out of that landmark civil rights statute and dispenses entirely with the pretense that the VRA is being used for any purpose other than naked partisan gain.

Sixth, the Remedial Map is an unconstitutional racial gerrymander. Remedial LD-14 (shown next) was aptly described as an "octopus slithering along the ocean floor." 2-ER-129. Like prior infamous racial gerrymanders, its bizarre shape reveals its unexplainable-except-by-racial-grounds nature—which the district court was completely explicit about in any case, declaring the map's "fundamental goal" to be race-based sorting. 1-ER-07 n.7. The resulting racial gerrymander belongs in the unconstitutional Hall of Shame every bit as much as the "sacred Mayan bird" and "bizarrely shaped tentacles" districts previously invalidated. *Allen v. Milligan*, 143 S. Ct. 1487, 1509 (2023).

Figure 1: Remedial Map Adopted (LD-14 is remedial district)



Seventh, the district court violated the Supreme Court's federalism-based mandate to craft a remedial map that minimizes changes to the districting plan

enacted by the State. Instead, the district court made sweeping and gratuitous changes to a huge number of legislative districts: altering thirteen of Washington's forty-nine total districts and moving half a million Washingtonians into different districts. These changes were wanton, particularly, as Appellants' remedial expert made clear, because a remedy accomplishing the district court's stated goal of performing for a Democratic candidate could be effected by altering just three districts and moving only 87,230 people, while Plaintiffs themselves proposed a remedial map altering just four districts and moving only 190,745 people. 2-ER-73, 81–82; 2-ER-153. In *Upham v. Seamon*, the Supreme Court held that a district court abused its discretion by redrawing *four* out of twenty-seven districts to remedy objections to *only two*. 456 U.S. 37, 38, 40 (1982). But here the district court redrew *thirteen* districts to remedy a violation in *just one*.

For all these reasons, this Court should reverse the district court's judgment and order adopting the Remedial Map, or at the very least vacate the Remedial Map.

JURISDICTION

The single-judge district court lacked jurisdiction to hear this case, which required a three-judge court to be formed, as explained below (*infra* § I).

If it did have single-judge jurisdiction, the district court had federal question jurisdiction under 28 U.S.C. § 1331. The district court entered its final judgment on § 2 liability on August 11, 2023. 1-ER-01. Intervenor-Defendant-Appellants

("Intervenors") filed a timely notice of appeal on September 8, 2023. 3-ER-573. The district court entered its final remedial order on March 15, 2024. 1-ER-2–12. Intervenors filed a notice of appeal that day. 3-ER-572.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. As explained below (*infra* § II), Intervenors have standing to bring this appeal.

STATEMENT OF ISSUES

The overarching issue in the merits appeal is whether the district court erred in holding that LD-15 violated § 2 of the VRA. Included within that global issue are:

(1) Whether the district court erred in asserting jurisdiction over this challenge to Washington's legislative maps when 28 U.S.C. § 2284(a) requires "[a] district court of three judges . . . when an action is filed challenging . . . the apportionment of any statewide legislative body."

(2) Whether the district court erred in holding that a viable § 2 claim could be asserted against a majority-minority district where the majority is not hollow or a façade.

(3) Whether the district court erred in holding that the first *Gingles* precondition was satisfied where the district court analyzed the compactness of the district's geographical lines, rather than the minority populations within the district, as Supreme Court precedent demands.

(4) Whether the district court erred in holding that the second and third *Gingles* preconditions were satisfied where the district court failed to analyze whether polarization in voting was due to partisanship rather than race.

(5) Whether the district court erred in holding that Plaintiffs had established a violation of § 2 under the totality of circumstances.

Answering any one of these questions in the affirmative requires reversal of the merits judgment below and vacatur of the district court's Remedial Map.

The legal questions underlying the district court's Remedial Map are:

(6) Whether the district court erred in attempting to remedy a found Section 2 violation of Hispanic vote dilution by decreasing the Hispanic citizen voting age population of the district.

(7) Whether the district court's intentional use of race in drawing the Remedial Map violated the Equal Protection Clause.

(8) Whether the district court abused its discretion in the extent of changes it made to the State's Enacted Map when it redrew thirteen districts to remedy a violation it found in just one.

Answering any of these questions in the affirmative requires vacatur of the Remedial Map.

STATUTORY ADDENDUM

Appellants' statutory addendum includes the text of VRA § 2.

STATEMENT OF THE CASE

Factual and Procedural Background

Under Washington law, congressional and legislative districts are supposed to be drawn exclusively by an independent and bipartisan redistricting commission (the "Commission"). *See* Wash. Const. art. II, § 43(1); U.S. Const. art II, § 2; 1-ER-17–18. The Commission consists of four voting members (each, a "Commissioner") and one non-voting member, with each voting member appointed by the legislative House and Senate leaders of the two largest political parties. *See* Wash. Const. art. II, § 43(2). The four voting members in turn select the nonvoting chair. *Id.* Following the 2020 Census, the Commission's voting members were duly appointed, and they elected Sarah Augustine as the Chairwoman. 2-ER-249.

The Commissioners were required by statute to create compact and convenient districts with equal (as practicable) populations that respected communities of interest, minimized splitting of existing county and town boundaries, and encouraged electoral competition. *See* RCW 44.05.090. Also by law, the Commission needed to agree by majority vote on a map by November 15, 2021 and then transmit the proposed plan to the Legislature, which then had thirty days beginning the next legislative session to adopt limited amendments to the map by a

two-thirds vote of both chambers or else the Commission's plan would become the final map. RCW 44.05.100(1)–(2).

The Commission unanimously agreed upon a map by the statutory deadline. 1-ER-17–18. The Legislature adopted the map, with limited amendments but no population changes to LD-15 (the "Enacted Map"), in February 2022. *Id.*

During map negotiations, and after each Commissioner released their respective opening map proposal, the Democratic-appointed Commissioners sought the assistance of Matt Barreto, a UCLA academic and advisor on VRA compliance. Dr. Barreto presented a PowerPoint slide deck to the two Democratic Commissioners that contained a scatterplot of demographic figures and precinct-level results for some statewide races, and concluded that the VRA mandated a "VRA-Compliant" district in the Yakima Valley. 3-ER-432–456.

The Commissioners ultimately decided specifically to draw a majority-minority district in the Yakima Valley, *i.e.*, a district with a majority Hispanic Citizen Voting Age Population (HCVAP). 1-ER-17–18. The result was LD-15, with an estimated HCVAP of 51.5% using 2019 population figures. 1-ER-17–18.

The result from the first contested election conducted under the Enacted Map was not particularly competitive, however. Instead, a Hispanic Republican candidate, Nikki Torres, secured more than twice as many votes as her White Democrat opponent, a 35.6% margin of victory: 67.7% to 32.1%. 3-ER-546.

Proceedings Below

This suit followed shortly after the Commission's adoption of the redistricting plan it had transmitted to the Legislature and was filed originally on January 19, 2022 against Secretary of State of Washington Steve Hobbs (the "Secretary"), Senate Majority Leader Andy Billig and Speaker of the House Laurie Jinkins. ECF No. 1.[1] Plaintiffs' amended complaint was focused entirely on LD-15, which it alleged was a "façade" district that "results in vote dilution in violation of Section 2 of the Voting Rights Act by failing to draw an effective Latino-majority state legislative district." 2-ER-232, 270–71. Although LD-15 was already a majority HCVAP district, Plaintiffs demanded, in the district court's words, "that the redistricting map of the Yakima Valley region be invalidated under Section 2 of the VRA and redrawn to include a majority-HCVAP district in which Latinos have a real opportunity to elect candidates of their choice." 1-ER-18. Plaintiffs further alleged that LD-15 was the product of intentional discrimination. ECF No. 70 at 41.

The Senate Majority and House Speaker were dismissed as defendants ECF No. 66, and the State of Washington ("the State") was then joined, ECF No. 68. Three individuals, Jose Trevino, Ismael G. Campos, and Alex Ybarra, moved to intervene and were granted permissive intervention. 2-ER-274–283.

[1] Unless otherwise specified, "ECF No." refers to entries in the district court in No. 3:22-cv-5035 and are included for cites to uncontested background information.

Meanwhile, in March 2022, LD-15 voter Benancio Garcia III brought a separate action against the Secretary, contending that the Commission and the State (later joined) violated the Equal Protection Clause by sorting voters in LD-15 on the basis of their race without sufficient justification. *See Garcia v. Hobbs*, No. 3:22-cv-5152, ECF No. 1. That claim triggered 28 U.S.C. § 2284, and a three-judge district court, consisting of Ninth Circuit Judge Lawrence VanDyke, District Court Judge Robert Lasnik, and Chief Judge David Estudillo, was empaneled to hear the *Garcia* challenge. *Garcia* ECF No. 18.

The parties in *Soto Palmer* retained experts to create reports pertinent to the *Gingles* legal framework, which governs challenges under § 2 of the VRA. *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986). Dr. Loren Collingwood, Dr. John Alford, and Dr. Mark Owens were retained by Plaintiffs, the State, and Intervenors, respectively, the reports of whom were admitted at trial. 3-ER-391–424; 3-ER-457–509; 3-ER-510–534.

While this case was pending, a Hispanic candidate, Nikki Torres, was elected as State Senator for LD-15 by a lopsided margin. 3-ER-546. Drs. Collingwood and Owens both supplemented their reports based on the 2022 election results. 3-ER-425–31; 3-ER-535–44. They, respectively, estimated that Senator Torres won 32% and 48% of the Hispanic vote. 3-ER-428; 3-ER-540.

The district court below and the *Garcia* three-judge district court set the two cases for a joint bench trial in June 2023. 1-ER-14–15. During the four-day trial, the district court heard testimony from the three *Gingles* preconditions experts, as well as testimony going to the totality of the circumstances concerning Hispanic participation in the political process in the Yakima Valley region.[2]

On August 10, 2023, the single-judge district court in *Soto Palmer* issued an opinion holding that "LD 15 violates Section 2's prohibition on discriminatory results" and accordingly did "not decide plaintiffs' discriminatory intent claim." 1-ER-15. Four weeks later, the three-judge *Garcia* court dismissed that case as moot in light of the decision in *Soto Palmer* over a dissent by Judge VanDyke. *Garcia v. Hobbs*, 3:22-cv-05152, ECF No. 81.

The district court did not specifically address Plaintiffs' claim that LD-15 was a "façade" majority-minority district, *i.e.*, one where, as in *LULAC*, the district was drawn to have a nominal Latino voting-age majority "without a citizen voting-age majority." 548 U.S. at 441.

No district court has ever previously held that a majority-minority district violates the VRA without finding that the putative majority was in fact a "façade" or "hollow" and been upheld on appeal. Despite that, the district court proceeded to

[2] The trial transcripts have been filed at ECF Nos. 206-09. Appellants include pertinent excerpts in the Excerpts of Record.

analyze LD-15 under the *Gingles* standard without addressing (or holding) that LD-15 was a façade/hollow majority-minority district.

The district court first analyzed the three *Gingles* preconditions. 1-ER-18. It held that the first *Gingles* precondition was satisfied because Plaintiffs had adduced at least one illustrative map in which the remedial district was geographically compact, crediting the testimonies of Drs. Collingwood, Barreto, and Alford. 1-ER-21–22. Because the "proposed maps … evaluated for compactness" fared better than the Enacted Map, the court found that Plaintiffs had satisfied the first *Gingles* precondition. 1-ER-21–22.

The district court also held that Plaintiffs had established the second precondition because "Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied." 1-ER-23.

The district court further held that Plaintiffs had satisfied the third *Gingles* precondition, concluding that White voters voted cohesively (around 70%) to block Hispanic-preferred candidates. 1-ER-24. In so doing, the court declined to analyze the cause of any such cohesion (*e.g.*, partisan versus racial causation). 1-ER-24–25.

Concluding that Plaintiffs had established all three *Gingles* preconditions, the district court proceeded to the second step of the *Gingles* standard: *i.e.*, evaluating whether, under the totality of the circumstances, the political process is not equally open to Hispanic voters in the Yakima Valley. *See* 1-ER-15. The district court held

that Plaintiffs prevailed under the totality-of-the-circumstances inquiry. 1-ER-26–39. The holding was predicated on: (i) the general history of discrimination in Washington's past, 1-ER-27–29; (ii) moderate polarized voting in one kind of election, 1-ER-29; (iii) voting practices of non-Presidential-year senate elections and at-large districts in the State of Washington, 1-ER-29–30; (iv) the socioeconomic disparities between Whites and Hispanics, 1-ER-31–32; (v) one instance of one candidate for local office invoking illegal immigration on a social media post, 1-ER-32; (vi) past Hispanic electoral success that is less than proportional to the Hispanic population in the Yakima Valley region, 1-ER-33–34; (vii) one-off instances of "white voter antipathy[,]" 1-ER-34; and (viii) elected legislative Republicans from the region not supporting all legislation endorsed by a single progressive self-anointed Hispanic advocacy group. 1-ER-34–36.

Collecting its holdings, the district court concluded that "the boundaries of LD 15, in combination with the social, economic, and historical conditions in the Yakima Valley, region, results in an inequality in the electoral opportunities enjoyed by white and Latino voters in the area." 1-ER-44. It then ordered judgment entered for Plaintiffs on their § 2 effects claim and enjoined LD-15 on August 10, 2023. 1-ER-44. The district court's injunction did not provide for any particular remedial maps to be used for future elections.

The district court directed that the State, through the Commission, could adopt "revised legislative district maps for the Yakima Valley region." 1-ER-44. The district court also defined how it viewed "equal opportunity" that the VRA required: that Hispanic voters in the Yakima Valley have a "realistic chance of electing their preferred candidates if a legislative district were drawn with that goal in mind." 1-ER-21.

Although the district court's opinion engages in some circumlocution about what precisely Hispanic voters' "preferred candidates" means in practice, the district court's opinion cannot be coherently understood except as holding that "preferred candidates" means "Democratic candidates" in all relevant circumstances. Indeed, the district court specifically held that "Latino voters have cohesively preferred a particular candidate in almost every election in the last decade," *i.e.*, a Democrat candidate. 1-ER-24 n.8.

