No. _____

# In The
# Supreme Court of the United States

BENANCIO GARCIA III,

*Appellant,*

V.

STEVEN HOBBS, ET AL.,

*Appellees.*

On Appeal from the United States District Court
for the Western District of Washington

## APPENDIX


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## APPENDIX TABLE OF CONTENTS

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT TACOMA**

BENANCIO GARCIA III,

Plaintiff,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,

Defendants.

CASE NO. 3:22-cv-05152-RSLDGE-LJCV

**OPINION AND ORDER DISMISSING PLAINTIFF'S CLAIM AS MOOT**

Chief District Judge David G. Estudillo authored the majority opinion, in which District Judge Robert S. Lasnik joined. Circuit Judge Lawrence J.C. VanDyke filed a dissenting opinion.[1]

Plaintiff Benancio Garcia III brings suit arguing that Washington Legislative District 15("LD 15") in the Yakima Valley is an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. The Panel sat for a three-day trial from June5th to June 7th to hear evidence

[1] Because Plaintiff "challeng[ed] the constitutionality of the apportionment" of a "statewide legislative body" under 28 U.S.C. § 2284(a), the Chief Judge of the Ninth Circuit designated a three-judge panel to hear Plaintiff's constitutional claim. (*See* Dkt. No. 18.)

regarding Plaintiff's Equal Protection Clause claim.[2] In light of the court's decision in *Soto Palmer*, the Court DISMISSES Plaintiff's claim as moot.

## I MOOTNESS

"[T]he judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'" *Flast v. Cohen*, 392 U.S. 83, 94 (1968). "There is thus no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (cleaned up). Article III's case-or-controversy requirement prevents federal courts from issuing advisory opinions. *See id.* A party must have "a specific live grievance," and cannot seek to litigate an "abstract disagreement over the constitutionality" of a law or other government action. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479 (1990) (cleaned up).

The Court finds that Plaintiff's challenge to the constitutionality of LD 15 is moot given the *Soto Palmer* court's finding that LD 15 violates § 2 of the Voting Rights Act ("VRA"). Plaintiff seeks declaratory relief determining that LD 15 "is an illegal racial gerrymander in violation of the Equal

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[2] The Panel heard evidence for the *Garcia* case concurrent with evidence presented for parallel litigation in *Soto Palmer v. Hobbs*, No. 3:22-cv-5035-RSL (W.D. Wash.). For purposes of judicial economy, the Court refers the reader to the procedural and factual background in *Soto Palmer*,2023 WL 5125390, at *1–3 (W.D. Wash. Aug. 10, 2023) and this Court's prior order (Dkt. No.56). The Court presumes reader familiarity with the facts of this case. This order only addresses Plaintiff Benancio Garcia III's Equal Protection claim.

Protection Clause of the Fourteenth Amendment" and an injunction "enjoining Defendant from enforcing or giving any effect to the boundaries of [] [LD 15], including an injunction barring Defendant from conducting any further elections for the Legislature based on [] [LD 15]." (Dkt. No. 14 at 18.) Plaintiff further requests the Court order a new legislative map be drawn. (*Id.*)

The *Soto Palmer* court determined that LD 15 violated § 2 of the VRA's prohibition against discriminatory results. *See Soto Palmer*, 2023 WL 5125390, at *11. In so deciding, the court found LD 15 to be invalid and ordered that the State's legislative districts be redrawn. *Id.* at *13. Since LD 15 has been found to be invalid and will be redrawn (and therefore not used for further elections), the Court cannot provide any more relief to Plaintiff. Plaintiff does not assert that any new district drawn by the Washington State Redistricting Commission ("Commission") would be a "mere continuation[] of the old, gerrymandered district[]." *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018). Plaintiff therefore lacks a specific, live grievance, and his case is moot.

Traditional principles of judicial restraint also counsel against resolving Plaintiff's Equal Protection Clause claim. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *see also Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in

advance of the necessity of deciding them."). The court's decision in *Soto Palmer* makes any decision in the instant case superfluous. A new Commission will draw new legislative districts in the Yakima Valley and, if challenged thereafter, the propriety of the new districts will be decided by analyzing the motivations and decisions of new individuals who constitute the Commission.[3] The Court cannot and will not presume that the new Commission will be motivated by the same factors that motivated its predecessor. Federal courts are courts of limited jurisdiction, and to unnecessarily decide a constitutional issue where there are alternate grounds available or where there is an absence of a case or controversy is to overstep our "proper, limited role in our Nation's governance." *Biden v. Nebraska*, 600 U.S. _, 143 S. Ct. 2355, 2384 (2023) (Kagan, J., dissenting).

Our dissenting colleague disagrees that the instant case is moot. In his view, the Commissioners racially gerrymandered the 2021 Washington Redistricting Map in violation of the Equal Protection Clause and therefore "the map was 'void *ab initio*.'" Additionally, the dissent argues that longstanding principles of judicial restraint and constitutional avoidance are inapplicable here because the decision in *Soto Palmer* does not completely moot the relief sought by Plaintiff. These arguments are uncompelling.

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[3] In the event that the Commission fails to draw a new map by the deadline set by the *Soto Palmer* court, the parties will submit proposed maps to the *Soto Palmer* court and the court will adopt and enforce a new redistricting plan. *See Soto Palmer*, 2023 WL 5125390, at *13.

First, the view that LD 15 was void *ab initio* presupposes that Plaintiff established an Equal Protection violation. To the contrary, a full analysis of the record presented does not yield such a result. The Court declines to issue an advisory opinion on the validity of Plaintiff's Equal Protection claim, however. Rather, it is sufficient to note only that we disagree with the dissent's summary and interpretation of the facts surrounding the creation of LD 15. Importantly, the Commissioners' testimony on the specific issue of whether race predominated in the formation of LD 15 is absent from the dissent's summary of the facts, and the Court encourages readers to examine the Commissioners' testimony in full.[4] This testimony weighs heavily against finding

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[4] Commissioner April Sims, for example, specifically disclaimed that race was the most important factor. (*See* Dkt. No. 73 at 77.) As she testified, "I would not agree that [race] [] was the most important factor. But that it was a factor." (*Id.*) Commissioner Brady Walkinshaw similarly noted that the Commissioners discussed a number of factors, including race, but "none of those [factors] were predominant." (*Id.* at 124.) He further emphasized the impact that the Commissioners' desire to unify the Yakama Nation into one legislative district had on the map (*see id.*), a factor that all Commissioners attested was important but is conspicuously absent from our colleague's analysis. Commissioner Joe Fain testified that his overriding interest in drawing maps for LD 15 was to ensure "competitiveness." (*See* Dkt. No. 74 at 48, 58.) He also testified that he believed Commissioner Walkinshaw would have voted for a map in LD 15 that would not have had a majority Latino Citizen Voting Age Population ("CVAP"). (*Id.* at 51.) Finally, Commissioner Paul Graves testified that "race and the partisan breakdown of the district were" tied in his mind as the most important factors. (Dkt. No. 75 at 85.)

that race predominated in the drawing of LD 15 and against finding an Equal Protection violation.[5]

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[5] The dissent's "ab initio" argument leads to the surprising assertion that the *Soto Palmer* court should have declined to issue an opinion in that case. *Soto Palmer* was the first-filed challenge to the redistricting map, and it presented a clearly justiciable case and controversy. Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976), and our dissenting colleague makes no effort to show that one of the "exceptional" circumstances that could justify a district court's refusal to exercise or postponement of the exercise of its jurisdiction existed, *Id.* at 813 and 817. Although the intervenors in *Soto Palmer* twice requested that the case be stayed, they did so on the ground that judicial efficiency would be served by waiting for the Supreme Court's decision in *Allen v. Milligan*, 599 U.S. __, 143 S. Ct. 1487 (2023). At no point prior to the dissemination of the dissent did anyone suggest that a decision in *Soto Palmer* would be advisory or otherwise improper.

More importantly, the suggestion that the VRA claim should have been stayed or held in abeyance while the Equal Protection claim was resolved is not supported by case law or legal analysis. The dissent does not discuss whether a stay of *Soto Palmer* would have been appropriate pending the resolution of *Garcia* under the rubric established in *Landis v. N. Am. Co.*, 299 U.S. 248, 254-56 (1936), nor does it cite any cases in which a decision on a VRA claim was postponed because of a related Equal Protection challenge. *Milligan* itself presented just such a confluence of claims, and the Supreme Court addressed the appropriateness of injunctive relief on the VRA claim without considering, much less prioritizing, the pending Equal Protection challenge. *See also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410 (2006) (resolving VRA claims without reaching the companion Equal Protection claim); *Singleton v. Allen*, 2:21-cv-1291- AMM-SM-TFM, Dkt. # 272 at 7–8, 194–95 (N.D. Ala. Sept. 5, 2023) (resolving VRA claims and reserving ruling on Equal Protection claims in light of the fundamental and longstanding principles of judicial restraint and constitutional avoidance).

It is also erroneous to argue that "resolving *Soto Palmer* in the *Soto Palmer* plaintiffs' favor does not moot *Garcia*." As noted, LD 15 will be redrawn and will not be used in its current form for any future election. The *Soto Palmer* court has therefore granted Plaintiff complete relief for purposes of our mootness analysis. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1526 (2020) (vacating judgment as moot where New York City amended its laws to grant "the precise relief that petitioners requested in the prayer for relief in their complaint" notwithstanding requests for declaratory and injunctive relief from future constitutional violations).[6]

Our colleague argues that this case is not moot because Plaintiff may obtain partial injunctive and declaratory relief. Specifically, the Court could declare that LD 15 was an illegal racial gerrymander

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[6] The dissent attempts to distinguish *New York State Rifle & Pistol Ass'n*, but the petitioners in that case argued, like our colleague, that an intervening change to New York City's firearms laws did not moot their request for declaratory and injunctive relief because of the continued possibility of future harm from New York City's unconstitutional firearms licensing scheme. *See* Petitioners' Response to Respondents' Suggestion of Mootness at 15–17, *New York State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280). As the petitioners noted in their brief, "nothing in the City's revised rule precludes the previous version of the rule, which governed for nearly two decades, from having continuing adverse effects." *Id.* at 16. The petitioners specifically sought a declaration from the Supreme Court that "that the City's longstanding restrictive [firearms] licensing scheme is incompatible with the Second Amendment" and that any attempt to impose a licensing scheme was "null and void ab initio." *Id.* The Supreme Court, however, rejected the petitioners' argument and held that the case was moot notwithstanding the continued possibility of constitutional harm from the newly revised rule.

and enjoin the state from "performing an illegal racial gerrymander when it redraws the map." This type of relief is insufficient to avoid a finding of mootness. It goes without saying that a federal court may only direct parties to undertake activities that comply with the Constitution, and the *Soto Palmer* court's directive to the State to redraw LD 15 properly presumes that the State will comply with the Constitution when it does so lest the future district be challenged once again. *Cf. Holloway v. City of Virginia Beach*, 42 F.4th 266, 275 (4th Cir. 2022) (rejecting argument that VRA case was not moot and Plaintiffs were entitled to court order "directing implementation of a new system that 'compl[ies] with Section 2'" of the VRA in light of changes to state law that provided otherwise complete relief).

The dissent asserts that "the order in *Soto Palmer* ensures that [Garcia] will not receive what he argues is a constitutionally valid legislative map" because his "claimed injury is not merely capable of repetition; it almost is certain to repeat itself." In the dissent's opinion, Garcia will most certainly suffer injury because *Soto Palmer* "ordered that the State engage in *even more* racial gerrymandering" than that claimed by Garcia in this case. But this claimed injury from a future legislative district is speculative because compliance with § 2 of the VRA, as ordered in *Soto Palmer*, would not result in a violation of the Equal Protection Clause. *See Cooper v. Harris*, 581 U.S. 285, 306 (2017) ("States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA."); *see also Milligan*, 143 S. Ct. at 1516–17 ("[F]or the last four decades, this Court and the lower federal courts

have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2.").

