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 RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOTE FOR MOTION CALENDAR: MARCH 31, 2023

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I. INTRODUCTION [1]

Plaintiff's racial gerrymandering claim fails at every turn.

As a threshold matter, it was the Legislature—not the Redistricting Commission—that amended and adopted the challenged map, and Plaintiff offers no evidence that racial considerations predominated in the Legislature's decision-making process. But even if the Commission's intent was dispositive, the evidence shows the Commissioners considered race among a mix of other factors, from traditional redistricting principles to partisan metrics—none of which it subordinated to racial considerations.

Even if Plaintiff could prove that race predominated in the minds of legislators or Commissioners, he would not be entitled to summary judgment, because there is a strong basis in evidence to conclude that Section 2 of the Voting Rights Act required a majority-minority district in the Yakima Valley. Recent federal and state VRA cases in the same geographical area and academic analysis supplied a strong evidentiary basis for this conclusion, and expert findings in this and related litigation confirm that the State had good reason to form this belief. In short, even if race somehow predominated in the design of Legislative 15, the district would survive strict scrutiny.

Plaintiff cannot meet his burden to establish that there are no issues of material fact on these fact-intensive issues. The State respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment.

II. FACTUAL BACKGROUND

A. The Commissioners' Work Is Shaped by Recent Litigation

The redistricting process was an evolving, bipartisan process that took place over many months. Each Commissioner brought their own set of priorities, each disagreed with the others

[1] 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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at times, and each sought to comply with federal and state law guiding redistricting. Ultimately, despite their different goals, the four Commissioners agreed on a framework plan.

From the outset, there was reason to believe the Commission might be required to draw a Hispanic opportunity district in the Yakima Valley area. The starting points are three recent cases applying the federal VRA and Washington Voting Rights Act in Yakima and Pasco.

In *Montes v. City of Yakima*, Judge Thomas Rice concluded that Yakima's at-large voting system for city council elections violated Section 2 of the VRA. 40 F. Supp. 3d 1377 (E.D. Wash. 2014). Judge Rice reviewed evidence regarding the three *Gingles* factors and concluded that each was satisfied with respect to Latino voters in the City of Yakima. *Id.* at 1390–1407. Most significant, for the Redistricting Commission's purposes, was his analysis of the second and third *Gingles* factors—which ask whether "the minority group is 'politically cohesive,'" and whether the "'white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Id.* at 1387 (quoting *Thornburg v. Gingles,* 478 U.S. 30, 51 (1986)). On the second *Gingles* factor, Judge Rice reviewed statistical analysis examining ten recent elections and concluded that plaintiffs had "made a strong showing that Latino voters in Yakima have clear political preferences that are distinct from those of the majority, and that a significant number of them usually vote for the same candidates." *Id.* at 1405 (quotations omitted). On the third *Gingles* factor, Judge Rice looked at both statistical and historical evidence, concluding "that the non-Latino majority in Yakima routinely suffocates the voting preferences of the Latino minority." *Id.* at 1407.

Similarly, in *Glatt v. City of Pasco*, a challenge to Pasco's at-large voting system, the court entered a consent decree in which the parties stipulated to each *Gingles* factor. *See* Partial Consent Decree, *Glatt v. City of Pasco*, No. 4:16-CV-05108-LRS, ECF No. 16 ¶¶ 15–22 (E.D. Wash. Sep. 2, 2016); *see also* Mem. Op. and Order, *Glatt v. City of Pasco*, No. 4:16-CV-05108-LRS, ECF No. 40 at 29 (E.D. Wash. Jan. 27, 2017) ("It has been stipulated and this court has

found that voting in Pasco evidences racial polarization.").[2]

Finally, several weeks before the Commissioners publicly released their proposed maps, Yakima County settled a case under the Washington Voting Rights Act, *Aguilar. v. Yakima County*, No. 20-2-0018019 (Kittitas Cnty. Super. Ct.), which likewise challenged an at-large voting system for diluting the votes of Hispanic voters. Declaration of Andrew Hughes (Hughes Decl.), Ex. C (*Aguilar* Complaint). In August 2021, the parties entered a settlement agreement, which the court approved in October, after finding that "[t]here is sufficient evidence from which the Court could find that the at-large system of electing Yakima County Commissioners violates the Washington Voting Rights Act." Hughes Decl., Exs. D, E (*Aguilar* Settlement and Order Approving Settlement).

Although Plaintiff ignores these cases, the Commissioners and their staff did not. They were well aware of these cases, and the implications they had for their own work. Dkt. 45-2 (Graves Dep.) at 265:24-266:8; Dkt. 45-3 (Sims Dep.) at 114:21-115:10, 227:7-228:3; Hughes Decl., Ex. F (Oct. 21, 2021 Walkinshaw Press Release); Dkt. 45-7 (Fain Dep.) at 52:6-11, 87:21-25. Adam Hall, Senior Policy Counsel for the Senate Democratic Caucus, explained the significance of these cases in a September 24, 2021, email to Commissioner Walkinshaw and staffers:

[2] The Partial Consent Decree and the Memorandum Opinion and Order from *Glatt v. Pasco* are filed herewith as Exhibits A and B to the Declaration of Andrew Hughes.

From: Hall, Adam
Sent: Friday, September 24, 2021 9:21 AM PDT
To: Brady Walkinshaw
CC: O'Neil, Ali; Adam Bartz; Bridges, Matt
Subject: Talking points on Republican legislative proposals (Yakima Valley)

- Since 2011, both the Yakima City Council and County Commission have been sued over their form of government. Community members successfully argued that Hispanic/Latino communities were denied an equal opportunity to elect candidates of the choice, which is a violation of the state and federal Voting Rights Act. Plaintiffs in both cases established that these communities exhibited racially polarized voting, a key element (prongs 2 and 3 below) for determining whether a majority-minority district *must* be drawn.