That conclusion was largely impervious to the actual 2022 election results in LD-15, in which a Hispanic Republican was overwhelmingly preferred by voters in the district by a greater-than-2-to-1 margin. Although the district court acknowledged the electoral outcome, 1-ER-23, 34, it did not analyze it as the only endogenous election contested to date under the enacted LD-15. Indeed, while the district court did note Senator Torres's victory in passing, it did not disclose (let alone analyze) her margin of victory. 1-ER-34.

Intervenors then appealed that judgment. 3-ER-573. Intervenors sought a stay of proceedings below pending appeal, which was denied on December 21, 2023. *Palmer v. Hobbs*, No. 23-35595, 2023 U.S. App. LEXIS 33985 (9th Cir. Dec. 21, 2023). Concurrently, Intervenors had filed a petition for writ of certiorari before judgment in the Supreme Court, arguing, *inter alia*, that the Court should hold the case in abeyance while adjudicating a separate appeal in *Garcia*. That petition was denied. *Trevino v. Palmer*, 218 L.Ed.2d 58 (U.S. Feb. 20, 2024). This Court placed merits briefing in No. 23-35595 in abeyance pending the remedial proceedings below. Dkt. No. 59.

In the meantime, the district court commenced remedial proceedings. After the district court read a newspaper article suggesting a possible legislative logjam on the drawing of a remedial map (the Governor has the power to convene a special session but declined), it issued an order that the court would "begin its own redistricting efforts." 2-ER-225. On December 1, 2023, Plaintiffs filed their initial brief on remedies, attaching the map files and expert declarations in support for review by the parties. 2-ER-180–223. Plaintiffs initially presented five remedial proposals. *Id*.

Although Plaintiffs' § 2 claim was that LD-15 unlawfully diluted Hispanic voting strength, each of Plaintiffs' proposals purported to remedy that alleged dilution by further diluting Hispanic voting strength. Under the Enacted Map, the

HCVAP of LD-15 in 2021 was 52.6%, but under Plaintiffs' five proposed maps, the HCVAP of the remedial district would decline to between 46.9% and 51.7%. 2-ER-155.

Intervenors explained that it was not possible to draw a remedial map that complied with the VRA and the Constitution; they therefore did not submit a proposed map and instead argued that Plaintiffs' proposed maps were all unlawful. ECF No. 252. The State also elected not to submit a proposed map. ECF No. 250.

After the parties failed to reach consensus on a special master, the Court appointed the State's recommended expert, Karin Mac Donald. ECF Nos. 244, 246. On December 22, 2023, Intervenors, the State, and the Secretary all filed Responses to Plaintiffs' proposals. ECF Nos. 252, 250, 248. The district court held a half-day evidentiary hearing on March 8, 2024. ECF No. 297 (filed transcript). At that hearing, the two experts for Plaintiffs testified, as did Intervenors' expert. Amended versions of the various maps were received by the court on March 13, 2024. ECF Nos. 288; 289.

On March 15, 2024, the district court issued its remedial order adopting Plaintiffs' "Map 3B", finding that the map remedied the § 2 violation by (1) "unit[ing] the Latino community of interest in the region[,]" 1-ER-07; and (2) making it "substantially more Democratic than its LD 15 predecessor[,]" 1-ER-11. The district court admitted that "the Latino citizen voting age population of LD 14

in the adopted map is less than that of the enacted district," but justified such dilution as necessary for Hispanic voters to "elect candidates of their choice to the state legislature" (*i.e.*, in the court's view, Democrats). 1-ER-05.

Intervenors filed a notice of appeal and moved in this Court for a stay pending appeal of the district court's mandatory injunction and order. This Court denied that request on March 22, 2024, stating: "Appellants have not carried their burden to demonstrate that they have the requisite standing to support jurisdiction at this stage of the proceedings. This denial is without prejudice to the parties renewing their respective arguments regarding appellants' standing, or to the parties making any other jurisdictional arguments, before the panel eventually assigned to decide the merits of this appeal." *Palmer v. Hobbs*, No. 24-1602, 2024 U.S. App. LEXIS 6939, at *3 (9th Cir. Mar. 22, 2024).

Intervenors then filed an application for a stay with the Supreme Court, which was denied on April 4. *Trevino v. Palmer*, 144 S. Ct. 1133 (2024).

The three-judge district court, meanwhile, had dismissed the *Garcia* case as moot based on the single-judge district court's decision in this Section 2 litigation. *Garcia v. Hobbs*, No. 3:22-cv-5152, ECF No. 81.

Mr. Garcia chose to appeal directly to the Supreme Court, filing a notice of appeal on September 18, 2023, *Garcia* ECF No. 83, and filing a jurisdictional

statement in the Supreme Court of the United States on October 31, 2023. *Garcia v. Hobbs*, No. 23-467 (U.S. Oct. 31, 2023).

After briefing, the Supreme Court directed the *Garcia* district court to enter a fresh judgment from which Mr. Garcia could appeal to this Court. *Garcia v. Hobbs*, 218 L.Ed.2d 16 (U.S. Feb. 20, 2024). As a result, Mr. Garcia's appeal is currently pending in this Court, No. 24-2603. This Court declined to consolidate *Garcia* with these consolidated appeals. No. 24-1602, Dkt. No. 37.

SUMMARY OF THE ARGUMENT

Although the State and Secretary have chosen not to defend the legality of the Enacted Map, Jose Trevino and Alex Ybarra each have a particularized stake in the ultimate outcome of this appeal. The Section 2 judgment and resulting Remedial Map harm Representative Ybarra by increasing financial cost and political difficulty of his reelection. Jose Trevino, meanwhile, is injured by the racial classification inherent to Section 2 remedies and the district court's explicit use of race-based criteria to redraw his district. As the Supreme Court recently reiterated, "[t]he racial classification itself is the relevant harm" in the racial redistricting context. *Alexander v. S.C. State Conference of the NAACP*, 144 S. Ct. 1221, 1252 (2024).

On the merits, Plaintiffs' Section 2 claim fails at the threshold. Because LD-15 is a working, non-façade majority-minority district, it cannot violate Section 2. By definition, if a racial group is an outright majority in a district by CVAP, and the

majority is not hollow or a mere façade, then that group cannot have "less opportunity than other members of the electorate … to elect representatives of their choice" since the majority-minority group could literally just outvote the smaller White minority. 52 U.S.C. § 10301(b). Plaintiffs' claim thus faces an insurmountable threshold obstacle in Section 2's plain text.

On *Gingles* I, the district court focused errantly on the compactness of the district itself, not the minority community within it, utterly failing to make any particularized findings about the spatial distance between Hispanic communities in the Yakima Valley region, instead relying on generalized shared experiences—ubiquitous experiences that would connect most Hispanics across the country—to conclude that the community is "geographically compact." This was error. *LULAC*, 548 U.S. at 433 ("The first *Gingles* condition refers to the compactness of the minority population, *not to the compactness of the contested district*." (emphasis added)).

On the second and third *Gingles* preconditions, the district court failed to determine whether any polarized voting resulting in the minority-preferred candidate losing elections was on account of partisanship, rather than being "on account of race or color," 52 U.S.C. § 10301(a), as only the latter implicates the VRA.

The district court's ultimate conclusions on the totality of the circumstances are also infected by legal error and are otherwise clearly erroneous. In particular, the

paper-thin reasoning upon which the ultimate finding rests would establish a Section 2 violation in almost every jurisdiction in the country, *i.e.*: (i) the general history of discrimination in the State's past unconnected to the present reality; (ii) moderate polarized voting in one kind of election; (iii) some generalized burdens of voting; (iv) the admitted socioeconomic disparities between Whites and Hispanics; (v) one instance of one candidate invoking illegal immigration on a social media post; (vi) past Hispanic electoral success that is less than proportional to the Hispanic population in the region; (vii) one-off instances of "white voter antipathy"; and (viii) elected Republicans' declining to support all legislation the court considers Hispanic-supported (which has near exact overlap with generic Democrat priorities). If such ubiquitous and minimally probative evidence suffices to constitute a Section 2 violation under the totality standard, virtually every jurisdiction in America could have its electoral maps invalidated.

The factual paucity of the district court's totality conclusion is paired with reversible legal errors. The district court declined to follow this Court's requirement that courts make a finding on a causal nexus in for a Section 2 claim. In particular, the court never explained *how* Washington's past discrimination and current socioeconomic disparities actually work to deny Hispanics equal political opportunity in Yakima Valley's present reality. The district court further flouted the

Supreme Court's admonitions to analyze and properly weigh the usual burdens of voting. *See Brnovich v. DNC.*, 594 U.S. 647, 668–69 (2021).

Even if the district court's § 2 merits analysis were tenable, its remedial decision is manifestly not. *First*, the district court attempted to create a remedy district that remedies putative vote dilution by lowering the CVAP of the minority group in question, a literal first in the history of the VRA. This goes against the text, purpose, and logic of the VRA and alone warrants vacatur of the map. *Second*, the map is a racial gerrymander that was not narrowly tailored, thereby violating the Equal Protection Clause. *Third*, the district court flouted precedent by making massive, gratuitous, and unnecessary changes to the map all across Washington, altering thirteen of Washington's forty-nine total districts and moving half a million Washingtonians into different districts.

For those reasons, the map should be vacated, regardless of this Court's views on the merits of the Section 2 claim.

STANDARDS OF REVIEW

In evaluating VRA § 2 claims, this Court "review[s] de novo the district court's legal determinations and mixed findings of law and fact." *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc). This Court "review[s] for clear error the district court's . . . ultimate finding whether, under the totality of circumstances, the challenged [district] violates § 2." *Id.*

"[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (cleaned up). The clear-error standard "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984).

A court-drawn remedial map is "held to higher standards than a State's own plan." *Chapman v. Meier*, 420 U.S. 1, 26 (1975). That heightened standard is "whether the District Court properly exercised its equitable discretion in reconciling the requirements of the [violated federal law] with the goals of state political policy." *Connor v. Finch*, 431 U.S. 407, 414 (1977). "In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness or discrimination." *Id*. at 415 (quotation marks and citation omitted).

"[A]n error of law … constitutes an abuse of discretion." *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019). This Court also will find an abuse of discretion if the district court's application of the law was "1) illogical, (2)

implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014).

ARGUMENT

I. THE SINGLE-JUDGE DISTRICT COURT LACKED JURISDICTION OVER THIS CASE

The three-judge panel statute, 28 U.S.C. § 2284(a) demands that "[a] district court of three judges shall be convened . . . when an action is filed challenging … the apportionment of any statewide legislative body." As five judges of the Fifth Circuit have noted, "[t]he most forthright, text-centric reading of 28 U.S.C. § 2284(a) is that a three-judge district court is required to decide apportionment challenges—both statutory and constitutional—to statewide legislative bodies." *Thomas v. Reeves*, 961 F.3d 800, 810 (5th Cir. 2020) (en banc) (Willett, J., concurring). The upshot of a single district judge's adjudication of a VRA challenge to a state legislative district is that "the district court lacked jurisdiction and that its judgment must be vacated." *Id*. at 827.

Plaintiffs' allegations under Section 2 of the VRA and the requested relief in the Amended Complaint constitute an action challenging "the apportionment of any statewide legislative body." *See* 28 U.S.C. § 2284(a); ECF No. 70. The single-judge district court therefore lacked power over this case.

This Court should "vacate the judgment below, therefore, and remand the matter to the district court with directions to convene a three-judge court to hear" these matters in the first instance. *Lopez v. Butz*, 535 F.2d 1170, 1172 (9th Cir. 1976).

II. INTERVENORS HAVE STANDING TO BRING THIS APPEAL

In prior stay briefing, Appellees have challenged Intervenors' standing to appeal the district court's judgment holding that LD-15 violates § 2 and order adopting the Remedial Map. A motions panel of this Court indicated that "Appellants have not carried their burden to demonstrate that they have the requisite standing to support jurisdiction at this stage of the proceedings[,]" a statement it made "without prejudice to the parties renewing their respective arguments regarding appellants' standing." *Palmer v. Hobbs*, No. 24-1602, 2024 U.S. App. LEXIS 6939, at *3 (9th Cir. Mar. 22, 2024). Intervenors therefore begin by setting forth their standing to bring this appeal.

"[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). "When the original defendant does not appeal, 'the test is whether the intervenor's interests have been adversely affected by the judgment.'" *Organized Vill. of Kake v. United States Dep't of Agric.*, 795 F.3d 956, 963 (9th Cir. 2015) (en banc) (citation omitted). "[T]he presence of one party with standing is sufficient to

satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).[3]

Mr. Garcia, who resides in the challenged district of the Enacted Map, has standing to challenge the Enacted Map as a racial gerrymander—standing which has never been questioned by the State, Secretary, or district court. Similarly, Jose Trevino, also a voter residing in LD-15, independently has Article III standing to appeal the race-based alterations to LD-15 effected by the district court's judgment and Remedial Map. And Alex Ybarra, as a Representative elected from adjacent LD-13, independently has standing to appeal based on the increased electoral challenges and costs that the district court's Remedial Map will occasion.

A. Jose Trevino Has Standing as an Individual Voter Classified on the Basis of His Race

As mentioned, Mr. Garcia's standing in his own challenge to the Enacted Map—*i.e.*, that he was injured due to being sorted on the basis of race—was so obvious that no one ever questioned it. For good reason: "Voters in [racially gerrymandered] districts may suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 745 (1995). For that reason, "a plaintiff [that] resides in a racially gerrymandered

[3] Although Appellants do not here include a separate section on standing for Ismael Campos but need not under *Rumsfeld*, because Jose Trevino and Alex Ybarra each have standing.

district … has standing to challenge" it. *Id.* at 744–45. Mr. Garcia, who resides in both the Enacted District LD-15 and the Remedial LD-14, inarguably has standing to challenge each district as a racial gerrymander—which no one ever disputed.