As the dissent concedes, "the Supreme Court has given States 'leeway' to draw lines on the basis of race in redistricting when States have good reasons, based in the evidence, to believe the racial gerrymander necessary under the VRA." The *Soto Palmer* court detailed in depth why a VRA compliant district is required for the Yakima Valley. *See, e.g.*, 2023 WL 5125390, at *5– 6, 11 (finding that the three *Gingles* factors were met and that the State had "impair[ed] the ability of Latino voters in [] [the Yakima Valley] to elect their candidate of choice on an equal basis with other voters"). The dissent would find that the prior Commissioners failed to judge a VRA district necessary, and therefore any racial prioritization that the Commissioners engaged in would not survive strict scrutiny. But this determination is necessarily fact-specific and only applicable to the actions of the prior Commission. By the dissent's own admission, so long as the State judges the use of race necessary to comply with the VRA it is not unlawful for the State to create a district with a higher Latino CVAP.

The dissent also argues the case is not moot because Plaintiff may want to appeal this case to the Supreme Court. Whether Plaintiff may desire to utilize this litigation to "challenge current precedent that considers compliance with the VRA a sufficient reason to racially gerrymander" is immaterial to the issue of whether a case is moot. Neither *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct.

1245 (2022), nor *Allen v. Santa Clara Cnty. Corr. Peace Officers Ass'n*, 38 F.4th 68 (9th Cir. 2022), stands for the proposition that a trial court, in deciding whether a case is moot, should consider how a party might utilize the litigation to challenge established Supreme Court precedent. Indeed, such an argument reinforces the majority's finding that the case is moot because a desire to appeal binding Supreme Court precedent, untethered from any specific injury, is far removed from a specific, live controversy.[7] It "would [also] reverse the canon of [constitutional] avoidance . . . [by addressing] divisive constitutional questions that are both unnecessary and contrary to the purposes of our precedents under the Voting Rights Act." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009).

This Court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *People of State of California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893). The fact remains that the *Soto Palmer* court has ordered the State to redraft legislative districts in the Yakima Valley. Having done so, the relief Plaintiff seeks in this litigation is now moot.

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[7] The dissent, like the State of Alabama, might wish for a different interpretation of § 2 of the VRA than that which has prevailed in this country for nearly forty years. The United States Supreme Court, however, recently rejected Alabama's invitation to do so in *Milligan*.

## II CONCLUSION

Accordingly, the Court DISMISSES as moot Plaintiff's claim that LD 15 violates the Equal Protection Clause. A judgment will be entered concurrent with this order.

Dated this 8th day of September, 2023.

/s/ David G. Estudillo
United States District Judge

/s/ Robert S. Lasnik
United States District Judge

*Garcia v. Hobbs et al.*, No 3:22-cv-5152 (W.D. Wash.) VANDYKE, J., dissenting,

In 2021, the State of Washington redistricted its state legislature electoral map. In the process, the State, acting through its Redistricting Commission, made the racial composition of Legislative District 15 (LD-15), a district in the Yakima Valley, a nonnegotiable criterion. In other words, the Commission racially gerrymandered. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017). This discrimination means the map was enacted in violation of the U.S. Constitution unless the Commission had a "strong basis in evidence" to believe, and in fact believed, that the federal Voting Rights Act (VRA) required the Commission to perform such racial gerrymandering. *See Wis.*

*Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022) (quotation omitted). A majority of the Commissioners did not believe the VRA required racial gerrymandering, so the map was drawn— and later enacted—in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

In a parallel case before a single district court judge, *Soto Palmer v. Hobbs*, plaintiffs also challenged the 2021 map as invalid. --- F.Supp.3d ----, 2023 WL 5125390, No. 3:22-cv-5035 (W.D. Wash. Aug. 10, 2023). But they alleged the map violated the VRA, which presented a more challenging question than the relatively straightforward one presented in this matter. Nonetheless, instead of waiting for this case to be decided, which would have mooted *Soto Palmer*, the court in *Soto Palmer* undertook a complicated analysis involving multiple expert witnesses and an indeterminate nine-factor balancing test and opined that the map violated the VRA and must be redrawn. Worse than undertaking a needless analysis, the court necessarily assumed that the map was not enacted in violation of the Equal Protection Clause. But it was. And because the map violated the Equal Protection Clause, it was "void *ab initio*." *Mester Mfg. Co. v. INS*, 879 F.2d 561, 570 (9th Cir. 1989) (citation omitted); *see Collins v. Yellen*, 141 S. Ct. 1761, 1788–89 (2021). As it was void ab initio, the *Soto Palmer* decision amounts to an advisory opinion on whether a void map would violate the VRA if it existed. That decision should never have been issued.

Even putting aside the advisory nature of the *Soto Palmer* decision, it does not moot this case. Garcia is seeking relief that the court in *Soto Palmer*

never provided, and he can still assert arguments not foreclosed by *Soto Palmer*. I thus respectfully dissent from my colleagues' conclusion to dismiss this case based on mootness.

## BACKGROUND

### I. In 2021, the State of Washington Drew New Legislative and Congressional Electoral Maps Following the Federal Census.

Under Washington law, the State of Washington redistricts its "state legislative and congressional districts" after the decennial federal census and congressional reapportionment. Wash. Const. art. II, § 43(1); *see* U.S. Const., art. I, § 2. Washington performs this redistricting through a Redistricting Commission consisting of four voting Commissioners and one non-voting Commission Chair. *See* Wash. Const. art. II, § 43(2). The "legislative leader of the two largest political parties in each house of the legislature" each appoints one Commissioner. *Id.* The four voting Commissioners then select by majority vote a nonvoting chairperson of the Commission. *Id.* "The commission shall complete redistricting as soon as possible following the federal decennial census, but no later than November 15th of each year ending in one." *Id.* § 43(6). The "redistricting plan" must be approved by "[a]t least three of the voting members." *Id.* After the Commission approves a plan, a supermajority of two-thirds of the Washington State Legislature may make minor amendments to the plan or do nothing—either way, the map is enacted after "the end of the thirtieth day of the first session convened after the commission … submitted its plan to the legislature."

*Id.* § 43(7). And in neither event can the Legislature reject the map. *See id.*

After the 2020 decennial census, Washington law called for the appointment of a Redistricting Commission to redistrict Washington's "state legislative and congressional districts." *Id.* § 43(1). The House Democratic leadership selected April Sims, the Senate Democratic leadership selected Brady Piñero Walkinshaw, the Senate Republican leadership selected Joe Fain, and the House Republican leadership selected Paul Graves. *Garcia* Dkt. No. 64 at ¶ 58–59. These four voting Commissioners selected Sarah Augustine as the Commission chairperson. *Garcia* Dkt. No. 64 at ¶ 60.

On September 21, 2021, each of the voting Commissioners released proposed redistricting maps. *Garcia* Dkt. No. 64 at ¶ 62. According to 2020 American Community Survey 5-year estimates, every Commissioner's September legislative map proposal included a legislative district in the Yakima Valley area of Washington made up of less than 50% Hispanic Citizen Voting Age Population (HCVAP). *Soto Palmer* Dkt. No. 191 at ¶¶ 75–78, 87. The Yakima Valley area, which is in southcentral Washington and encompasses areas in Yakima, Adams, Benton, Grant, and Franklin counties, would ultimately contain LD-15, the district challenged in this case and in *Soto Palmer*. *Soto Palmer* Dkt. No. 191 at ¶ 88.

Around a month later, the Commission received a slideshow presentation file from the Washington State Senate Democratic Caucus. *Garcia* Dkt. No. 64 at ¶ 68. The presentation was prepared by Matt Barreto, PhD, who opined that there was "racially polarized voting" in the Yakima Valley area and that

the Republican Commissioners' maps "crack[ed]" the Latino population into multiple districts. Ex. 179 at 17–18. The presentation also offered two alternative, "VRA Complaint," maps. Ex. 179 at 22–23.

From the circulation of this slideshow onward, the racial composition of the Yakima Valley district became an enduring focus of the Commission. Unlike with any other district, the Commission focused intensely on the racial composition of LD-15. As Commissioner Fain put it, although the racial composition of districts was a topic generally discussed for "many districts," "it was more widely discussed with regards to the Yakima Valley area." *Garcia* Dkt. No. 74 at 86–87. For LD-15, the "racial composition" was "a very important component of that negotiation" and there were not "other districts where [racial composition] was as important of a component." *Garcia* Dkt. No. 74 at 87.

Commissioner Sims confirmed in her testimony that without a "majority Hispanic … CVAP in LD 15," she "[wasn't] going to reach an agreement on LD 15." *Garcia* Dkt. No. 73 at 440. More broadly, one of Commissioner Sims's "priorities with the Redistricting Commission[] was to create a majority-minority district for Hispanic and Latino voters in the Yakima Valley," specifically, "to create a majority CVAP Hispanic district in the Yakima Valley." *Garcia* Dkt. No. 73 at 37. One of Commissioner Walkinshaw's draft maps included a note that the map "[c]reate[d] a majority Hispanic district" in the Yakima Valley. *Garcia* Dkt. No. 73 at 132; Ex. 150 at 17. And a member of Walkinshaw's staff confirmed in her testimony that a district that "perform[ed] for Latino voters" "should be nonnegotiable." *Garcia* Dkt. No. 75 at 111.

Commissioner Fain paid attention to the "Hispanic CVAP measurement" "through the various iterations of maps, in most cases." *Garcia* Dkt. No. 74 at 49. He "belie[ved]" that "the Hispanic CVAP was a metric that was important to Democratic commissioners" and he was "willing to give [an increase in Hispanic CVAP in LD-15] in order to secure support for a final compromise map." *Garcia* Dkt. No. 74 at 49–50. Ultimately, "creating more minority-majority, or majorityminority districts" was important to Fain "as part of the negotiation in getting a final map." *Garcia* Dkt. No. 74 at 61. Fain testified that "[he] tried to prioritize greater CVAP districts" and that one of the things he was "willing to do" was "of course … most definitely increasing minority-majority districts." *Garcia* Dkt. No. 74 at 84.

Commissioner Graves testified that he thought a majority Hispanic CVAP district in LD-15 would be required to obtain both Commissioner Sims and Commissioner Walkinshaw's votes. He "had [it] in mind" that he "would need to draw a major[ity] Hispanic CVAP district in the 15th LD[] if [he] wanted to secure [Commissioner Walkinshaw's] vote for the final plan." *Garcia* Dkt. No. 75 at 67. Based on a variety of indicia, Graves believed that a majority Hispanic CVAP district in LD-15 "would probably be a go, no-go decision point for [Commissioner Walkinshaw]." *Garcia* Dkt. No. 75 at 67–68. Graves also thought that a majority Hispanic CVAP LD-15 was necessary "to get Commissioner Sims's vote for a final plan." *Garcia* Dkt. No. 75 at 70. It was "[v]ery hard for [Commissioner Graves] to see three of the voting commissioners voting for a map that did not have a majority Hispanic CVAP

district in the Yakima Valley." *Garcia* Dkt. No. 75 at 73.

Anton Grose, one of Commissioner Graves's staffers, testified that "[a]s time went on, it became apparent that a Yakima Valley district that was majority Hispanic, by citizens of voting age population, … would be a requirement to get support from both Republicans and Democrats." *Garcia* Dkt. No. 73 at 153. Grose testified that for LD-15, in particular, [HCVAP data] was very, very important to our kind of counterparts, and it was [thus] very important to us." *Garcia* Dkt. No. 73 at 153–54. LD-15, "in particular, certainly was far more race-focused than [Grose] th[ought] any other district on the map." *Garcia* Dkt. No. 73 at 155. "[T]here were some other considerations neglected in the drawing of the 15th," Grose thought, "race predominantly being … the major focus of that district." *Garcia* Dkt. No. 73 at 153. When drawing proposed maps, Grose was "cognizant" of racial compositions because Commissioner Graves wanted a majority HCVAP district so that he could get a map that passed. *Garcia* Dkt. No. 73 at 186–87.

