The Honorable Robert S. Lasnik
The Honorable David G. Estudillo
The Honorable Lawrence Van Dyke

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BENANCIO GARCIA III,

Plaintiff,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,

Defendants.

Case No.: 3:22-cv-5152-RSL-DGE-LJCV

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant State of Washington's (the "State") Response to Plaintiff's Motion for Summary Judgment (*see* Dkt. # 52) is notable in two respects: (1) it shows—rather unintentionally—that the material facts in this case are undisputed; and (2) it demonstrates the State's misunderstanding of the legal principles at play in this case. Put differently, the State's misapplied legal principles present the appearance of factual disputes, but when the correct legal standards are used and the undisputed material facts applied, it is clear that Plaintiff is entitled to summary judgment as a matter of law.

FACTS AND BACKGROUND

Plaintiff's "Statement of Material Facts" contained in his Motion for Summary Judgment ("MSJ") (*see* Dkt. # 45 at 2-7) is incorporated herein by reference.

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ARGUMENT

Both parties agree that the Court's analysis here is a two-step inquiry, which asks (1) whether race predominated in the drawing of Legislative District 15 ("LD-15") and (2) if so, does this racial districting pass strict scrutiny. (*See* Dkt. # 45 at 8; Dkt. # 52 at 14-15.) However, the State's misapplication of those two steps attempts to create a factual dispute where none exists.[1] Each misapplication is addressed in turn.

A. Race Predominated Over Traditional Redistricting Principles.

1. It is the Commission's racial districting, not the Legislature's technical amendments to the Commission's map, that is at issue here.

The State contends that Plaintiff must show racial considerations predominated in the decision-making process of the *State Legislature* (the "Legislature"), as opposed to that of the *Redistricting Commission* (the "Commission"). (*See* Dkt. # 51 at 1, 13-14.) This is incorrect.

The U.S. Supreme Court has long held that, "[f]or redistricting purposes, . . . 'the Legislature' d[oes] not mean the representative body alone." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 805 (2015) (explaining *Davis v. Hildebrant*, 241 U.S. 565, 567-69 (1916)). Indeed, as the Supreme Court observed, redistricting "involves lawmaking in its essential features and most important aspect" and "must be in accordance with the method which the State has prescribed for legislative enactments." *Id.* at 807 (quoting *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932)). Here, the people of Washington delegated the power of redistricting to the Commission,[2] which is clearly constitutionally permissible. *See Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 824.

For a redistricting plan to be adopted in Washington, it must be approved by "[a]t least three of the [four] voting members" of the Commission. WASH. CONST. art. II, § 43(6). "Upon

[1] Although the State raises numerous factual and legal arguments in its Response brief (*see* Dkt. # 52), this Reply brief by Plaintiff—in an effort to not inundate the Court with arguments already made in its MSJ—is focused only on the State's most obvious legal errors. However, this is not an admission to, or waiver of, any allegations or arguments presented by the State in its Response.

[2] *See* WASH. CONST. art. II, § 43, *amended by* WASH. CONST. amend. 74, S.J Res. 103, 48th Leg., Reg. Sess. (Wash. 1983 (enacted, approved by voters Nov. 8, 1983). *See generally* T. Thomas Singer, *Reappraising Reapportionment*, 22 GONZ. L. REV. 527 (1986-87).

approval of a redistricting plan," the Commission "shall submit the plan to the legislature[,]" which may amend the Commission's plan within the first thirty days of the next regular or special legislative session by "an affirmative vote in each house of two-thirds of the members elected or appointed thereto." RCW 44.05.100. However, the Legislature's authority to amend the Commission's plan is limited, as any change "may not include more than two percent of the population of any legislative or congressional district." *Id.* After the 30-day period, "[t]he plan approved by the commission, with any amendment approved by the legislature, shall be final . . . and shall constitute the districting law applicable to this state for legislative and congressional elections, beginning with the next elections held in the year ending in two." *Id.*; *see also* WASH. CONST. art II, § 43(7). If the Commission has ceased to exist, the Legislature may "adopt legislation reconvening the commission for purposes of modifying the redistricting plan." RCW 44.05.120(1). And critically, "[l]egislative and congressional districts may not be changed or established except pursuant to" the Commission process established by article II, section 43 of the Washington constitution.