- This means that whereas in 2011 the commission was **able to** draw a majority-minority district, there is a strong chance our commission will likely be **required to** draw one under federal law and the failure to do so will result in a lawsuit striking down that map.

Hughes Decl., Ex. G; *see also* Dkt. 45-5 (Hall Dep.) at 58:11-20. To similar effect, in September 2021, House Policy Counsel Alec Osenbach prepared guidance for Commissioner Sims explaining that "previous court cases" showed that "white people vote differently than [L]atinx people" in the Yakima Valley area, which implicated the VRA. Hughes Decl., Ex. H.

VRA questions:

- **There's a two-step analysis under the VRA to determine if a majority-minority district should be drawn.**
  - **First, is there statistical evidence of racially polarized voting? To answer this question, we would look at past elections to determine whether white people vote differently than latinx people. This has already been done for us in previous court cases, and the answer is definitively yes.**
  - **Then, is it possible to draw a majority-minority district that could statistically elect a minority candidate? Obviously the answer here is "yes" because both D maps did so.**

At least one Commissioner, April Sims, reviewed further research regarding the potential need to create a Hispanic opportunity district in the Yakima Valley. Dkt. 45-3 at 232:15-242:2; Hughes Decl., Exs. I–K. She reviewed an analysis of Yakima County Commission elections prepared by MGGG Redistricting Lab in January 2020, which "f[ou]nd that Yakima has a clear

pattern of racial polarization with strong *Gingles* 2 and 3 findings." *Id.*, Ex. J; *see also* Dkt. 45-3 at 236:18-20. Commissioner Sims also reviewed a 2013 report from Dr. Matt Barreto in which he analyzed elections in Yakima County Council and state Legislative Districts 14 and 15, among other elections, and showed, in Commissioners' Sims' words, "[t]hat there is racially polarized voting in the Yakima area." Hughes Decl., Ex. K; Dkt. 45-3 at 241:12-16.

B. The Commissioners Propose Initial Maps

On September 21, 2021, each Commissioner publicly released their proposed legislative map. As Plaintiff notes, each Commissioner's map was guided by varied goals. Dkt. 45 at 4–5. Commissioner Fain said his overarching goal "was to promote competitiveness" in elections, and he sought to keep communities of interest together, with an emphasis on school districts. Dkt. 45-7 at 120:16; Dkt. 45 at 5. Commissioner Graves stated one of his "top priorities" was to try to increase the number of competitive districts in the State, and to maintain communities of interest. Dkt. 45-2 at 260:25-261:2; Dkt. 45 at 5. Commissioner Sims explained she wanted maps that reflected "the political reality of the state," respected tribal sovereignty, and "provide[d] fair representation for communities of interests." Dkt. 45-3 at 61:3-19. Commissioner Walkinshaw described "keep[ing] communities of interest together," including preserving "county lines, city lines, communities of interest, . . . and sovereign tribal nations" as his "guiding ethos." Dkt. 45-4 at 90:1-17.[3] They were also, unsurprisingly, driven by partisan concerns. *See, e.g.*, Dkt. 45 at 11.

C. The Commissioners Receive a Report from Dr. Barreto and Two Commissioners Propose Revised Maps

Shortly after the Commissioner's publicly released maps, the Senate Democratic Caucus retained Dr. Matt Barreto of the UCLA Voting Rights Project, and each Commissioner reviewed

[3] With respect to the Yakima Valley in particular, Commissioner Walkinshaw described his goals as "unifying the Yakama Nation and ideally the ancestral lands of the Yakama Nation," "keeping communities of interest together," "compliance with the Voting Rights Act," and respecting "public input that we had come in during the process." Dkt 45-4 at 108:16-109:1, 109:9-14.

a report he prepared. Hughes Decl., Ex. L. The primary goal of retaining Dr. Barreto was "to understand . . . whether there was a requirement under federal law for [the Commission] to draw an opportunity district in the Yakima Valley." Dkt. 45-4 (Hall Dep.) at 101:3-12.

In his report, Dr. Barreto used a method called ecological inference—the same method used by the parties' experts in this case and *Soto Palmer v. Hobbs*, 22-cv-05035-RSL—to analyze racially polarized voting in the Yakima Valley across 12 recent elections.[4] Hughes Decl., Ex. L at 7. In each election, Dr. Barreto found clear evidence of racially polarized voting between Hispanic and non-Hispanic voters. *Id.* at 9–15. Based on his analysis, Dr. Barreto concluded there was "crystal clear" evidence "of racially polarized voting." *Id.* at 16. As Commissioner Walkinshaw explained it in a press release: "Dr. Barreto's analysis found that to comply with federal law, the legislative map adopted by the Washington State Redistricting Commission must include a majority-Hispanic district based on Citizen Voting Age Population . . . that also has the demonstrated ability to allow Latino voters to elect candidates of their choice . . . ." Hughes Decl. Ex. F.

Accordingly, following their review of the Barreto Report, Commissioners Sims and Walkinshaw publicly released new proposed maps to better comply with the VRA. Dkts. 45-29, 45-31. With the new maps, the Commissioners sought to comply with the VRA while improving on traditional redistricting criteria. Thus, Commissioner Walkinshaw explained that his map not only "undoubtedly complie[d] with federal law," it also "reduce[d] the number of split cities and counties, in accordance with our state's redistricting statute," "keeps communities together, [and] responds to public feedback." Hughes Decl. Ex. M.

Meanwhile Commissioners Fain and Graves obtained a legal opinion from lawyers at Davis Wright Tremaine LLP, which advised that a majority-minority district need not be drawn.