The Commission had a November 15 deadline to agree to a redistricting plan. Wash. Const. art. II, § 43(6). As the negotiations got underway, the Commissioners split up for negotiations into two groups of two. *Garcia* Dkt. No. 75 at 17, 49. Commissioners Graves and Sims were primarily responsible for negotiating the legislative map, while Commissioners Walkinshaw and Fain were primarily responsible for the congressional map. *Garcia* Dkt. No. 75 at 49. Several days before a final agreement was reached on November 15, Commissioners Graves and Sims "agreed to … make

the district 50 percent Latino CVAP." *Garcia* Dkt. No. 75 at 31; *see also id.* at 91 (noting that before the November 15th deadline, Commissioner Graves had reached an agreement with Commissioner Sims that LD- 15 "would be a majority Hispanic district[] by eligible voters"). There was "an agreement … between [Commissioner Graves] and Commissioner Sims that this district would be greater than 50 percent [Hispanic] CVAP." *Garcia* Dkt. No. 75 at 32. The partisan balance of LD-15 was still "up in the air," but however that turned out, the district would contain above 50% Hispanic CVAP. *Garcia* Dkt. No. 75 at 32.

Commissioner Sims appears to have made a Hispanic CVAP district a nonnegotiable criterion because she believed such a district was required by the VRA. *Garcia* Dkt. No. 73 at 51. Commissioner Walkinshaw might have believed this, but his testimony on the point was less clear. *Garcia* Dkt. No. 73 at 135. Commissioners Graves and Fain did not think that the VRA required a legislative district in the Yakima Valley containing a majority HCVAP. *Garcia* Dkt. Nos. 75 at 71 (Graves); 74 at 50 (Fain).

When November 15 finally arrived, the Commissioners moved their negotiations to a hotel in Federal Way, Washington. *Garcia* Dkt. No. 73 at 30. There the Commissioners reached what they referred to as a "framework agreement." *Garcia* Dkt. Nos. 73 at 16–17; 74 at 71; 75 at 42. Although they did not vote on specific maps before the deadline, they voted on an agreement that they testified could be turned into a legislative map. *Garcia* Dkt. No. 75 at 41 (Commissioner Graves confirming that he stated in a press conference "that the framework that had been agreed to was sufficiently detailed

that, without discretion, it could be turned into a map"). The framework agreement was "that [LD-15] would be that 50.1 Hispanic CVAP number." *Garcia* Dkt. No. 75 at 42. The framework agreement did not "stipulate the racial composition of any other district[] besides the 15th." *Garcia* Dkt. No. 75 at 72.

After the Commissioners shook on their framework agreement in the evening of November 15, the Commissioners and their staff began turning the framework agreement into an actual map. *Garcia* Dkt. No. 73 at 192. This process went late through the night and into the morning of November 16. During this time, the map drawers tweaked the racial composition (*i.e.*, the percentage of Hispanic citizens of voting age) of LD-15, bringing it as close as reasonably possible to 50% while staying barely above a 50/50 split. Ex. 487 at 7 (comparing Commissioner Graves's November 12 map, with a 50.2% Hispanic CVAP, to the enacted map, with a 50.02% Hispanic CVAP). While drawing the maps in the early morning hours of November 16, Grose was "also trying to ensure the district was majority Hispanic by CVAP." *Garcia* Dkt. No. 73 at 205. It is clear the map drawers were aware of the nonnegotiable criteria that LD-15 must be over 50% HCVAP.

On November 16, 2021, the Commission transmitted its final maps to the Washington State Legislature. Ex. 123. The Legislature made minor amendments to the maps, changing only a few census blocks that resulted in no change in the population of LD-15, and voted to enact the maps in February 2022. *See* H. Con. Res. 4407, 67th Leg. Reg. Sess., at 2:35–36, 71:9–77:26.

**II. Following Redistricting, Two Challenges Were Brought Against the Enacted 2021 Legislative Map.**

On January 19, 2022, several plaintiffs—including lead plaintiff Susan Soto Palmer—filed a lawsuit against the Washington Secretary of State alleging that the legislative map ratified by the legislature in February, the "2021 Legislative Map," was enacted in violation of the VRA because (i) the map diluted the voting power of Hispanic residents of LD-15 and because (ii) the Commission drew the map with discriminatory intent. *Soto Palmer* Dkt. No. 70 at 39–40. On March 15, 2022, Benancio Garcia, III, filed a lawsuit against the Washington Secretary of State alleging that the Commission, in drawing LD-15, racially gerrymandered in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Garcia* Dkt. No. 14 at 17. Pursuant to Garcia's request under 28 U.S.C. § 2284, a three-judge panel was drawn consisting of my colleagues in the majority and me. *Garcia* Dkt. No. 1 at 1, 18. The court in both cases joined the State of Washington as a defendant, and the court in *Soto Palmer* granted several individuals' motion to intervene and defend the map. *Garcia* Dkt. No. 13; *Soto Palmer* Dkt. Nos. 68–69. The court consolidated the cases for trial, which was held the week of June 5, 2023.[1] On August 10, the court in *Soto Palmer* issued a decision finding in favor of the *Soto Palmer* plaintiffs and directing the State of Washington to redraw the legislative map. *Soto Palmer*, 2023 WL 5125390, at *13.

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[1] *Soto Palmer* also included an additional trial day on June 2, 2023.

## ANALYSIS

The majority dismisses this case as moot. It is not. Not only is the case not moot, but the panel should have acknowledged the map was enacted in violation of the Equal Protection Clause, found in favor of Garcia, and directed the State of Washington to redraw the maps in a way that does not violate the Constitution. That would have mooted the VRA challenge in *Soto Palmer* and avoided the issuance of an advisory opinion in that case.

### I. This Case Is Not Moot.

The majority concludes Garcia's lawsuit is "moot" because, in the panel's opinion, the court in *Soto Palmer* concluded that the 2021 map violated the VRA and ordered the State of Washington to redraw it. That opinion was advisory, should never have been rendered, and even putting that aside, does not moot this case.

The *Soto Palmer* decision should never have been issued. Because the 2021 map violates the Equal Protection Clause, it was "void *ab initio*." *Mester Mfg. Co.*, 879 F.2d at 570 (citation omitted). "An act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Indeed, as the Supreme Court put it recently, "an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)." *Collins*, 141 S. Ct. at 1788–89. In deciding the claim in *Soto Palmer*—

while necessarily aware of this challenge against the map on constitutional grounds—the *Soto Palmer* court simply ignored the unconstitutionality of the map and jumped ahead to decide whether a hypothetically constitutional map would violate the VRA.

In other words, the *Soto Palmer* court issued an advisory opinion. *See Hall v. Beals*, 396 U.S. 45, 48 (1969) (declining to address the constitutionality of a statute that was no longer legally extant on other grounds because of the need to "avoid advisory opinions on abstract propositions of law"). Opining on "important" but hypothetical "questions of law" is not a function within the "exercise of [the] judicial power" granted in Article III of the U.S. Constitution. *United States v. Evans*, 213 U.S. 297, 300–01 (1909). Indeed, "[federal courts] are constitutionally forbidden from issuing advisory opinions." *United States v. Guzman-Padilla*, 573 F.3d 865, 879 (9th Cir. 2009); *see also United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) ("[F]ederal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

Beyond the jurisdictional reason to avoid deciding the VRA claim, there is also an important prudential reason that the court in *Soto Palmer* should have at least deferred resolution of the VRA claim until this panel resolved the Equal Protection claim. The VRA claim in *Soto Palmer* was complex and involved the application of a nine-factor indeterminate balancing test. *See Soto Palmer*, 2023 WL 5125390, at *6–11. As a matter of prudence, it makes little sense to undertake a complicated test that involves indeterminate balancing when a

simpler threshold basis exists for resolving the matter.

The majority cites to *Landis v. North American Co.*, 299 U.S. 248 (1936), as a possible reason not to have prioritized this panel's Equal Protection claim. First, it's not clear *Landis* is even relevant. *Landis* considered a court's power to grant a *motion* for a stay, whereas the issue here involves a court's *internal* docket management. *See id.* at 256. I do not suggest, as the majority believes, that *Soto Palmer* should have been formally "held in abeyance." Different considerations come into play when a court is assessing its own order-of-business than when a court is considering an application for a formal stay or for a case to be held in abeyance. But even assuming *Landis* did govern, it was no bar to the court in *Soto Palmer* appropriately deferring. "Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id.*

Similarly, despite the majority's assertion otherwise, the Supreme Court's recent decision in *Allen v. Milligan* does not indicate that a court should undertake a many-factored VRA analysis ahead of a simple Equal Protection analysis that would moot the VRA claim. 143 S. Ct. 1487 (2023). The Supreme Court in *Allen* granted review on only one question: "Whether the State of Alabama's 2021 Redistricting Plan … violated Section 2 of the Voting Rights Act." The Court did not grant review on any Equal Protection claim. There was thus no Equal Protection claim pending before the Court that would have potentially mooted the case and which it

could have answered before addressing the VRA question. The Supreme Court's discretionary docket allows it to limit itself just to a question granted. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 28 (1993). But we, of course, are not the Supreme Court.

While my colleagues in the majority opine that the *Soto Palmer* decision was not advisory because of the principle of constitutional avoidance, that principle has no application here. That discretionary principle indicates that a nonconstitutional decision should usually be preferred to a constitutional decision when the nonconstitutional decision would render the constitutional decision unnecessary. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (1988) (explaining that, "before addressing [a] constitutional issue," courts should consider "whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims"). Perhaps if there were a symmetrical relationship between the *Soto Palmer* and *Garcia* cases, such that a decision in one would necessarily moot the other case, and vice versa, there might be a better argument for constitutional avoidance in *Garcia*. But that is not the case. There is instead an asymmetry, where the correct decision in *Garcia* would moot *Soto Palmer*, but a decision in *Soto Palmer*, regardless of the result, does not moot *Garcia*.

Resolving *Garcia* in the plaintiff's favor would have mooted *Soto Palmer*. It would have meant recognizing that the map challenged in *Soto Palmer* has never legally existed—enacted in violation of the

Equal Protection Clause, there never was a constitutionally valid map that could possibly violate the VRA. *See Collins*, 141 S. Ct. at 1788–89; *Mester Mfg. Co.*, 879 F.2d at 570. That recognition would leave no map for the *Soto Palmer* plaintiffs to challenge, and thus moot their action.

By contrast, resolving *Soto Palmer* in the *Soto Palmer* plaintiffs' favor does not moot *Garcia*. The majority disagrees, stating that because LD-15 is now gone as a result of the decision in *Soto Palmer*, the *Garcia* plaintiff got what he wanted. But he didn't, of course. Consider what happened: In this case, Plaintiff Garcia complains that the State considered race unlawfully in drawing the legislative map.

In *Soto Palmer*, the plaintiff complained that the State violated the VRA because LD-15 did not *consider race enough*—that is, that the final LD-15 contains too few Hispanic voters. The Court in *Soto Palmer* agreed with the plaintiff that there were not enough Hispanic voters in LD-15 to comply with the VRA and directed the State to go redraw the map in a way that complies with the VRA. The State will do this by placing *more* Hispanic voters in LD-15, a task which necessarily requires the State to consider race.[2]

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[2] The majority cites a recent order in the now-remanded *Milligan* litigation as support for its decision to dismiss Garcia's claims as moot. *See Milligan v. Allen*, 2:21-cv- 1530-AMM, Dkt. No. 272 at 7–8, 194–95 (N.D. Ala. Sept. 5, 2023). But the relationship between the VRA and constitutional claims in *Milligan* is noticeably different from the relationship between *Soto Palmer*'s VRA claim and *Garcia*'s constitutional claim. Thus, *Milligan* does not support the majority's reliance on constitutional avoidance here.

The *Milligan* litigation involves several consolidated cases, but among those with constitutional claims are the aforementioned *Milligan* case and the *Singleton v. Allen* case. The *Milligan* plaintiffs argue that Alabama's remedial proposal fails to remedy the VRA violation, and because Alabama's racial gerrymandering cannot otherwise survive strict scrutiny, it also violates the Equal Protection Clause. *See id.*, Dkt. No. 200 at 16–19, 23–26. As the *Milligan* plaintiffs have presented their arguments, their VRA and Equal Protection claims seek the same thing, and both depend on their underlying theory that Alabama has an affirmative obligation to use race properly to satisfy the demands of the VRA. Thus, their constitutional claims effectively serve as a backstop to their VRA claims, and so relief on the latter necessarily eliminates any need to reach the former. That is a textbook application of mootness. Garcia's argument here, in contrast, is that the Equal Protection Clause requires the State to abstain from considering race, which is, of course, directly at odds with the *Soto Palmer* plaintiffs' arguments that the State must consider race more. Unlike in *Milligan*, where plaintiffs received all the relief they sought (undereither of their claims) when the district court tossed Alabama's remedial maps based on the VRA, the majority here cannot avoid Garcia's constitutional claim based on *Soto Palmer*, which does not offer relief that redresses Garcia's claim.