For the same essential reasons that Mr. Garcia's standing has gone unquestioned, Mr. Trevino has standing to challenge the district court's judgment and order adopting the Remedial Map. Mr. Trevino is a resident and voter in Granger, which was in Enacted LD-15 and was moved into Remedial LD-14. The district court's rejiggering of his district was explicitly race-based and unquestionably involved race-based classifications. Indeed, the district court went so far as to declare that the "fundamental goal of the remedial process" was to redraw the district on race-based lines. 1-ER-07 n.7.

The Supreme Court has long held that such race-based redistricting inflicts "fundamental injury" to the "individual rights of a person," regardless of whether the racial classification is ultimately upheld. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (*Shaw II*). That is because "[t]he racial classification *itself is the relevant harm*." *Alexander*, 144 S. Ct. at 1252 (emphasis added); *see also North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (per curiam) ("[I]t is the segregation of the plaintiffs—not the [government's] line-drawing as such—that gives rise to their claims."). Here, the district court unambiguously engaged in "racial classification"

in redrawing the district in which Mr. Trevino lived—which is the "relevant harm" that establishes standing here. *Alexander*, 144 S. Ct. at 1252.

The district court's race-based classification flowed from its VRA holding, illustrating how "compliance with the Voting Rights Act ... pulls in the opposite direction" of the Equal Protection Clause because it "insists that districts be created precisely because of race." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). Section 2 remedies are created for the purpose of providing ethnic or racial minorities electoral opportunity. As such, Section 2 remedies inexorably require racial classifications, since they are "created precisely because of race," *id.*, that is to say, created precisely to remedy a race-based harm under Section 2. The district court's race-based redrawing of Mr. Trevino's district thus causes him "fundamental injury," *Shaw II*, 517 U.S. at 908, particularly as "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2162–63 (2023) (citation omitted).

What the district court actually did is a classic example of Section 2 race-based classification. The court labeled it a "fundamental goal of the remedial process" that the remedial district "unite the Latino community of interest in the region." 1-ER-07 n.7. It then defined the Hispanic communities referenced as those

in "East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco." 1-ER-07. The primary line-drawer for the eventually-adopted map rightly believed that the district court had ordered segregation of those communities: "I was asked to draw maps that include an LD 14 that … unifies the population centers from East Yakima to Pasco that form a community of interest, including cities in the Lower Yakima Valley like Wapato, Toppenish, *Granger*, Sunnyside, Mabton, and Grandview." 2-ER-192 (emphasis added). As a Hispanic voter in Granger, Mr. Trevino was, therefore, classified on the basis of his race.

Notably, neither Plaintiffs nor the State have disputed that Mr. Trevino would have had Article III standing to challenge LD-15 as approved by the Washington Legislature as an unconstitutional racial gerrymander (as Mr. Garcia has done). Indeed, Plaintiffs' own standing is specifically premised on their being voters within the Yakima Valley. *See* 2-ER-238–40. (The institutional Plaintiff terminated in December 2022.)

The injury that the Court recognized in *Shaw* does not disappear when the institution wielding the racial gerrymandering pen is a court rather than a commission or legislature. Article III standing exists to challenge the resulting racial gerrymandering, however it arises and "regardless of the motivations." *Alexander*, 144 S. Ct. at 1252. Being sorted into illegal districts either inflicts cognizable injury or it doesn't. If it does, Intervenors have standing to appeal and will suffer harm from

the unlawful Remedial Map. If it does not, the judgment below must be vacated because *Plaintiffs* lack Article III standing.

Mr. Trevino is neither asserting an institutional injury nor attempting to "stand in for the State." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). There, the Supreme Court identified a fundamental distinction between "standing to represent the State's interests[,]" *id.* (citing *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013), and an intervenor's assertion of "standing in its own right[,]" *id.* at 1953. Here, Mr. Trevino is asserting his own rights not to be subject to the "sordid business [of] divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part). This ongoing effort to vindicate his own individual rights establishes his standing, rather than any attempt to vindicate Washington's sovereign and generalized interest in the "constitutional validity" of the Enacted Map. *Hollingsworth*, 570 U.S. at 706. Unlike in *Hollingsworth*, Mr. Trevino *does indeed* have a "'personal stake' in defending [the challenged law's] enforcement that is distinguishable from the general interest of every citizen" of the State. *Id*. at 707.

Neither *Hollingsworth* nor *Bethune-Hill* established the per se rule that both sets of Appellees have suggested in stay briefing, that an intervenor never has standing to defend a State law in the State's absence simply because an individual intervenor has no duty nor oath to defend/enforce a given law. Indeed, this Court has already rejected Appellees' "bright-line rule" that "[t]he only party with a cognizable

interest in defending the constitutionality of a generally applicable law is the government, and the only persons permitted to assert that interest in federal court, accordingly, are the government's officials or other agents." *Atay v. Cnty. of Maui*, 842 F.3d 688, 696 (9th Cir. 2016). In that case, this Court held that such a bright-line rule "overlook[s] a key aspect of the Supreme Court's standing analysis": that "intervenors can establish standing if they can do so independently[,]" *i.e.*, when they have a "judicially cognizable interest *of their own*." *Id*. (quoting *Hollingsworth*, at 570 U.S. at 707) (emphasis in *Atay* opinion).

Accordingly, the fact that the intervenors in *Atay* had been ballot initiative proponents and intervenors below did not matter; what mattered is that they could show independent harm to them as individuals—there, it was "economic harm" to the intervenors' farms. *Id*. Other circuits likewise reject the Appellees' per se rule that would never allow intervenors defending a law to assert individual standing. *See Kim v. Hanlon*, 99 F.4th 140, 154 n.8 (3d Cir. 2024); *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 793–94 (11th Cir. 2020); *Cooper v. Tex. Alcoholic Bev. Comm'n*, 820 F.3d 730, 738–39 (5th Cir. 2016); *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014).

Hollingsworth's holding that an individual does not have interest in implementation where the intervenor does not otherwise have a "personal stake" in the outcome of the suit is therefore no bar to standing here. 570 U.S. at 706. Although

a generalized interest in seeing the laws of one's own state implemented does not *itself* support standing, an intervenor may assert a separate cognizable and individualized interest. Mr. Trevino does so here in the form of challenging use of racial classifications to redraw his electoral districts, which the Supreme Court has repeatedly recognized causes cognizable injury.

A critical distinction thus exists between (1) a generalized interest in the implementation/validity of a state law; and (2) a personal stake in vindicating one's own concrete individual rights. *Hollingsworth* did not address the latter at all. Indeed, removing that second possibility would entirely vitiate individual voters' ability to fight for their "personal stake," *i.e.*, their individual rights, in these types of voting rights cases. *Hollingsworth* and *Bethune-Hill* preclude standing where intervenors assert only implementation/enforcement harms to the State or other public institution.

Finally, it is worth noting that accepting Plaintiffs' standing arguments ultimately would prove self-defeating for them. If voters in LD-15 truly lack standing to challenge the legal violations in constructing the district's configuration, then Plaintiffs' loss here necessarily follows since their standing is based entirely on being voters in enacted LD-15. If being drawn into illegal districts does not inflict cognizable harm—contra *Hays*—Plaintiffs here lack standing and this Court should accordingly vacated the judgment below on that basis. *See Arizonans for Official*

English v. Arizona, 520 U.S. 43, 66–67 (1997) ("We may resolve the question whether there remains a live case or controversy with respect to [original plaintiff's] claim without first determining whether [intervenor-defendant] has standing to appeal.").

B. Representative Ybarra Has Standing as an Individual Legislator

Individual legislators have standing when "their own institutional position, as opposed to their position as a member of the body politic, is affected." *Newdow v. United States Cong.*, 313 F.3d 495, 498–99 (9th Cir. 2002). That result follows from *Raines v. Byrd*'s holding that standing is established where a legislator has "been singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies." 521 U.S. 811, 821 (1997). The dispositive question is whether the alleged harm "zeroe[s] in on an[] individual Member." *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015).

That is just so for Representative Ybarra, who now faces a costlier and more difficult general election campaign because of the realignment of his district.

The Remedial Map certainly strengthens the reelection chances of many incumbents across Washington in the thirteen rejiggered districts, but Representative Ybarra is not one of them. Over 30,000 of Representative Ybarra's constituents, many of whom are Hispanic due to the racial resorting in the Remedial Map, have

been moved out of his district, LD-13, and replaced with a comparable number of new voters, many of whom are White and Democrat-leaning. 2-ER-133, 137, 166.

Representative Ybarra is expending and will continue to expend additional resources to introduce himself to his new constituents and campaign for their votes on a highly expedited basis (having only discovered the identity of his constituents in March of an election year). Doing so will certainly cause and is currently causing Representative Ybarra to incur more than $3.76 in expenses—*i.e.*, the amount of financial injury that this Court held sufficient to establish Article III standing in *Van v. LLR, Inc.*, 962 F.3d 1160, 1162 (9th Cir. 2020). And no one "dispute[s] that even one dollar's worth of harm is traditionally enough to qualify as concrete injury under Article III." *United States v. Texas*, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring) (cleaned up).

That harm is not conceivably a "generalized grievance" shared by the general public. *See Hollingsworth*, 570 U.S. at 706. Nor will all "member[s] of the body politic" in Washington share this harm; rather, only those legislators directly affected by the remedial map will face this particularized injury (though most affected are actually Democratic legislators whose reelection chances have been enhanced, not hindered). *See Newdow*, 313 F.3d at 498–99.

Similarly, the Remedial Map injures Representative Ybarra by making his reelection more difficult. Intervenors' expert for the remedial proceedings produced

numbers showing the Remedial Map, as based on Plaintiffs' Proposals, does "not merely create a new, more heavily Democratic district in southern Washington. [It does] so by weakening several Republican incumbents in unrelated portions of the map." 2-ER-125–26, 142–43. The affected districts include Representative Ybarra's. 2-ER-166. He will therefore by definition face a more difficult reelection campaign.[4] This is not as in *Wittman v. Personhuballah*, where the legislators failed to submit "any evidence that an alternative to the Enacted Plan (including the Remedial Plan) will reduce the relevant intervenors' chances of reelection." 578 U.S. at 545. Here, Rep. Ybarra has submitted exactly that evidence.

C. A Denial of Standing Would Permit a Collusive End-Run around the Washington Constitution and Create Irreparable Harm to the Very Concept of Federalism

Under Washington law, "[l]egislative and congressional districts may not be changed or established except" by the Commission. Wash. Const. art. II, § 43(11). And "[a]t least three of the voting members [of the Commission] shall approve [the] redistricting plan." Wash. Const. art. II, § 43(6). Due to the Commission's consisting

[4] The Supreme Court has not yet explicitly resolved whether "harms centered on costlier or more difficult election campaigns are cognizable." *Bethune-Hill*, 139 S. Ct. at 1956 (citing *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016)). But applying the Court's ordinary non-legislator standing precedents makes clear that they are: such increased difficulties necessarily result in additional campaign expenditures—a form of financial harm. And "monetary harms" are one of the "most obvious" and "traditional" forms of injury, which "readily qualify as concrete injuries under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

of two Republican-appointed and two Democrat-appointed Commissioners, *any* redistricting change must achieve at least some degree of bipartisan consensus.

However, when initiating this litigation, Plaintiffs sued only Democratic officials, such as the Secretary of State. *See* ECF No. 1; ECF No. 40 at 1; ECF No. 37 at 2. The Secretary of State has consistently "take[n] no position on the issue of whether the state legislative redistricting plan violates section 2," *e.g.*, ECF No. 40 at 1. Likewise, the later-joined State (represented by the Attorney General of Washington, also a Democrat and current leading candidate for Governor this cycle) announced on the eve of trial that it would "not dispute the merits of *Soto Palmer* Plaintiffs' discriminatory results claim," ECF No. 194 at 4, and Plaintiffs vigorously opposed Intervenors' motion to intervene below even despite the absence of any other adverse party, *see* ECF No. 64.

To deny standing to Intervenor-Appellants is to no less than eliminate their ability to vindicate their Fourteenth Amendment protections against racial gerrymandering—at least without the contrivance of a separate suit. The danger of a State's officials' employing strategic surrender in litigation to achieve political ends that escaped their grasp in the political arena is not a novel one. This very issue of collusive conduct underlay two recent grants of certiorari by the Supreme Court to this Court in which government officials tried to obtain desired policy ends through the unseemly expedient of strategic capitulation. *See Arizona v. San*

Francisco, 142 S. Ct. 1926 (2022); *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1312 (2023). In both cases, the Supreme Court did not reach the merits for thorny procedural or mootness-based reasons. But the issue of whether litigants' rights can be nullified by the surrender of governmental officials remains a critically important one. And it is particularly important here: the Equal Protection Clause is *supposed* to be an *individual right* that protects citizens *against* governmental race-based action—*not* a license for States to sell out the individual rights of their citizens. A denial of standing here would effectively allow Washington State officials to acquiesce in violations of the Equal Protection Clause rights of their citizens, thereby nullifying those rights by insulating violations of them from judicial review. That cannot be—and is not—the law.

III. THE DISTRICT COURT ERRED IN HOLDING THAT A VIABLE § 2 CLAIM COULD BE BROUGHT AGAINST A NON-FAÇADE MAJORITY-MINORITY DISTRICT

Turning to the merits, the district court erred as a threshold matter by holding that a viable § 2 claim could be brought against a single majority-minority district without establishing that the majority is in fact a façade. LD-15 is a working majority-minority district—with a 52.6% Hispanic CVAP in 2021—and there was no evidence that the majority was not genuine. The district court accordingly erred by not dismissing Plaintiffs' claim at the threshold.

A. Challenges to Single Majority-Majority Districts under Section 2 Fail unless the Majority Is Hollow

This case turns § 2 on its head: in a typical § 2 case, plaintiffs challenge a district that lacks a majority CVAP for a racial minority and seek the creation of a majority-minority (by CVAP) district as a *remedy* for that putative dilution. *See Milligan*, 143 S. Ct. 1487. But here Plaintiffs challenge a district that is *already* majority Hispanic by CVAP and allege that this *majority* somehow prevents Hispanic voters from "elect[ing] representatives of their choice." 52 U.S.C. § 10301(b). That claim cannot be squared with § 2, which precludes such a challenge unless the majority is a mere façade or a "hollow" majority. *LULAC*, 548 U.S. at 429; *see also Smith v. Brunswick County*, 984 F.2d 1393, 1402 (4th Cir. 1993) (citizen voting-age majority lacks real electoral opportunity when it lacks "equal access to the polls.").