[4] Plaintiff asserts that Dr. Barreto's report "included an analysis of voting patterns for just two statewide general elections." Dkt. 45 at 6. This is misleading. While the *publicly* shared version included only two statewide races, the version available to the Commissioners analyzed *ten* statewide elections plus two federal congressional elections. Hughes Decl., Ex. L (Barreto Report); Dkt. 45-5 (Hall Dep.) at 114:25-115:5 (explaining that for the public version of Dr. Barreto's report "we took out some of the data slides because we felt they were redundant").

Dkt. 45-18. That memo did not undertake its own analysis regarding racially polarized voting in the Yakima Valley. *See id.*

Upon receipt of the Davis Wright Tremaine memo, Democratic staffer Adam Hall conferred with Dr. Barreto, along with two prominent election lawyers—Abha Khanna at the Elias Law Group and Yurij Rudensky at the Brennan Center for Justice—all of whom apparently expressed disagreement with the memo. Dkt. 45-5 at 134:2-21.

D. The Commission Ultimately Adopts a Compromise Framework Based on Partisan Metrics

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 Legislative District 15, centered largely around partisan performance. Dkt. 45-5 at 228:2-15, 232:12-233:13; 278:3-23. Simply put, the Democratic Commissioners wanted LD 15 to lean Democratic, and the Republican Commissioners wanted it to lean Republican. Each Commissioner also wanted the district to comply with the VRA, although they had differing understanding of what that might require. Dkt. 45-3 at 233:5-8, 246:16-19; Dkt. 45-4 at 111:17-23, 138:5-11; Dkt. 45-2 at 251:14-21; Dkt. 45-7 at 216:10-21.

In the weeks before the deadline, Commissioners Graves and Sims exchanged various proposals, some of which were majority-HCVAP, some of which were not; some of which leaned Democratic, some of which leaned Republican. Hughes Decl., Ex. N; *see generally* Dkt. 45-3 at 148–179. In one proposal, Commissioner Graves expressed a willingness to agree to a lean-Democratic district in LD 15, but only if Commissioner Sims would agree to lean-Republican districts in other parts of the state. Hughes Decl., Ex. O.

As the deadline approached, the Commissioners had still not reached an agreement. Following a chaotic final day and evening of negotiations, the Commissioners ultimately voted to approve a legislative redistricting plan just seconds before midnight. *Id.*, Exs. P, Q.

The Commission did not vote to approve detailed legislative district lines. Dkt. 45-4 at 300:5-15; Dkt. 45-8 at 183:4-11. Rather, the Commission approved a framework, based primarily on partisan metrics, which staffers then converted into the final plan for submission to the Legislature. Dkt. 45-8 at 182:11-14; 183:17-20 ("The vote that took place was on a framework that I believe each of the commissioners, or at least that I had an understanding of what that framework would look like from a partisan performance perspective."). Thus, the final vote did not include a delineated map of District 15. And it is unclear from the testimony whether the Commissioners reached any agreement on demographic metrics for LD 15 or any other district. Dkt. 45-4 at 300:16-22 ("Q And what was your understanding of the configuration of the Yakima Valley district in that framework? A I [Commissioner Walkinshaw] actually don't recall the specifics. . . . I think that there had been some -- some final numbers on around partisanship; and I can't remember the specifics beyond that."); *but see* Dkt. 45-2 at 144:13-19 (Commissioner Graves testifying that, to his understanding, the framework included a provision that LD 15 "would be 50.1 percent Hispanic eligible voters"). On November 16, the maps that were drawn by staffers based on the agreed-upon partisan metrics were transmitted to the Legislature. Hughes Decl., Exs. P, Q.

Each Commissioner has testified about their view of the Plan's compliance with the law. Commissioners Fain and Graves have testified that they believe the Plan complies with Section 2 of the VRA because they did not believe the VRA required the creation of a Hispanic opportunity district in the Yakima Valley. Dkt. 45-2 at 122:1-11; Dkt. 45-7 at 193:13-19, 209:6-9. Commissioner Sims, on the other hand, testified that she believed a Hispanic opportunity district was required under Section 2 of the VRA, and that LD 15 is one. Ex. 2 at 225:14-17, 169:25-170:16, 260:18-23. For his part, Commissioner Walkinshaw was unsure whether the plan transmitted to the Legislature complied with the VRA. Dkt. 45-4 at 302:1-303:2. Nonetheless, he ultimately voted for the framework because he "felt [it] was the best outcome from the bipartisan process we were in." *Id.* at 301:23-25.

E. The Washington Legislature Amends the Commission's Proposal

By statute, once the Commission's Plan was submitted to the Legislature, the Legislature then had the option to amend the Plan, which requires a two-third vote, and adopt the amended plan, or do nothing, in which case the Plan would become law. Wash. Rev. Code § 44.05.100. The Legislature here chose to amend the Plan, including changes to LD 15. On February 8, the Legislature passed House Concurrent Resolution 4407 (HCR 4407), adopting an amended redistricting plan. H.R. Con. Res. 4407, 67th Leg., Reg. Sess. (2021–22) (enacted).[5] Upon passage, the Legislature's amended redistricting plan became State law. Wash Rev. Code § 44.05.100.

F. Experts in this Litigation and *Soto Palmer* Litigation Submit Findings

To evaluate plaintiffs' claims in both *Garcia* and *Soto Palmer*, the State hired Dr. John Alford, one of the pre-eminent experts on racially polarized voting under the VRA. Dr. Alford is a tenured professor at Rice University who has worked with local and state governments on redistricting plans and on VRA issues. Dr. Alford served as a defense expert in *Montes*. *See Montes*, 40 F. Supp. 3d at 1403–07.