The *Singleton* plaintiffs, who are advancing only constitutional claims, have taken a different view of the Alabama redistricting dispute. They have offered alternative congressional maps that they contend comply with the VRA without taking race into consideration at all. *See Singleton v. Allen*, 2:21-cv-1291-AMM, Dkt. No. 147 at 19–20. If race need not be considered to satisfy the demands of the VRA, they argue, then Alabama's admitted consideration of race must violate the Equal Protection Clause. *Id.* at 17–18. Because the Alabama court again granted relief on VRA grounds, it had no need to separately consider *at this point in the litigation* the *Singleton* plaintiffs' claim that VRA compliance can be achieved without resort to racial gerrymandering. But that reasoning has no purchase here, where Garcia's claim that the State is improperly using race is neither addressed nor resolved by the *Soto Palmer* court's admonition that the State needs to double

The majority's position is thus that an order directing the State to consider race *more* has "granted … complete relief" to a plaintiff who complains the State shouldn't have considered race *at all*. This kind of logic should make us wonder if this case is really moot.

It is not, for at least two reasons. First, the plaintiff in this case may wish to appeal this matter to the Supreme Court to challenge current precedent that considers compliance with the VRA a sufficient reason to racially gerrymander. *See Wis. Legislature*, 142 S. Ct. at 1248; *Allen v. Santa Clara Cnty. Corr. Peace Officers Ass'n*, 38 F.4th 68, 70 n.1 (9th Cir. 2022) (noting that the appellants "concede[d] that binding precedent forecloses" one of their arguments "and only seek to preserve that claim for further appellate review"). While that issue is currently foreclosed by current Supreme Court precedent, the plaintiff in *Garcia* could ask the Supreme Court to revisit that precedent. Even assuming success in that endeavor is a longshot, that doesn't *moot* this case. I agree with the majority that, *if* Garcia had no

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down on its use of race to comply with the VRA's demands. *Soto Palmer* court's admonition that the State needs to double down on its use of race to comply with the VRA's demands.

And in any event, while it is true that, when faced with both VRA and constitutional claims, the Alabama court in its recent *Milligan* order decided only the VRA claims, the court neither ultimately rejected the constitutional claims nor took any other action preventing their future adjudication. Instead, it merely "reserve[d] ruling" on them. *Milligan v. Allen*, 2:21-cv-1530-AMM, Dkt. No. 272 at 8, 194. Especially in view of the *Singleton* plaintiffs' claim, which—not unlike Garcia's—do not wholly depend on the outcome of the VRA claim, the Alabama court's decision was a measured and constrained course of action that undercuts rather than supports the majority's severe and terminal decision here.

ongoing injury, he could not litigate a case with simply the hope that he could persuade the Supreme Court to revisit one of its precedents. But he still has injury. He claims injury from past racial gerrymandering. The decision in *Soto Palmer* ordered that the State engage in *even more* racial gerrymandering. That does not somehow eliminate Garcia's injury.

Secondly, even putting aside the possibility of *Garcia* seeking relief from the Supreme Court, the *Garcia* case is also not moot because, notwithstanding the finding of a VRA violation in *Soto Palmer* and the resulting invalidation of the redistricting maps, "there is still a live controversy" in *Garcia* "as to the adequacy of" the remedy in *Soto Palmer* in addressing all of the relief sought by Garcia in this case. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307–08 (2012). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (cleaned up). And "the burden of demonstrating mootness is a heavy one." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (cleaned up). Moreover, a case is not moot simply because the exact remedy sought by the plaintiff cannot be fully given. The existence of a possible partial remedy "is sufficient to prevent [a] case from being moot." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992).

In this case, Garcia seeks a declaration "that Legislative District 15 is an illegal racial gerrymander in violation of the Equal Protection Clause" *and* an order from this court that the State

create a "new valid plan for legislative districts … that does not violate the Equal Protection Clause." *Garcia* Dkt. No. 14 at 18. Although the decision in *Soto Palmer* might moot some of the relief that Garcia sought to obtain in this case, the court in *Soto Palmer* did not issue an order directing the State to avoid performing an illegal racial gerrymander when it redraws the map—that is, to avoid violating the Equal Protection Clause. *See Soto Palmer*, 2023 WL 5125390, at *13. Garcia requested the map be redrawn without violating the Equal Protection Clause, and this unfulfilled request for relief "is sufficient to prevent this case from being moot." *Church of Scientology*, 506 U.S. at 13.

The majority disagrees because "a federal court may only direct parties to undertake activities that comply with the Constitution." Thus, the panel "presumes" that the court in *Soto Palmer* "direct[ed] the State to redraw LD 15" in a way that complies with the Constitution. The source of this presumption is unclear. Although courts obviously should avoid intentionally directing parties to violate the Constitution, there is little reason to presume that the court's order in *Soto Palmer* implicitly instructed the State not to violate the Equal Protection Clause. The State had earlier violated the Equal Protection Clause *by unlawfully considering race*, and the court's order directs the State to consider race *more*. It doesn't set any limit for how much more. Garcia has still not received a court order directing the State to redraw the map in a way that does not violate the Equal Protection Clause.

The majority is therefore wrong that there remains no "availability of any meaningful injunctive relief." The majority relies on *New York*

*State Rifle and Pistol Association, Inc. v. City of New York* to support its belief that the mere fact that the *Soto Palmer* court directed the map be redrawn is enough to moot this case. *See* 140 S. Ct. 1525 (2020) (per curiam). The Supreme Court in *New York* said no such thing. The Court instead concluded that a case was partially moot when plaintiffs challenged a rule that was subsequently amended by state and local authorities during litigation. *See id.* at 1526. In this case, however, Garcia requested not just that the old map be held invalid but that a new map be drawn in a way that does not violate the Constitution. He is still seeking that relief and has not received it from the order in *Soto Palmer*. Indeed, the order in *Soto Palmer* ensures that he will not receive what he argues is a constitutionally valid legislative map. Garcia's claimed injury is not merely capable of repetition; it is almost certain to repeat itself.

The majority's insistent portrayal of this case as indistinguishable from *New York* glosses over the starkly different procedural postures of the two cases and ignores the practical consequences of its own decision to dismiss Garcia's claim as moot. In *New York*, petitioners' constitutional claims were considered on a discretionary basis by a court of last resort. Here, Garcia's constitution claim was presented in the first instance to a district court with a non-discretionary obligation to adjudicate it, and that distinction makes a difference.

After the Supreme Court granted certiorari in *New York*, "the State of New York amended its firearm licensing statute, and the City amended the [challenged] rule" to provide "the precise relief that petitioners requested[.]" 140 S. Ct. at 1526. In

response to New York's argument that the amendments mooted their claims, the petitioners noted (1) that the new rule shared some of the old rule's constitutional problems and (2) raised the prospect of saving their complaint by amending it to seek damages. *Id.* at 1526–27.

While the Supreme Court concluded that petitioners' old claims were moot, its subsequent vacatur *and remand* (which, it bears noting, is nowhere near the same thing as this court *finally dismissing* this case for mootness) affirmatively disclaimed neither of petitioners' arguments. As to the petitioners' first argument, the Supreme Court gave no indication that it disagreed with their contention that New York's replacement rule might have constitutional problems of its own. Instead, it ordered the lower court to address that argument in the first instance. And then, just two years later, the Supreme Court vindicated that exact argument from the very same petitioners. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). And as to petitioners' second argument that they might amend their challenge to the old rule and avoid mootness by adding a damages claim, the Supreme Court *again* merely sent that argument back to the lower court to address in the first instance. *New York*, 140 S. Ct. at 1527. It did not, like the majority does here, reject and dismiss that claim. In short, while the Supreme Court in *New York* did conclude the petitioners' challenge to the old rule was "moot" for purposes of the Supreme Court's own continued review, the Court's actions taken in response to that conclusion bear no resemblance to the majority's decision here. Instead, the Supreme Court merely exercised its unique discretion to have the lower

courts address all the remaining non-moot issues in the first instance.

But it bears repeating: we are not the Supreme Court. A three-judge district court panel has nowhere to remand the remaining non-moot issues in this case. The Supreme Court's unique method of managing its own discretionary appellate docket, which in *New York* kept alive the prospect that petitioners' non-moot claims would receive substantive review, provides no support for the majority's broad mootness decision here, which kills Garcia's entire case—including the parts that aren't moot—before any court had the opportunity to review its merits.

In sum, the panel is wrong on the narrow question of mootness in this case. More broadly—and more disconcerting—the court in *Soto Palmer* was incorrect to issue an advisory opinion opining on whether, assuming LD-15 had been enacted in compliance with the Constitution and was thus legally extant, the district would have violated the VRA. My criticism that the *Soto Palmer* decision is an advisory opinion depends, of course, on my conclusion that the State of Washington violated the Equal Protection Clause. I thus turn now to that question. It is not a hard one on this record.

## II. The State of Washington Violated the Equal Protection Clause by Racially Gerrymandering Without a Compelling Interest.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S.

Const. amend. XIV, § 1. "[A]bsent extraordinary justification," this clause prohibits a State from "segregat[ing] citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal citations omitted). Such sifting is odious to the Constitution and our Republic. It is no less so when a "State assigns voters on the basis of race" and "engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Id.* at 911–12 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). These "[r]ace-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.* In short, "[u]nder the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious" and "cannot be upheld unless they are narrowly tailored to achieve a compelling state interest." *Wis. Legislature*, 142 S. Ct. at 1248 (cleaned up).

When a plaintiff has shown that a State racially gerrymandered in drawing a particular district, the burden shifts to the State to show that the gerrymander was "narrowly tailored to achieve a compelling interest." *Miller*, 515 U.S. at 904; *see also Wis. Legislature*, 142 S. Ct. at 1248. A State may have a compelling interest to draw lines on the basis of race when, "at the time of imposition," it has a "strong basis in evidence" to believe the racial gerrymander was necessary to comply with the VRA

and in fact "judg[ed] [such gerrymandering] necessary under a proper interpretation of the VRA." *Wis. Legislature*, 142 S. Ct. at 1249–50.[3]

In this case, the 2021 Washington State Redistricting Commission (1) racially gerrymandered in drawing LD-15 and (2) a majority of the Commission did not, "at the time of imposition, judge [such a gerrymander] necessary under a proper interpretation of the VRA." *Id.* (cleaned up). Because the Commission racially gerrymandered without a compelling interest, the 2021 Redistricting Map violated the Equal Protection Clause of the U.S. Constitution and was "void *ab initio*." *Mester Mfg. Co.*, 879 F.2d at 570; *see also Collins*, 141 S. Ct. at 1788–89. But before discussing the evidence showing the Commission grouped voters on the basis of race and that its racial sorting was not in furtherance of a compelling interest, a threshold question must first be considered. Specifically, the parties dispute whether the Commission or the Washington Legislature is

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[3] The majority mischaracterizes me as "admi[tting]" that "so long as the State judges the use of race necessary to comply with the VRA it is not unlawful for the State to create a district with a higher Latino CVAP." That is incorrect. The mere fact that a State (through its officials) "judges the use of race necessary to comply with the VRA" is decidedly *not* the correct standard for policing the line between racial discrimination that violates the Equal Protection Clause and racial discrimination that complies with the VRA. It is one thing to subject a State that is racially gerrymandering to "the burden of showing that the design of th[e] district withstands strict scrutiny." *Wis. Legislature*, 142 S. Ct. at 1249. It is quite another to bless a State's racial discrimination any time "the State judges the use of race necessary to comply with the VRA." While the Supreme Court has sanctioned the former approach, it has never endorsed the latter, and for good reason.

the entity whose intent matters for determining whether the State violated the Equal Protection Clause. The answer is not difficult: it is the Commission's intent that matters.

