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, and STATE OF WASHINGTON,

Defendants.

NO. 3:22-cv-5152-RSL-DGE-LJCV

STATE OF WASHINGTON'S TRIAL BRIEF

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I. INTRODUCTION[1]

The *Soto Palmer* and *Garcia* cases arose from the 2021 enactment of Legislative District 15—a legislative district in the Yakima Valley proposed by the Washington State Redistricting Commission and subsequently amended and adopted by the Legislature. Latinos make up a large majority of LD 15 and Latino voters hold a slim majority in the district. However, despite the Commissioners' good-faith efforts to comply with the Voting Rights Act, expert analysis in this litigation has revealed that LD 15 likely does not afford Latino voters the same opportunity as white voters to elect candidates of their choice.

The concurrent trials in these matters involve three interrelated claims. *First*, the *Soto Palmer* Plaintiffs allege that LD 15 violates Section 2 of the VRA because it yields a discriminatory result, namely the dilution of the voting strength of Latino voters. *Second*, the *Soto Palmer* Plaintiffs contend that LD 15 was enacted with discriminatory intent, also in violation of Section 2. *Third*, the *Garcia* Plaintiff contends that LD 15 is a racial gerrymander under the Equal Protection Clause of the Fourteenth Amendment.

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While the State of Washington cannot and does not dispute the merits of *Soto Palmer* Plaintiffs' discriminatory results claim, the upcoming trial will reveal that the *Soto Palmer* Plaintiffs' discriminatory intent claim finds no support in the record or the law. Despite the Legislature's role in the redistricting process, *Soto Palmer* Plaintiffs will offer no credible evidence as to the Legislature's intent—much less an intent to discriminate against Latino voters. Furthermore, the evidence will show that the Commissioners genuinely intended and endeavored to comply with the VRA. And even if *Soto Palmer* Plaintiffs could prove that the Commissioners knowingly approved a noncompliant map—which they cannot—*Soto Palmer* Plaintiffs could not meet their burden to prove that the challenged action was undertaken because of, and not merely in spite of, its adverse effect on Latino voters.

[1] This trial brief is being filed concurrently in both *Soto Palmer v. Hobbs*, No. 3:22-cv-5035, and *Garcia v. Hobbs*, No. 3:22-cv-5152. Throughout this brief, the State uses the terms "Latino" and "Hispanic" interchangeably, and, consistent with the relevant case law, uses the term "race" to refer to both race and ethnicity.

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Finally, although the constitutional avoidance doctrine counsels against reaching the *Garcia* Plaintiff's racial gerrymandering claim, that claim fails at the threshold. The *Garcia* Plaintiff cannot meet his burden to prove that racial considerations predominated in the redistricting process. And even if he could, the State could readily meet its burden to prove that Section 2 of the VRA necessitated prioritizing race in the drawing of the district.

Accordingly, the State respectfully requests that the respective Courts enter judgment in favor of the State on the *Soto Palmer* Plaintiffs' discriminatory intent claim and the *Garcia* Plaintiff's racial gerrymandering claim following the close of evidence and dismiss these two claims with prejudice.

II. ISSUES FOR TRIAL

1. Can *Soto Palmer* Plaintiffs prove that Legislative District 15 as enacted violates Section 2 of the Voting Rights Act based on discriminatory results by diluting the voting strength of Hispanic voters in that district?

2. Can *Soto Palmer* Plaintiffs prove that the Redistricting Commission intentionally discriminated against Hispanic voters in violation of Section 2 of the Voting Rights Act?

3. Can the *Garcia* Plaintiff prove that racial considerations predominated in the adoption of Legislative District 15 such that the district is a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment, and, if so, was the Commission's consideration of race narrowly tailored to achieve the compelling government interest of VRA compliance?

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III. BACKGROUND[2]

A. Structure and Mandate of Redistricting Commission

Article II, section 43 of the Washington Constitution provides for a bipartisan Washington State Redistricting Commission (Commission) for redistricting of state legislative

[2] Throughout this brief, the State refers to exhibits filed with the Court on May 31, 2023 and listed on the agreed pretrial order filed in the *Soto Palmer* matter on May 24, 2023. *Soto Palmer*, Dkt. # 191.

and congressional districts. The Commission consists of four voting members and one non-voting member who serves as the chairperson. *See* Wash. Const. art II, § 43(2). The voting members are appointed by the legislative leaders of the two largest political parties in each house of the Legislature. *Id.* For the 2021 redistricting cycle, the voting members included April Sims (appointed by the House Democratic Caucus), Brady Piñero Walkinshaw (appointed by the Senate Democratic Caucus), Paul Graves (appointed by the House Republican Caucus), and Joe Fain (appointed by the Senate Republican Caucus).

In addition to the Washington Constitution, state statute also sets forth requirements for the Commission and the districting plans. Specifically, Wash. Rev. Code § 44.05.090 sets forth the requirements for state legislative redistricting plans in Washington State. Among other requirements, district lines should coincide with the boundaries or local political subdivisions and maintain communities of interest, city and county splits should be kept to a minimum, and districts should be comprised of contiguous and compact territory. Wash. Rev. Code § 44.05.090.

The Commission must agree, by majority vote, to a redistricting plan by November 15 of the relevant year, at which point the Commission transmits the plan to the Legislature. Wash. Rev. Code § 44.05.100(1); Wash. Const. art II, § 43(2). Should the Commission fail to agree upon a redistricting plan, the task falls to the Supreme Court of Washington. Wash. Rev. Code § 44.05.100(4). Upon submission of the plan by the Commission, the Legislature has 30 days during a regular or special session to amend the plan by an affirmative two-thirds vote. Wash Rev. Code 44.05.100(2). The amendment may not include more than two percent of the population of any legislative or congressional district. *Id*. The redistricting plan becomes final upon the Legislature's approval of any amendment or after the expiration of the 30-day window for amending the plan, whichever occurs sooner. Wash Rev. Code § 44.05.100(3).