In his report, Dr. Alford concludes that each *Gingles* factors is likely met in the Yakima Valley. For the first *Gingles* factor, Dr. Alford explains that it "seems to be met here as evidenced by the fact that the Hispanic Citizen Voting Age Population (HCVAP) exceeds 50%, both in the current Legislative District 15 as enacted, and in the alternative demonstrative configurations" propounded by *Soto Palmer* Plaintiffs. Hughes Decl., Ex. R at 4. Dr. Alford notes LD 15 is compact in terms of its "visual appearance" and "by the summary indicators for compactness" highlighted by Plaintiffs' expert, Dr. Loren Collingwood. *Id.* Under the second *Gingles* factor, 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

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

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.

Dr. Alford's results are broadly consistent with those of *Soto Palmer* Plaintiffs' expert, Dr. Collingwood. Hughes Decl., Ex. S. Dr. Collingwood conducted racially polarized voting analysis "[a]cross 25 elections in and around the Yakima Valley and surrounding areas, featuring statewide elections, state legislative elections, and county elections, several involving Latino candidates," and found "very clear patterns of RPV between Anglo and Latino voters in 23 out of 25 (92%) contests." *Id.* at 1. Dr. Collingwood's analysis also concluded that "Latino voters" in the Yakima Valley "are politically cohesive. Latino voters consistently vote as a group for the same candidates, regularly casting ballots between 75-80% for the Democratic candidate . . . ." *Id.* at 2. "Meanwhile, a similar share of white voters consistently cast ballots for the Republican candidate." *Id.* As a result, "white voters are politically cohesive with one another and vote as a bloc against the Latino preferred candidates, leading to the defeat of the Latino candidates of choice," in the Yakima Valley region. *Id.* at 17. In other words, Dr. Collingwood, like Dr. Alford, agrees that the second and third *Gingles* factors are satisfied.[6]

Dr. Alford's conclusions are also largely consistent with the conclusions of the *Soto Palmer* Intervenor–Defendants' expert, Dr. Mark Owens. Hughes Decl., Ex. T. Dr. Owens' report focuses only on the second and third *Gingles* factors.[7] While Dr. Owens opines that Hispanic voters in Legislative District *13* do not vote cohesively and appears to agree with Dr.

[6] Dr. Collingwood does not explicitly opine on whether enacted LD 15 satisfies the first *Gingles* factor, but does so implicitly insofar as he uses it as a benchmark for concluding that *Soto Palmer* Plaintiffs' demonstrative districts satisfy *Gingles* 1. Hughes Decl., Ex. S at 25–26.

[7] Dr. Owens appears to agree that Plaintiffs satisfy the first *Gingles* factor. Hughes Decl., Ex. T 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.").

Alford that non-partisan elections do not clearly exhibit racially polarized voting, Dr. Owens nonetheless 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," *Id.* at 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[.]"). 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.

III. ARGUMENT

A. Legal Standard

The Equal Protection Clause of the Fourteenth Amendment prohibits the State from "separating its citizens into different voting districts on the basis of race" absent "sufficient justification." *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (cleaned up). Courts conduct a "two-step analysis" to determine whether a legislative districting plan is an illegal racial gerrymander under the Fourteenth Amendment. *Id.*

"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). 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). "Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Id.* 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). 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).[8]

A racial gerrymandering 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) ("[T]he burden of proof on the plaintiffs (who attack the district) is a demanding one.") (cleaned up).

Summary judgment is appropriate only upon a showing "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. In making this determination, a court must "view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (cleaned up). "Legislative motivation or intent is a paradigmatic fact question," *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000), and "summary judgment is rarely granted in a plaintiff's favor in cases where the issue is a defendant's racial motivation," including cases involving "racial gerrymandering claims." *Hunt v. Cromartie,* 526 U.S. 541, 553 n. 9 (1999).

B. Race Did Not Predominate in the Enactment of Legislative District 15

To make out a racial gerrymandering claim, a plaintiff first must establish "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 581 U.S. at 291. To clear this hurdle, it is not enough to prove that "redistricting [was] performed with consciousness of race" or that the State intentionally created a majority-minority district. *Bush v. Vera*, 517 U.S. 952, 958 (1996); *Chen v. City of Houston*, 206 F.3d 502, 514 (5th Cir. 2000) ("[T]he mere presence of race in the mix of decision making factors . . . does not automatically trigger strict scrutiny."); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995) (legislatures "will . . . almost always be aware of

[8] Although Plaintiff recites both prongs of this standard, he overlooks the second prong in asserting that "[r]ace predominated in the Commission's deliberations concerning LD-15, and Plaintiff is therefore entitled to judgment as a matter of law." Dkt. 45 at 8.

racial demographics"). Instead, the plaintiff must demonstrate that the State "subordinated other factors . . . to racial considerations." *Cooper*, 581 U.S. at 291; *accord Bush*, 517 U.S. at 958 ("Strict scrutiny applies where redistricting legislation is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles, or where race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.") (cleaned up). "Courts use restraint" in making this determination "because the underlying districting decision falls within [the] legislature's sphere of competence." *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140, 1148 (C.D. Cal. 2015), *aff'd*, 908 F.3d 1175 (9th Cir. 2018) (cleaned up).

Plaintiff's attack on LD 15 falls far short of meeting this demanding standard. First, there is no evidence whatsoever "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 (emphasis added). Second, to the extent the Commission considered race, it considered this factor among a "mix of decision making factors," *Chen*, 206 F.3d at 514, negating Plaintiff's assertion that "racial considerations predominated" in the enactment of LD 15. Dkt. 45 at 9.

1. Plaintiff has adduced zero evidence that race predominated in the Legislature's decision to amend and adopt the redistricting plan

The currently operative Redistricting Plan is not the plan passed by the Commission. It is instead an amended version of that plan passed by a two-thirds vote in the Legislature. Plaintiff glosses over this fact, and it is not hard to see why: there is no evidence whatsoever that in considering the Commission's plan, amending it, and ultimately adopting the current, operative plan, race was "the *predominant* factor motivating the legislature's decision." *Easley,* 532 U.S. at 241-42 (2001) (emphases in original) (internal citations and quotations omitted). This is fatal to Plaintiff's claim.