Notably, the division of redistricting authority between Washington's Commission and Legislature differs greatly from other states with redistricting commissions. In Utah, for example, the redistricting commission's plan can be disregarded entirely by its state legislature. *Compare* Utah Code § 20A-20-303 ("The committee or the Legislature may, but is not required to, vote on or adopt a map submitted to the committee or the Legislature by the commission.") *with* RCW 44.05.100(3) ("The plan approved by the *commission*, with any amendment approved by the legislature, shall be final . . . and shall constitute the districting law applicable to this state for legislative and congressional elections." (emphasis added)). Moreover, in Washington, the Legislature may not change more than two percent of the population of any district drawn by the Commission., *See* RCW 44.05.100(2). Thus, as a matter of law, it is the Commission, not the Legislature, that possesses the authority to draw legislative maps in Washington.

The specifics of Washington's redistricting scheme also undercut the primary case cited by the State— *Prejean v. Foster*, 227 F.3d 504 (5th Cir. 2000)—supporting its novel theory that "the

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Legislature ultimately bears responsibility for passing the amended plan." (Dkt. # 52 at 17.) *Prejean* did not involve a state legislature's adoption of a redistricting plan from a constitutionally-appointed redistricting commission. *See generally* 227 F.3d 504. Instead, the redistricting map in question was the result of years-long litigation and a settlement that resulted in the sub-districting of a judicial district. *See id.* at 507-08. Moreover, the *Prejean* court noted that the "Supreme Court consider[s] judicial elections to invoke more complex voting rights problems than legislative elections." Here, unlike the *judicial* district considered by the *Prejean* court, this Court is tasked with determining the constitutionality of a *legislative* district. Put simply, *Prejean* does not support the generalized rule that the legislature's intent controls even where a state has constitutionally delegated its redistricting authority to an independent commission. Further, *Prejean* examines redistricting in Louisiana where that state's legislature has full authority to redistrict—and there is no third-party, such as a commission, that performs redistricting. *See* LA. CONST. art. III, § 6; *see also Legal Requirements for Redistricting in Louisiana*, Louisiana House of Representatives, available at https://house.louisiana.gov/h_redistricting2011/Legal%20Requirements_fnlv2-1215.pdf (last visited Mar. 31, 2023).

Furthermore, the State's argument is a logical absurdity. First, it creates a "heads I win, tails you lose" situation. As explained above, if the Legislature does not amend the Commission's approved redistricting plan, that plan becomes the final districting law. *See* WASH. CONST. art II, § 43(7); RCW 44.05.100(2). So if the Legislature approved of the Commission's plan and wished to maintain the demographics proposed by the Commission, the logical legislative action would be to not amend the Commission's plan at all. Yet the State contends that by making "multiple changes" to LD-15 that "ke[pt] the demographic composition essentially the same," the Legislature therefore "affirmatively decided to maintain the demographics proposed by the Commission." (Dkt. # 52 at 17.) Thus, by the State's logic, both amending the map and not amending the map are indicia of "affirmatively decid[ing] to maintain the demographics proposed by the Commission."

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Second, the State's argument would immunize unconstitutional behavior by the Commission, as long as the Legislature amended the Commission by just one census block. For example, even if all four Commissioners admitted on the record that they drew the map by looking only at Hispanic population, for no reason other than to dilute Hispanic voting power, the State's logic would shield the Commission from a Fourteenth Amendment violation as long as the Legislature made some de minimis amendment to the map, even if the minority population of a district remained unchanged. This cannot be—and is indeed not—what the Fourteenth Amendment requires.

Therefore, it is the Commission's act of adopting the legislative district map, not the Legislature's technical edits, that are at issue here.

2. The Commission's consideration of race predominated over traditional redistricting principles.

The State's primary argument regarding racial predominance is that the Commission also considered other factors besides race. (*See* Dkt. # 52 at 18-21.) The State essentially argues that the Commissioners engaged in horse trading for a particular partisan outcome in LD-15—that the Republican Commissioners *received* a district that leaned Republican. (*See id.*) But the State conveniently leaves out what was *given* in the negotiations—a racial demographic target for LD-15. (*See* Dkt. # 45 at 9-12.) And the State cannot plausibly dispute that the Commission had a clear racial target for LD-15. (*See id.*; *see generally* Dkt. # 52.) This fact derails the State's argument that race did not predominate.