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B. Public Feedback, Recent Litigation, and Research on Racially Polarized Voting Inform the Redistricting Process

The 2021 redistricting process was an evolving, bipartisan process that took place over many months. Despite challenges associated with the COVID-19 pandemic, and a compressed schedule caused by late receipt of Census data and a new constitutional deadline requiring decennial redistricting plans to be adopted by the Commission almost seven weeks earlier than for prior Commissions, the Commissioners sought extensive public feedback throughout the redistricting process. The Commission held 17 public outreach meetings and 22 regular business meetings, received testimony from hundreds of Washingtonians and thousands of comments about maps or the Commission's process, and met with many stakeholders, including individual Tribes.

The 2021 redistricting process unfolded against a backdrop of litigation exposing the presence of racially polarized voting in the Yakima Valley. *See* Ex. # 602 (*Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) (concluding that Yakima's at-large voting system for city council elections violated Section 2 of the VRA)); Ex. # 603, at pp. 6–8, (Partial Consent Decree ¶¶ 15–22, *Glatt v. City of Pasco*, No. 4:16-CV-05108-LRS (E.D. Wash. Sep. 2, 2016), Dkt. # 16); Ex. # 604 at p. 29 (Mem. Op. and Order, *Glatt*, No. 4:16-CV-05108-LRS (Jan. 27, 2017), Dkt. # 40 (resulting in stipulation and finding of racially polarized voting in Yakima)); Exs. ## 605, 606 (*Aguilar v. Yakima County*, No. 20-2-0018019 (Kittitas Cnty. Sup. Ct.) (resulting in court-approved settlement agreement that included a finding that the conditions for a violation of the Washington Voting Rights Act, including racially polarized voting, were satisfied)). *See infra* § IV(A)(2) (describing these cases in greater detail).

The Commissioners and their staff were familiar with these cases and with their implications for the Commission's work. In addition to reviewing these cases, staffers and at least one Commissioner conducted additional research on VRA requirements, uncovering

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materials that further evinced the need to create a Hispanic opportunity district in the Yakima Valley.

C. The Commissioners Propose Initial Maps

On September 21, 2021, each of the four voting Commissioners publicly released a proposed legislative map. Consistent with the governing statutory and constitutional framework, the initial maps advanced a broad range of priorities, including promoting competiveness, maintaining communities of interest, unifying school districts, preserving city and county lines, unifying sovereign tribal nations, and advancing partisan interests. *See* Wash. Const. art. II, § 43(5); Wash Rev. Code § 44.05.090.

D. The Commissioners Receive a Report from Dr. Barreto, and Two Commissioners Release Revised Maps

Shortly after the Commissioners released their proposed maps, the Senate Democratic Caucus retained Dr. Matt Barreto of the UCLA Voting Rights Project to evaluate the existence of racially polarized voting in the Yakima Valley and assess the public maps' compliance with the VRA. Ex. # 179. Each Commissioner reviewed Dr. Barreto's report. In his analysis, Dr. Barreto concluded that there was "clear" evidence "of racially polarized voting" in the Yakima Valley. *Id.* at 16. Dr. Barreto explained that to comply with the VRA, the Commission needed to include a district with a majority-Hispanic Citizen Voting Age Population (CVAP) that allowed Latino voters to elect candidates of their choice.

After reviewing the Barreto Report, Commissioners Sims and Walkinshaw released new proposed maps designed to better comply with the VRA while improving on the previous maps in other respects. *See* Exs. ## 196, 197. Meanwhile, Commissioners Fain and Graves obtained a legal opinion from lawyers at Davis Wright Tremaine LLP, who opined that a majority-minority district in the Yakima Valley was not necessary and that the consideration of race could amount to illegal gerrymandering. Ex. # 225.

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E. The Commission Adopts a Compromise Framework Based on Partisan Metrics, and the Legislature Amends the Commission's Plan.

As the deadline approached, the Commissioners negotiated extensively in an effort to reach bipartisan compromise. While each Commissioner remained committed to their overarching goals, the sticking points, including with respect to LD 15, largely centered around partisan performance. Each Commissioner also wanted the district to comply with the VRA, although the Commissioners had varied understandings of what that might require. Following a chaotic final day and evening of negotiations, the Commissioners ultimately voted to approve a legislative redistricting plan just before midnight. The agreed-upon plan consisted of a framework, based primarily on partisan metrics, which staffers then converted into the final map for submission to the Legislature. On November 16, the Commission transmitted the final map to the Legislature. In the final map, LD 15 is 73% Hispanic and, according to estimates based on the 2020 American Community Survey, approximately 51.5% Hispanic by citizen voting age population (CVAP).

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The Washington Supreme Court determined that the Commission met the constitutional deadline and substantially complied with the statutory deadline to transmit to the matter to the Legislature. Ex. # 1046. Three of the voting Commissioners believed that the Commission's final map complied with the VRA, and the remaining voting Commissioner believed there was a fair chance that it complied.

Upon transmission, the Legislature exercised its statutory prerogative to amend the Plan and in so doing, made changes to LD 15 without altering its demographic make-up. On February 8, 2022, the Legislature passed House Concurrent Resolution 4407 (HCR 4407), adopting an amended redistricting plan. H.R. Con. Res. 4407, 67th Leg., Reg. Sess. (Wash. 2022) (enacted).[3]

[3] The full text of the law, as well as the legislative history for H.R. Con. Res. 4407, can be found at: https://app.leg.wa.gov/billsummary?Year=2021&BillNumber=4407.

Upon passage, the Legislature's amended redistricting plan became State law. Wash Rev. Code § 44.05.100.