Here, the Legislature exercised its statutory prerogative to adopt an amended plan by passing House Concurrent Resolution 4407. *See* HCR 4407. The Legislature made multiple changes to Legislative District 15, *id.* at pp. 71–77, but elected to keep the demographic composition essentially the same, *id.* at 2. This suggests the Legislature affirmatively decided to maintain the demographics proposed by the Commission. *See Am. Cas. Co. of Reading, Pennsylvania 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 legislature intended to leave the untouched provisions' original meaning intact.").

Because the Legislature ultimately bears responsibility for passing the amended plan, it is not the Commission's intent that controls. *Prejean* is instructive on this point. 227 F.3d 504. 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 support *inferences* about the Legislature's intent—although any inference is weaker here because the Legislature *amended* the Commission's proposed plan. But any inferences do not prove the absence of any material fact, particularly given "the presumption of good faith that must be accorded legislative enactments." *Miller*, 515 U.S. at 916.

2. Race did not predominate in the commission's design of Legislative District 15

Even if the Commissioners' intent were controlling, the evidence shows race did not predominate in the Commissioners' decision-making process. Instead, it shows that the Commissioners' decisions were largely animated by traditional redistricting principles and partisan metrics—concerns that do not implicate the Fourteenth Amendment.

a. The Commissioners relied on traditional redistricting criteria

The Commission's final map was largely a product of traditional redistricting principles—a fact that dooms Plaintiff's claim. *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*, 88 F. Supp. 3d at 1153 (rejecting claim where challenged district boundaries "promoted traditional redistricting criteria").

Commissioner Walkinshaw testified that unifying "communities of interest" was the "guiding ethos" of the Senate Democratic caucus and that he considered "county lines, city lines, [and] communities of interest – like tribal governments and sovereign tribal nations" in reviewing draft legislative districts. Dkt. 45-4 at 89:24-90:17. When asked whether his staff had an ability to "identify areas of Hispanic population to add to a particular district," he indicated that he recalled no such exercise and instead recalled a process that involved "the team talking a lot about . . . combining communities of interest, thinking how you map the city and county lines and those – those sorts of approaches." *Id.* at 354:17-355:7. Similarly, Commissioner Fain testified that drawing a "cohesive or compact district" was "a priority." Dkt. 45-7 at 86:2-3.

Contrary to Plaintiff's assertions, the Commissioners did not subordinate traditional redistricting principles and other race-neutral considerations to considerations of race, much less "neglect[ ]" these principles altogether. *See Cano*, 211 F. Supp. 2d at 1208 (a racial

gerrymandering claim "exists only if traditional districting criteria are neglected . . . predominantly due to the misuse of race.") (cleaned up). Commissioner Walkinshaw described VRA compliance as one of four guiding principles in "drawing the Yakima Valley." Dkt. 45-4 at 108:16-109:14. Similarly, an October 2001 press release touted Commissioner Walkinshaw's updated map as one that "follows our state's redistricting criteria, keeps communities together, responds to public feedback, and undoubtedly complies with federal law." Hughes Decl. Ex. M.

And Commissioner Graves flatly rejected the notion that "compliance with the Voting Rights Act should come ahead of whatever partisan balance there is in the map." Dkt. 45-2 at 142:2-11 ("Every district we drew had to comply with Section 2, and you can do that while also caring about electoral competition."). Indeed, the agreement that Commissioner Graves reached with Commissioner Sims on the eve of the November 15 deadline apparently involved several parameters other than race, including ensuring that the legislative district in the Yakima Valley leaned Republican, maintained communities of interest, kept cities and counties together, unified school districts, and kept the Yakama Nation intact. *Id*. at 145:16-146:17.

Beyond adhering to traditional redistricting principles, the Commissioners were motivated by "partisan advantage," *Cooper*, 581 U.S. at 1464, belying Plaintiff's assertion that race predominated. For example, as Plaintiff concedes, Commissioner Fain "confirmed that his overriding objective throughout the redistricting process 'was to promote competitiveness' on a statewide basis." Dkt. 45 at 11 (quoting Dkt. 45-7 at 120:16). While Fain testified that he was willing to "cede to the Democratic Commissioners the geographical boundaries that they cared about," he made clear that he was only willing to do so "in exchange for statewide competitiveness." Dkt. 45-7 at 158:9-12. In other words, for Commissioner Fain, concerns about competitiveness and partisanship "predominated" over racial considerations. *See 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").

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Plaintiff nonetheless asserts it was "clear" that race predominated in the minds of the Republican Commissioners because "they were willing to acquiesce in enacting an LD-15 that suited Democratic preferences in exchange for enhancing the partisan competitiveness of districts in other parts of the State." Dkt. 45 at 10. But the email they cite, written by Commissioner Graves, cuts sharply against them because it clearly shows that Commissioner Graves was motivated by *partisan*, and not racial objectives. Dkt. 45-15 (offering improved Democratic performance in LD 15 in exchange for improved Republican performance elsewhere). Far from unconstitutional, this sort of partisan horse-trading is common in legislative redistricting.

The evidence shows partisan concerns carried weight on both sides of the aisle. One democratic staffer testified that his "team was struggling to get commissioners to focus on drawing maps instead of simply negotiating on partisan metrics." Dkt. 45-5 at 83:1-3. The staffer further lamented that "[m]uch of the negotiations in the final weeks was based upon the idea of what districts performed at what number for Democrats." *Id*. at 83:6-9. And as Plaintiff concedes, Commissioner Sims "characterized her own goals in partisan terms." Dkt. 45 at 11 (citing Dkt. 45-3 at 61:02-16); *see also* Dkt. 45 at 10 (characterizing the creation of a majority-minority district as "*one of* [the Democratic Commissioners'] primary goals" and noting that a Democratic staffer defined objectives in partisan terms) (emphasis added).