The text of Section 2 makes this plain. It applies when racial minorities have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 thus focuses on the minority group's "opportunity … to elect representatives of their choice" and disavows mandating particular electoral outcomes: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* Given this language, the Supreme Court has unsurprisingly held that "the ultimate right of § 2 is *equality of*

opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994) (emphasis added).

By definition, if a group constitutes a majority of the citizen-age voting population, then it necessarily possesses *at least* an equal "opportunity . . . to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Indeed, that group possesses a better opportunity than all other groups, since it can simply outvote all other racial groups combined in that district. That much is just math. So unless the majority is a mere façade—as Plaintiffs alleged here, *see* 2-ER-232, but the district court *never* found (and Plaintiffs never proved)—then a § 2 challenge to that single *majority*-minority district is simply not viable under § 2's text.

This reading of § 2 is confirmed by *Gingles* itself, which demands as its first precondition for a voter-dilution claim that a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to *constitute a majority* in a single-member district." 478 U.S. at 50 (emphasis added). That precondition thus assumes the challenged district is *not* already a majority-minority district and examines whether such a *majority*-minority district can be drawn to remedy alleged vote dilution. *Id.* That standard becomes senseless where the racial

minority group is *already a majority* in the district (and doubly nonsensical where, as here, Plaintiffs' proposed remedy for that putative dilution is more dilution).

Similarly, the third *Gingles* precondition expressly asks whether the "*white majority* votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." 478 U.S. at 51 (emphasis added). But this precondition *cannot* be satisfied in a majority-minority district because there is no "white majority" at all. *Id.* The district court's tortured reasoning illustrates that contradiction: It explained it was analyzing "whether the challenged district boundaries allow the *non-Hispanic white majority* to thwart the cohesive minority vote." 1-ER-24 (emphasis added). But no such "non-Hispanic white majority" existed in LD-15.

The purpose of the second and third *Gingles* preconditions likewise is that they "are needed to establish that the challenged districting thwarts a distinctive minority vote *by submerging it in a larger white voting population*." *Growe v. Emison*, 507 U.S. 25, 40 (1993) (emphasis added). But Hispanic voters cannot be "submerge[ed] [with] a larger white voting population" in a district where they are the majority and larger group themselves, who outnumber White voters. *See id.*

For these reasons, "[n]o court has ever ruled that a majority-minority district violates § 2 in isolation"—without being vacated at least. *Thomas v. Bryant*, 938 F.3d 134, 181 (5th Cir. 2019) (Willett, J., dissenting) ("I am unaware of any court decision holding that a majority-minority district can violate § 2 in a vacuum, all by

itself, unaccompanied by evidence—or even an allegation—of packing or cracking").[5]

To be sure, the principle that a § 2 violation cannot be established by a single majority-minority district is subject to two important limitations. The first is that the majority cannot be "hollow" or a mere "façade." *LULAC*, 548 U.S. at 429, 441. The Supreme Court thus invalidated a district where "Latinos … [we]re a bare majority of the voting-age population," but not a majority of the *citizen* voting-age population. *LULAC*, 548 U.S. at 429; *id.* at 427 (Challenged district had an "Anglo citizen voting-age *majority* [that] w[ould] often, if not always, prevent Latinos from electing the candidate of their choice in the district." (emphasis added)); *id.* at 441 (State's drawing of a district to "have a nominal Latino voting-age majority (without a citizen voting-age majority)" constituted a "façade of a Latino district."). So for voting purposes, the putative "majority" in *LULAC* was in fact no majority at all, and merely a façade created by using voting-age population and not CVAP as the relevant metric. But no such issue exists here as it is undisputed that LD-15 has a majority Hispanic *citizen* voting-age population, and the majority cannot be considered a façade on that basis.

[5] Though Judge Willett was in the dissent in *Thomas*, the Fifth Circuit subsequently granted a petition for rehearing en banc and then vacated the panel opinion and district court judgment as moot. *See Thomas*, 961 F.3d at 801 (en banc).

Similarly, a majority CVAP might be "hollow" where schemes such as literacy tests or barriers to registration may create a system where voting is not "equally open to participation" by minority voters, 52 U.S.C. § 10301(b), and the majority CVAP on paper is in fact not "working" in real life. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality op.) ("In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population."). But no such governmental barrier to poll access is even alleged here either, and the district court even acknowledged that "progress has been made towards making registration and voting more accessible to all Washington voters." 1-ER-28.[6]

Nor did the district court make any other findings that could justify concluding that the conceded *majority* HCVAP was a mere façade. Instead, it asserted that Hispanic voters in LD-15 constituted a "bare, ineffective majority." 1-ER-41. The only evidence cited for this putative ineffectiveness (which appears elsewhere in the opinion) was that the putative Hispanic-preferred candidates did not typically win. *See* 1-ER-24 ("A defeat is a defeat, regardless of the vote count."). But § 2 is "*not a guarantee of electoral success* for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11 (emphasis added). The district court thus erred by

[6] Even Plaintiffs' own witnesses testified at trial to the ease of voting in Washington elections. 3-ER-553–54.

fixating on electoral results to conclude that an "ineffective majority" created a viable § 2 claim, rather than a hollow one or a façade. 1-ER-41.

The district court further reasoned that the majority-minority district was not "effective" because "past discrimination, current social/economic conditions, and a sense of hopelessness keep Latino voters from the polls in numbers significantly greater than white voters." 1-ER-41. But again, that erroneously demands that § 2 produce particular electoral outcomes, rather than guarantee equal "opportunity" and "open[ness] to participation." 52 U.S.C. § 10301(b). Whether voters avail themselves of the equal opportunities mandated by § 2 is a question of electoral *outcomes* that § 2 does not regulate.

Here, Washington State elections are incontestably equally *open* to voters of all races and all races have equal "opportunity" to avail themselves of the chance to vote, *id.*—a fact that no "sense of hopelessness" can change. 1-ER-41. Moreover, as explained next, the district court's complete refusal to attempt to reconcile this "sense of hopelessness" finding with the recent smashing electoral victory of a Hispanic candidate in the district is simply untenable and clearly erroneous.

There is also an important second caveat to the no-viable-§ 2-challenge-to-genuine-majority-minority-districts principle, but it too is inapplicable here. Specifically, while a bona fide majority-minority district may not violate § 2 in isolation, it might be part of a larger multi-district scheme to dilute minority voting

strength through either "cracking" or "packing." *See Gingles*, 478 U.S. at 46 n.11. That is, the majority-minority CVAP district could be part of a systemic violation as the product of intentional packing to dilute minority voting strength elsewhere. *See, e.g.*, *Montes v. City of Yakima*, No. 12-cv-3108, 2015 U.S. Dist. LEXIS 194284, at *22–23 (E.D. Wash. Feb. 17, 2015) ("[T]he packing (concentration) of a minority population into one district can minimize the influence that minorities will have in neighboring districts."). But such cracking/packing dilutive tactics are necessarily multi-district in character, and the claim the district court accepted below was a single-district challenge to LD-15 in isolation.

The upshot is that a challenge to a single majority-minority district in isolation necessarily fails to state a claim under § 2 unless the majority is a "hollow" one. *LULAC*, 548 U.S. at 429. Because Plaintiffs failed to prove as much, the district court erred in failing to reject their claim. And even if the district court's "ineffective" majority reasoning were otherwise sufficient, it was unlawfully predicated on electoral outcomes rather than equality of opportunity/openness, and thus misapplied § 2.

B. Even If § 2 Challenges to Single Majority-Minority Districts Were Generally Viable, This One Is Not

Even if § 2 could ever be used to challenge single majority-minority districts that do not feature hollow majorities, the district court erred in holding that LD-15 could be subject to such a challenge here. The district court never held that the

existing Hispanic majority in LD-15 was hollow or a mere façade, nor did it make any findings whatsoever regarding cracking or packing (though it mentioned "cracking" without making findings on cracking). The court simply assumed a viable claim based on Democrats' failure to win a sufficient number of elections. 1-ER-40. Compounding its sins of omission, the district court failed to grapple meaningfully with the only results that LD-15 as enacted has ever produced: those in 2022. In that election, a Hispanic candidate won by a 35.6% margin, defeating a White candidate 67.7% to 32.1%. 3-ER-546. That is hardly the sort of stuff of which § 2 violations are made.

The district court's only engagement with this remarkable fact consists of these two sentences: "State Senator Nikki Torres, one of the three Latino candidates elected to the state legislature, was elected from LD 15 under the challenged map. Her election is a welcome sign that the race-based bloc voting that prevails in the Yakima Valley region is not insurmountable." 1-ER-34. Notably, the district court failed even to mention—let alone *analyze*—the size of that victory. And the district court instead viewed that unacknowledged-landslide victory as being outweighed by the almost entirely hearsay testimony of a single witness about her own personal encounters involving elections and race. 1-ER-34. That is a quintessential example of missing the forest for the trees.

Senator Torres's victory renders wholly untenable the district court's conclusion that the Hispanic majority in LD-15 is "bare, ineffective" one. 1-ER-41. Its effectiveness in producing a landslide victory for a Hispanic candidate is an incontestable fact.[7] That victory further underscores that even a *large majority* Hispanic CVAP would not produce different outcome. Boosting the 52.6% HCVAP by a full ten percentage points, for example, could not possibly have changed the outcome of that 2022 election even if those added Hispanic voters *all* voted for Torres's opponent and the voters removed from the district had all voted for Torres. Even assuming 100% bloc voting by White and Hispanic voters (which bears little resemblance to reality), that would have reduced Senator Torres's margin of victory to a "mere" 15.6%.

Indeed, given the size of Senator Torres's victory, it is doubtful that the HCVAP of the district could be boosted sufficiently to produce a different outcome without violating the VRA through unlawful packing. For example, even assuming that a 75% HCVAP district could be drawn in the Yakima Valley and would have elected Ms. Keesling over Senator Torres, that district could *easily* be deemed to constitute illegal packing in violation of § 2—something that the district court failed to consider. *See*, *e.g.*, *Montes*, No. 12-cv-3108, 2015 U.S. Dist. LEXIS 194284, at

[7] Moreover, the average partisan lean of enacted LD-15 is about 2 percentage points, depending on which historical races are included. *See* 2-ER-143. Yet Nikki Torres over-performed this average baseline by *over 30-points*.

*22–23 (E.D. Wash. Feb. 17, 2015) (holding that an HCVAP as comparatively low as 53.46% constituted packing). It further would require the sort of intensive use of race that would create at least severe doubts as to whether it violated the Equal Protection Clause as applied.

The virtual impossibility of drawing a lawful district with a larger HCVAP that would have sent Senator Torres's opponent to Olympia instead of her is presumably why Plaintiffs and the district court went the other direction: decreasing Hispanic vote share while increasing Democratic vote share to ensure Senator Torres's defeat. But a putative voter-dilution claim that requires yet-more dilution as the "remedy" is hardly what § 2 intends, requires, or even permits. *See infra* § VI.A.

Thus, even if a viable § 2 claim could theoretically be brought against a single district with a bona fide majority-minority CVAP, the § 2 challenge here to a majority-minority district that produced a landslide victory for a Hispanic candidate simply is not legally sound, especially when it was used to lower Hispanic voting strength to an even smaller majority CVAP.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE *GINGLES* PRECONDITIONS WERE SATISIFED

Section 2 vote dilution claims are governed by the *Gingles* standard. The *Gingles* standard has two main parts (and many sub-parts): first, Plaintiffs must satisfy three preconditions; second, the court must then determine under the totality

of the circumstances whether minority voters are deprived of equal opportunity. *Milligan*, 143 S. Ct. at 1503.

The three *Gingles* preconditions are: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district (comporting with traditional districting criteria); (2) the minority group must be able to demonstrate it is politically cohesive; and (3) the minority group must be able to demonstrate that the White majority votes sufficiently as a bloc to enable the White majority to defeat the minority's preferred candidate. *Id.*

Although the district court held that all three preconditions were satisfied, those holdings were erroneous. As to the first precondition (*Gingles* I), the district court failed properly to analyze the compactness of the *minority population* of the district, rather than the district's geography itself. On the second and third, the district court utterly failed to determine whether partisanship, not race, was the aggregate cause of what limited voting polarization existed.

A. The District Court's Compactness Analysis Rests on Patent Legal Error

The first *Gingles* precondition requires plaintiffs to show the minority group in question is "sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Milligan*, 143 S. Ct. at 1503 (quoting *Wisc. Legis. v. Wisc. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam)

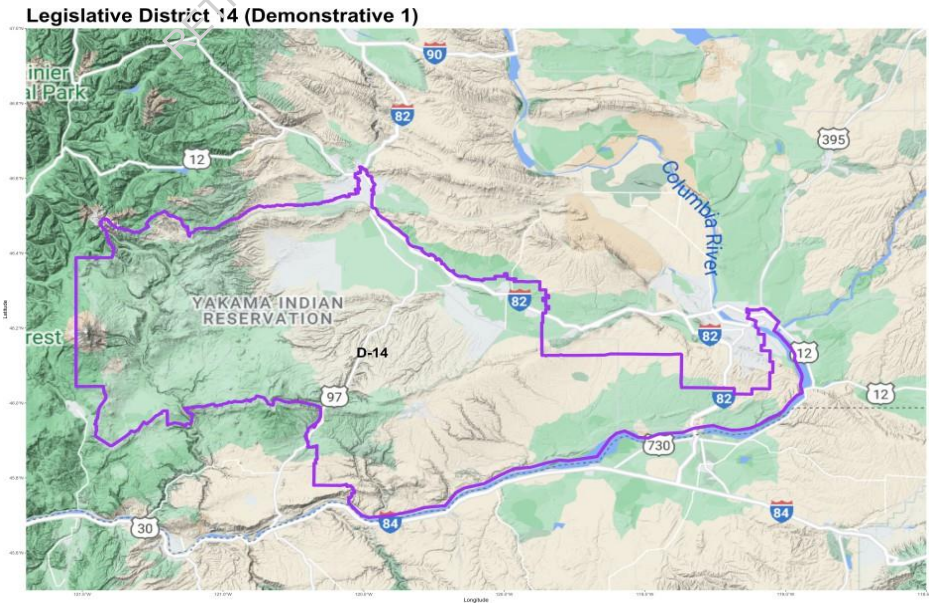
(alterations in original)). This prerequisite is often referred to as the "compactness" requirement.

