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

BRIEF OF CITIZEN ACTION DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF INTERVENOR-APPELLANTS

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RULE 29 STATEMENTS

1. CADF's counsel authored the brief in whole and no other party contributed money that was intended to fund this brief.

2. All parties consented to the filing of this *amicus* brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, CADF attests that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

This *amicus* brief is submitted by the **Citizen Action Defense Fund** ("CADF"). CADF is an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation to advance free markets, restrain government overreach, and defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs when the state enacts laws that violate the state or federal constitutions, when government officials take actions that infringe upon the First Amendment or other constitutional rights, and when agencies promulgate rules in violation of state law.

Amicus has a strong interest in the outcome of this case as they are committed to the integrity of elections in Washington State and throughout the United States. Specifically, *amicus* is concerned that the district court's endorsement of Plaintiffs' theory of majority-minority redistricting constitutes an improper exercise of federal power over what is a longstanding state-controlled enterprise.

INTRODUCTION & SUMMARY OF ARGUMENT

Since the Founding—indeed, prior to—the states have held a monopoly over the drawing of their own internal electoral boundaries. And properly so. While the national government under the Articles of Confederation (1781-89) suffered several flaws, states' prerogative over their internal electoral boundaries was not one of

them. Before, during, and after, the Constitutional Convention of 1789, there was little, if any, chatter of handing over to a new federal government the authority to intervene in intra-border affairs of nearly *any* kind. Fast forward to the "Second Founding" as it is sometimes called—that is, the immediate post-Civil War slate of constitutional amendments. *See generally* Ilan Wurman, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020). While these greatly expanded federal authority to intervene within states' borders, such powers were still limited to protecting individual citizens from governmental overreach—*i.e.*, by ensuring due-process and equal-protection rights. While this remains the core (and, in relative terms, practically the *only*) purpose for this sort of federal intervention in states' internal political boundaries, as *Amicus* will explain, such core (or practically only) purpose is not applicable to this case.

ARGUMENT

I. States Have a Broad Constitutional Mandate to Draw Their Own Internal Political Boundaries

Redistricting of both state and federal legislative boundaries remains, with very narrow exception, the states' exclusive bailiwick. *See*, *e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (establishing that the Guarantee Clause of Article IV, §4 of the Constitution—"The United States shall guarantee to every State in this Union a Republican Form of Government"—does not permit federal piercing of the state-level political question of how that government is formed or constituted). *See also*

Pac. States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912) (confirming that Congress may pierce state-level "political questions," but not federal courts). It was only in the mid-twentieth century that the federal courts, led by their highest, extended this national mandate to include the limited regulation of states' internal political boundary-drawing. *See* James G. Gimpel *et al.*, *The Geography of Law: Understanding the Origin of State and Federal Redistricting Cases*, 1, POL. RES. Q. (2021) ("As late as 1960, courts played a minimal role in the politics of redistricting").

The basis for this latter-day expansion was still the protection of the individual, however—including their membership in minority groups subject to invidious discrimination. *See United States v. Carolene Products Co.*, 304 U.S. 144, 142 n.4 (1938) (noting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities . . . may call for a correspondingly searching judicial inquiry").

Of course this includes protecting such minority-member individuals' access to the ballot and proportional representation. *Id.* ("Since the U.S. Supreme Court opened the door to the justiciability of claims of unfair apportionment in 1962, courts' dockets have been regularly stocked with redistricting cases working their way through both state and federal court systems."). But in the context of the

Fourteenth Amendment's Due Process and Equal Protection Clauses, this means simply ensuring that the internal political boundaries states *have* drawn reflect demographic reality. *Baker v. Carr*, 369 U.S. 186 (1962). This in important addition to the Fifteenth Amendment, which provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV. And the Amendment gives Congress the "power to enforce this article by appropriate legislation." *Id.* The purely partisan results of elections are far outside this ambit.

As the Civil Rights Act of 1964 provides:

> The district courts shall have original jurisdiction . . . [t]o redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution . . . or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. §1343(a)(3).