### A. The Redistricting Commission's Intent Matters for Garcia's Equal Protection Claim.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). To establish his prima facie case that the State of Washington violated the Equal Protection Clause in enacting the 2021 map, Garcia must thus show that the State intentionally racially gerrymandered. But whose intent? The State of Washington argues it is the Washington Legislature's intent. *Garcia* Dkt. No. 78 at 30. Because Washington law structurally makes the Redistricting Commission primarily responsible for redistricting and because the Legislature made only minor changes to the map submitted by the 2021 Redistricting Commission—none of which affected the racial composition of LD-15 imposed by the Commission—the State is incorrect. It is the Commission's intent that is legally relevant.

"[Supreme Court] precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include," for example, the popular "referendum and the Governor's veto." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015). Accordingly, it is

important to first attend to what institution Washington law makes responsible for redistricting. Structurally, Washington law delegates redistricting to the Redistricting Commission, leaving only a minor role for the Washington Legislature.

The Washington Constitution provides that "redistricting of state legislative and congressional districts" shall be performed by "a commission." Wash. Const. art. II, § 43(1). "The legislature may amend the redistricting plan but must do so by a two-thirds vote of the legislators elected or appointed to each house of the legislature." *Id.* § 43(7). "After submission of the plan by the commission, the legislature shall have the next thirty days during any regular or special session to amend the commission's plan." Wash. Rev. Code § 44.05.100(2). The Legislature's amendments "may not include [a change of] more than two percent of the population of any legislative or congressional district." *Id.* Moreover, if the Legislature fails to timely make any amendments, the Commission's plan automatically becomes "the state districting law." Wash. Const. art. II, § 43(7).

It is plain from these state constitutional and statutory requirements that Washington law delegates primary redistricting responsibility to the Commission, leaving only tightly circumscribed discretion for a supermajority of the Legislature to make minor changes to the map. Because Washington law delegates almost all responsibility to the Redistricting Commission, the Commission is at least presumptively responsible for performing the "legislative function" of redistricting and is thus the entity whose intent matters for evaluating an

Equal Protection claim. *Ariz. State Legislature*, 576 U.S. at 808.

Even assuming that presumption could be overcome in some case, it was not here. The Legislature minimally amended LD-15, the district that Garcia contends was drawn discriminatorily, changing only a few census blocks that resulted in no change in population to LD-15. *See* H. Con. Res. 4407, 67th Leg. Reg. Sess., at 2:35–36, 71:9–77:26. Moreover, the House and Senate majority leaders both explained that they viewed the Commission as the entity responsible for drawing the maps, with the Legislature playing a minor role. The House Majority Leader discussed the changes as "technical in nature" and explained that "[i]f we do nothing, then the maps come into being without our vote" but that the maps would then "come into being without [certain] changes that were recommended by the county commissioners." Ex. 1065 at 5:04–22. The Senate Majority Leader explained that adopting the maps "is not an approval of the redistricting map and the redistricting plans; it's not an endorsement of that plan. The Legislature does not have the power to approve or endorse the redistricting plan that the Redistricting Commission approved." Ex. 126 at 2:10–2:38.

The intent of the 2021 Redistricting Commission is the intent we must consider when evaluating Garcia's Equal Protection claim.

### B. Race Predominated the Commission's Considerations in Drawing LD-15.

Garcia claims that the 2021 Redistricting Commission racially gerrymandered when it drew

LD-15. The evidence establishes that he is right. "[A] plaintiff alleging racial gerrymandering bears the burden 'to show … that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Bethune-Hill*, 580 U.S. at 187 (quoting *Miller*, 515 U.S. at 916). "Race may predominate even when a reapportionment plan respects traditional principles … if race was the criterion that, in the State's view, could not be compromised, and race-neutral considerations came into play only after the race-based decision had been made." *Id.* at 189 (cleaned up) (quoting *Shaw v. Hunt*, 517 U.S. 899, 907 (1996)).[4] Finally, it is no excuse that a government racially sorted voters so that it could accomplish an ultimate non-race objective. *See Cooper v. Harris*, 581 U.S. 285, 291 n.1 (2017).

Race clearly predominated the considerations of the 2021 Redistricting Commission when it drew LD-15. The racial composition of LD-15 featured heavily in the Commissioner's negotiations over the legislative map. *Garcia* Dkt. Nos. 73 at 117, 153–54, 177; 75 at 30–31. And in the ramp-up to final negotiations, the Commissioners reached an agreement to racially gerrymander LD-15 to be at least a bare majority Hispanic CVAP. *Garcia* Dkt. No. 75 at 30, 91. This initial agreement to make LD-

[4] The Supreme Court recently reinforced that when a State makes the racial composition of a district the criterion on which it will not compromise, it has elevated race to a position of predominance. *See Allen v. Milligan*, 143 S. Ct. at 1510–12 (plurality op.) (obtaining only a minority of the justices for an analysis opining that race does not necessarily predominate when a State crafts a district with an objective of a specific racial composition).

15 a majority HCVAP district was then cemented in the final framework agreement among the Commissioners. *Garcia* Dkt. Nos. 73 at 16–17; 74 at 71; 75 at 42, 72. This agreement was the primary criterion for LD-15, contrasting with the other districts where the Commission was aware of racial demographics but nonetheless did not make race a nonnegotiable criterion. *Garcia* Dkt. No. 75 at 42.

All the Commissioners, for varying reasons, elevated the racial composition of LD-15 to be a nonnegotiable criterion around which other factors and passage of the map itself must fall. Commissioner Sims believed that a majority HCVAP in LD-15 was required by the VRA and also believed that the Commission must follow the law. *Garcia* Dkt. No. 73 at 48, 51. One of Commissioner Walkinshaw's draft maps included a note that the map "[c]reate[d] a majority Hispanic district" in the Yakima Valley. *Garcia* Dkt. No. 73 at 132. And one of Walkinshaw's staff stated that a district that "perform[ed] for Latino voters" should be nonnegotiable." *Garcia* Dkt. No. 75 at 110–11. Making LD-15 a majority HCVAP was critical to Commissioner Fain because he "belie[ved] that "the Hispanic CVAP was a metric that was important to Democratic commissioners" and he was "willing to give [an increase in Hispanic CVAP in LD-15] in order to secure support for a final compromise map." *Garcia* Dkt. No. 74 at 49–50. Commissioner Graves wanted LD-15 to be a majority HCVAP so that he could get a map that obtained a majority of the Commissioners' votes; it was "[v]ery hard for [Commissioner Graves] to see three of the voting commissioners voting for a map that did not have a majority Hispanic CVAP district in the Yakima

Valley." *Garcia* Dkt. Nos. 73 at 186–87; 75 at 73. Commissioners Fain and Graves may have wanted LD-15 to be a majority HCVAP district for reasons unrelated to their own concerns about race, but the government may not "elevate[] race to the predominant criterion in order to advance other goals, including political ones." *Cooper*, 581 U.S. at 291 n.1.

The Commissioners then transformed these intents into an agreement that, come what may, LD-15 would be a majority HCVAP district. In the days leading up to the Commission's deadline to agree on maps, the two Commissioners responsible for negotiating the legislative map (as opposed to the congressional map) reached an agreement that LD-15 "would be a majority Hispanic district by eligible voters." *Garcia* Dkt. No. 75 at 91. They "agreed to … make the district 50 percent Latino CVAP." *Garcia* Dkt. No. 75 at 31. The district's partisan makeup was still "up in the air," but it was agreed that the district would be majority HCVAP.[5] *Garcia* Dkt. No. 75 at 32. And finally, when November 15 arrived, all the Commissioners reached a framework agreement on how the maps would be drawn, which included that LD-15 would be a majority HCVAP district. *Garcia* Dkt. Nos. 73 at 16–17; 74 at 71; 75 at 42, 72.

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[5] The State of Washington notes that Commissioner Fain did not remember the racial composition of LD-15 being a part of the framework agreement. *Garcia* Dkt. No. 78 at 32 n.12. But Commissioner Fain's lack of memory is hardly surprising given that he was negotiating the congressional map, not the legislative map. *Garcia* Dkt. No. 75 at 49. And his inability to remember this part of the framework agreement is unpersuasive evidence of whether the agreement contained this nonnegotiable criterion, in light of testimony from one of the legislative map negotiators that it was part of the agreement.

Underlining that race predominated the Commission's drawing of LD-15 is the fact that the Commission did not elevate race to be the predominant factor in drawing other districts. Grose, one of Commissioner Graves's staffers, testified that LD-15, "in particular," was "certainly … far more race-focused than [Grose] th[ought] any other district on the map." *Garcia* Dkt. No. 73 at 155. Commissioner Fain testified that the "racial composition" of LD-15 was "a very important component of that negotiation" and confirmed that there were not "other districts where [racial composition] was as important of a component." *Garcia* Dkt. No. 74 at 87. In making the racial composition of LD-15 nonnegotiable—the "criterion that … could not be compromised"—the Commission elevated race, and it predominated the drawing of LD-15. *Bethune-Hill*, 580 U.S. at 189 (cleaned up).

The majority does not dispute that the racial composition of LD-15 was nonnegotiable for the Commission. The majority instead argues that race did not predominate because the Commissioners considered other factors when drawing the legislative map and because the Commissioners later denied that race predominated their considerations. The reason several of the Commissioners gave for believing that race did not predominate is the same reason relied on by the majority: simply that, in addition to considering race a nonnegotiable criterion, they also considered other factors.

It is of course not surprising at all that the Commissioners considered other factors. But it is also irrelevant. When a map drawer elevates a specific racial composition as "a "criterion that, in the [map drawer's] view, could not be compromised,"

race predominates. *Bethune-Hill*, 580 U.S. at 189. If the mere consideration of other factors *in addition* to making race nonnegotiable meant race no longer predominated, then race would literally never predominate. Map drawers always consider more than just race, even when they operate with the express purpose of meeting a racial target. Take a simple example. Map drawers always attempt to comply with the Constitution's requirement that states' legislative maps be drawn with "equality of population among the districts." *Mahan v. Howell*, 410 U.S. 315, 321, *modified*, 411 U.S. 922 (1973). If the mere consideration of other factors could stop race from predominating when a map drawer makes racial composition a nonnegotiable criterion, then it would make little sense for the Court to repeatedly state that race predominates when it is a "criterion that … could not be compromised." *Shaw*, 517 U.S. at 907; *Bethune-Hill*, 580 U.S. at 189.

By the basic nature of their task, drawers of legislative districts always take a number of essential considerations into account. The ever-present nature of such considerations cannot somehow dilute the constitutional taint of a map drawer who makes race a nonnegotiable criterion in drawing a map. *See Lee v. City of Los Angeles*, 908 F.3d 1175, 1183 (9th Cir. 2018) (explaining that "traditional redistricting principles are 'numerous and malleable'" and "a legislative body 'could construct a plethora of potential maps that look consistent with traditional, raceneutral principles'") (quoting *Bethune-Hill*, 580 U.S. at 190). That the Commission here unsurprisingly considered "traditional, race-neutral principles" *in addition* to making race a nonnegotiable requirement does not

mean those other factors somehow sufficiently watered-down race as the Commission's predominant consideration in drawing LD-15. *Id.* The racial composition of LD-15— specifically, that it be majority HCVAP—was a "criterion that, in the [Commission's] view, could not be compromised," and thus "race-neutral considerations came into play only after the race-based decision had been made." *Bethune-Hill*, 580 U.S. at 189 (quoting *Shaw*, 517 U.S. at 907).

### C. The 2021 Legislative Map Fails Strict Scrutiny.

Race predominated the Commission's decision to draw LD-15 as it did. For the map to nonetheless be constitutional, the State must show that it survives strict scrutiny. Specifically, the State must show that the map is "narrowly tailored to achieve a compelling state interest." *Miller*, 515 U.S. at 904. The State argues the gerrymander was justified under the VRA. *Garcia* Dkt. No. 78 at 34. The Supreme Court has held that complying with the VRA can be a compelling state interest, but only if the State, "at the time of imposition, judge[d] [the racial gerrymander] necessary under a proper interpretation of the VRA." *Wis. Legislature*, 142 S. Ct. at 1248, 1250 (cleaned up). Because a majority of the voting Commissioners did not "judg[e]" the gerrymander "necessary" under the VRA at the time that the Commission approved the 2021 Legislative Map, the map fails strict scrutiny. *Id.*

Commissioner Graves testified that he was "entirely uncertain" of whether the VRA required "a Hispanic CVAP district." He thought "that the law

was entirely unclear on that particular question." *Garcia* Dkt. No. 75 at 71. When asked if he had a "clear understanding of what the VRA required[] in the Yakima Valley," Commissioner Graves answered that he was "not sure the VRA itself has a clear understanding of exactly what it requires in the Yakima Valley." *Garcia* Dkt. No. 75 at 58. It is evident that Commissioner Graves's decision to racially gerrymander LD-15 was not because he thought that it was required by the VRA.