F. Procedural History

LD 15 has drawn two distinct challenges in the wake of its enactment. *Soto Palmer* Plaintiffs have alleged violations of Section 2 of the VRA based on both discriminatory results and discriminatory intent. The *Garcia* Plaintiff has alleged that LD 15 constitutes a racial gerrymander under the Equal Protection Clause of the Fourteenth Amendment. Both sets of plaintiffs seek declaratory and injunctive relief, including the invalidation of the current map. *See generally* Amended Compl., *Soto Palmer*, 3:22-cv-05035-RSL, Dkt. # 70; Amended Compl., *Garcia*, No. 3:22-cv-5152-RSL, Dkt. # 14. The respective courts have set the *Soto Palmer* and *Garcia* trials to be heard concurrently.

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IV. ARGUMENT

A. In Light of the Expert Testimony and Other Evidence, the State Does Not Dispute that Legislative District 15 of the Redistricting Plan Violates Section 2's Prohibition on Discriminatory Results

Given the conclusions of the State's expert, the other record evidence, and factual findings in relevant federal and state VRA cases in Eastern Washington, the State of Washington cannot and does not intend to dispute at trial that *Soto Palmer* Plaintiffs have satisfied the three *Gingles* preconditions for pursuing a claim under Section 2 of the VRA based on discriminatory results. Based on the same evidence, the State cannot and does not intend to dispute that the totality of the evidence test likewise favors the *Soto Palmer* Plaintiffs' discriminatory results claim.

1. To prevail on their discriminatory results claim, *Soto Palmer* plaintiffs must satisfy the three *Gingles* preconditions and establish that under the totality of the circumstances, Hispanic voters are less able to participate in the political process and elect candidates of their choice than white voters

"A violation of § 2 occurs when, based upon the totality of the circumstances, the challenged electoral process is 'not equally open to participation by members of a [racial

minority group] 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.'" *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1387 (E.D. Wash. 2014) (quoting 42 U.S.C. § 1973(b) (emphasis omitted)). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

Soto Palmer Plaintiffs' vote dilution claim requires them to establish three "necessary preconditions"—known as the *Gingles* factors—to show that "a bloc voting majority [will] *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Gingles*, 478 U.S. at 49, 50 (emphasis in original). *First*, they must show that Hispanic voters in the Yakima area are "sufficiently large and geographically compact to constitute a majority in a single-member [voting] district." *Id.* at 50. *Second*, they must show that Hispanic voters are "politically cohesive," *id.* at 51, *i.e.*, that they have "expressed clear political preferences that are distinct from those of the majority," *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988). *Third*, they must "demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat [Hispanic voters'] preferred candidate." *Gingles*, 478 U.S. at 51. To prove a discriminatory results claim under Section 2, *Soto Palmer* Plaintiffs need not establish that the maps were intentionally drawn to discriminate against Hispanic voters. *See, e.g.*, *Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 594 (9th Cir.1997).

If *Soto Palmer* Plaintiffs can establish each *Gingles* precondition, they will then need to "prove that, under 'the totality of [the] circumstances,' [Hispanic] voters have less opportunity than [white voters] to participate in the political process and to elect representatives of their choice." *Montes*, 40 F. Supp. 3d at 1387 (quoting 42 U.S.C. § 1973(b)). This analysis rests on seven non-exclusive factors called the "Senate Factors," which originated in a 1982 report by

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the Senate Judiciary Committee. *Id.* at 1387–88 (citing *Gingles*, 478 U.S. at 44–45). These factors are:

> (1) The history of voting-related discrimination in the jurisdiction;
>
> (2) The extent to which voting in the elections of the jurisdiction is racially polarized;
>
> (3) The extent to which the jurisdiction has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
>
> (4) The exclusion of members of the minority group from candidate slating processes;
>
> (5) The extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
>
> (6) The use of overt or subtle racial appeals in political campaigns; and
>
> (7) The extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 1388 (citing *Gingles*, 478 U.S. at 44–45). "When relevant to the particular claim being asserted, a court may also consider the extent to which elected officials have been responsive to the particularized needs of the minority group, and the policy underlying the challenged voting practice or procedures." *Id.* (citing *Gingles*, 478 U.S. at 45).

No single factor is controlling. *Gingles*, 478 U.S. at 45.

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2. The State does not dispute that the three *Gingles* preconditions for a Section 2 claim are satisfied

Based on the evidence expected at trial, the State has no basis to dispute that each of the three *Gingles* preconditions is met. In particular, the report of the State's expert, Dr. John Alford,[4] provides ample support for this conclusion. Ex. # 601 (Expert Report of Dr. John Alford). In his report, Dr. Alford concludes that the first *Gingles* precondition "seems to be met here as evidenced by the fact that the Hispanic Citizen Voting Age Population (HCVAP) exceeds 50%, both in the current LD 15 as enacted, and in the alternative

[4] The Court will admit expert reports as substantive evidence in this matter. *See Soto Palmer*, Dkt. # 187.

demonstrative configurations" propounded by *Soto Palmer* Plaintiffs. *Id*. at 4. He further notes that these districts are compact both in terms of their "visual appearance" and "by the summary indicators for compactness" highlighted by *Soto Palmer* Plaintiffs' expert, Dr. Loren Collingwood. *Id*. at 4. Under the second *Gingles* precondition, Dr. Alford concludes that Hispanic "voter cohesion is stable in the 70 percent range across election types, suggesting consistent moderate cohesion." *Id.* at 17–18. And under the third *Gingles* factor, Dr. Alford concludes that "non-Hispanic White voters demonstrate cohesive opposition to" Hispanic-preferred candidates in partisan elections, and that this "opposition is modestly elevated when those [Hispanic-preferred] candidates are also Hispanic," although he also notes that "in contests without a party cue, non-Hispanic White voters do not exhibit cohesive opposition to Hispanic candidates." *Id.* at 18. Finally, in examining electoral performance, Dr. Alford concludes "that candidates preferred by Hispanic voters can prevail in enacted Legislative District 15, albeit not as often as they would fail to be elected." *Id.* In short, Dr. Alford concludes that for partisan elections, racially polarized voting exists such that white voters in District 15 will generally vote as a bloc to defeat the candidates preferred by Hispanic voters. But, he writes, "[g]iven the highly competitive partisan balance" in the current district, "it seems likely that a very modest change could shift the district to one equally likely to elect the Hispanic candidate of choice." *Id.*