The Supreme Court has been perfectly clear as to how compactness *must* be analyzed: "The first *Gingles* condition refers to the compactness of the minority population, *not to the compactness of the contested district*." *LULAC*, 548 U.S. at 433 (quoting *Bush v. Vera*, 517 U.S. 952, 997 (1996)) (emphasis added). In *LULAC*, the Supreme Court made clear that a district is not compact when multiple Hispanic communities within it are (1) distinct in terms of distance and (2) distinct in terms of their respective needs and interests. 548 U.S. at 435 ("We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations … that renders [the district] noncompact for § 2 purposes.").

The district court flouted this requirement, however, and analyzed compactness solely in terms of the districts' geographic boundaries rather than the compactness of the minority populations in the area. The district court thus relied on Dr. Collingwood's analysis, which reasoned that the "proposed maps … perform similarly or better than the enacted map when evaluated for compactness." 1-ER-21–22. But that analysis from Dr. Collingwood was expressly analyzing the compactness of the illustrative districts' geography and boundaries—not the minority population. 3-ER-415; *see also* 3-ER-566 (Q (Mr. Holt): "Did you perform

any analysis to show these are cohesive communities, for purposes of the minority communities being compact, as a whole, in [Othello, Yakima, and Pasco]?" A (Dr. Collingwood): "[N]o, I didn't do that."). The district court similarly relied on Dr. Alford's reasoning that Plaintiffs' illustrative examples were "among the more compact demonstration districts he's seen." 1-ER-22. (alteration omitted). But again, as he admitted at trial, that was analyzing the compactness of the *district*, not its minority population. *See* 3-ER-552 (Q (Mr. Acker): "[Y]ou're referring to the compactness of the district itself, as opposed to the compactness of the Latino community within it?" A (Dr. Alford): "Exactly.")

Reproduced here as an example is Plaintiffs' Demonstrative Map 1, which was the template for the eventual adopted Remedial Map featured two ungainly, reaching appendages, one in the north snaking up into the city of Yakima, and one in the southeast grabbing Hispanic-heavy neighborhoods in the city of Pasco:



3-ER-412.

This weird configuration is the direct result of trying to stitch together into a single district at least three distinct, far-flung Hispanic communities—those in urban Yakima, those in suburban Pasco, and those in rural farming towns along the Yakima River. Those communities are bookended by two cities that are physically separated by more than eighty miles—roughly the distance between San Francisco and Sacramento, California, between Portland and Tillamook, Oregon, or between Seattle and Centralia, Washington. That approach is what the Supreme Court has made plain is not what Section 2 requires for compactness. *See LULAC*, 548 U.S. at 435 ("[T]he enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations … renders District 25 noncompact for § 2 purposes.").

The district court's sole attempt to account for the compactness of the Hispanic population itself came with its observation that "Yakima and Pasco are geographically connected by other, smaller, Latino population centers." 1-ER-22. But the operative inquiry has never been whether there is a complete absence of minority voters in the interstitial space between the disparate population centers—and the district court certainly cited nothing for that proposition. To the contrary, the Supreme Court has made plain that compactness is lacking where the district

"combines two farflung segments of a racial group with disparate interests." *LULAC*, 548 U.S. at 433. And that describes Plaintiffs' illustrative maps to a "T."

In the district court's attempt to sidestep the required *Gingles* I analysis, it focused on the communities of interest factor. 1-ER-22. Under the court's errant view, any Hispanics in any jurisdiction are always "geographically compact," because Hispanics generally share culture, language, religion, and economic situations. The district court's findings about the similar needs and interests of the two communities were far too generalized to suffice. Some of the things on the list—language, religious and cultural practices, and significant immigrant populations—are ubiquitous, common to practically all Hispanic communities across the country. By the district court's reasoning, no Hispanic majority-minority district will *ever* fail to be compact, no matter how outrageous the geographic separations are. Indeed, by that extremely generalized logic, a district stitching together Hispanic communities along I-5 from San Diego all the way up to Redding (or even Seattle) would be a "compact" one.

Those are no specific connections between the Hispanic communities in Yakima and Pasco, or between either of those communities and the ones found in rural farming towns along I-84 the Yakima River. Second, the slightly less general connections alleged by the district court—rural, agricultural environment, similar industries, and common housing and labor concerns—are still at too high a level of

abstraction to meet the Supreme Court's requirements for intensely local compactness findings about the actual "needs and interests" of the specific populations at issue. *See LULAC*, 548 U.S. at 435. The district court here "found" that the Hispanic communities in Yakima and Pasco share interests, without making any actual findings supporting that barest of conclusions. *See* 1-ER-22–23 (stating that Hispanics in the Yakima Valley region "share many of the same experiences and concerns regardless of whether they live in Yakima, Pasco, or along the highways and rivers in between[]" without making any findings to support that conclusion). In essence, the district court's view is that all Hispanics in any jurisdiction necessarily share language, culture, and similar experience that, by definition, make a Hispanic population geographically compact, no matter the geographic distance or political or other differences between them. That, of course, would apply to most Hispanic communities in every jurisdiction in America—and at the very least flirts with employing ethnic stereotypes in lieu of legal analysis. Furthermore, the district court's all-Hispanics-anywhere-are-alike approach would have upheld the three-hundred-mile-long majority-Hispanic District 25 in *LULAC*. But the Supreme Court did no such thing. *See* 548 U.S. at 432 ("Under the District Court's approach, a district would satisfy § 2 no matter how noncompact it was, so long as all the members of a racial group, added together, could control election outcomes.").

Because the district court failed to conduct the operative compactness inquiry—*i.e.*, genuinely analyzing the compactness of the minority populations in the district, rather than the districts' boundaries—the district court erred in concluding that Plaintiffs had satisfied the first *Gingles* precondition. This error is not harmless, because the district court made no specific findings on either (1) the distance between different clusters of Hispanic voters or (2) the specific needs and interests of those particular communities rather than all Hispanic citizens writ large. Had it done so, it would have found the first precondition unsatisfied. This Court should hold that threadbare assertions that two Hispanic communities eighty miles apart are geographically compact on the basis that they "share many of the same experiences," without any findings substantiating that conclusion, are not sufficient to satisfy the "intensely local" requirements of *Gingles* I. Plaintiffs did not satisfy this precondition.

B. The District Court Erred in Holding the Second and Third *Gingles* Preconditions Satisfied without Analyzing Whether Polarization in Voting was Based on Partisanship instead of Race

The district court also erred in concluding that Plaintiffs had satisfied the latter two *Gingles* preconditions. Specifically, the district court failed to evaluate whether voting was polarized on the basis of partisanship rather than race.

This Court has expressly held that racially polarized voting ("RPV") exists when the "minority group has expressed *clear* political preferences that are distinct

from those of the majority." *Gomez v. Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988) (emphasis added). This Court's requirement for "clear" political preferences, *id.*, flows from the Supreme Court's requirement that RPV must be "legally significant[,]" *see Gingles*, 478 U.S. at 55–56 (noting that that "the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district"). That is, racially polarized voting alone does not satisfy the preconditions; it needs more to meet the "clear" and "legally significant" thresholds.

Courts therefore should "undertake the additional inquiry into the reasons for, or causes of," racial polarized voting "in order to determine whether they were the product of 'partisan politics' *or* 'racial vote dilution,' 'political defeat' *or* 'built-in bias.'" *LULAC v. Clements*, 999 F.2d 831, 853–54 (5th Cir. 1993) (en banc) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). This baseline causation requirement flows from the text of Section 2 itself, which prohibits only "standard[s], practice[s], or procedure[s] … which result[] in a denial or abridgement of the right of any citizen of the United States…to vote *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). Where challenged practices are caused by partisanship, rather than race, they necessarily are outside of § 2's scope. *See, e.g.*, *Nipper v. Smith*, 39 F.3d 1494, 1525 (11th Cir. 1994) ("'Electoral losses that are attributable to partisan politics … do not implicate the protections of § 2.'" (quoting *Clements*, 999 F.2d at 863)).

Thus, "to make out a § 2 claim … [plaintiffs] must establish that the [challenged] requirement results in discrimination 'on account of race or color….' '[S]ection 2 plaintiffs must show a causal connection between the challenged voting practice and a prohibited discriminatory result.'" *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (quoting § 2(a) and *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 312 (3d Cir. 1994) (collecting § 2 cases rejecting claims based on failure to establish race-based causation)). Where "partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens" the third *Gingles* precondition cannot be established. *Clements*, 999 F.2d at 850.[8]

This partisanship-vs-race causation issue does not require any inquiry into the subjective or individualized intent of minority or White voters but rather into whether the aggregate cause of differences in voting is the political identity of the minority-preferred candidate, defined by this Court as the "candidate who receives sufficient votes to be elected if the election were held only among the minority group in question[,]" *Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998).

[8] Other circuits alternatively consider this partisan-versus-racial causation issue as part of the totality-of-the-circumstances inquiry. *See Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir. 1999); *United States. v. Charleston County, S.C.*, 365 F.3d 341 (4th Cir. 2004). Either way, where divergent results are caused by partisanship rather than race, the § 2 claim necessarily fails.

The district court erred by not undertaking this analysis. Had it done so, the record would have compelled it to conclude that the voting patterns at issue are caused by partisanship rather than race.

The trial established two truths about voting in the Yakima Valley region. First, polarized voting among ethnic groups only existed for one kind of election—partisan contests between a White Democrat and a White Republican.[9] It existed in no others. Such cohesion is weak, or in the words of Dr. Alford, "less cohesive than not." 3-ER-551. Notably, when a Hispanic Republican faced a White Democrat in the district in 2022, she won in a 35-point landslide. RPV also disappeared in nonpartisan races, even when one of the candidates was Hispanic, and in races between two Democrats (a general election possibility under Washington's "top

[9] In particular, Drs. Owens (Intervenors' expert) and Alford (State Defendants' expert), joined by Dr. Collingwood (Plaintiffs' expert) in a number of instances, concluded that racially polarized voting exists in the Yakima Valley only in races between a White Democrat and a White Republican. Change any of those two parties or races, and the observed racial polarization quickly melts away. *See* 3-ER-557 (in partisan races between two candidates from the same party (a phenomenon possible under Washington's "Top Two" primary system), Dr. Owens' analysis shows that the Hispanic vote splits evenly); 3-ER-557–58 (Dr. Owens: finding that when a partisan race involves a White Democrat and Hispanic Republican, Hispanic voters were much less supportive of the Democratic candidate); *accord* 3-ER-518; 3-ER-567–68 (Dr. Collingwood: reporting that racially polarized voting was not found in White Democrat vs. Hispanic Republican elections); 3-ER-555–56 (Dr. Owens: reporting that, in nonpartisan races, Hispanic voters were less cohesive); *accord* 3-ER-567–68 (Dr. Collingwood); 3-ER-549–51 (Dr. Alford: reporting his findings that in nonpartisan elections, Hispanic voters are "slightly less cohesive" and White voters show "essentially no evidence of cohesion at all.").

two" primary system). *See* 3-ER-567–68. Second, polarization was caused by the partisan identity of the candidate. Because the district court failed to adhere to Section 2's textual admonition to disentangle race from politics and because it characterized the polarization as legally significant when it was not, the court erred.

This differential is important not just because it shows that racial polarization in voting in LD-15 is intermittent at best, but also because that polarization only occurs when this Court has held it is *least probative*. Specifically, "[a]n election pitting a minority against a non-minority … is considered more probative and accorded more weight." *Ruiz*, 160 F.3d at 552; *id.* at 553 (the "most probative evidence … is derived from elections involving minority candidates" (alteration omitted)). In contrast, "non-minority elections … do not fully demonstrate the degree of racially polarized voting in the community." *Id.* at 552–53. Indeed, "they may reveal little" and are "comparatively less important." *Id.* at 553. Thus, the *only* evidence of meaningful racial voting polarization in LD-15 occurs when it is *least important and probative*. But the district court did not account for this Court's holdings in *Ruiz* as to how to analyze polarization evidence and thus committed legal error.

Notably, the district court also did not dispute Dr. Owens's conclusion that polarization existed only in White-vs-White-candidate elections; rather, like the Plaintiffs' expert, the district court simply did not focus on such distinctions (and

issued no specific findings on them) because it believed that partisan causation was not relevant. In its view, this issue was readily discounted—and need not be meaningfully analyzed—because "a minority [does not] waive[] its statutory protections simply because its needs and interests align with one partisan party over another." 1-ER-42. That refusal to analyze partisan versus racial causation was error, since § 2 explicitly requires causation "on account of race or color." 52 U.S.C. § 10301(a); *Gonzalez*, 677 F.3d at 405 (en banc) (Section 2 plaintiffs must show proof of "causal connection between the challenged voting practice and a prohibited discriminatory result.") (quoting *Salt River Project*, 109 F.3d at 595).

The district court also erred in its (non-)consideration of Senator Torres's 35-point victory in LD-15. This is an independent ground for reversal, because such a result, involving an election with a minority candidate, is precisely the sort that this Court has made plain provides the "most probative evidence." *Ruiz*, 160 F.3d at 553. Similarly, actual endogenous election results are more probative than exogenous hypotheticals constructed by experts. *See, e.g.*, *Milligan*, 143 S. Ct. at 1513 n.8 ("[C]ourts should exercise caution before treating results produced by algorithms as all but dispositive of a § 2 claim.").