So too Commissioner Fain. When he was asked point-blank at trial whether he believed the Hispanic CVAP majority in LD-15 was "required[] by the Voting Rights Act," Commissioner Fain answered: "No." *Garcia* Dkt. No. 74 at 50.

Commissioner Walkinshaw was less direct but also unclear as to whether he believed a majority HCVAP was necessary in LD-15. He certainly believed complying with the VRA was important, calling it "mission critical." *Garcia* Dkt. No. 73 at 106. After he received the slideshow prepared by Dr. Barreto, Commissioner Walkinshaw released a new map that included an explanation that "[n]ow that we have this information, we as Commissioners should not consider legislative district maps that don't comply with the VRA." *Garcia* Dkt. No. 73 at 135. But his general statement that the Commission should comply with the law does not clearly evince that he actually believed the racial gerrymander ultimately embodied in the final legislative map was *necessary* under the VRA. It is possible that Commissioner Walkinshaw believed the VRA required a racial gerrymander, but his testimony and the record are ambiguous.

Ultimately, only Commissioner Sims clearly believed the racial gerrymander performed in LD-15 was required by the VRA. Commissioner Sims straightforwardly answered "Yes" when asked whether she "believe[d] that the VRA required the Commission to create a majority Hispanic CVAP district[] in the Yakima Valley." *Garcia* Dkt. No. 73 at 51.

The State bears the burden of showing that the 2021 Legislative map survives strict scrutiny. *See Cooper*, 581 U.S. at 292. Even giving the State the benefit of the doubt (which, of course, would not be particularly *strict* scrutiny), and thus assuming Commissioner Walkinshaw believed the VRA required that LD-15 be racially gerrymandered, the State cannot show that a majority of commissioners racially gerrymandered because they intended to comply with the VRA. Two of four commissioners do not constitute a majority of the Commission, *see* Wash. Const. art. II, § 43(6), and thus there was no majority of the Commission who, "at the time of imposition, judge[d] [the racial gerrymander] necessary under a proper interpretation of the VRA," *Wis. Legislature*, 142 S. Ct. at 1250 (cleaned up). The judgment of only two Commissioners was not enough to demonstrate that the Commission in any official sense believed racial sorting was necessary to comply with the VRA.

State governments may not arrange people into districts based on race and then hope to justify it by simply pantomiming at the VRA as an interest that could have justified their gerrymander. "What matters is 'the actual considerations that provided the essential basis for the lines drawn, not post hoc justifications the legislative body in theory could

have used but in reality did not.'" *Lee*, 908 F.3d at 1182 (cleaned up) (quoting *Bethune-Hill*, 137 S. Ct. at 799). For good or ill, the Supreme Court has given States "leeway" to draw lines on the basis of race in redistricting when States have good reasons, based in the evidence, to believe the racial gerrymander necessary under the VRA. *Cooper*, 581 U.S. at 306; *see Wis. Legislature*, 142 S. Ct. at 1250. But the Supreme Court also understandably requires that states *actually* judge such segregation necessary under the VRA, not just hope that they can find good experts and good lawyers to make post hoc arguments if someone challenges it as violating the Equal Protection Clause. The State of Washington took the latter approach and so fails to satisfy strict scrutiny. The State thus enacted the 2021 Legislative Map in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

* * *

My colleagues in the majority are not properly dismissing an already dead case as moot. Instead, after improperly (and unsuccessfully) trying to indirectly kill this case from a distance in *Soto Palmer*, they are forcefully pulling the plug on a case that—even now—still has some life in it. And had they properly reached the merits, a straightforward analysis shows both that race predominated in the drawing of LD-15 in the 2021 Legislative Map and that, because a majority of the Commission did not judge such racial ordering necessary under the VRA at the time the map was adopted, the map cannot survive strict scrutiny. We should have found in

favor of Garcia and directed the State of Washington to redraw the Legislative Map without violating the Equal Protection Clause. And then *that* map could be properly evaluated for compliance with the VRA, instead of the advisory analysis provided in the *Soto Palmer* decision. I thus respectfully dissent.

Dated this 8th day of September, 2023.

/s/ Lawrence VanDyke
United States Circuit Judge

**UNITED STATES DISTRICT COURT**
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BENANCIO GARCIA III,
Plaintiff,
v.

STEVEN HOBBS in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,
Defendants.

**JUDGMENT IN A CIVIL CASE**
CASE NUMBER. 3:22-cv-05152-RSLDGE-LJCV

**Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

This case is dismissed as moot.

Dated September 8, 2023.

Ravi Subramanian
Clerk of Court

s/Michael Williaims
Deputy Clerk

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

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

BENANCIO GARCIA III,
*Plaintiff*,

v.

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

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF OPINION AND ORDER DISMISSING PLAINTIFF'S CLAIM**

Notice is hereby given that Plaintiff in the above-captioned case hereby appeals to the Supreme Court of the United States from this Court's September 8, 2023, Opinion and Order Dismissing Plaintiff's Claim as Moot (Dkt. # 81), and its September 8, 2023, Judgment regarding the same (Dkt. # 82).

This appeal is being taken under 28 U.S.C. § 1253.

DATED this 28th day of September, 2023.

Respectfully submitted,

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FILED 8/10/23

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE**

CASE NO. 3:22-cv-05035-RSL

SUSAN SOTO PALMER, et al.,
Plaintiffs,

v.

STEVEN HOBBS, et al.,
Defendants,

And

JOSE TREVINO, et al.,
Intervenor-Defendants.

**MEMORANDUM OF DECISION**

Plaintiffs, five registered Latino[1] voters in Legislative Districts 14 and 15 in the Yakima Valley region of Washington State,[2] brought suit seeking to

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[1] Latino refers to individuals who identify as Hispanic or Latino, as defined by the U.S. Census. References to white voters herein refer to non-Hispanic white voters.

[2] The Court uses the terms "Yakima Valley region" as a shorthand for the geographic region on and around the Yakima and Columbia Rivers, including parts of Adams, Benton, Franklin, Grant, and Yakima counties. These counties feature in the versions of LD 14 and 15 considered by the bipartisan commission tasked with redistricting state legislative and congressional districts in Washington.

stop the Secretary of State from conducting elections under a redistricting plan adopted by the Washington State Legislature on February 8, 2022. Plaintiffs argue that the redistricting plan cracks the Latino vote and is therefore invalid under Section 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301. "Cracking" is a type of vote dilution that involves splitting up a group of voters "among multiple districts so that they fall short of a majority in each one." *Portugal v. Franklin Cnty.*, __ Wn.3d __, 530 P.3d 994, 1001 (2023) (quoting *Gill v. Whitford*, __ U.S. __, 138 S.Ct. 1916, 1924 (2018)). Intervenors, three registered Latino voters from legislative districts whose boundaries may be impacted if plaintiffs prevail in this litigation, were permitted to intervene to oppose plaintiffs' Section 2 claim because, at the time, there were no other truly adverse parties.[3]

In a parallel litigation, Benancio Garcia III challenged legislative district ("LD") 15 as an illegal racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Garcia v. Hobbs*, C22-5152-RSL-DGELJCV (W.D. Wash.). Pursuant to 28 U.S.C. § 2284, a three-judge district court was empaneled to hear that claim. The trial of the

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[3] The State of Washington was subsequently joined as a defendant to ensure that, if plaintiffs were able to prove their claims, the Court would have the power to provide all of the relief requested, particularly the development and adoption of a VRA-compliant redistricting plan. After retaining its own voting rights expert and reviewing the evidence in the case, the State concluded that the existing legislative plan dilutes the Latino vote in the Yakima Valley region in violation of Section 2, but strenuously opposed plaintiffs' claim that it intended to crack Latino voters.

Section 2 results claim asserted in *Soto Palmer* began on June 2, 2023, before the undersigned: the Court heard the testimony of Faviola Lopez, Dr. Loren Collingwood, Dr. Josue Estrada, and Senator Rebecca Saldaña on that first day. The remainder of the evidence was presented before a panel comprised of the undersigned, Chief Judge David E. Estudillo, and Circuit Judge Lawrence J.C. VanDyke between June 5th and June 7th. This Memorandum of Decision deals only with the Section 2 claim. A separate order will be issued in *Garcia* regarding the Equal Protection claim.

Over the course of the *Soto Palmer* trial, the Court heard live testimony from 15 witnesses, accepted the deposition testimony of another 18 witnesses, considered as substantive evidence the reports of the parties' experts, admitted 548 exhibits into evidence, and reviewed the parties' excellent closing statements. Having heard the testimony and considered the extensive record, the Court concludes that LD 15 violates Section 2's prohibition on discriminatory results. The redistricting plan for the Yakima Valley region is therefore invalid, and the Court need not decide plaintiffs' discriminatory intent claim.

### A. Redistricting Process

Article I, § 2, of the United States Constitution requires that Members of the House of Representatives "be apportioned among the several States ... according to their respective Numbers." Each state's population is counted every ten years in a national census, and states rely on census data to apportion their congressional seats into districts. In

Washington, the state constitution provides for a bipartisan commission ("the Commission") tasked with redistricting state legislative and congressional districts. Wash. Const. art. II, § 43. The Commission consists of four voting members and one non-voting member who serves as the chairperson. 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.* A state statute sets forth specific requirements for the redistricting plan:

> (1) Districts shall have a population as nearly equal as is practicable, excluding nonresident military personnel, based on the population reported in the federal decennial census as adjusted by RCW 44.05.140.
>
> (2) To the extent consistent with subsection (1) of this section the commission plan should, insofar as practical, accomplish the following:
>
> > (a) District lines should be drawn so as to coincide with the boundaries of local political subdivisions and areas recognized as communities of interest. The number of counties and municipalities divided among more than one district should be as small as possible;
> >
> > (b) Districts should be composed of convenient, contiguous, and compact territory. Land areas may be deemed contiguous if they share a common land

> border or are connected by a ferry, highway, bridge, or tunnel. Areas separated by geographical boundaries or artificial barriers that prevent transportation within a district should not be deemed contiguous; and
>
> (c) Whenever practicable, a precinct shall be wholly within a single legislative district.
>
> (3) The commission's plan and any plan adopted by the supreme court under RCW 44.05.100(4) shall provide for forty-nine legislative districts.
>
> (4) The house of representatives shall consist of ninety-eight members, two of whom shall be elected from and run at large within each legislative district. The senate shall consist of forty-nine members, one of whom shall be elected from each legislative district.
>
> (5) The commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition. The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.

RCW 44.05.090.

The Commission must agree, by majority vote, to a redistricting plan by November 15 of the relevant

year,[4] at which point the Commission transmits the plan to the Legislature. RCW 44.05.100(1); Wash. Const. art. II, § 43(2). If the Commission fails to agree upon a redistricting plan within the time allowed, the task falls to the state Supreme Court. RCW 44.05.100(4). Following submission of the plan by the Commission, the Legislature has 30 days during a regular or special session to amend the plan

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[4] Though not relevant to the results analysis which ultimately resolves this case, the evidence at trial showed that the Commission faced and overcame a set of challenges unlike anything any prior Commission had ever faced. Not only did the COVID-19 pandemic prevent the Commissioners from meeting face-to-face, but the Commission's schedule was compressed by several months as a result of a delay in receiving the census data and a statutory change in the deadline for submission of the redistricting plan to the Legislature. In addition, the Commission was the first in Washington history to address the serious possibility that the VRA imposed redistricting requirements that had to be accommodated along with the traditional redistricting criteria laid out in Washington's constitution and statutes.