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Dr. Alford's conclusions will be corroborated by other expert testimony. Dr. Alford's results are broadly consistent with those of *Soto Palmer* Plaintiffs' *Gingles* expert, Dr. Loren Collingwood. *See generally* Ex. # 001. They are also largely consistent with the conclusions of Intervenor-Defendants' expert, Dr. Mark Owens. Dr. Owens' expert report focuses only on the second and third *Gingles* factors.[5] Ex. # 1001. Dr. Owens opines that Hispanic voters in Legislative District 13 do not vote cohesively, and he appears to agree with Dr. Alford (and Dr.

[5] While Dr. Owens' report includes some observations on the geographical distribution of Hispanic voters in and around the Yakima Valley, Dr. Owens appears to agree that Plaintiffs satisfy the first *Gingles* factor. Ex. # 1001 at 18–19 ("Do Hispanics live close enough to make their own district? The ability to generate a majority Hispanic district for the state legislature suggests that it is.").

Collingwood, for that matter) that non-partisan elections do not clearly exhibit racially polarized voting. Nonetheless, Dr. Owens agrees that "election returns and demographic information indicate there is a consistent trend in the preference for a Democratic candidate among Hispanic voters within [District] 15." Ex. # 1001 at p. 11; *see also id.* at 9 (table showing Hispanic voter cohesion in District 15), 18 ("The data show the political loyalty of Hispanic voters favors the Democratic Party[.]"). Moreover, Dr. Owens' report does not challenge *Soto Palmer* Plaintiffs' contention (and Dr. Alford's conclusion) that white voters, voting as a bloc, tend to overwhelm Hispanic voters' preferences. *See generally* Ex. # 1001.

Despite his general agreement with Dr. Alford and Dr. Collingwood, Dr. Owens will likely testify that the Redistricting Plan is nonetheless compliant with the VRA because voters' "choice is based on partisanship instead of racial identity," *id.* at 18, and he does not "find evidence that opposition to candidates increase as a result of the race of the candidate," *id.* at 2. This conclusion does not negate the evidence of a discriminatory result under Section 2. As *Gingles* makes clear, "[i]t is the *difference* between the choices made by [minority voters] and whites—not the reasons for that difference—that results in [minority voters] having less opportunity than whites to elect their preferred representatives." 478 U.S. at 63. "Consequently, . . . under the 'results test' of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters." *Id.*

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Dr. Alford's conclusions also find support in the recent cases addressing racially polarized voting in the Yakima Valley. In *Montes*, a challenge to Yakima's at-large voting system for city council elections, Judge Thomas Rice concluded that each of the *Gingles* factors was satisfied with respect to Latino voters in the City of Yakima. Ex. # 602 (*Montes*, 40 F. Supp. 3d at 1390–1407). Similarly, in *Glatt*, a challenge to Pasco's at-large voting system for city council elections, the parties entered into a consent decree, which the Court confirmed, stipulating to the satisfaction of each *Gingles* precondition. Ex. # 603 at 6–8 (Partial Consent Decree ¶¶ 15–22, *Glatt*, No. 4:16-CV-05108-LRS, Dkt. # 16); *see also* Ex. # 604 (Mem. Op. and

Order at 29, *Glatt*, No. 4:16-CV-05108-LRS, Dkt. # 40) ("It has been stipulated and this court has found that voting in Pasco evidences racial polarization."). Lastly, in *Aguilar*, a challenge against the at-large voting system used in Yakima County, the parties entered and the court approved a settlement agreement finding that the conditions for a violation of the Washington Voting Rights Act (WVRA), including a showing of racially polarized voting, had been met in Yakima County. Exs. ## 605, 606. While *Montes*, *Glatt*, and *Aguilar* addressed slightly different geographic areas than the area encompassed by LD 15, the findings of racial polarization in those three cases lend support to Dr. Alford's conclusions of racially polarized voting in the Yakima Valley area under the second and third *Gingles* factors.

3. The State does not dispute that the evidence will establish that many of the Senate Factors are satisfied

As *Gingles* makes clear, "the most important Senate . . . [F]actors bearing on § 2 challenges . . . are the extent to which minority group members have been elected to public office in the jurisdiction and the extent to which voting in the elections of the state or political subdivision is racially polarized," factors that are largely incorporated into the precondition analysis. *Gingles*, 478 U.S. at 51 n.15 (quotation omitted).[6] Thus, "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir.1993).

Here, the State does not dispute that the expert testimony and other evidence will demonstrate that Hispanic voters in the Yakima Valley area are less able than white voters to elect representatives of their choice. Dr. Alford's performance analysis underscores this differential, indicating that while LD 15 is highly competitive, "[t]he preferred candidate of

[6] The *Gingles* Court went on: "If present, the other [Senate F]actors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists . . . are supportive of, but *not essential to,* a minority voter's claim." *Gingles*, 478 U.S. at 51 n.15 (emphasis in original).

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Spanish-surnamed voters prevails in three of the ten contests." Ex. # 601 at p. 16. Publicly available data from Dave's Redistricting—the software Commissioners used to draft and share maps—confirms this conclusion, suggesting that LD 15 would have voted fairly consistently against Hispanic-preferred candidates in statewide races from 2016 to 2020, albeit by relatively narrow margins. WA 2022 State Legislatures, Dave's Redistricting LLC, available at https://davesredistricting.org/maps#viewmap::3e3c5f5c-3a83-4847-b1d8-5328fb3b9e31 (last accessed May 31, 2023).