When the Commissioners finally reached agreement, it was not on an actual map, but rather, a framework based on partisan performance. *See, e.g.*, Dkt. 45-4 at 300:5-11 (explaining that Commissioners "ultimately voted for . . . a framework that was later translated to maps"); *id*. at 300:16-22 (framework included partisan metrics); Dkt. 45-7 at 182:11-14 (Commissioners voted on "[a] conceptual structure of both legislative and congressional districts that was based upon the various performance in those areas"). While demographics were certainly a factor in deliberations over LD 15, the boundaries were ultimately drawn to conform to an agreement on *partisan* metrics. On this record, it cannot be said that the Commission "subordinated other

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factors . . . to racial considerations[,]" *Cooper*, 581 U.S. at 291. Plaintiff has fallen well short of his burden to show there is no dispute of material fact on this issue.

b. Plaintiff cannot show race even arguably predominated for a majority of Commissioners

In the end, the Commission adopted a framework by a unanimous, bipartisan vote. Thus, even if the Court were to ignore the overwhelming evidence of Commissioner Walkinshaw and Sims' reliance on traditional redistricting criteria and partisan metrics, and determine that their efforts to negotiate a Hispanic opportunity district "neglected traditional districting criteria," *Bush*, 517 U.S. at 962, Plaintiff's Motion would still fail at the threshold because Plaintiff could not possibly prove that race predominated for Commissioners Graves and Fain. Thus, even if Plaintiff could prove that race predominated for two Commissioners, he could not prove that it predominated for the Commission as a whole—much less the Legislature.

C. There Was—and Is—Ample Reason to Believe that Section 2 of the VRA Requires the Drawing of a Race-Conscious District in the Yakima Valley

Even if race predominated in the enactment of LD 15, which it did not, Plaintiff still would not be entitled to summary judgment because the State could readily establish a "strong basis in evidence" to draw a race-conscious district in order to comply with the VRA. *Cooper*, 581 U.S. at 292.

1. Recent litigation highlighted racially polarized voting in the Yakima Valley

Recent litigation involving the same geographical area provided ample reason to believe 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 Montes*, 40 F. Supp. 3d at 1390–1407; Hughes Decl., Ex. A (*Glatt* Consent Decree); *id.*, Ex. D at 5 (*Aguilar* Settlement Agreement). Each of the Commissioners was aware of these lawsuits and their significance. *See supra* at II.A. 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.

2. Dr. Barreto's presentation provided a strong basis for believing a Latino Opportunity District was required in the Yakima Valley

Dr. Barreto's analysis confirmed what the previous lawsuits had suggested: each of the *Gingles* factors is met with respect to Hispanic voters in the Yakima Valley. Consequently, after receiving Dr. Barreto's analysis, the Commissioners had an even "strong[er] basis in evidence" to believe they needed to create a Hispanic opportunity district. *See Cooper*, 581 U.S. at 292.[9]

Plaintiff takes issue with one of the sample maps Dr. Barreto provided in his analysis, Dkt. 45 at 18–19, but Plaintiff's critique of a suggested district that was never adopted is irrelevant. Plaintiff also quibbles with Dr. Barreto's analysis by arguing that it failed to provide "legally significance evidence"—as opposed to merely "statistically significant evidence"—of racially polarized voting. *Id*. at 24. But Plaintiff fails to explain how the high level of RPV demonstrated by Dr. Barreto was legally insignificant. More broadly, Plaintiff misses the point: "[w]hen a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, the narrow tailoring requirement insists only that the legislature has a strong basis in evidence in support of the (race-based) choice that it has made." *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 193–94 (2017) (quotation omitted). This "does not require the State to show that its action was actually necessary to avoid a statutory violation" *Id.* (cleaned up). Rather, the State need only show it "ha[d] good reasons to believe it must use race in order to satisfy the Voting Rights Act, even if a court does not find that the actions were necessary for statutory compliance." *Id*. (cleaned up).

Finally, Plaintiff makes much of the two Republican Commissioners' disagreement with Dr. Barreto's analysis, but that disagreement does not justify summary judgment. Dr. Barreto's

[9] Plaintiff argues that Dr. Barreto's report "cannot—as a legal matter—serve as the only basis for the Commission to believe that the first precondition was met" because "one group's demands alone cannot be enough." Dkt. 45 at 19 (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018)). But *Abbott* is inapposite. The Court in that case addressed the insufficiency of "demands" from an interest group—not an academic analysis commissioned by redistricting staffers. *Abbott*, 138 S. Ct. at 2334. In any event, Dr. Barreto's analysis was not the only basis upon which the Commission could conclude that Section 2 required a majority-minority district in the Yakima Valley. *See supra* at II.A.

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conclusions found support in the outcomes of previous lawsuits involving the Yakima Valley region, and as explained below, expert analysis in this litigation corroborated Dr. Barreto's findings. Because the Republican Commissioners had "a strong basis in evidence for concluding" that the VRA required a majority-minority district in the Yakima Valley, any partisan disagreement with Dr. Barreto is immaterial. *See Cooper*, 581 U.S. at 292.

Moreover, Plaintiff provides no support for the notion that the views of two Republican Commissioners entitles him to summary judgment where the only Commissioners for whom race even *arguably* predominated agreed with Dr. Barreto's conclusion that the VRA required the consideration of race in the Yakima Valley.