But the district court failed to consider the 2022 election results as part of the *Gingles* preconditions analysis at all. 1-ER-18–26. And it further failed completely to *acknowledge*—let alone *analyze*—the actual vote margins from 2022, rather than

the bare outcome. *See* 1-ER-34. Indeed, reading only the district court's opinion, one could easily be left with the impression that Senator Torres won in a squeaker, rather than a landslide. To the extent the court wrote off the election as one of "special circumstance," that too was error. There was no "absence of an opponent, incumbency, or the utilization of bullet voting." *Gingles*, 478 U.S. at 57. And the Democrat opponent's poor fundraising and write-in campaign in the Democrat primary are "representative of the typical way in which the electoral process functions," *Ruiz*, 160 F.3d at 557.

The district court thus erred by giving scant-to-no attention to what this Court has held is "[t]he most probative evidence." *Ruiz*, 160 F.3d at 553. That is particularly problematic as this is the exact scenario that Justice White thought would indicate that partisanship, not race, was the underlying cause of voting patterns such that Section 2 was not violated. *See Gingles*, 478 U.S. at 83 (White, J., concurring) (ignoring the "race of the candidate" in analyzing polarization would make § 2 regulate "interest-group politics rather than a rule hedging against racial discrimination").

Rather than focusing on the crucial partisan-vs-racial causation issue in light of real-world election results, the district court fixated on the binary results of ten exogenous elections (cherry-picked by Plaintiffs' expert), relying on "Dr. Collingwood conclu[sions] … that white voters in the Yakima Valley region vote

cohesively to block the Latino-preferred candidates in the majority of elections (approximately 70% [of the elections considered][10]),” waving away the elections where “the margins … [were] quite small[]” because “[a] defeat is a defeat, regardless of the vote count.” 1-ER-24; *see also* 3-ER-472 (two of those seven projected defeats “are very close” and were well within a margin of error).

This too was error. Because partisanship (or other factors like individual candidate quality or campaign strategy) rather than race-based causes could easily be dispositive in close races, the virtual toss-ups that Plaintiffs’ expert hand-picked made the necessity of analyzing partisan-versus-racial causation particularly acute. Where elections are close, any number of non-racial factors could easily swing the outcome. But the district court blithely and erroneously dispensed with any analysis of racial causation that this Court (and § 2’s text) mandate based on little more than a catchphrase that “a defeat is a defeat.” 1-ER-24. Section § 2 begs to differ, and demands analysis of whether that conjectured defeat was “on account of race or color” or not. 52 U.S.C. § 10301(a).

Because the district court failed to analyze whether the electoral defeats central to Plaintiffs’ claims were caused by partisanship rather than racial polarization, its § 2 liability judgment rests on reversible legal error.

[10] Of the ten elections Dr. Collingwood analyzed, five were won or narrowly lost by the Hispanic-preferred candidate, and a sixth was within 1.7 points.

V. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS HAD ESTABLISHED A VIOLATION OF § 2 UNDER THE TOTALITY OF CIRCUMSTANCES

The end purpose of the Section 2 analysis is to determine whether, under the "totality of the circumstances," Hispanic voters in the greater Yakima region have less or equal opportunity to participate in the political process. *See Earl Old Person v. Brown*, 312 F.3d 1036, 1040–41 (9th Cir. 2002) (applying the factors identified in the Senate Judiciary Committee Majority Report accompanying the 1982 bill amending Section 2). This final, conclusive analysis is no afterthought, and this Court has in the past found the absence of a Section 2 violation where the three *Gingles* preconditions were nonetheless met. *See id.* at 1051; *see also Clark v. Calhoun Cty.*, 88 F.3d 1393, 1397 (5th Cir. 1996) (The totality of the circumstances inquiry is no "empty formalism" and can be "powerful indeed."). The Supreme Court has identified nine relevant factors. *See Feldman v. Reagan*, 843 F.3d 366, 378 n.9 (9th Cir. 2016) (citing *Gingles*, 478 U.S. at 36–37 (quotation marks omitted) (listing factors)).

The Supreme Court has singled out Factors 2 and 7—the "extent" of racially polarized voting and the "extent" of minority electoral success in the jurisdiction—as "the most important." *Gingles*, 478 U.S. at 48 n.15.

The district court committed a myriad of errors, both legal and mixed, in its rapid march through the Senate factors.[11] Those legal errors are important because, as here, "[i]f a trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Alexander*, 144 S. Ct. at 1240 (cleaned up).

Some of the legal errors across various factors can be put into two groups: (i) causation errors; and (ii) failing to account for the usual burdens of voting. And the overall piecemeal approach resulted in a faulty overemphasis on about half a dozen issues, instead of considering the true totality of the circumstances. In the end, the district court found a Section 2 violation based on *ipso facto* conclusions that would render every jurisdiction in America violative of the VRA.

A. The District Court Failed to Analyze Causation as Section 2 Requires

This Court has held that Section 2 contains a causation element; that is, plaintiffs must show proof of "causal connection between the challenged voting practice and a prohibited discriminatory result." *Gonzalez*, 677 F.3d at 405 (en banc) (quoting *Salt River Project*, 109 F.3d at 595). Therefore, a "bare statistical showing

[11] The district court credited Senate Factor 9, Justification for Challenged Electoral Practice, to the defense, and Senate Factor 4, Access to Candidate Slating Process, was not at issue.

of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry."). *Id*.

Given this textual mandate, the causation requirement applies to the Senate Factors that discuss disparities between racial and ethnic groups: history of official discrimination (Senate Factor 1) and socioeconomic disparities (Senate Factor 5). Plaintiffs thus had the burden to show how the history of official discrimination contributorily "resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice." *Gonzalez*, 677 F.3d at 407. Other appellate courts are in accord. *See NAACP v. Fordice*, 252 F.3d 361, 367 (5th Cir. 2011) ("Absent an indication that these facts actually hamper the ability of minorities to participate, they are, however, insufficient to support a finding that minorities suffer from unequal access to Mississippi's political process.") (cleaned up); *Clements*, 999 F.2d at 866 ("Texas' long history of discrimination [is] insufficient to support the district court's 'finding' that minorities do not enjoy equal access to the political process absent some indication that these effects of past discrimination actually hamper the ability of minorities to participate."); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1561 (11th Cir. 1987) ("[A] history of official discrimination did exist in Carroll County but . . . the plaintiffs failed to establish there was a lack of ability of blacks to participate in the political process.").

Plaintiffs did not carry that burden, and the district court repeatedly failed to hold Plaintiffs to their burden when analyzing the Senate Factors.

Factor 1. The district court pointed to *Montes v. City of Yakima*, 40 F. Supp.3d 1377 (E.D. Wash. 2014), which concerned the *City* of Yakima, as well as a 2004 consent agreement between Yakima *County* and the DOJ, and then proceeded to state that those instances indicated official discrimination contributing to inequal access today. *See* 1-ER-27–28. Causation would, in reality, go the other way—the court decision and consent agreement have ameliorative effects, and contribute to protecting Hispanic political access. Washington has made legislative efforts at the same time and in the same vein. *See, e.g.*, 1-ER-28 (district court acknowledging that "progress has been made toward making registration and voting more accessible to all Washington Voters"); Washington Voting Rights Act of 2018, Wash. Laws of 2018, ch. 113; *see also Butts v. City of New York*, 779 F.2d 141, 150 (2d Cir. 1985) ("[M]itigating factors [like steps to encourage minority voting, mail registration, and a registration task force] further diminish the force of this showing [of past discrimination]."). The district court waved away these inconvenient facts, instead pointing to past problems as controlling the present reality, without explaining how. But "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Mobile v. Bolden*, 446 U.S. 55, 74 (1980).

Factor 5. The district court failed to require of Plaintiffs or find for itself a causal nexus that could connect how socioeconomic disparities actually work to "hinder [the minority group's] ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37. The bare assertion of Plaintiffs' expert that Hispanic political participation is hindered by disparities is a conclusion, not an explanation. *See* 1-ER-31. (Dr. Estrada "observed disparities hinder and limit the ability of Latino voters to participate fully in the electoral process"). A mere conclusion is not itself evidence of a causal connection, and the district court did not identify any other evidence that could support causation. Plaintiffs' expert certainly gave examples of discrimination in the past and examples of Hispanic-White social disparities in the present. But at no point did he provide, nor did the court below rely on, that required link that the disparities "hinder Latinos' ability to participate in the political process." *Gingles*, 478 U.S. at 37.

And even if no formal causal nexus is required, the district court still failed to satisfactorily explain how the factor applies. The conclusory paragraph simply asserts what ("all these barriers compounded . . . hinder Latinos' ability to participate in the political process") instead of *how*. 1-ER-31.

The court's finding of facts on these factors, then, was "predicated on a misunderstanding of the governing rule of law." *Old Person v. Cooney*, 230 F.3d 1113, 1119 (9th Cir. 2000) (citation omitted).

B. The District Court Legally Erred by Factoring the Usual Burdens of Voting in the Plaintiffs' Favor (Factor 3)

In performing a Section 2 analysis on totality of the circumstances, district courts have an affirmative duty to analyze the size of the burden—which "every voting rule imposes." *Brnovich*, 141 S. Ct. at 2338. District courts must recognize that "the concept of a voting system that is 'equally open' and that furnishes an equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'" *Id.* (quoting *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.)). The district court below made no such inquiry, instead assuming that run-of-the-mill voting procedures, including holding non-presidential year elections for state senate in LD-15,[12] at-large districts, and ballot signature verification,[13] all work to "enhance the opportunity for discrimination" against

[12] Twenty-four of Washington's 49 state senate positions are elected in non-presidential year elections, 25 senators are elected in presidential year elections, and all 98 state representative positions are elected in both presidential and non-presidential election years. Nearly every state in the Ninth Circuit—Alaska, California, Montana, Nevada and Oregon—follows this same pattern. Only Idaho and Arizona, whose state senate terms last for two years, have senate elections in both presidential and non-presidential election years. Hawaii's state senate utilizes a "2-4-4" system, so it mostly follows Washington's pattern of electing half of its senators every two years, except once per decade, when all 25 of its senate positions are on the ballot.

[13] Despite invoking an ongoing lawsuit about ballot signature verification in Yakima County, which has since been dismissed with prejudice upon a settlement by county officials who agreed to additional signature verification training, cultural competency training, and displaying information about signature verification and

Hispanics. *See Gingles*, 478 U.S. at 37. But it is doubtful that any of these even amount to the "usual burdens of voting," *Brnovich*, 141 S. Ct. at 2338—let alone burdens that violate § 2.

The district court expressly reasoned, however, that the mere election of state legislators in a non-presidential year puts this factor on the side of finding a Section 2 violation. *See* 1-ER-29. But if electing state legislators in non-presidential years is powerful evidence of a § 2 violation, as the district court reasoned, 1-ER-29, then *most* states are violating the VRA. Indeed, the biannual elections to the U.S. House would only be saved from invalidation under § 2 because they are expressly mandated by the Constitution itself.

The district court similarly fixated on ubiquitous electoral practices as somehow supporting a § 2 violation by reasoning that some at-large voting schemes "may" dilute minority strength, again without explaining *how* they would do so. 1-ER-29. By relying on the "usual burdens of voting"—such as electing state legislators in non-presidential years and electing two representatives per district—as evidence that supported a § 2 violation, the district court both committed legal error and engaged in factual analysis that cannot withstand appellate scrutiny. Even

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cure process more prominently, but with no finding or admission of liability, *see Reyes v. Chilton*, No. 4:21-cv-5075 (E.D. Wash.). The district court seemingly retreated from relying on that voting practice, conceding that Plaintiffs' expert's conclusion of disparate impact was "based entirely on an article published on Crosscut.com which summarized two other articles." 1-ER-30.

worse, the district court's reasoning that such ubiquitous, nonburdensome electoral practices impose uniquely burdensome barriers to Hispanic voters infantilizes the very voters that Section 2 is supposed to protect.

C. The District Court Erred on the Totality of the Circumstances

The district court's overall analysis of the facts and application of the Senate Factors to them was faulty. Whether characterized as legal, mixed, or factual, the errors go to the heart of the Section 2 question—whether Hispanics in the Yakima Valley region are excluded from equal participation in the political process. In the totality analysis, Factors 2 and 7—the "extent" of racially polarized voting and the "extent" of minority electoral success in the jurisdiction—are "the most important." *Gingles*, 478 U.S. at 48 n.15.

Factor 2. As explained above in § IV.B., racially polarized voting in the region is limited to White Democrat versus White Republican partisan elections and is caused by partisan signal, not racial polarization. And even if this Court finds the preconditions satisfied, it should still conclude from the evidence presented at trial that the "extent" of the racially polarized voting in the region is quite limited. The district court legally erred by failing to analyze the "extent" of RPV, instead simply stating the bare conclusion that "voting in the Yakima Valley region is racially polarized." 1-ER-29. Had the district court engaged in the correct analysis on the *extent* of the polarization, it would have found that any racially polarized voting was

cabined to one particular kind of partisan election and thus driven by partisan politics. Dr. Alford, the State's expert, concluded that any minority cohesion in the Yakima Valley was "less cohesive than not." 3-ER-548.

Factor 7. This factor looks at "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37. In analyzing the seventh factor, the district court equated Nikki Torres's victory with Ms. Soto Palmer's testimony about out-of-court statements she allegedly heard while door-knocking for a Democrat Hispanic candidate. The latter has nothing to do with this factor, but even if it did, the two are not equivalent. Ms. Soto Palmer testified to the hearsay statement of one White individual concerning a Hispanic candidate: "I'm not voting for him, I'm racist." 3-ER-562. The district court weighed this one-off alleged comment of one individual voter *equally* with Senator Torres's 35-point victory (the product of thousands of voters), a jaw-dropping abuse of its discretion. The district court also failed to credit the electoral success of others in the Yakima Valley region, including area legislators like Mary Skinner and Intervenor Alex Ybarra, and the numerous cities in Yakima County with Hispanic mayors and city councilmembers. *See* 3-ER-563. The district court presented a skewed picture that sets up an imperfect past as a strawman instead of looking at the "present reality." That blinkered, one-sided analysis produced a clearly erroneous finding of a Section 2 violation.