Furthermore, successful Section 2 and WVRA lawsuits in Yakima, Yakima County, and Pasco provide compelling evidence that, historically, Hispanic voters in and around the Yakima Valley have been prevented from electing the candidates of their choice. *Montes*, 40 F. Supp. 3d at 1409–1415; Partial Consent Decree, *Glatt*, No. 4:16-CV-05108-LRS, Dkt. # 16; *Aguilar*, No. 20-2-0018019. A recent history of Section 2 violations is itself highly significant. But *Montes* also includes detailed findings under the Senate Factors. The Court there pointed to historical voting-related discrimination (most notably a 2004 lawsuit against Yakima County for failing to provide Spanish-language voting materials), evidence of racially polarized voting, significant statistical evidence of socio-economic disparities between whites and Hispanics in Yakima, and the lack of electoral success of Hispanic candidates in Yakima to conclude that the Senate Factors "weigh firmly" in favor of Section 2 liability. *Montes*, 40 F. Supp. 3d at 1414. The State cannot dispute that these factors point in the same direction here. *See* Ex. # 004 (Expert Report of Dr. Josué Estrada).[7]

In summary, the State has no basis to dispute that the evidence at trial will demonstrate that the *Soto Palmer* Plaintiffs have satisfied the three *Gingles* preconditions for a Section 2 vote

[7] This is not to say that the State agrees with or adopts the conclusions of *Soto Palmer* Plaintiffs' Senate Factors Expert, Dr. Josué Estrada, but merely that many of the facts that were dispositive in *Montes* are essentially undisputed here.

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dilution claim and that, under the totality of the circumstances, Hispanic voters in LD 15 are less able to participate in the political process and elect candidates of their choice than white voters.

B. *Soto Palmer* Plaintiffs Cannot Carry Their Burden to Prove That the Redistricting Commission Intentionally Discriminated Against Latino Voters

While the State does not dispute that the *Soto Palmer* Plaintiffs can establish a discriminatory result, *Soto Palmer* Plaintiffs will fall far short of proving discriminatory intent within the meaning of Section 2.

Soto Palmer Plaintiffs face a daunting burden of proof. To prevail on this claim, they must overcome "the presumption of good faith that must be accorded legislative enactments." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This requires them to prove that "a discriminatory purpose has been a motivating factor in the decision" to adopt LD 15. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265–66 (1977); *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021) (applying *Arlington Heights* framework to discriminatory intent claim under Section 2 of the VRA). "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . . ***It implies that the decision maker . . . selected or reaffirmed a particular course of action at least or in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable [minority] group***." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added) (internal citation omitted); *accord Veasey v. Abbott*, 830 F.3d 216, 231 (5th Cir. 2016) (relying on *Feeney* in considering a discriminatory intent claim under Section 2 and recognizing that "[l]egislators' awareness of a disparate impact on a protected group is not enough: the law must be passed *because of* that disparate impact"); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (4th 2016) (similar); *see also Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Proving the motivation behind official action is often a problematic undertaking."). *Soto Palmer* Plaintiffs cannot meet their burden to prove discriminatory purpose under this demanding standard.

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As a threshold matter, a critical decision maker for purposes of this analysis in the Legislature, and the *Soto Palmer* Plaintiffs will offer scant, if any, evidence of the Legislature's intent. And even if it were appropriate to focus solely on the Commission, the evidence at trial will reveal no discriminatory motives on the part of the Commissioners. In fact, the evidence will show that each of the Commissioners intended—and endeavored—to comply with the VRA.

1. There is no evidence that the Washington State Legislature intentionally discriminated against Latino voters

As an initial matter, the Redistricting Plan at issue in this litigation is not the plan passed by the Commission. Instead, the operative version of the Redistricting Plan is an amended version of the Commission's plan—adopted not by the Commission but by the Washington State Legislature. *See* H.R. Con. Res. 4407. Notably, in exercising its statutory prerogative to adopt an amended plan under Wash Rev. Code § 44.05.100, the Legislature made multiple changes to LD 15 but elected to keep the demographic composition essentially the same. H.R. Con. Res. 4407 at 71–77. This suggests that the Legislature affirmatively decided to maintain the demographics proposed by the Commission. *See Am. Cas. Co. of Reading, Penn. v. Nordic Leasing, Inc.*, 42 F.3d 725, 732 (2d Cir. 1994) ("Where sections of a statute have been amended but certain provisions have been left unchanged, we must generally assume that the [L]egislature intended to leave the untouched provisions' original meaning intact.").

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Despite the Legislature's deciding role in enacting the Redistricting Plan at issue, the State anticipates that the *Soto Palmer* Plaintiffs will focus exclusively on the intent of the Commission and fail to offer *any* evidence as to the Legislature's intent, let alone evidence that any legislator intended to discriminate. Furthermore, "[w]here the court is asked to identify the intent of an entire state legislature, as opposed to a smaller body, the charge becomes proportionately more challenging." *Veasey*, 830 F.3d at 233. Absent a showing that the Legislature intentionally discriminated against Latino voters in amending the Commission's plan and adopting the operative Redistricting Plan, *Soto Palmer* Plaintiffs' intentional discrimination

claim must fail. *Cf.* Ord. Den. Pltf.'s Mot. Summ. J. at 11 n. 2, *Garcia,* No. 2:22-cv-5152, Dkt. # 56 ("The decision making at issue in this case encompasses the various steps and bodies through which the legislative power of redistricting is accomplished under Washington law, not simply the representative body itself . . . . Both the Commissioner and the Legislature are therefore 'part of the legislative process' and it is their combined efforts which must be evaluated for compliance with the Equal Protection Clause.") (citing *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 805–07 (2015)).[8]

2. There is no evidence that the Commission intentionally discriminated against Latino voters

Even if it were appropriate to focus exclusively on the intent of the Commission, *Soto Palmer* Plaintiffs' intentional discrimination claim would fail.