3. Expert analysis confirms Dr. Barreto's conclusions

In asserting that the State cannot establish that *any* of the *Gingles* preconditions were met, and therefore cannot invoke Section 2, Plaintiff ignores the expert findings in this matter. *See* Dkt. 45 at 15–25 (discussing *Gingles* preconditions). These findings, however, are fatal to Plaintiff's Motion; they flatly contradict Plaintiff's position by showing that *all three* of the *Gingles* preconditions appear to be met. *See supra* at II.F. These expert findings corroborate the previous lawsuits in the Yakima Valley, Dr. Barreto's presentation, and other evidence, and they compel the conclusion that each of the Commissioners had a "strong basis in evidence" to conclude that Section 2 required a majority Hispanic CVAP district in the Yakima Valley.

4. Commissioners intended to comply with the VRA

Plaintiff tries to brush aside this overwhelming support for the Commissioners' "strong basis in evidence" by contending that the Commissioners did not *actually* intend to comply with the VRA. Dkt. 45 at 16–17. But Plaintiff's thinly supported assertion is belied by evidence that each Commissioner intended to comply with the VRA, whether they believed it required the creation of a Latino opportunity district or not.

Commissioner Sims understood the VRA to require a Latino opportunity district in the Yakima Valley. Dkt. 45-3 at 93:20-94:23, 114:3-10, 119:16-120:24. She believed LD 15, as

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passed by the Legislature, would give Hispanic voters the opportunity to elect candidates of their choice. *Id*. at 169:25-170:16, 260:18-23. She drew these conclusion from a variety of sources, including a presentation to the Commission by the Washington State Attorney General's Office (*id*. at 225:18-20), previous VRA lawsuits involving the Yakima Valley (*id*. at 226:20-228:3), Dr. Barreto's analysis (*id*. at 225:18-22), the analysis of Yakima County Commission elections prepared by MGGG Redistricting Lab in January 2020 (*id*. at 236:5-25), and community feedback (*id.* at 228:4-229:5).

Commissioner Walkinshaw agreed the VRA required a Latino opportunity district. Hughes Decl., Ex. F; *see also* Dkt. 45-4 at 74:19-75:13, 82:5-17; Dkt. 45 at 10 (conceding that "Walkinshaw . . . expressed . . . his belief that 'it was necessary . . . to have a majority Latino CVAP district in the Yakima Valley'") (quoting Dkt. 45-7 at 194:2-8). Although he had concerns the final map was not as clearly compliant with the VRA as his own proposals, he believed it "was the best outcome" possible under the circumstances. Dkt. 45-4 at 301:23-303:2.

For their part, the Republic Commissioners certainly intended to comply with the VRA; they just did not apparently think it required a Hispanic opportunity district in the Yakima Valley. Even so, they believed that their Democratic colleagues held their views in good faith. Dkt. 45-2 (Graves Dep.) at 122:1-21, 268:15-269:2, 270:11-19; Dkt. 45-7 (Fain Dep.) at 196:9-13. Consequently—and to say nothing of the overwhelming evidence corroborating the views of their Democratic colleagues—the Republican Commissioners had a "strong basis in evidence" to believe that the VRA required a race-conscious district in the Yakima Valley. *Cooper*, 581 U.S. at 292.

Plaintiff largely ignores the Commissioners' own testimony about their thinking, and instead relies heavily on the testimony of people who are not the Commissioners. This testimony lacks foundation and is largely hearsay.[10] More to the point, Plaintiff cannot demonstrate the

[10] In some cases, Plaintiff also mischaracterizes the record. For example, Plaintiff purports to quote "[a] staffer for Commissioner Sims" who "testified that [Commissioner Sims] 'thought it was more important . . . to focus on other areas of the map than comply with the Voting Rights Act[.]'" Dkt. 45 at 13 (quoting Bridges Dep.,

absence of material facts regarding the Commissioners' states of mind by simply disregarding the Commissioners' own contrary testimony. *Compare, e.g.*, Dkt. 45 at 10–11 (relying on testimony from staff to claim that Commissioner Walkinshaw "did not personally believe the final map was compliant with the VRA") (cleaned up) *with* Dkt. 45-4 at 301:23-303:2.; Dkt. 45 at 16 (relying on staff testimony to supposedly prove Democratic commissioners "did not believe that the district they created. . . was compliant with the VRA" and that "VRA compliance was actually negotiable for the Democratic Commissioners") (quotation omitted) *with* Dkt. 45-3 at 169:25-170:16, 260:18-23, 161:11-14 ("I had been pretty consistent in negotiations with Commissioner Graves that I wasn't negotiating away Democratic performance in other districts for a VRA-compliant district in eastern Washington . . . ."). In any event, disputes about the Commissioners' intent are "paradigmatic fact question[s]," *Prejean*, 227 F.3d at 509, which must be resolved by the factfinder at trial.

5. Plaintiff's arguments do not negate the strong basis in evidence to conclude that the VRA required race-conscious boundaries

Plaintiff argues that "the State had no compelling interest that could justify" what it termed the State's "racial gerrymander of Legislative District 15." Dkt. 45 at 14 (cleaned up). Each of Plaintiff's arguments fail.