The fact that the Commission also considered traditional redistricting principles does not save a plan that was enacted with a clear racial target. Certainly, "'[r]ace may predominate *even when a reapportionment plan respects traditional principles*,'—for example, when a legislative body uses race as the predominant criterion to advance those principles." *Lee v. City of Los Angeles*, 908 F.3d 1175, 1183 (9th Cir. 2018) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 190 (2017); citing *Cooper v. Harris*, 581 U.S. 285, 292 (2017)) (emphasis added).

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This is exactly what happened here—some commissioners wanted a partisan outcome, while some thought the Voting Rights Act required racial districting, but all negotiated a racial demographic target for LD-15 to achieve their respective ends (*see* Dkt. # 45 at 9-12), which is racial predominance, *see Bethune-Hill*, 580 U.S. at 190 ("[I]f race for its own sake is the overriding reason for choosing one map over others, race still may predominate."). Consequently, the Commission's undisputed racial target for LD-15 establishes that race predominated and subjects the Commission's racial districting to strict scrutiny. *See Cooper*, 581 U.S. at 292-93.

B. The Commission's Racial Districting Fails Strict Scrutiny, Which Entails A Review Of What The Commission Considered At The Time It Drew The Challenged Map, Not What Experts Have Opined After The Fact.

The parties agree that—to the extent the Commission engaged in racial districting—its map-enacting process is subject to strict scrutiny and that compliance with the VRA is assumed to be a compelling interest. (*See* Dkt. # 45 at 14; Dkt 52 at 14-16.) However, the State misapplies the narrow tailoring analysis by relying on post-hoc justifications for the Commission's racial gerrymandering. (*See* Dkt. # 52 at 12-14, 23.)

"When a State invokes the VRA to justify race-based districting, it must show (to meet the 'narrow tailoring' requirement) that it *had* 'a strong basis in evidence' for concluding that the statute required its action." *Cooper*, 581 U.S. at 292 (quoting *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015)) (emphasis added). Consequently, this analysis, by its nature, is not concerned with *ex post* speculation of experts. Indeed, "[t]he Supreme Court's [substantial basis in evidence] test itself demands a hindsight review of the evidence *before the state when it configured a district*." *Prejean*, 227 F.3d at 517 (emphasis added).

Consequently, a post-hoc justification based on legal analysis that was not available to the Commission when it enacted the map cannot satisfy the substantial basis in evidence test. *See, e.g.*, *Lee v. City of Los Angeles*, 908 F.3d 1175, 1182 (9th Cir. 2018) ("What matters is 'the actual considerations that provided the essential basis for the lines drawn, not post hoc justifications the [legislative body] in theory could have used but in reality did not.'" (quoting *Bethune-Hill*, 580 U.S. at 189-90).

Yet here, the State attempts to use such a post-hoc justification in the form of legal experts' opinions about *Gingles* factors and whether the VRA required a majority-minority district. (*See* Dkt. # 52 at 12-14, 23.) The Court should decline the State's invitation to this impermissible inquiry. What experts now opine about the enacted map is irrelevant to answering whether, *at the time the Commission enacted the map*, it had a strong basis in evidence to believe that VRA compliance required racial districting. *See Prejean*, 227 F.3d at 517; *Cooper*, 581 U.S. at 292.

Moreover, the State does not cite any case supporting the proposition that a commission's intent to comply with the VRA absolves it of racial districting where half the enacting body does not believe the VRA required a majority-minority district. (*See* Dkt. # 52 at 23-24.) Nor are Plaintiff's counsel aware of any such case. Here, it is an undisputed fact that at least half the Commission did not believe that the VRA required a majority-minority district in the Yakima region (*see* Dkt. # 45 at 17), which even the State acknowledges (*see* Dkt. # 52 at 24 ("[T]he Republic [sic] Commissioners certainly intended to comply with the VRA[, but] they . . . did not apparently think it required a Hispanic opportunity district in the Yakima Valley.")). And *more than half the Commission did not believe that the enacted map actually complied with the VRA*. (*See* Dkt. # 45 at 17.) Simply put, the State's assertions about the Commission's intent are unsupported both factually and legally.