The evidence will show that each of the Commissioners sincerely intended to comply with the VRA. Commissioners Fain and Graves will testify that they took VRA compliance seriously but genuinely did not believe that the VRA required a majority-minority district in the Yakima Valley. Both will explain that they opted against hiring a VRA consultant because they felt it would be unproductive—not because they didn't care. For their part, Commissioners Sims and Walkinshaw will testify that they made it a priority to empower minority communities throughout Washington State and, in particular, actively sought to draw a majority-minority district in the Yakima Valley. Indeed, the evidence will show that VRA compliance was a central component of the Democratic Commissioners' positions. *See, e.g.,* Exs. ## 195, 200 (statements from Commissioners Sims and Walkinshaw announcing new maps after receipt of Dr. Barreto's analysis).

However, while each of the Commissioners endeavored to comply with the VRA, compliance was not straightforward. For example, Commissioner Sims will testify that while

[8] To the extent Plaintiffs attempt to meet this burden by calling Senator Rebecca Saldaña, Plaintiffs did not disclose her testimony to encompass purported intentional discrimination. In any event, any "reliance on post-enactment speculation by [an] opponent[] of" the enacted plan would be "misplaced." *Veasey*, 830 F.3d at 233.

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she understood the VRA to require a district with a majority-Hispanic CVAP, she was unsure whether or to what extent the VRA also required such a district to lean Democratic. Her testimony, as well as her contemporaneous communications with other Commissioners, will show that she endeavored to comply with the VRA, and believed that the districts she proposed and ultimately voted on gave Hispanic voters an opportunity to elect the candidates of their choice. *See, e.g.*, Ex. # 288.

Similarly, Commissioner Walkinshaw will testify that he was committed to adopting a district that empowered Hispanic voters in the Yakima Valley to elect candidates of their choice. The evidence will show that, as the first Hispanic redistricting commissioner, Commissioner Walkinshaw was fully committed to enacting a district that complied with the VRA. The evidence will show that even though the version of LD 15 he ultimately voted for was not his preferred configuration of the district, he believed there was a fair chance it complied with the VRA.

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For their part, the evidence will show that Commissioners Graves and Fain believed in good faith that the VRA did not require a majority-Hispanic district in the Yakima Valley, much less one that leaned Democratic. Both Republican Commissioners will testify to a sincere desire to comply with the VRA and will explain that they genuinely believed that Dr. Barreto's analysis was politically motivated and therefore unreliable. Indeed, Dr. Barreto's analysis conflicted with the advice they received from their own attorneys at Davis Wright Tremaine, who not only rejected the notion that the VRA required a majority-minority district in the Yakima Valley but also opined that the consideration of race could result in an illegal gerrymander. Ex. # 225.

Soto Palmer Plaintiffs will also attempt to ascribe discriminatory intent to the Commission's decision to number the Hispanic Opportunity District LD 15 rather than LD 14, but the evidence at trial will not bear out this theory. Instead, the evidence will show that the Commissioners never considered Hispanic turnout in discussions on whether to number the district LD 15 or LD 14, belying any notion that they numbered the district LD 15 to suppress

turnout among Hispanic voters. In fact, *Soto Palmer* Plaintiffs will be unable to present any evidence suggesting that race or ethnicity was a factor in this decision. Instead, testimony from the Commissioners will reveal that the Commissioners opted to number the majority-Hispanic district LD 15 merely because that was what the district in that area had previously been numbered.

The evidence at trial will demonstrate that a majority of the Commissioners believed the Redistricting Plan the Commission transmitted to the Washington Supreme Court and legislative leaders complied with the VRA and that none of the Commissioners knowingly—much less intentionally—voted for a noncompliant map. *See Feeney*, 442 U.S. at 256 (requiring decision maker to "select[ ] or reaffirm[ ] a particular course of action at least or in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"). The Republican Commissioners will testify that they believed the approved map was compliant. As noted, Commissioner Sims will testify that while she understood that the VRA required a majority-Hispanic CVAP district, it was not clear to her whether that district needed to lean Democratic. Still, she was confident that LD 15 would gain a higher concentration of Latino voters over time and that with enough organizing, Latino voters would be able to elect candidates of their choice under the approved map. Commissioner Walkinshaw will testify that when he voted to approve the final map, he believed it was possible that it complied with the VRA.

The State anticipates that the *Soto Palmer* Plaintiffs will rely heavily on the testimony of a small cadre of Senate Democratic Caucus staffers in a bid to overcome the testimony of the Commissioners themselves. The staffers' testimony as to the Commissioners' intent lacks foundation and is largely hearsay. In any event, the Commissioners are obviously in a better position to testify to their own motives and intentions than are their staffers. Unlike the Commissioners, the staffers can only speculate as to the inner workings of the Commissioners' minds. Moreover, in many cases, they were not privy to the negotiations between the

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Commissioners and instead relied on second- or even third-hand information. Furthermore, other staffers will corroborate the Commissioners' good faith efforts to comply with the VRA.

Finally, *Soto Palmer* Plaintiffs may offer evidence of purported procedural irregularities in the 2021 redistricting process in an attempt to prove discriminatory intent. The problem with this approach is that none of the alleged irregularities actually evinces discriminatory intent on the part of the Commissioners. For example, many of the so-called irregularities in the 2021 redistricting process were attributable to the COVID-19 pandemic, which created formidable—and unprecedented—obstacles for in-person meetings and negotiations. Similarly, the 2021 Commission was under unprecedented time pressure due to receiving Census data later than prior Commissions, and to having an earlier deadline than prior Commissions (November 15 as opposed to December 31) that was imposed by a recent constitutional amendment. Despite this time pressure, the Commission engaged in substantial public outreach. *Cf. Petteway v. Galveston County*, No. 3:22-CV-57, 2023 WL 2782704, at *10 (S.D. Tex. Mar. 30, 2023) (sequence of events, including stalling to release map proposals and holding just one public meeting the day before the deadline to adopt a map, as well as allegations that the lone Black commissioner and constituents were treated unfavorably, were "probative of the commissioners court's intent to discriminate against minority voters"). Furthermore, *Soto Palmer* Plaintiffs have not actually adduced probative evidence about what happened with prior Commissions, and many of their claims of procedural "irregularities"—such as Commissioners privately negotiating in pairs to comply with the Open Public Meetings Act or negotiating up to the deadline—are in fact entirely consistent with prior Commissions.