In addressing these challenges, the Commissioners pored over countless iterations of various maps and spreadsheets, held 17 public outreach meetings, consulted with Washington's 29 federally-recognized tribes, conducted 22 regular business meetings, reviewed VRA litigation from the Yakima Valley region, obtained VRA analyses, and considered thousands of public comments. Throughout the process, the Commissioners endeavored to reach a bipartisan consensus on maps which not only divided up a diverse and geographically complex state into 49 reasonably compact districts of roughly 157,000, but also promoted competitiveness in elections. The Court commends the Commissioners for their diligence, determination, and commitment to the various legal requirements that guided their deliberations, particularly the requirement that the redistricting "plan shall not be drawn purposely to favor or discriminate against any political party or group." Wash. Const. art. II, § 43(5); *see also* RCW 44.05.090(5).

by an affirmative two-thirds vote, but the amendment may not include more than two percent of the population of any legislative or congressional district. RCW 44.05.100(2). 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. RCW 44.05.100(3).

The redistricting plan as enacted in February 2022 contains a legislative district in the Yakima Valley region, LD 15, that has a Hispanic citizen voting age population ("HCVAP") of approximately 51.5%. Plaintiffs argue that, although Latinos form a slim majority of voting-age citizens in LD 15, the district nevertheless fails to afford Latinos equal opportunity to elect candidates of their choice given the totality of the circumstances, including voter turnout, the degree of racial polarized voting in the area, a history of voter suppression and discrimination, and socio-economic disparities that chill Latino political activity. Plaintiffs request that the redistricting map of the Yakima Valley region be invalidated under Section 2 of the VRA and redrawn to include a majority-HCVAP district in which Latinos have a real opportunity to elect candidates of their choice.

### B. Three-Part *Gingles* Framework

The Supreme Court evaluates claims brought under Section 2 using the so-called *Gingles* framework developed in *Thornburg v. Gingles*, 478 U.S. 30 (1986).[5] To prove a violation of Section 2,

[5] While voting rights advocates and many legal scholars feared that the Supreme Court would alter, if not invalidate, the

plaintiffs must satisfy three "preconditions." *Id.* at 50. First, the "minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Wisconsin Legislature v. Wisconsin Elections* Comm'n, 595 U.S. __, 142 S.Ct. 1245, 1248 (2022) (per curiam) (citing *Gingles*, 478 U.S. at 46–51). A district is reasonably configured if it comports with traditional districting criteria. *See Milligan*, 143 S.Ct. at 1503 (citing *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015)). "Second, the minority group must be able to show that it is politically cohesive," such that it could, in fact, elect a representative of its choice. *Gingles*, 478 U.S. at 51. The first two preconditions "are needed to establish that the minority has the potential to elect a representative of its own choice in some singlemember district." *Growe v. Emison*, 507 U.S. 25, 40 (1993). Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. "[T]he 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population." *Growe*, 507 U.S. at 40.

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existing analytical framework for Section 2 cases when it decided Allen v. *Milligan* in June 2023, the majority instead "decline[d] to recast our § 2 case law" and reaffirmed the *Gingles* inquiry "that has been the baseline of our § 2 jurisprudence for nearly forty years." 599 U.S. __, 143 S.Ct. 1487, 1507, 1508 (2023) (internal quotation marks and citation omitted).

If a plaintiff fails to establish the three preconditions "there neither has been a wrong nor can be a remedy." *Id.* at 40–41. If, however, a plaintiff demonstrates the three preconditions, he or she must also show that under the "totality of circumstances" the political process is not "equally open" to minority voters in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. Factors to be considered when evaluating the totality of circumstances include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction[;]
>
> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and]
>
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

*Gingles*, 478 U.S. at 36–37 (the "Senate Factors") (quoting S. Rep. 97-417, 28–29, 1982 U.S.C.C.A.N. 177, 206–07).

In applying Section 2, the Court must keep in mind the ill the statute is designed to redress. In 1986 and again in 2023, the Supreme Court explained that "[t]he 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 white voters to elect their preferred representatives." *Id.* at 47; *see also Milligan*, 143 S.Ct. at 1503. Where an electoral structure, such as the boundary lines of a legislative district, "operates to minimize or cancel out" minority voters' "ability to elect their preferred candidates," relief under Section 2 may be available. *Gingles*, 478 U.S. at 48; *Milligan*, 143 S.Ct. at 1503. "Such a risk is greatest 'where minority and majority voters consistently prefer different candidates' and where minority voters are submerged in a majority voting population that 'regularly defeat[s]' their choices." *Milligan*, 143 S.Ct. at 1503 (quoting *Gingles*, 478 U.S. at 48). Before courts can find a violation of Section 2, they must conduct "an intensely local appraisal" of the electoral structure at issue, as well as a "searching practical evaluation of the 'past and present reality.'" *Milligan*, 143 S.Ct. at 1503 (quoting *Gingles*, 478 U.S. at 79).[6]

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[6] In writing the majority opinion in *Milligan*, Chief Justice Roberts provides the historical context out of which the Voting Rights Act arose, starting from the end of the Civil War and going through the 1982 amendments to the statute. The primer chronicles the "parchment promise" of the Fifteenth Amendment, the unchecked proliferation of literacy tests, poll taxes, and "good-morals" requirements, the statutory effort to "banish the blight of racial discrimination in voting," the judiciary's narrow interpretation of the original VRA, and the corrective amendment proposed by Senator Bob Dole that reinvigorated the fight against electoral schemes that have a disparate impact on minorities even if there was no discriminatory intent. 143 S.Ct. at 1498–1501 (citation omitted). The summary is a forceful reminder that ferreting out racial discrimination in voting does not merely involve ensuring that minority voters can register to vote and go to the polls without hindrance, but also requires an evaluation of facially neutral electoral practices that have the effect of

### C. Numerosity and Geographic Compactness

It is undisputed that Latino voters in the Yakima Valley region are numerous enough that they could have a realistic chance of electing their preferred candidates if a legislative district were drawn with that goal in mind. Plaintiffs have shown that such a district could be reasonably configured. Dr. Loren Collingwood, plaintiffs' expert on the statistical and demographic analysis of political data, presented three proposed maps that perform similarly or better than the enacted map when evaluated for compactness and adherence to traditional redistricting criteria. The Commissioners and Dr. Matthew Barreto, an expert on Latino voting patterns with whom some of the Commissioners consulted, also created maps that would unify Latino communities in the Yakima Valley region in a single legislative district without the kind of "'tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find' them sufficiently compact." *Milligan*, 143 S.Ct. at 1504 (quoting *Singleton v. Merrill*, 582 F. Supp.3d 924, 1011 (N.D. Ala. 2022)). The State's redistricting and voting rights expert, Dr. John Alford, testified that plaintiffs' examples are "among the more compact demonstration districts [he's] seen" in thirty years. Tr. 857:11-14.

Intervenors take issue with the length and breadth of the demonstrative districts, arguing that because Yakima is 80+ miles away from Pasco, the Latino populations of those cities are "farflung segments of a racial group with disparate interests."

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keeping minority voters from the polls and/or their preferred candidates from office.

Dkt. # 215 at 16 (quoting *LULAC v. Perry*, 548 U.S. 399, 433 (2006)). But the evidence in the case shows that Yakima and Pasco are geographically connected by other, smaller, Latino population centers and that the community as a whole largely shares a rural, agricultural environment, performs similar jobs in similar industries, has common concerns regarding housing and labor protections, uses the same languages, participates in the same religious and cultural practices, and has significant immigrant populations. The Court finds that Latinos in the Yakima Valley region form a community of interest based on more than just race. While the community is by no means uniform or monolithic, its members share many of the same experiences and concerns regardless of whether they live in Yakima, Pasco, or along the highways and rivers in between.[7]

Plaintiffs have the burden under the first *Gingles* precondition to "adduce[] at least one illustrative map" that shows a reasonably configured district in which Latino voters have an equal opportunity to elect their preferred representatives. *Milligan*, 143 S.Ct. at 1512. They have done so.

### D. Political Cohesiveness

The second *Gingles* precondition focuses on whether the Latino community in the relevant area is politically cohesive, such that it would rally around a preferred candidate. *Milligan*, 143 S.Ct. at

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[7] Intervenors' political science expert, Dr. Mark Owens, raised the issue of disparate and therefore distinct Latino populations but acknowledged at trial that he does not know anything about the communities in the Yakima Valley region other than what the maps and data show.

1503. Each of the experts who addressed this issue, including Intervenors' expert, testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied. The one exception to this unanimous opinion was the 2022 State Senate race pitting a Latina Republican against a white Democrat. With regards to that election, Dr. Owens' analysis showed a 52/48 split in the Latino vote, which he interpreted as a lack of cohesion. Dr. Collingwood, on the other hand, calculated that between 60-68% of the Latino vote went to the white Democrat, a showing of moderate cohesion that was consistent with the overall pattern of racially polarized voting.[8] Despite this one point of disagreement in the expert testimony, the regardless of the vote count. Intervenors provide no support for the assertion that losses by a small margin are somehow excluded from the tally when determining whether there is legally significant bloc voting or whether the majority "usually" votes to defeat the

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[8] Dr. Owens also identified the 2020 Superintendent of Public Institutions race as something of an anomaly, noting that the Latino vote in the Yakima Valley region did not coalesce around the Democratic candidate, but rather around his Republican opponent. The question under the second *Gingles* precondition is whether Latino voters in the relevant area exhibit sufficient political cohesiveness to elect their preferred candidate – of any party or no party – if given the chance. As Dr. Barreto explained, a Latino preferred candidate is not necessarily the same thing as a Democratic candidate. In southern Florida, for example, an opportunity district for Latinos would have to perform well for Republicans rather than for Democrats. The evidence in this case shows that Latino voters have cohesively preferred a particular candidate in almost every election in the last decade, but that their preference can vary based on the ethnicity of the candidates and/or the policies they champion.

minority's preferred candidate. White bloc voting is "legally significant" when white voters "normally . . . defeat the combined strength of minority support plus white 'crossover' votes." *Gingles*, 478 at 56. Such is the case here.[9]

Finally Intervenors argue that because the Latino community in the Yakima Valley region generally prefers Democratic candidates, its choices are partisan and, therefore, the community's losses at the polls are not "on account of race or color" as required for a successful claim under Section 2(a). While the Court will certainly have to determine whether the totality of the circumstances in the Yakima Valley region shows that Latino voters have less opportunity than white voters to elect representatives of their choice on account of their ethnicity (as opposed to their partisan preferences), that question does not inform the political cohesiveness or bloc voting analyses. *See Milligan*, 143 S.Ct. at 1503 (describing the second and third *Gingles* preconditions without reference to the cause of the bloc voting); *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring) (finding that defendants cannot rebut statistical evidence of divergent racial voting patterns by offering evidence that the patterns may be explained by causes other than race, although the evidence may be relevant to the overall voter dilution inquiry); *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000)

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[9] Although small margins of defeat do not impact the cohesiveness and/or bloc voting analyses, the closeness of the elections is not irrelevant. As Dr. Alford suggests, it goes to the extent of the map alterations that may be necessary to remedy the Section 2 violation. It does not, however, go to whether there is or is not a Section 2 violation in the first place.

(noting that *Gingles* establishes preconditions, but they are not necessarily dispositive if other circumstances, such as political or personal affiliations of the different racial groups with different candidates, explain the election losses); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359, 361 (7th Cir. 1992) (assuming that plaintiffs can prove the three *Gingles* preconditions before considering as part of the totality of the circumstances whether electoral losses had more to do with party than with race); *but see LULAC v. Clements*, 999 F.2d 831, 856 (5th Cir. 1993) (finding that a white majority that votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate is legally significant under the third *Gingles* precondition only if based on the race of the candidate).

**F. Totality of the Circumstances**

"[A] plaintiff who demonstrates the three preconditions must also show, under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters." *Milligan*, 143 S.Ct. at 1503 (quoting *Gingles*, 478 U.S. at 45–46). Proof that the contested electoral practice – here, the drawing of the boundaries of LD 15 – was adopted with an intent to discriminate against Latino voters is not required. Rather, the correct question "is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Gingles*, 478 U.S. at 44 (quoting S. Rep. 97-417 at 28, 1982 U.S.C.C.A.N. at 206). In enacting Section 2, Congress recognized that

"voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Gingles*, 478 U.S. at 44 n.9 (quoting S. Rep. 97-417 at 40, 1982 U.S.C.C.A.N. at 218). The Court "must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors,'" i.e., the Senate Factors, *Gingles*, 478 U.S. at 44 (quoting S. Rep. 97–417, at 27, 1982 U.S.C.C.A.N. at 205), in order to determine whether the structure or practice is causally connected to the observed statistical disparities between Latino and white voters in the Yakima Valley region, *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012)). "[T]here is no requirement that any particular number of [the Senate Factors] be proved, or that a majority of them point one way or the other." *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97–417 at 29, 1982 U.S.C.C.A.N. at 209) (internal quotation marks omitted).