Neither the Second Founding nor the Civil Rights Act of 1964 disturbed *Luther*'s core holding that the content of government within a republican form is a nonjusticiable political question. *See* Ari J Savitzky, *The Law of Democracy and the Two* Luther v. Borden*s: A Counterhistory*, 86 NYU L. REV. 2028, 2030 (2011) ("*Luther* is the origin of the political question doctrine and of the nonjusticiability of the Constitution's promise" set forth in the Guarantee Clause.). The former's overarching purpose was to accord and then ensure the rights of federal citizenship

on all Americans, most notably including Black Americans, *most* of whom had just been freed from the grips of slavery. Whereas *Luther*, like *Baker* more than a century later, provided that the content of a state's republican form of government—including how it constituted internal political districts—was outside the federal courts' legerdemain. *Baker*, and *Shelby*, together make clear that this general principle remains at the core of the Court's voting- and election-related jurisprudence.

II. None of The Limited Purposes for Federal Judicial Intervention Are Applicable Here

Even after the "Second Founding" it was nearly a century before the U.S. Supreme Court and others interpreted the postbellum amendments to require the federal government to intervene in states' internal political boundary-drawing and even then for the core limited purpose of ensuring equal (or as close to equal as possible) legislative representation of their respective populations. There are other, ancillary purposes for such federal judicial intervention. These include ensuring minority "participation in municipal affairs." *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

None of those relatively ancillary issues are relevant to this case, however. And the core purpose of ensuring equal legislative representation—that is, to accord with the Fourteenth and Fifteenth Amendments—is still a severely limited one. To wit, in *Gray v. Sanders*, 372 U.S. 368, 376 (1963), the U.S. Supreme Court clarified that

the federal authority confirmed in *Baker v. Carr* "involve[ed] a question of the degree to which the Equal Protection Clause . . . limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen . . ." No more, no less. As one scholar notes, *Baker* turned on whether Tennessee could maintain state-legislative boundaries that no longer reflected "actual voter distribution," as "the scheme had not been changed since 1901." Franklin Sacha, *Excising Federalism: The Consequences of* Baker v. Carr *Beyond the Electoral Arena*, 101 VA. L. REV. 2264, 2273 (2015).

This is the sort of state-level shenanigans that the Guarantee Clause—through *Baker*—subject to federal oversight. And of course, given the nation's fraught racial history, many such fights regard state-level rules designed to prevent or dilute minority communities' political power. Ameliorative measures have included ensuring majority-minority districts where the demographics appear to require it. But the U.S. Supreme Court severely limits the extent of this intervention. In *Shelby County v. Holder*, 570 U.S. 529 (2012), the Court noted that the federal rule requiring certain states or parts of states to "obtain federal permission [aka 'preclearance'] before enacting any law related to voting"—granted not a perfect fit to the facts at bar—was "a drastic departure from basic principles of federalism." *Id.* at 534. More to the point, *Shelby* reiterated that "[d]rawing lines for congressional districts is . . .

'primarily the duty and responsibility of the State.'" *Id.* at 543 (quoting *Perry v. Perez*, 565 U.S. 388, 392 (2012) (internal citation omitted)).

As is now the case with *ex ante* "preclearance," in *post hoc* (that is, post-drawing) litigation there first must be a cognizable anomaly in the way voting rules and electoral districts are designed—in particular, *demonstrable* racial-discriminatory intent. *See Shelby*, 570 U.S. at 552 (critiquing Congress's 2006 extension of preclearance until 2031 as using the state of affairs in the 1960s and 70s as contemporary guide: "the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets").