In summary, *Soto Palmer* Plaintiffs cannot meet their burden of proof to show that the Commission or Legislature intentionally discriminated against Hispanic voters.

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C. The *Garcia* Plaintiff Cannot Prove that Legislative District 15 is a Racial Gerrymander in Violation of the Equal Protection Clause[9]

The *Garcia* court recently denied the *Garcia* Plaintiff's Motion for Summary Judgment. *Garcia*, Dkt. # 56. His racial gerrymandering claim will fare no better at trial.

As a plaintiff alleging racial gerrymandering, the *Garcia* Plaintiff "faces an extraordinarily high burden." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1215 (C.D. Cal. 2002); *accord Easley v. Cromartie*, 532 U.S. 234, 241 (2001). To determine whether a legislative districting plan is an illegal racial gerrymander under the Fourteenth Amendment, courts conduct a "two-step analysis." *Cooper v. Harris*, 581 U.S. 285, 291 (2017). "*First*, the plaintiff must prove that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id*. (cleaned up; emphasis added). To make this showing, the plaintiff must demonstrate that the Legislature "subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id*. (cleaned up). Because the legislative body enjoys a presumption of good faith, the burden lies with the challenger to prove that race predominated. *Lee v. City of Los Angeles*, 908 F.3d 1175, 1183 (9th Cir. 2018). "*Second*, if racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Cooper*, 581 U.S. at 292. At this stage in the inquiry, the burden "shifts to the State" to establish that "its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Id*. (cleaned up; emphasis added). Courts have long considered compliance with the VRA to be a compelling interest. *Id.* To satisfy the narrowing tailoring requirement, a State invoking the VRA must prove "that it had a 'strong basis in evidence' for concluding that the statute required its action." *Id*. (cleaned up).

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[9] The State believes that resolution of the *Soto Palmer*'s Section 2 results claim will render this claim moot. *Cf. United States v. Lamont*, 330 F.3d 1249, 1251 (9th Cir. 2003) (courts "start from a 'fundamental and longstanding principle of judicial restraint'" requiring them to "'avoid reaching constitutional questions in advance of the necessity of deciding them'") (quoting *Lyng v. Nw. Indian Cemetery Prot. Ass'n,* 485 U.S. 439, 445 (1988)).

The evidence at trial will soundly defeat the *Garcia* Plaintiff's racial gerrymandering claim. As a threshold matter, and as the Court already held, it is critical to inquire whether race predominated for the Legislature—not merely the Commission. The *Garcia* Plaintiff is not prepared to offer any evidence that "race was the predominant factor motivating the legislature's decision" to amend and adopt the Commission's redistricting plan. *Cooper*, 581 U.S. at 291. Nor can he make the requisite showing for the Commission, as the evidence will plainly show that race was among a "mix of decision making factors" the Commission considered. *Chen v. City of Houston*, 206 F.3d 504, 514 (5th Cir. 2000). While the Court need not reach this inquiry, the evidence will further demonstrate that the State had a "strong basis in evidence" to believe that the VRA required the consideration of race in the Yakima Valley. *Cooper*, 581 U.S. at 292.

1. Race did not predominate in the Legislature's decision to amend and adopt LD 15

Despite the *Garcia* Plaintiff's likely exclusive focus on the Commission, it was the Legislature, not the Commission, which adopted the operative Redistricting Plan. Accordingly, the Legislature's intent is central. *Prejean v. Foster* is instructive on this point. 227 F.3d 504 (5th Cir. 2000). That case concerned judicial subdistricts drawn by a judicial candidate, Judge Turner, and then adopted—without modification—by the Louisiana legislature. The district court granted summary judgment against plaintiffs' gerrymandering claim, relying on an affidavit from Judge Turner "averr[ing] that race did not predominate over traditional districting principles. *Id*. at 510. The Fifth Circuit reversed, however, finding that "Judge Turner's affidavit describing his intent in drawing the subdistricts" cannot be "taken as conclusive proof of the legislature's intent." *Id.* As the court explained, "[t]he fact that the legislature adopted Judge Turner's districting plan without modification might support an *inference* that racial considerations did not predominate[,] . . . however, the district court was required to view the evidence and all inferences therefrom in the light most favorable to the non-movants." *Id* (emphasis added). As in *Prejean*, here the evidence of the Commissioners' intent may at best

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support *inferences* about the Legislature's intent—although any inference is weaker here because the Legislature *amended* the Commission's proposed plan. *See supra*, § III(E); *cf. Lee*, 908 F.3d at 1184 (racial considerations did not necessarily predominate in redistricting process despite the predominance of these considerations for the City Council President and a single Commissioner because these two individuals "were only two people in a process that incorporated multiple layers of decisions and alterations from the entire Commission, as well as the City Council").

2. Race did not predominate for the Redistricting Commission

Even if the Commissioners' intent were controlling, the evidence will show that race did not predominate in the Commissioners' decision-making process. Instead, it will demonstrate that the Commissioners' decisions rested heavily on traditional redistricting principles and partisan metrics—concerns that do not implicate the Fourteenth Amendment. *See Miller*, 515 U.S. at 916 ("Where [traditional race-neutral districting principles] or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines.") (cleaned up); *see, e.g.*, *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140, 1153 (C.D. Cal. 2015) (rejecting claim where challenged district boundaries "promoted traditional redistricting criteria").

