Nos. 23-35595 & 24-1602

IN THE 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 STATE OF WASHINGTON,

Defendant-Appellees,

JOSE A. TREVINO; et al.,

Intervenor-Defendants-Appellants.

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

AMICUS CURIAE BRIEF OF REDISTRICTING COMMISSIONERS IN SUPPORT OF NO PARTY AND SUPPORTING REVERSAL

Paul Graves
1339 West Valley Highway N
Auburn, WA 98071
206-818-5607
Paul.Graves@oakh.com

Attorney for Amicus Curiae Sarah Augustine, Joe Fain, and Paul Graves

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STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS

Amicus Curiae are Sarah Augustine, Joe Fain, and Paul Graves, three of the five commissioners on the 2021 Washington State Redistricting Commission, and who in this brief are called "the Commissioners." Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties here have consented to the filing of this brief.

The Commissioners spent much of 2021 working on and negotiating what ultimately became the maps at issue in this case. Faced with novel challenges—the late release of the required census data, an earlier deadline than previous Washington Redistricting Commissions, a pandemic that required most meetings to be remote, substantial partisan pressure from special interests—the Redistricting Commission nevertheless created and approved maps for Washington's ten congressional districts and 49 legislative districts. The vote to approve the maps was unanimous, receiving votes from commissioners appointed by both democrats and republicans.

The maps as a whole, and the district challenged here in particular, comply with both the Voting Rights Act and the 14th Amendment. The Commissioners have an interest in seeing their work vindicated, and in advocating both for these specific maps, and for the benefits of the redistricting approach adopted by the people of Washington, an approach designed to require bipartisan input and limit the pernicious partisan gerrymandering that occurs so often across the country.

STATEMENT OF AUTHORSHIP

Counsel for Amicus certifies that no party's counsel authored this brief in whole or in part. No party nor any party's counsel contributed money intended to fund preparing or submitting this brief. No other person contributed money intended to fund preparing or submitting this brief.

SUMMARY

Faced with credible arguments that a legislative district in Washington's Yakima Valley required consideration of race—and also required the traditionally republican district to switch to a democratic district—along with credible arguments that considering race would violate the Constitution, Washington's bipartisan Redistricting Commission unanimously drew a district where Hispanics were the majority of eligible voters, and, based on recent election results, would be a toss-up district leaning slightly republican.

The Commissioners' decision was well within the boundaries set by the 14th Amendment and Section 2 of the Voting Rights Act. The decision below was in error because it held that a majority-minority district is a Voting Rights Act voter dilution violation—the first time that has ever happened. That decision that can't be squared with the words of the Voting Rights Act, nor with cases interpreting it.

The court below came to that extraordinary conclusion because it held that Hispanics are and will continue to be democrats—despite ample evidence that Hispanics are independent-minded voters with shifting views on the parties—and so the district had to be gerrymandered for democrats, even though that meant *reducing* the Hispanic population of eligible voters. That error, if upheld, would drag federal courts into partisan disputes that are squarely the province of map-drawers, and would deny Hispanics the dignity of voting for candidates of any party any time they see fit.

On the other side—the claim that the Commission wrongly considered race—

the dissent below, from a concurrent three-judge panel, incorrectly would have held that race can only be taken into account if all map-drawers are personally persuaded that the Voting Rights Act requires consideration of race. In the context of the Voting Rights Act's three-part-threshold-followed-by-seven-factor-analysis, *Thornburg v. Gingles*, 478 U.S. 30 (1986)—a test that is nearly always uncertain of application—it is instead enough that map-drawers recognize "good reasons" to think the Voting Rights Act requires consideration of race. *Abbott v. Perez*, 585 U.S. 579, 587 (2018) (quotation omitted).

(That dissent was in a related but unconsolidated case being heard by the same panel hearing this case, *see Garcia v. Hobbs*, No. 24-2603. Because the issues in the two cases are so related, and the Commissioners believe both challenges should fail, they plan to file a similar amicus brief, addressing both lawsuits, in each case.)