True, the Equal Protection Clause (alongside the Due Process Clause and the Fifteenth Amendment) compels federal authorities to occupy some portion of what is, otherwise, a state's field of law once a race-based anomaly in voting rules or district borders is held to exist *but up until that anomaly removed*. *Id.* at 549 (noting, and then partly invalidating, Congress's 2006 amendment of the preclearance rules "to prohibit laws that could have favored [minority] groups but did not do so because of a discriminatory purpose . . ."). Neither the Fourteenth nor Fifteenth Amendments permit the federal government to find seemingly anomalous results *first* (*e.g.*, a Latino-majority district electing a Republican) and then work backwards to detect—or fabricate—apparently apparent disparate intent.

Disparate racial outcomes in the electoral and voting realms are not necessarily the result of state laws violating equal protection. The case at bar vividly demonstrates that there can be no formula for determining whether a given electoral *result* that bucks historical ethno-social voting patterns is a consequence of race-based gerrymandering. Here, the Washington legislative district in issue became majority-minority (specifically, Latino) but then proceeded to elect a Republican (again, a Latino woman). Whether the results of an election, rather than the constitution of legislative districts, is right or proper in either the legal or demographic sense is about as purely a state-level political question as one could conjure. The alternative regime would see federal lawmakers and courts "piercing the veil" of post-*electoral* partisanship (as opposed to during the boundary-drawing process) whenever one side or another within the purely political field are unsatisfied with the choice of voters they have come to expect as "locked-in," so to speak.

While scholars and laymen routinely disagree with how this balance should shake out, the consensus remains that a balance *exists,* nonetheless; and that federal intervention is limited, properly, to instances of pre-electoral *racial* disparities—*e.g.*, carving districts such that a Black-majority urban area is sliced up and becomes minority elements of White-majority districts. Thus does the district court's ruling in favor of Plaintiffs threaten not merely the respective weights of this balance, but the balance *itself*. In *Rucho v. Common Cause*, 588 U.S. 684 (2019), for example,

the U.S. Supreme Court affirmed that political considerations—*e.g.*, hyper-partisan election results—to the extent they are the result of gerrymandering, is the near-exclusive domain of the states themselves, and to the extent they are not—as Congress has in several instances "exercised its Elections Clause power, including to address partisan gerrymander," *id.* at 698—the federal *courts* certainly are not permitted to so intervene. *Id.* The district court below appears almost to have elevated elements of *Baker*, ignoring or minimizing others, all to forge a reverse-*Rucho*.

And so it is that the balance—between political considerations (state legislatures and redistricting commissions and Congress; *e.g.*, *Rucho*) and racial ones (federal, but limited; *i.e.*, *Shelby*)—remains a central feature of our federalist system. *Rucho*, 588 U.S. at 703–04 ("An expansive standard requiring 'the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process.'") (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 124 (2004).

Within this balanced framework, federal courts are empowered to ensure equal protection and guarantee republican government. Neither prerogatives include resolving partisan bickering over whether election results match historical patterns or expectations. Here, Plaintiffs seek federal redress for an outcome that they did not like, under the frankly anti-democratic assumption that a Latino-majority district

could not possibly choose a Republican to represent them. That this *must* mean that voting rules or electoral boundaries have been manipulated, pre-election, to better ensure this ostensibly strange occurrence. Nonsense.

At bottom, permitting federal courts to establish discriminatory purposes by dint of an election's partisan outcomes opens the states' near-exclusive authority over the structuring of their republican governments endangers the entire premise undergirding *Shelby*—that "a departure from the fundamental principle of equal sovereignty [of the states] requires a showing that a statute's disparate geographic coverage" of only certain states or portions thereof "is sufficiently related to the problem that it targets. 570 U.S. at 542 (quoting *Nw. Austin Muni. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009)). Republican (or Democratic or any other parties') victories in free and fair elections has no bearing whatever on whether the pre-election rules are tainted with discriminatory purposes.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below, finding that the district court erred as a threshold matter in holding that a viable Civil Rights Act claim—specifically, under its §2—could be brought against a majority-minority district without first establishing that its apparently a façade.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3(2) because it consists of **2,292** words, excluding the documents listed at Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f). This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using 14-point font.

DATE: July 8, 2024

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CERTIFICATE OF SERVICE

I certify that on July 8, 2024, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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