Factor 6. The district court pointed to a single incident of a candidate's campaigning against birthright citizenship (a *Facebook* post, the nature of which the district court elided). 1-ER-32. The court further alluded to "race-based appeals" in campaigns but gave no examples. *Id*. At no point did the court even attempt to support its assertion that candidates were "making race an issue on the campaign trail . . . in a way that demonizes the minority community." 1-ER-33. What the factor actually requires of district courts is to determine "whether political campaigns have been *characterized* by overt or subtle racial appeals." *Gingles*, 478 U.S. at 37 (emphasis added). The Plaintiffs and the district court had no basis whatsoever to argue that campaigns are "characterized" by racial appeals. Instead, the district court engaged in "nutpicking"—taking a single extreme negative example, then trying to impute that one candidate's alleged subtle appeal to supposed racial animus of *every other* White candidate in the Yakima Valley. In the true present reality, the dozens of other, normal campaigns in the Yakima Valley region are not characterized by racial appeals. At most,[14] one out of the total number of campaigns in the Yakima Valley included one racial appeal. It was clear error to find that political campaigning is "characterized" by racial appeals in that area.

[14] The district court's implication that campaigning against birthright citizenship is per se racist is itself fallacious and thus clearly erroneous.

Factor 8. The district court found a "significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," *see Gingles*, 478 U.S. at 37, because it credited the testimony of Senator Saldaña and Dr. Estrada that a single progressive Hispanic advocacy organization supported legislation that Republican representatives did not. Beyond that, the court relied on the hearsay testimony of Sen. Saldaña (who represents Seattle, not the Yakima Valley, and who admitted at trial she had never even lived in the Yakima Valley) about the out-of-court opinions of Hispanic individuals. At no point did the district court explain how the political differences amount to a "significant lack of responsiveness." The district court also ignored contrary evidence, such as the fact that incumbent Republican legislators from LD-14 and LD-15 helped secure $3.5 million in state budget appropriations for KDNA, a Spanish-language radio station in the Yakima Valley, *see* 3-ER-564–65, or that Ms. Soto Palmer's state senator and both state representatives both voted for the "Real Hope Act," a measure that extended in-state tuition at Washington's colleges and universities to undocumented students and which Ms. Soto Palmer had lobbied her legislators to support, *see* 3-ER-560–61.

In the end, the district court found that the Yakima Valley region denies Hispanics equal access to the political process because of the following: (i) the general history of discrimination in Washington's past unconnected to the present

reality; (ii) moderate polarized voting in one kind of election; (iii) some regular burdens of voting; (iv) the admitted socioeconomic disparities between Whites and Hispanics; (v) one instance of one candidate invoking illegal immigration; (vi) past Hispanic electoral success that is not quite proportional to the Hispanic population in the Yakima Valley region; (vii) one-off instances of "white voter antipathy"; and (viii) elected Republicans' not supporting all legislation the court considered Hispanic-supported based on one organization's opinion. That is all upon which the court relied—nothing more.

The above list would apply to almost every single jurisdiction in America with a modestly sizeable Hispanic population. Nothing in the district court's analysis is specific or "intensely local" to the Yakima Valley region. It is far too generalized. If Hispanics are denied equal access to the political process here based on the above facts, then they would be denied the same anywhere in America. Section 2 violations would exist in any place where the preconditions are met, rendering the totality prong superfluous. (Also, the preconditions too would always be met under the district court's regime for similar reasons, because, in the district court's errant and stereotyping view, any Hispanics in any jurisdiction are always "geographically compact," because Hispanics generally share culture, language, religion, and economic situations, *see supra* § IV.A.

By grounding its § 2 finding overwhelmingly on ubiquitous generalities that apply virtually *everywhere* in the United States, the district court both committed legal error and made clearly erroneous factual findings. This Court should accordingly reverse its totality-of-the-circumstances determination.

VI. THE DISTRICT COURT'S REMEDIAL MAP IS ILLEGAL

The district court's mandatory injunction, imposing its Remedial Map, is riddled with even more and even worse legal errors. Three stand out. *First*, the order purported to remedy alleged dilution of Hispanic voting strength by purposely decreasing the HCVAP of the remedial remedy, a novel and illegal undertaking. That cure-dilution-with-dilution "remedy" is utterly unprecedented in the entire history of the VRA. And for good reason: Section 2 is supposed to *prevent* dilution of minority voting strength, not *inflict* it.

Second, the district court's Remedial Map is itself an unconstitutional gerrymander. In particular, the district's shape—rightly likened to an octopus slithering on the ocean floor—can only be explained by the unconstitutional use of race. But here there is no need to infer the district court's race-based motives, because that court was disarmingly open about its race-based objectives, declaring forthrightly that its "fundamental goal" in drawing the Remedial Map was race-based redistribution of voters along racial lines.

Third, the Remedial Map made gratuitous, sweeping, and unnecessary disruptions to the Enacted Map, changing thirteen out of forty-nine districts in a one-sided partisan way. The Supreme Court has held that redrawing four out of twenty-seven districts to remedy VRA violations found in two of those districts was an unlawful abuse of discretion. *Upham*, 456 U.S. at 38, 40. The district court's transgressions are *far* broader here: *redrawing thirteen out of forty-nine districts* to remedy a putative violation in *just one*. Reversal is mandated here under *Upham*.

All together, the errors comprise an egregious violation of the most basic tenets of our federalist system: A federal district court, with the collusive support of Washington's Attorney General, usurped a State's independent bipartisan redistricting Commission to use race-based districting to redraw a quarter of the entire statewide legislative map, all favoring one political party, premised on a finding of a VRA violation in just one legislative district. And the resulting remedial map is a paradigmatic example of the sorts of Lovecraftian horrors that the Supreme Court has repeatedly invalidated as racial gerrymanders.

A. The District Court Erred by Purporting to Cure Dilution of Hispanic Voting Strength by Diluting It Further

The district court debuted a never-before-seen VRA remedy: purporting to cure dilution of minority voting strength by affirmatively lowering their CVAP. Specifically, the district court's remedy for allegedly diluted Hispanic voting strength in LD-15 was to *lower* the HCVAP from 52.6% to 50.2% in 2021

population numbers. 2-ER-73. In a nutshell: the district court purported to cure vote dilution with yet more dilution. *See Alexander*, 144 S. Ct. at 1264 (Thomas, J., concurring in part) ("The [*Soto Palmer*] court later purported to correct the lack of Hispanic opportunity by imposing a remedial map that made the district 'substantially more Democratic,' but slightly less Hispanic.").

In the stay briefings at this Court and the Supreme Court, neither Intervenors nor either set of Appellees could identity a *single instance* in the entire history of the Voting Rights Act where a court has previously purported to "remedy" a § 2 vote-dilution violation by affirmatively diluting the CVAP of the relevant minority group. In fact, no Appellee has even pointed to an example of a party's *ever even asking* for such a VRA "remedy." But even if such a precedent existed, it would be obviously wrong. Such a remedy is akin to a district "remedying" a malapportioned electoral map to ordering *greater* malapportionment to "cure" the equal-population violation.

To state the obvious: the VRA prohibits dilution of minority voting strength rather than promoting it. Injunctions must provide "relief in light of the statutory purposes." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). But here the district court's Remedial Map twists the VRA into its antithesis: a tool for *affirmatively diluting* minority voting strength. That is patent legal error.

But even assuming that a cure-dilution-with-dilution remedy could *ever* be appropriate, it would require some persuasive rationale for why it was appropriate

under the particular circumstances. The district court manifestly failed to provide any such rationale when it lowered the HCVAP from 52.6% to 50.2%. In support of this drastic and novel undertaking the court below offered just one sentence: "Although the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district, the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature." 1-ER-05. This single sentence alone cannot suffice to justify this completely unprecedented remedy.

Further, the HCVAP-lowering remedy was accomplished by injecting non-Hispanic Democrats, mostly Native American voters, into the new district while attempting to replace Republican-leaning White voters with more Democrat-leaning voters. 2-ER-85. Whether this new district is characterized as a species of coalition district or crossover district, it performs for Democrats in all hypothetical matchups run by Plaintiffs' expert. *Id.* The only way to understand the district court's remedial theory is that the lowering of the HCVAP was justified because the injection of voters of other ethnicities and races allowed the minority voters to together form an effective coalition with other groups. *See* Plaintiffs-Appellees' Opp. to Appellants' Emergency Mot. for a Stay Pending Appeal, No. 24-1602, Dkt. No. 12.1 at 22–24; State-Appellee's Opp. to Appellants' Emergency Mot. for a Stay Pending Appeal, No. 24-1602, Dkt. No. 11.1 at 22–23; *see also Alexander*, 144 S. Ct. at 1264

(Thomas, J., concurring in part) ("In short, the [*Soto Palmer*] court concluded that securing the rights of Hispanic voters required replacing some of those voters with non-Hispanic Democrats"). But "nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 556 U.S. at 15 (plurality and controlling opinion under *Marks v. United States*, 430 U.S. 188, 193 (1977)). On the contrary, for the purposes of Section 2, "[t]here is a difference between a racial minority group's 'own choice' and the choice made by a coalition," *id.*—a difference that the district court's opinion flatly flouts.[15] The district court's approach interpreted Section 2 to compel inclusion of crossover votes—at the very cost of decreasing HCVAP—"would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* at 21 (quotation marks and citation omitted).

Bartlett is not the only Supreme Court case contravened by the district court. In *Cooper v. Harris*, the Court held that "[w]hen a minority group is not sufficiently large to make up a majority in a reasonably shaped district, §2 simply does not apply." 581 U.S. 285, 305 (2017) (citation omitted). Plaintiffs' claim is that the existing Hispanic majority in LD-15 is too small to be an effective one. But Plaintiffs did not even attempt to offer a remedial map in which increased Hispanic voting

[15] Moreover, at no point during trial or briefing did Plaintiffs even attempt to explain why Native American voters should be combined with Hispanic voters, or what they have in common with each other.

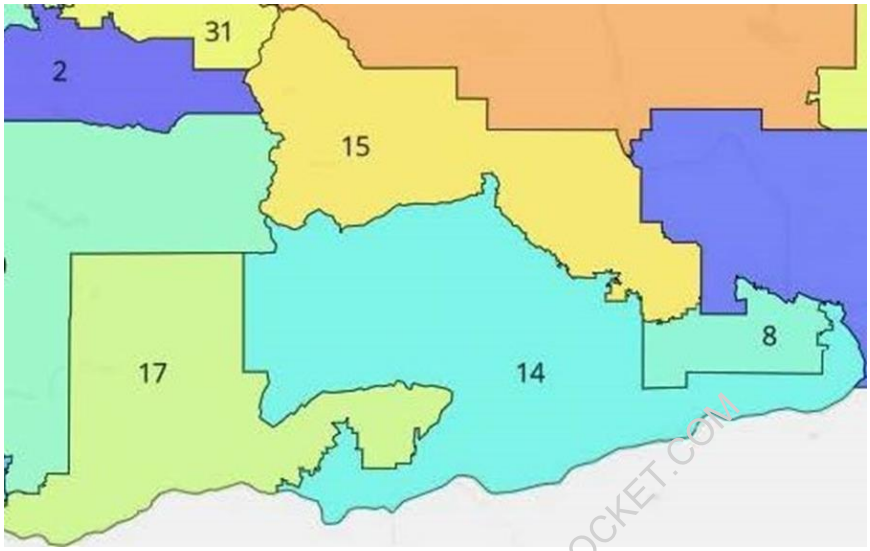
strength would provide an effective majority, instead relying on injection of other racial groups to assist Hispanic voters with electing a candidate of "their choice." Accordingly, Plaintiffs' proposed remedies, realized in the adopted Remedial Map, concede that the minority group was not sufficiently large enough to make up a *working* majority in a remedial district (which is further evidence *Gingles* I was never met to begin with).

The district court's attempt to employ § 2 to mandate creation of a *de facto* coalition district violates *Bartlett* and *Cooper* and requires reversal.

B. The Remedial Map Is an Unconstitutional Racial Gerrymander

The district court also erred in adopting the Remedial Map because that map violates the Equal Protection Clause as a racial gerrymander. It seems an obvious point, but "federal judges are equally bound to follow the dictates of the Constitution." *Johnson v. Mortham*, 915 F. Supp. 1529, 1545 (N.D. Fla. 1995) (three-judge court). Like prior infamous racial gerrymanders, Remedial LD-14's bizarre shape reveals its unexplainable-except-by-racial-grounds nature—which the district court was completely explicit about in any case, declaring the map's "fundamental goal" to be race-based sorting. 1-ER-07 n.7. Here, the Remedial Map's revised district was aptly described as an "octopus slithering along the ocean floor." 2-ER-129. The shape calls to mind descriptions like the "sacred Mayan bird"

and "bizarrely shaped tentacles" descriptions of maps previously invalidated. *See Milligan*, 143 S. Ct. at 1509.



The Supreme Court has held that, under its aesthetic test, "appearances do matter" for districts, so a bizarre shape is powerful evidence that boundaries are "unexplainable" but by race-based criteria. *Shaw v. Reno*, 509 U.S. 630, 647, 644 (1993) (*Shaw I*); *see also Milligan*, 143 S. Ct. at 1509 (listing as unlawful examples districts with "bizarrely shaped tentacles" and a shape like "a sacred Mayan bird"). Race-motivated district lines with "bizarre shapes" are typically subject to strict scrutiny and presumptively unconstitutional. *Vera*, 517 U.S. at 975.

The reality, however, is that *Shaw*'s implicit res ipsa loquitur approach to racial gerrymandering need not be applied here. The district court, after all, expressly declared it a "fundamental goal of the remedial process" that the remedial district "*unite the Latino community* of interest in the region." 1-ER-07 n.7 (emphasis

added). The district court further made it clear that the Hispanic communities referenced are those in "East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco." 1-ER-05.