Striking down the maps here for either reason—that race was considered too much or not enough—would deal a major blow for the independent and bipartisan redistricting process Washington voters have established for themselves. It would damage the trust required to produce bipartisan maps. It would do harm to the tribes who worked collaboratively with the Redistricting Commission. It would entangle courts in partisan fights. It should not be done. The decision below should be reversed and the maps upheld.

ARGUMENT

I. The Map complied with the Voting Rights Act.

While the parties have spent substantial time litigating the many factors involved in a Section 2 Voting Rights Act claim, the issue here is quite simple: if those factors point to a violation, the remedy is a majority-Hispanic district. That is exactly what the Commissioners drew. *Soto Palmer v. Trevino*, No. 3:22-cv-05035-RSL (W.D. Wa.), ECF No. 218 at 5-6.

The typical remedy for a Section 2 voter dilution violation is the drawing of a majority-minority district. *See, e.g., Rose v. Secretary, State of Ga.*, 87 F.4th 469, 477 (11th Cir. 2023); *Singleton v. Merrill*, 582 F.Supp.3d 924, 936 (M.D. Ala. 2022), *affirmed by Allen v. Milligan*, 599 U.S. 1 (2023); *see also LULAC v. Perry*, 548 U.S. 399, 395 (2006) (Roberts, J., concurring)("[I]n the context of single-member districting schemes, we have invariably understood [the Voting Rights Act] to require the possibility of additional single-member districts that minority voters might control."). And the decision below marks the first time that a court has found a majority-minority district—where the majority of eligible voters are minorities—illegally dilutes the votes of the minority in that district.

The obvious reason why no other court has done so is this: if a minority group is the majority of eligible voters in a district, how can "its members 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. § 13031(b)? How could a minority group's votes be diluted when it makes up a majority of eligible voters?

The court below answered those questions by holding that Hispanics are democrats, so unless the district votes for democrats, it is a Section 2 violation. Here is what the court wrote: "Party labels help identify candidates that favor a certain bundle of policy prescriptions and choices, and the Democratic platform is apparently better aligned with the economic and social preferences of Latinos in the Yakima Valley region than is the Republican platform." *Soto-Palmer*, ECF No. 218 at 30. But from that sprang a new challenge: the areas around the district that have voted for democrats are less Hispanic. Yet armed with the conviction that the district had to vote for democrats, the court below drew a new district that had a *lower* Hispanic eligible voter population than the adopted map, but one that was designed to vote for democrats. *Soto-Palmer*, ECF No. 251 at 67.

That was wrong as a matter of law and should be reversed. The two-step analysis—Hispanics are democrats, so a district must support democrats, even if it is less Hispanic—runs contrary to the law and the facts.

"It is true that redistricting in most cases will implicate a political calculus in which various interest group compete for recognition, but it does not follow from this

that individuals of the same race share a single political interest." *Miller v. Johnson*, 515 U.S. 900, 914 (1995). "The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain minority views that must be different from those of other citizens, the precise use of race as a proxy the Constitution prohibits." *Id.* (citation omitted and cleaned up).

"Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations." *Rucho v. Common Cause*, 139 S.Ct. 2484, 2504 (2019). And importantly, "demographics and priorities change over time," meaning that "predictions of durability prove[] to be dramatically wrong." *Id.* at 2503.

The new map here, drawn by the court below, illustrates the point. Because it was drawn to favor democrats as much as possible, Joe Biden would have taken 56.6% of its vote in 2020. Yet in 2022, democratic U.S. Senator Patty Murray, in her reelection bid, would only have taken 43%. *See* https://www.nwprogressive.org/weblog/2024/03/new-2024-legislative-maps-offer-historic-opportunities-for-latino-representation-and-democratic-pickups-across-washington.html (last visited July 8, 2024). If a district drawn specifically to favor democrats could only muster 43% for a democratic U.S. Senate candidate—if