To gloss over this fact, the State primarily points to two possible pieces of evidence that it contends would lead the Commission to believe, at the time it enacted the map, that the VRA required a majority-minority district in Yakima Valley: (1) other redistricting cases in the Yakima and Pasco region regarding exogenous elections, and (2) a presentation by Dr. Matt Barreto, which was procured by the Senate Democratic Caucus. (*See* Dkt. # 52 at 22-23.) Plaintiff has already highlighted the deficiencies of Dr. Barreto's analysis (*see* Dkt. # 45 at 18-19, 22-25) and will not repeat those points here. Moreover, as a matter of undisputed fact, the State cannot show the previous redistricting litigation was relied on by the Commissioners to conclude that the VRA required a majority-minority district because, as already noted, at least half the Commissioners did not believe that the VRA so required. (*Id.* at 17.) Put differently, the State cannot raise the

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Commission's purported belief in VRA compliance as a defense to racial districting where half the Commission did not believe that the VRA demanded racial districting.[3] *See* WASH. CONST. art. II, § 43(6) ("At least *three* of the [four] voting members [of the Commission] shall approve . . . a redistricting plan." (emphasis added)).

For these reasons, the State cannot carry the burden of strict scrutiny, and Plaintiff is entitled to summary judgment.

C. The Best Remedy Is To Resolve *Garcia* Before Deciding *Palmer*.

Because the State misconstrues the potential outcome of Plaintiff's arguments (*see* Dkt. # 52 at 28), Plaintiff here clarifies what the appropriate remedy is, should the Court rule in his favor. Should the Court find—as Plaintiff urges—that the undisputed material facts show that the Commission racially gerrymandered in LD-15 in violation of the Fourteenth Amendment, the appropriate remedy would be: to (1) strike down the challenged map; (2) order the Legislature to reconvene the Commission, pursuant to RCW 44.05.120(1), to draw a new and constitutionally-compliant map in a race-neutral manner; and (3) stay *Soto Palmer v. Hobbs*, No. 3:22-cv-05035 (W.D. Wash. filed Jan. 19, 2022) until a new map is passed, at which time the *Soto-Palmer* plaintiffs can determine if they wish the challenge the newly enacted map under the VRA.[4]

This is the logical course for multiple reasons. First, it addresses this case and *Soto Palmer* by the order in which their respective causes of action accrued. This case is based on what the Commission considered when enacting the map—i.e., the *process* of redistricting—whereas *Soto Palmer* is about whether the enacted map violated the VRA—i.e., the *result* of redistricting. *See, e.g.*, *Bethune-Hill*, 580 U.S. at 189 ("The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications."). Obviously, a violation of the process

[3] Although the State attempts to create a fact issue by calling into question whether—and to what extent—the Commissioners considered then-existing redistricting litigation, it is entirely beside the point. Even if the Commission as a whole considered those lawsuits, at least two Commissioners concluded that the VRA did not require a majority-minority district in LD-15.

[4] It is entirely possible, at that time, that the Commission may conduct an appropriate VRA analysis and determine that a majority-minority district is not required, and that Plaintiffs may be satisfied and not pursue a VRA claim.

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occurs before that process results in violative substance; thus, the cause of action accrued in this case first, and should be addressed here before *Soto-Palmer* is decided.

Second, there was no Motion for Summary Judgement filed in *Soto Palmer*; Plaintiff's MSJ in this case is the only dispositive motion presently before a court to decide.

As a remedy, perhaps the Commission will conduct a proper VRA analysis and conclude a VRA district is required? Perhaps it will conduct a proper analysis and conclude that one is not? In either event, it is for the State—through the Commission—to address the violation to the U.S Constitution in the first instance and not for litigants in *Soto Palmer* to show that an already unconstitutional map could have possibly complied with the VRA when it was enacted.

CONCLUSION

For the Court to rule in Defendants' favor here, it would have to find that (1) the Commission's undisputed racial target for LD-15 was not racial predominance in the drawing of LD-15; and (2) even if it was, the Commission had a strong basis in evidence to believe that the VRA required racial districting, even though it is undisputed that at least half the Commissioners did not believe the VRA required racial districting. This cannot be the correct result. Therefore, the undisputed facts show that Plaintiff is entitled to summary judgment as a matter of law.

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DATED this 31st day of March, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 31st day of March, 2023.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this Motion and accompanying memorandum contains 2,999 words, in compliance with the Local Civil Rules of the United States District Court for the Western District of Washington.

DATED this 31st day of March, 2023.

Respectfully submitted,

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