Further evidence of the racial gerrymandering is the district court's choosing of Map 3 over Plaintiffs' Map 5 and Intervenors' proof-of-concept Map. The district court rejected both because neither segregated the Hispanic voters among the East Yakima-Pasco corridor into one district, the fundamental goal of the district court. 1-ER-07 n.7.

These race-based motivations wrought the sauntering cephalopod. The eastern tentacle, along with the abscess atop the octopus's head, are the direct result of ethnic sorting to unite those far-flung Hispanic communities. It is simply "unexplainable" on any other grounds. The map even has a "northernmost hook … [that] is tailored perfectly to" capture minority population. *See Vera*, 517 U.S. at 971.

"The mere fact" that the Remedial District was "created by a federal court does not change" the analysis because "federal judges are equally bound to follow the dictates of the Constitution." *Johnson*, 915 F. Supp. at 1544–45. "To hold otherwise … would be akin to holding that the Equal Protection Clause of the Fourteenth Amendment does not apply to federal courts." *Id*. at 1545 n.26.

Lack of Narrow Tailoring. Because race predominated in the drawing of the Remedial Map—seen in both its bizarre shape and by the district court's explicit

admission—the Remedial Map violates the Constitution unless it satisfies strict scrutiny. *See Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 188–89 (2017). For the reasons explained immediately below in Section C., the Remedial Map made sweeping, gratuitous changes to the Enacted Map. These changes were unnecessary. Accordingly, were the Court to find that Section 2 required a racial remedy in this case, the Map is not narrowly tailored to its racial ends. *See Johnson v. Mortham*, 926 F. Supp. 1460, 1484 (N.D. Fla. 1996) (three-judge court) ("Assuming it had been established that a compelling interest requires race-based redistricting under a correct reading of the Voting Rights Act statute, any remedial plan must still be narrowly tailored") (cleaned up). On the contrary, it was crafted to effect expansive changes throughout the statewide map. The district court in this way took a "shortsighted and unauthorized view of the Voting Rights Act," which resulted in drawing an ugly, unconstitutional district. *See Miller v. Johnson*, 515 U.S. 900, 927–28 (1995). For these reasons, the Remedial Map violates the Equal Protection Clause.

C. The District Court Exceeded Its Authority and Abused Its Discretion by Adopting Sweeping and Gratuitous Changes to the Enacted Map

The district court's merits order called for "revised legislative district maps for the Yakima Valley region." 1-ER-44. But the Remedial Map does not reflect this putatively humble ambition putative merely drawing districts in the "Yakima Valley

region." Instead, it makes changes to a whopping thirteen out of forty-nine districts, sweeping far, far outside the Yakima Valley region to populations, partisan makeups, and district shapes. The district court's cascading disruptions to Washington's maps are gratuitous, offend basic principles of federalism, and, most damning of all, were entirely unnecessary by the Plaintiffs'—and the district court's—own reasoning.

Remedial "court-ordered reapportionment plans are subject . . . to stricter standards than are plans developed by a state legislature." *Upham*, 456 U.S. at 42. When drawing a Section 2 remedy map of its own accord, "a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed . . . in the reapportionment plans proposed by the state legislature." *Id*. at 41. Any revisions should be "to the extent" necessary to comply with the VRA, and no further. *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). The north star must be "the State's recently enacted plan[,]" which "reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." *Perry v. Perez*, 565 U.S. 388, 393 (2012). This is true even when replacing a plan held to violate the law. *Id*.

In *Upham*, the district court's error was its redrawing four out of twenty-seven districts to remedy VRA violations found in two of those districts. In other words, the *Upham* court changed districts at a 2-1 revision-to-violation ratio, changing a

total of 4/27 districts (~15%) statewide. The Supreme Court vacated that remedy. In the present case, the district court changed thirteen districts for a violation found in a single one, a *13-1 revision-to-violation* ratio, changing a total of 13/49 (~27%) districts statewide.

The district court adopted a revised form of Plaintiffs' Proposed Map 3A. As mentioned, pursuant to the district court's finding of a VRA violation in one district only, the Remedial Map changes thirteen districts, including some in Western, North Central, and Eastern Washington. 2-ER-69–71. A cool half-a-million Washingtonians are moved into new districts, and over two million live in districts altered by the Remedial Map. *Id*. Multiple incumbents were displaced, forcing them to decide whether to move to remain in their districts or choose early retirement. 2-ER-78.

Furthermore, instead of cleaving to the "State's policy judgments" expressed in Washington law that the districts "provide fair and effective representation and [] encourage electoral competition" and "not be drawn purposely to favor or discriminate against any political party or group[,]" RCW 44.05.090(5), the district court brazenly changed the partisan composition of *ten* districts—almost uniformly benefiting one political party. Most egregiously, the district court flipped LD-12, far away in North Central Washington, from a district carried by former President Trump into one carried by President Biden, and it flipped LD-17—in the Portland

suburbs of Southwest Washington—from one where Republicans won by 0.9% on average to one where Democrats would have a 2.0% advantage on average. 2-ER-142–46; 2-ER-81.

All of this was unnecessary on the Plaintiffs' own terms. Plaintiffs submitted five proposed maps (one of which was the Map 3 that would be adopted as modified) and affirmatively averred each was "a *complete and comprehensive remedy* to Plaintiffs' Section 2 harms that aligns with both traditional redistricting principles and federal law." 2-ER-181 (emphasis added). The State further agreed that "each map [of Plaintiffs' five proposed remedial maps] '[wa]s a complete and comprehensive remedy to Plaintiffs' Section 2 harms.'" 2-ER-168. No expert disagreed with Plaintiff's expert's performance analysis that showed that "in nine of the nine elections considered, the Latino-preferred candidate would win in LD 14" in each of the proposals. 2-ER-184–86.

Plaintiffs' own remedial maps affirmatively demonstrated that it was possible to achieve Plaintiffs' aims without the sweeping changes made by the district court—illustrating the gratuitous and wonton nature of those changes to *thirteen* districts.

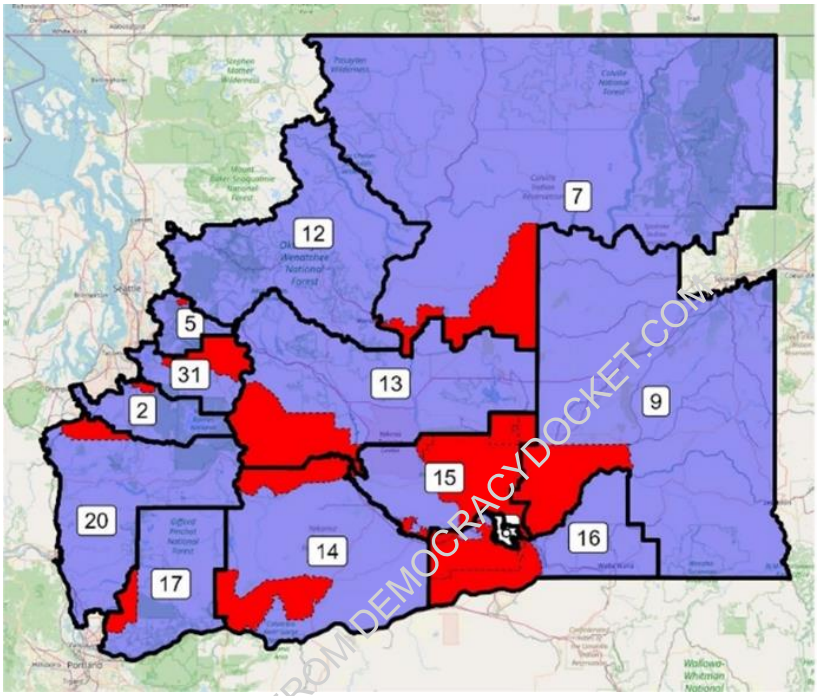
Consider Plaintiffs' Proposal 4. That map had "ha[d] an identical configuration to LD 14 in Plaintiffs' Remedial Proposal 3," 2-ER-185, octopoid shape and all. Map 4 (and its revised version, 4A), however, altered three fewer

districts, moved 50,000 fewer people, and did not transform the partisan nature of LD-12, which crosses over into the distant Seattle suburbs, 2-ER-136–37; 2-ER-142. If partisan changes through Washington were not the point, it is simply incomprehensible why the district court adopted a Map 3 variant. After all, Map 4, which has the same exact HCVAP and shape as Map 3, was far less disruptive, and Plaintiffs had conceded it was "a complete and comprehensive remedy." 2-ER-181.

The bizarreness does not stop there. Consider next Plaintiffs' Proposal 5/5A, which was the most modest of the proposed maps and was, in their words, "a complete and comprehensive remedy." Map 5 and its variants: (1) *moved only 190,745 people*, (2) *changed only four districts* (as opposed to thirteen (in Map 3) and ten (in Map 4)), (3) only redrew districts in the Yakima Valley region, not Western and North Central Washington, (4) impacted no new counties, (5) made very few changes to partisanship, and (6) did not pair any Senate incumbents in primary fights whatsoever. 2-ER-153–54. Under the principles of federalism that necessarily govern federal courts usurping States' roles in drawing districts, Map 5 was superior in essentially every conceivable way. Yet the district court rejected it in favor of making *far* more sweeping changes that were wholly unnecessary given Plaintiffs' concession that Map 5 was "a complete and comprehensive remedy[,]" 2-ER-181. The district court thus gravely erred in adopting the Remedial Map.

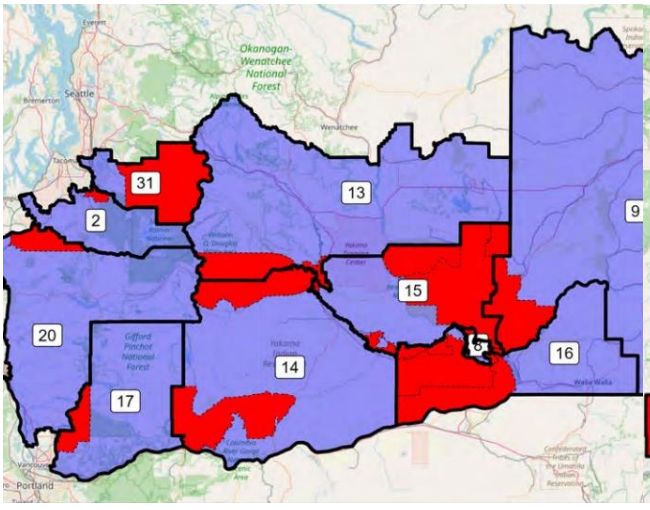
Intervenors' expert provided the following visual comparisons. Again, Plaintiffs and the State avowed that all of these were complete remedies:

Plaintiffs' Map 3 (adopted as Remedial Map) Changes to Enacted Map

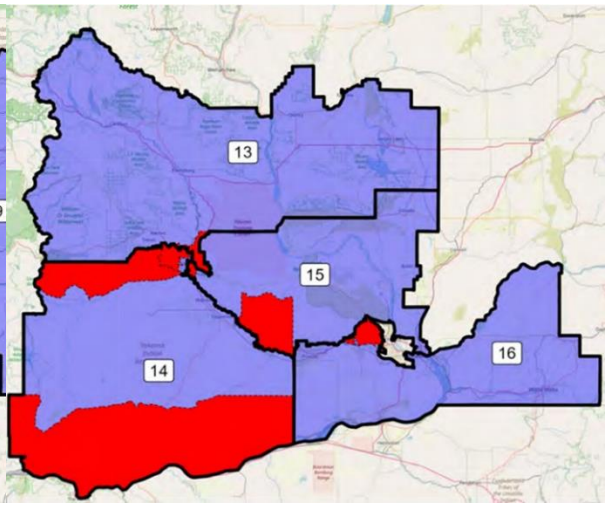


Plaintiffs' Maps 4 and 5 Changes to Enacted Map

Map 4



Map 5



2-ER-132, 136, 153.

If Plaintiffs' own maps weren't enough, Intervenors' expert introduced a proof-of-concept map himself to show that a Democrat-performing map in the Yakima Valley was entirely possible without the wanton disruption of Map 3. Appellants' map created a majority-HCVAP district in the Valley that performed for Democrats, all the while keeping the Yakama Nation and its traditional lands together in the next district over, yet changing only three districts total, moving only 87,230 people total, changing the partisan nature of only two districts total, and displacing zero incumbents. 2-ER-73, 81–82.

But instead the district court opted for maximum disruption, making no effort to comply with the Supreme Court's clear rules in *Upham*, *Abrams*, and *Perry*, or with one of the most fundamental mandates of federalism: maximizing State ability to draw their own maps to the extent possible. And if the district court's wanton changes were actually no "more than necessary," *Upham*, 456 U.S. at 41–42, then *Upham* means nothing. *Upham* remains binding precedent, so the district court's egregious violations of its minimization mandate require reversal.

CONCLUSION

The district court's decision that the enacted Washington legislative map violates § 2 of the VRA should be reversed and the district court's order enacting the Remedial Map should be vacated regardless.

If the Court agrees that the district court lacked jurisdiction to hear this case on its own, the Court should vacate and remand the matter to the district court with directions to convene a three-judge court to hear these matters in the first instance.

Respectfully submitted,

/s/ Jason Torchinsky

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Counsel for Intervenor-Appellants

Dated: July 1, 2024

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants list the *Garcia v. Hobbs et al.*, No. 24-2603 case as a related case, for the reasons set forth throughout this brief and in the joint motion to consolidate filed in both these appeals in in the *Garcia* appeal. This Court has ordered that these consolidated appeals "will be calendared before the panel assigned to consider the merits of appeal No. 24-2603." No. 24-1602, Dkt. No. 37.

STATUTORY ADDENDUM

Section 2 of the Voting Rights Act, 52 U.S. Code § 10301

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

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

CERTIFICATE OF COMPLIANCE
Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 23-35595 & 24-1602

I am the attorney or self-represented party.

This brief contains 19,856 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature: s/ Jason B. Torchinsky **Dated:** July 1, 2024

CERTIFICATE OF SERVICE

I, Jason B. Torchinsky, hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on July 1, 2024, which will send notice of such filing to all registered ACMS users.

/s/ *Jason B. Torchinsky*
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