Yakima Hispanics are and will continue to be democrats, so much so that it justified striking down a majority-Hispanic district and *reducing* the Hispanic population to add more democrats, and yet a now-seven-term democratic Senator would have lost the district by more than 14%—surely something has gone wrong. And that something is plain: Hispanics voters are not robotic democrats. *See* Tim Alberta, *Why Democrats are Losing Hispanic Voters*, THE ATLANTIC, Nov. 3, 2022, *available at* https://www.theatlantic.com/politics/archive/2022/11/hispanic-voters-fleeing-democratic-party/671851/ (last visited July 8, 2024); Ruy Teixeira, *The Democrats' Woes with Hispanic Voters*, WALL STREET J., Aug. 4, 2022, *available at* https://www.wsj.com/articles/the-democrats-woes-with-hispanic-voters-11659625647 (last visited July 8, 2024).

Treating Hispanic voters as if they are and always will be democrats is wrong on the facts, and is an insult to their dignity. Voters of all races regularly shift their partisan preferences. That is to the good. It requires elected officials of both parties to remain responsive to their needs, and lets voters express the very American statement that they can't be taken for granted. And it accords them the dignity they deserve. Locking any racial group into a party, and then using the Voting Rights Act to lock them into a partisan gerrymander, is an insult to that dignity.

The simplest method for reversal would be a straightforward legal holding that a majority-minority district—where a majority of eligible voters are members of a

minority group—is not vote dilution. Short of that, at the very least the Court should hold that the two-step method used below—this minority group invariably votes for that party, so any district must be gerrymandered for that party—is a flawed method. Either way, the decision below should be reversed.

II. The Map complied with the Fourteenth Amendment.

That would not end the inquiry, however, because a second lawsuit challenged the district as a racial gerrymander under the 14th Amendment, and the dissent below in that case would have agreed. *See Garcia v. Hobbs*, No. 3:22-cv-5152 (W.D. Wa.), ECF No. 81-1. That conclusion would be error as well.

If race is the predominant factor when drawing a district, strict scrutiny applies. *Wis. Legislature v. Wis. Elections Comm'n*, 142 S.Ct. 1245, 1248 (2022). Complying with the Voting Rights Act is a compelling interest satisfying strict scrutiny. *Id.* Yet what is required, *before* adopting a map, to decide that the Voting Rights Act requires consideration of race?

The Voting Rights Act is among the more complicated tests in the United States Code. Three threshold factors must first be considered. *See Thornburg,* 478 U.S. at 50-53. Following that is a totality-of-the-circumstances test that involves at least seven criteria, perhaps nine, none of which is dispositive and all of which involve measures of degree: history, education, employment, health, "subtle racial appeals,"—even things like the placement of sidewalks. *See* S.Rep. No. 97-417, 97th

Cong., 2d Sess. (1982) pages 28-29; *Soto Palmer*, ECF 218 at 16. That requires "an intensely local appraisal" and a "searching practical evaluation of the past and present reality." *Allen*, 143 S.Ct. at 1503 (citation and quotation marks omitted). The parties here have spent years of litigation and submitted massive expert reports trying to address all of that. It is no wonder that map-drawers, attempting to consider it in a few short months, could come to different conclusions among themselves.

That is why "States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA[.]" *Cooper*, 581 U.S. at 303. The test is that map-drawers must have a "strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2[.]" *Bush*, 517 U.S. at 977 (citation omitted and cleaned up). Putting the test slightly differently, a "State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has good reasons for believing that its decision is necessary in order to comply with the VRA." *Abbott,* 585 U.S. at 587 (quotation omitted). A hunch or mere possibility is not enough, *see Wis. Legislature*, 142 S.Ct. at 1249, but nor must all map-drawers be absolutely certain what a federal judge (or judges) might someday hold; the "strong basis (or good reasons) standard gives States breathing room to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 581 U.S. at 295. That is especially so for bipartisan redistricting systems like

Washington's. *See Bethune-Hill v. State Bd. of Elections*, 137 S.Ct. 788, 801 (2017) (affirming use of race when "[r]edrawing this district presented a difficult task, and the result reflected the good faith effort of Delegate Jones and his colleagues to achieve an informed bipartisan consensus.").