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The Commissioners will testify that throughout the redistricting process, they applied a range of traditional restricting principles, from maintaining communities of interest to respecting county and city lines to drawing compact districts to unifying school districts to preserving tribal sovereignty. They will further testify that they focused heavily on partisan metrics. For example, Commissioner Fain will explain that his overriding objective throughout the district was to draw competitive districts and that he was only willing to bend to his colleagues' demands in exchange for statewide competitiveness. Similarly, Commissioner Graves conditioned his acquiescence to his colleagues' request for a majority-Hispanic CVAP in LD 15 on increased Republican performance elsewhere in the state.

The evidence will also underscore the importance of partisan concerns for the Democratic Commissioners. For example, Commissioner Sims will testify that one of her aims was creating maps that reflected Washington's Democratic lean. Indeed, the evidence will show that when the Commission finally reached an agreement, it was not on an actual map but rather, a framework based on partisan performance. *Cf. Easley*, 532 U.S. at 253 (finding no evidence of racial predominance in a legislator's statement that a map provided "geographic, racial and partisan balance" because at worst "the phrase shows that the legislature considered race, along with other partisan and geographic considerations"). The *Garcia* Plaintiff may urge this Court to infer racial predominance from the shape of the district itself. But the evidence will show that the district is not the sort of "bizarrely shaped and far from compact" district that might give rise to an inference of gerrymandering. *Bush v. Vera*, 517 U.S. 952, 954 (1996). To the contrary, the evidence will show that LD 15 is compact, adheres to Washington's statutory redistricting guidelines, and is no more oddly shaped than other districts adopted by the Commission and enacted by the Legislature. *See Garcia*, Dkt. # 56 at p. 12 ("The shape of Legislative District 15 is not less compact and contiguous than many others in the final map[.]").

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In short, Mr. Garcia will be unable to prove that the Commission or Legislature "subordinated other factors . . . to racial considerations[,]" *Cooper*, 581 U.S. at 291.

3. There was ample reason to believe that Section 2 of the VRA requires the drawing of a race-conscious district in the Yakima Valley

Although the Court need not reach the second prong of this inquiry in light of the clear evidence that race did not predominate, the evidence will firmly establish that the State had a "strong basis in evidence" to draw a race-conscious district in order to comply with the VRA. *Cooper*, 581 U.S. at 292.

Recent litigation involving the same geographical area provided ample reason to believe that the VRA required a majority-minority district in the Yakima Valley. The *Montes*, *Glatt*, and *Aguilar* cases demonstrated racially polarized voting in approximately the same geographical

area. *See supra*, § IV(A)(2). Each of the Commissioners was aware of these lawsuits and their significance. *Supra*, § III(B). By themselves, these lawsuits supplied "a strong basis in evidence for concluding" that the VRA required a majority-minority district in the Yakima Valley. *See Cooper*, 581 U.S. at 292.

Testimony at trial will also establish that the Commissioners received briefing on Dr. Barreto's analysis of racially polarized voting in the Yakima Valley. Exs. ## 177, 179. That analysis provided compelling evidence that the *Gingles* preconditions were satisfied with respect to Hispanic voters in the Yakima Valley. *Id.* Dr. Barreto's conclusions aligned with the outcomes of previous lawsuits involving the Yakima Valley region, as well as independent research by the Democratic Commissioners and their staffers. *Supra*, § III(B). Expert analysis in this litigation further substantiates Dr. Barreto's findings, further demonstrating the soundness of the Commissioners' reliance. *Supra*, § IV(A)(2).

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The Barreto report—coupled with the outcomes of previous lawsuits, the results of the legislative staffers' research, and the expert findings—provided "a strong basis in evidence for concluding" that the VRA required a majority-minority district in the Yakima Valley. *See Cooper*, 581 U.S. at 292. Against this backdrop, the Republican Commissioners' subjective belief that the VRA did not require such a district is immaterial. The evidence at trial will firmly establish that although Commissioners Graves and Fain held this view in good faith, they were wrong. It would be absurd to fault the Commission for considering race when, in fact, the VRA required them to do exactly that.

Mr. Garcia may argue that the Commissioners' failure to perform an independent analysis of the *Gingles* preconditions negates any defense based on Section 2 of the VRA. That argument lacks merit. There was no need to reinvent the wheel to conclude the VRA required a Latino opportunity district in the Yakima Valley. The evidence will show that the Commissioners were aware of *Montes*, *Glatt*, and *Aguilar*, and had received Dr. Barreto's analysis. *See supra*, §§ III(B), III(D). Armed with this knowledge, each Commissioner could

evaluate specific maps using demographic and performance data preloaded in their mapping software. Furthermore, expert analysis in this litigation shows that each *Gingles* factor is met with respect to the Yakima Valley. *See supra*, § IV(A)(2). In other words, the Commission's failure to perform its own *Gingles* analysis did not prevent the Commission from getting it right. By the same token, the Commission's failure to hire consultants to perform a racially polarized voting analysis for the Commission at large was of no moment when there was already ample evidence before the Commission that racially polarized voting had occurred in the Yakima Valley.

V. CONCLUSION

The State of Washington cannot dispute that *Soto Palmer* Plaintiffs have satisfied the three *Gingles* preconditions for pursuing a discriminatory results claim under Section 2 of the VRA and that the totality of the evidence test likewise supports the *Soto Palmer* Plaintiffs' discriminatory results claim. However, the evidence adduced at trial will support judgments in favor of the State on *Soto Palmer* Plaintiffs' discriminatory intent claim and Mr. Garcia's racial gerrymandering claim. Accordingly, following the close of evidence, the respective Courts should deny the *Soto Palmer* Plaintiffs and Mr. Garcia any relief associated with these claims and dismiss the intentional discrimination and racial gerrymandering claims with prejudice.

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DATED this 31st day of May, 2023.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 31st day of May, 2023 at Seattle, Washington

s/ Andrew R.W. Hughes
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