There is no merit to Plaintiff's arguments that "none of the Commissioners performed an independent analysis of the *Gingles* preconditions with respect to the final map." *See* Dkt. 45 at 16. The Commissioners didn't need to reinvent the wheel to conclude the VRA required a Latino opportunity district in the Yakima Valley. The Commissioners were aware of *Montes*, *Glatt*, and *Aguilar*, and they had Dr. Barreto's analysis, all of which provided strong evidence of racially

(33:12-22) (Dkt. 45-6)). But the staffer in question, Matt Bridges, actually staffed Commissioner Walkinshaw; *see also* Dkt. 45 at 13 (relying on Matt Bridges' testimony to supposedly prove that "Commissioner Sims' position was apparently that VRA compliance was someone else's problem"). As another example, Plaintiff quotes the testimony of "one Democrat staffer who" Plaintiff claims, "participated in Commission deliberations" that "at least two commissioners [Commissioners Fain and Graves] were dead set on drawing a district that was 50.1 Latino in the Yakima Valley[.]" Dkt. 45 at 14 (quoting Adam Hall). But on the very same page Plaintiff quotes, Hall makes clear he did not participate in any Commission deliberations. Dkt. 45-5 at 75:7-9; *see also id.* at 176:1-5.

polarized voting in the Yakima Valley. *See supra* at III.C.1.-2.[11] Armed with this knowledge, each Commissioner could evaluate specific maps using demographic and performance data preloaded in their mapping software. Dkt.45-5 at 150:15-23. Finally, expert analysis in this case and *Soto Palmer* shows that each *Gingles* factor is met with respect to the Yakima Valley. *See supra* at II.F. 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 *entire* Commission" was hardly "fatal" to a Section 2 defense when there was already ample evidence before the Commission that racially polarized voting had occurred in the Yakima Valley. *See* Dkt. 45 at 22 (emphasis in original).

There is no merit to Plaintiff's argument that the State "lacked good reason to believe [the first *Gingles*] precondition was satisfied before drawing its race-based map." Dkt. 45 at 18. To the contrary, as Dr. Alford notes, LD 15 is compact in terms of its "visual appearance" and "by the summary indicators for compactness" used by redistricting experts. Hughes Decl., Ex. R at 4.

Plaintiff's argument regarding jurisdictional splits is equally thin gruel. He complains that LD 15 covers portions of five counties, Dkt. 45 at 20, but a cursory glance at the rest of the state shows that this is far from unusual. LD 7 covers portions of seven counties; LD 9 covers portions of eight. LD 19 covers parts of five counties and LD 20 goes into four. *See* Dkt. 45-23. What the shape and breadth of the district reflects, above all, is that people don't live in neat, evenly spaced grids, especially in rural areas.

Plaintiff contends that the Commission failed to "maintain[] communities of interest and traditional boundaries," by linking together portions of Yakima and Pasco, while keeping "the southwestern boundary of the map . . . resolutely north of State Highway 22 to avoid

[11] And at least one Commissioner, April Sims, reviewed other materials supporting the need to create a Hispanic opportunity district in the Yakima Valley. *See supra* at II.A.

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incorporating any parts of the Yakama reservation." Dkt. 45 at 20–21 (quoting *Sensley v. Albritton*, 385 F.3d 591, 598 (5th Cir. 2004)). The irony is palpable: the Yakama Nation expressly requested they be kept within a single district. Dkt. 45-3 (Sims Dep.) at 228:25-229:5. Respecting the wishes of the Yakama Nation and its sovereign borders is the very definition of "*maintaining* communities of interest and traditional boundaries." *Sensley*, 385 F.3d at 598.

Contrary to Plaintiff's assertions, the record evinces a desire on the part of all four voting Commissioners to comply with federal law. *See* Dkt. 45 at 10. Commissioner Sims testified that "complying with the VRA was something that was very important" to her as a Commissioner, Dkt. 45-3 at 233:5-8, and that she "wanted to draw a map that was legal and compliant." *Id*. at 246:16-19. Commissioner Walkinshaw testified that "guaranteeing voting rights for the Latino community" was "mission critical" to him and that it was "critical" that any map he released was "beyond a shadow of a doubt compliant with the Voting Rights Act." Dkt. 45-4 at 138:5-11. He further testified that "drawing a district in the Yakima Valley area that complied with the Voting Rights Act [was] a priority" for him "[b]ecause it's federal law" and "important for our democracy." *Id.* at 111:17-23. Commissioner Graves testified that he and his fellow Commissioners were "trying [their] best" to comply with federal law, Dkt. 45-2 at 251:14-21, and explained that the Commission's decision to forego a VRA consultant could not be attributed to a lack of interest in VRA compliance. *Compare id.* at 275:1-4 ("I think we all cared a lot") *with* Dkt. 45 at 17 (asserting that Republican Commissioners did not care enough about VRA compliance to hire a consultant). Commissioner Fain echoed that sentiment. Dkt. 45-7 at 172:14-173:5 ("So it wasn't for lack of importance with the VRA, but just the belief that bringing in a long tirade of dueling consultants wasn't actually going to get us further to a conclusion."). He further testified to a "sincere desire to understand what our obligations were under the VRA and a "good faith effort to . . . respect the VRA." *Id*. at 216:10-21. Indeed, during the redistricting process, he worked to ensure that his caucus understood "the complexity and importance of the VRA and its impact on this process." *Id.* at 212:17-20; Hughes Decl., Ex. U.

Likewise, there is no merit to Plaintiff's argument that "the State cannot invoke a VRA defense, because it knew it was not creating a VRA compliant map when it passed the enacted LD 15." Dkt. 45 at 16 (cleaned up). As an initial matter, this argument misconstrues the facts, as the Commissioners by and large believed they were enacting a compliant map. *See* Dkt. 45-3 at 99:10-14, 260:18-23; Dkt. 45-4 at 302:1-10; Dkt. 45-2 at 110:15-21; Dkt. 45-7 at 209:6-10. And in any event, Plaintiff's argument leads to absurd results. Under Plaintiff's theory, if a state knew that the VRA required a majority-minority district and yet failed to adopt one, the remedy would not be an order compelling the adoption of a compliant district, but rather, an order compelling the adoption of a race-blind district that is even less compliant with the VRA than the challenged district.

IV. CONCLUSION

The State respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment.

DATED this 27th day of March, 2023

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I certify that this memorandum contains 8,321 words, in compliance with the Local Civil Rules.

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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 27th day of March, 2023 at Seattle, Washington

s/ Andrew R.W. Hughes
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