Conscientious map-drawers will also be aware of litigation risk, and it is "entirely reasonable and certainly legitimate" to consider that risk when drawing maps. *Abbott*, 585 U.S. at 602. Courts thus give deference to map-drawers' "reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Id.*

It is true, as the dissent below discussed, that two of the four voting commissioners here did not believe the Voting Rights Act required a majority-minority district. *Garcia*, ECF No. 81-1. But both nevertheless testified that there were good arguments to the contrary. *See Soto Palmer*, ECF No. 127-3 at 270; *Garcia*, ECF No. 45-7 at 196. That is enough.

Consider the situation from the point of view of a map-drawer. The 14th Amendment forbids the use of race, unless the Voting Rights Act requires it. Whether the Voting Rights Act requires it is inevitably uncertain. Partisans from both sides insist that when you analyze the totality-of-the-circumstances factors, the result supports their desired outcome, and the only real time you get an answer is following a years-long appeals process. Because the law is so uncertain, you must be wary of any group or expert "that wants a State to create a district with a particular design"

because that group or expert may "have an overly expansive understanding of what § 2 demands," *Abbott*, 585 U.S. at 615. The easiest option, of course, is to throw up your hands and let the courts decide.

But that is exactly the opposite of what the Supreme Court has suggested over and over. *Growe v. Emison*, 507 U.S. 25, 34 (1993), *quoting Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."). And it would amount to a real dereliction of the duty to draw maps that are fair and comply with the law. In those circumstances, the Constitution provides breathing room enough to allow map-drawers, not themselves convinced of a Voting Rights Act requirement, nevertheless to recognize that a federal judge might disagree, and to act accordingly.

That is exactly what the Commission here did. That choice complied with the Constitution.

III. The decision below will cause harm to independent and bipartisan redistricting efforts.

More broadly, invalidating the map for either reason would do harm to the people of Washington, who have adopted for themselves a process meant to minimize partisan gerrymandering and other problems arising from other redistricting processes.

Washington citizens, following nasty legislative battles over redistricting in the

middle of last century, chose a different path for themselves. Through a popular vote, they amended their state Constitution to create an independent, bipartisan system for drawing legislative and congressional maps. Wash. Const., Art. II § 43; *see also* Official Voters Pamphlet, Wash. Sec. of State at 5, 1983, *available at* https://www2.sos.wa.gov/_assets/elections/voters'%20pamphlet%201983.pdf#page=4 ("Legislative efforts at redistricting have inevitably turned into a time consuming and highly partisan process" and urging support for Washington's now-current system, which "will ensure that future redistricting efforts will be carried out in [a] fair and independent fashion[.]").

Under Washington's system, the leaders of the two largest parties in the state house and senate each appoint one voting commissioner. Wash. Const., Art. II § 43(2). Those four then appoint a fifth, non-voting chair. Three votes are required to approve a map. *Id.*

That system was designed to address many of the pitfalls of pure legislative redistricting. None of the commissioners can be in the legislature or congress, Wash. Const., Art. II § 43(3), which avoids the problem of legislators choosing their own voters. A map requires bipartisan approval, thus limiting aggressive partisan gerrymandering.

The Supreme Court has noted the value of independent commissions like Washington's. *See Rucho,* 139 S.Ct. at 2507 ("numerous other States are restricting

partisan considerations in districting through legislation"). They act as a bulwark against the naked partisan gerrymandering that can take place when one party is in charge of drawing maps, and which partisan gerrymandering is not reviewable by federal courts. *See id.* at 2508. They can promote trust in the democratic process, and they provide a better shot at producing fair maps.

But the process still faces its challenges. In these polarized times, commissioners must develop trust, because any bipartisan map is subject to attack from both parties. Commissioners themselves are regularly subject to personal attacks from special interests; indeed, the chair of this very Commission ultimately resigned in protest. Sarah Augustine, *Why I Resigned as Chair of the Redistricting Commission*, SEATTLE TIMES, Mar. 11, 2022, *available at* https://www.seattletimes.com/opinion/why-i-resigned-as-chair-of-the-redistricting-commission/ (last visited July 8, 2024). The author of this brief, one of the Commissioners, recently faced false claims that he sought to invalidate the maps he voted for—Marilyn W. Thompson, *Republicans Hatched a Secret Assault on the Voting Rights Act in Washington State*, PROPUBLICA, Feb. 28, 2024, *available at* https://www.propublica.org/article/republicans-hatched-secret-assault-voting-rights-act-washington-state, (last visited July 8, 2024)—even though he in fact consistently tried to defend the maps from challengers on both sides, *see* Soto-Palmer ECF No. 127-3 at 200-05, 285-87—something he continues now, with this brief. All of that

goes to show that bipartisan and independent redistricting has its enemies who threaten the system Washingtonians have fashioned for themselves.

That threat is made real in these lawsuits, and imperils not only these maps, but the very potential for agreement in future redistricting. Consider two issues far afield from the issues in this case, but implicated by the maps ultimately drawn by the court below. First, tribal sovereignty. The Commission made a priority of engaging with tribes in Washington, and in both its congressional and legislative maps, accommodated all the requests of tribes that provided input. *See Palmer*, ECF Nos. 252-3, 252-4, 252-5, 252-6. That included the Yakama Nation, which requested, through extensive government-to-government consultation, that its reservation lands and traditional hunting and fishing lands be consolidated in a single legislative district. *Palmer*, ECF Nos. 252-4, 252-5, 252-6. The new map adopted by the district court below did not do so; it instead divided much of the traditional hunting and fishing lands of the Yakama. *Palmer*, ECF No. 245-1. According to the Yakama Tribe itself, the new map does not "represent the Yakama Nation's interest to the same degree as the current 14th Legislative District that was a product of the Yakama Nation's active participation as a sovereign government in Consultative posture with the Washington State Redistricting Commission." *Palmer*, ECF No. 267-1.

Second, the map adopted below created a substantial partisan shift in the traditionally swing 17th legislative district, which was not the subject of this lawsuit.

That district, like all swing legislative districts, was the subject of intense negotiation among the commissioners. Yet under the map adopted below, it moves from a district where, using a key metric of recent elections, republicans have won by 0.9%, to a district where democrats have won by 1.4%. *Palmer*, ECF No. 251 at 36, 57.

That is a truly massive shift for a swing district. And it threatens not only the 17th district, but the overall partisan balance of the adopted map. Drawing any particular district does not happen in a vacuum. Washington law calls for its redistricting commission to "encourage electoral competition" and to refrain from "favor[ing] or discriminat[ing] against any political party or group." RCW 44.05.090(5). By shifting one district so substantially—and doing other things like districting 12 republicans out of their districts and no democrats—the Court below changed the overall partisan balance of the adopted map in a way that harms competitiveness and breaches the overarching agreement reached by the Redistricting Commission.

Both of those issues—respecting the sovereignty of the Yakama Nation, and the partisanship of a swing district not at issue here—were the subject of much work and negotiation by the Commission. Future commissioners are watching. If they realize that their agreements are uncertain, they will simply not make them. If these maps are invalidated—either because they did not consider race (and partisanship) enough, or because they considered it at all—the easy tendency for future

commissioners will be to give up any hope of agreement, retreat to the positions of hard partisans and special interests, and simply let the courts decide. That would deal a real blow to people of Washington, who have tried to choose something better. Thankfully, the law does not require that outcome.

CONCLUSION

The maps here comply with both the Voting Rights Act and the 14th Amendment. They should be affirmed. The decision below should be reversed.

Date: July 8, 2024

/s/ Paul Graves
Paul Graves

Attorneys for Amicus Curiae Sarah Augustine, Joe Fain, and Paul Graves

CERTIFICATE OF COMPLIANCE

9th Cir. Case Numbers 23-35595 & 24-1602

I am the attorney for Amicus Sarah Augustine, Joe Fain, and Paul Graves. This brief contains 3,381 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).

I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

Signature s/Paul Graves

Date July 8, 2024

CERTIFICATE OF SERVICE

I 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 8, 2025, which will send notice of such filing to all registered ACMS users.

/s/ Paul Graves