**1. History of Official Discrimination**

The first Senate Factor requires an evaluation of the history of official discrimination in the state or political subdivision that impacted the right of Latinos to register, to vote, or otherwise to participate in the democratic process. Plaintiffs provided ample historical evidence of discriminatory English literacy tests, English-only election materials, and at-large systems of election that prevented or suppressed Latino voting. In addition, plaintiffs identified official election practices and procedures that have prevented Latino voters in the Yakima Valley region from electing candidates of their choice as recently as the last few years. *See*

*Aguilar v. Yakima Cnty.*, No. 20-2-0018019 (Kittitas Cnty. Super. Ct.); *Glatt v. City of Pasco*, 4:16-cv-05108-LRS (E.D. Wash.); *Montes v. City of Yakima*, 40 F. Supp.3d 1377 (E.D. Wash. 2014). *See also Portugal*, 530 P.3d at 1006. While progress has been made towards making registration and voting more accessible to all Washington voters, those advances have been hard won, following decades of community organizing and multiple lawsuits designed to undo a half century of blatant anti-Latino discrimination.

Intervenors do not dispute this evidence, but argue that plaintiffs have failed to show that the "litany of past miscarriages of justice . . . work to deny Hispanics equal opportunity to participate in the political process today." Dkt. # 215 at 26. The Court disagrees. State Senator Rebecca Saldaña explained that historic barriers to voting have continuing effects on the Latino population. Seemingly small, everyday municipal decisions, like which neighborhoods would get sidewalks, as well as larger decisions about who could vote, were for decades decided by people who owned property.

> And so the people that are renters, the people that are living in labor camps, would not be allowed to have a say in those circumstances. So there's a bias towards land ownership, historically, and how lines are drawn, who gets to vote, who gets to have a say in their democracy. If you don't feel like you can even have a say about sidewalks, it creates a barrier for you to actually believe that your vote would matter, even if you could vote.

Trial Tr. at 181. This problem is compounded by the significant percentage of the community that is ineligible to vote because of their immigration status or who face literacy and language barriers that prevent full access to the electoral process. "[A]ll of these are barriers that make it harder for Latino voters to be able to believe that their vote counts [or that they] have access to vote." Trial Tr. at 182. In addition, both Senator Saldaña and plaintiff Susan Soto Palmer testified that the historic and continuing lack of candidates and representatives who truly represent Latino voters – those who are aligned with their interests, their perspectives, and their experiences – continues to suppress the community's voter turnout. Trial Tr. at 182 and 296. There is ample evidence to support the conclusion that Latino voters in the Yakima Valley region faced official discrimination that impacted and continues to impact their rights to participate in the democratic process.

**2. Extent of Racially Polarized Voting**

As discussed above, voting in the Yakima Valley region is racially polarized. The Intervenors do not separately address Senate Factor 2, which the Supreme Court has indicated is one of the most important of the factors bearing on the Section 2 analysis.

**3. Voting Practices That May Enhance the Opportunity for Discrimination**

Three of the experts who testified at trial opined that there are voting practices, separate and apart

from the drawing of LD 15's boundaries, that may hinder Latino voters' ability to fully participate in the electoral process in the Yakima Valley region. First, LD 15 holds its senate election in a non-presidential (off) election year. Drs. Collingwood, Estrada, and Barreto opined that Latino voter turnout is at its lowest in off-year elections, enlarging the turnout gap between Latino and white voters in the area. Second, Dr. Barreto indicated that Washington uses at-large, nested districts to elect state house representatives, a system that may further dilute minority voting strength. *See Gingles*, 478 U.S. at 47. Third, Dr. Estrada testified that the ballots of Latino voters in Yakima and Franklin Counties are rejected at a disproportionally high rate during the signature verification process, a procedure that is currently being challenged in the United States District Court for the Eastern District of Washington in *Reyes v. Chilton*, No. 4:21-cv-05075-MKD.

Intervenors generally ignore this testimony and the experts' reports, baldly asserting that there is "no evidence" of other voting practices or procedures that discriminate against Latino voters in the Yakima Valley region. Dkt. # 215 at 27. The State, for its part, challenges only the signature verification argument. It appears that Dr. Estrada's opinion that Latino voters are disproportionately impacted by the process is based entirely on an article published on Crosscut.com which summarized two other articles from a non-profit organization called Investigate West. While it may be that experts in the fields of history and Latino voter suppression would rely on facts asserted in secondary articles when developing their opinions,

the Court need not decide the admissibility of this opinion under Fed. R. Ev. 703. Even without considering the possibility that the State's signature verification process, as implemented in Yakima and Franklin Counties, suppresses the Latino vote, plaintiffs have produced unrebutted evidence of other electoral practices that may enhance the opportunity for discrimination against the minority group.

**4. Access to Candidate Slating Process**

There is no evidence that there is a candidate slating process or that members of the minority group have been denied access to that process.

**5. Continuing Effects of Discrimination**

Senate Factor 5 evaluates "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37. Intervenors do not dispute plaintiffs' evidence of significant socioeconomic disparities between Latino and white residents of the Yakima Valley region, but they assert that there is no evidence of a causal connection between these disparities and Latino political participation. The assertion is belied by the record. Dr. Estrada opined that decades of discrimination against Latinos in the area has had lingering effects, as evidenced by present-day disparities with regard to income, unemployment, poverty, voter participation,

education, housing, health, and criminal justice. He also opined that the observed disparities hinder and limit the ability of Latino voters to participate fully in the electoral process. Trial Tr. at 142 ("And all these barriers compounded, they limit, they hinder Latinos' ability to participate in the political process. If an individual is already struggling to find a job, if they don't have a bachelor's degree, can't find employment, maybe are also having to deal with finding child care, registering to vote, voting is not necessarily one of their priorities."); *see also* Trial Tr. at 182 (Senator Saldaña noting that the language and educational barriers Latino voters face makes it hard for them to access the vote); Trial Tr. at 834-86 (Mr. Portugal describing the need for decades of advocacy work to educate Latino voters about the legal and electoral processes and to help them navigate through the systems). In addition, there is evidence that the unequal power structure between white land owners and Latino agricultural workers suppresses the Latino community's participation in the electoral process out of a concern that they could jeopardize their jobs and, in some cases, their homes if they get involved in politics or vote against their employers' wishes. Senate Factor 5 weighs heavily in plaintiffs' favor.

**6. Overt or Subtle Racial Appeals in Political Campaigns**

Assertions that "non-citizens" are voting in and affecting the outcome of elections, that white voters will soon be outnumbered and disenfranchised, and that the Democratic Party is promoting immigration as a means of winning elections are all race-based

appeals that have been put forward by candidates in the Yakima Valley region during the past decade. Plaintiffs have also provided evidence that a candidate campaigned against the Fourteenth Amendment's guarantee that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States," a part of U.S. law since 1868. Political messages such as this that avoid naming race directly but manipulate racial concepts and stereotypes to invoke negative reactions in and garner support from the audience are commonly referred to as dog-whistles. The impact of these appeals is heightened by the speakers' tendencies to equate "immigrant" or "non-citizen" with the derogatory term "illegal" and then use those terms to describe the entire Latino community without regard to actual facts regarding citizenship and/or immigration status.

Intervenors take the position that illegal immigration is a fair topic for political debate, and it is. But the Senate Factors are designed to guide the determination of whether "the political processes leading to nomination or election in the . . . political subdivision are not equally open to participation by members of" the Latino community. *Gingles*, 478 U.S. at 36 (quoting Section 2). If candidates are making race an issue on the campaign trail – especially in a way that demonizes the minority community and stokes fear and/or anger in the majority – the possibility of inequality in electoral opportunities increases. As recognized by the Senate when enacting Section 2, such appeals are clearly a circumstance that should be considered.

### 7. Success of Latino Candidates

This Senate Factor evaluates the extent to which members of the minority group have been elected to public office in the jurisdiction, a calculation made more difficult in this case by the fact that the boundaries of the "jurisdiction" have moved over time. The parties agree, however, that in the history of Washington State, only three Latinos were elected to the state Legislature from legislative districts that included parts of the Yakima Valley region. That is a "very, very small number" compared to the number of representatives elected over time and considering the large Latino population in the area. Trial Tr. at 145 (Dr. Estrada testifying). Even when the boundaries of the "jurisdiction" are reduced to county lines, Latino candidates have not fared well in countywide elections: as of the time of trial, only one Latino had ever been elected to the three-member Board of Yakima County Commissioners, and no Latino had ever been elected to the Franklin County Board of Commissioners.[10]

The Court finds two other facts in the record to be relevant when evaluating the electoral success of Latino candidates in the Yakima Valley region. First, State Senator Nikki Torres, one of the three Latino candidates elected to the state legislature,

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[10] Intervenors criticize Dr. Estrada for disregarding municipal elections, but the Section 2 claim is based on allegations that the boundaries of LD 15 were drawn in such a way that it cracked the Latino vote, a practice that is virtually impossible in a single polity with defined borders and a sizeable majority. That Latino candidates are successful in municipal elections where they make up a significant majority of an electorate that cannot be cracked has little relevance to the Section 2 claim asserted here.

was elected from LD 15 under the challenged map. Her election is a welcome sign that the race-based bloc voting that prevails in the Yakima Valley region is not insurmountable. The other factor is not so hopeful, however. Plaintiff Soto Palmer testified to experiencing blatant and explicit racial animosity while campaigning for a Latino candidate in LD 15. Her testimony suggests not only the existence of white voter antipathy toward Latino candidates, but also that Latino candidates may be at a disadvantage in their efforts to participate in the political process if, as Ms. Soto Palmer did, they fear to campaign in areas that are predominately white because of safety concerns.

**8. Responsiveness of Elected Officials**

Senate Factor 8 considers whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of Latinos in the Yakima Valley region. Members of the Latino community in the area testified that their statewide representatives have not supported their community events (such as May Day and Citizenship Day), have failed to support legislation that is important to the community (such as the Washington Voting Rights Act, healthcare funding for undocumented individuals, and the Dream Act), do not support unions and farmworker rights, and were dismissive of safety concerns that arose following the anti-Latino rhetoric of the 2016 presidential election. Ms. Lopez and Ms. Soto Palmer have concluded that their representatives in the Legislature simply do not care about Latinos and

often vote against the statutes and resources that would help them.

Senator Saldaña, who represents LD 37 on the west side of the state, considers herself a "very unique voice" in the Legislature, one that she uses to help her fellow legislators understand how their work impacts the people of Washington. Trial Tr. 173. When she first went to Olympia as a student advocating for farmworker housing, she realized that the then-senator from LD 15 was not supportive of or advocating for the issues she was hearing were important to the Yakima Valley Latino community, things like farmworker housing, education, dual-language education, access to healthcare, access to counsel, and access to state IDs. Senator Saldaña testified that Latinos from around the state, including the Yakima Valley, seek meetings with her, rather than their own representatives, to discuss issues that are important to them.

Plaintiffs also presented expert testimony on this point. Dr. Estrada compared the 2022 legislative priorities of Washington's Latino Civic Alliance ("LCA") to the voting records of the legislators from the Yakima Valley region. LCA sent the list of bills the community supported to the legislators ahead of the Legislative Day held in February 2022. The voting records of elected officials in LD 14, LD 15, and LD 16 on these bills are set forth in Trial Exhibit 4 at 75-76. Of the forty-eight votes cast, only eight of them were in favor of legislation that LCA supported.

The Intervenors point out that the Washington State Legislature has required an investigation into racially-restrictive covenants, has funded a Spanish-language radio station in the Yakima Valley, and

has enacted a law making undocumented students eligible for state college financial aid programs. Even if one assumes that the elected officials from the Yakima Valley region voted for these successful initiatives, Intervenors do not acknowledge the years of community effort it took to bring the bills to the floor or that these three initiatives reflect only a few of the bills that the Latino community supports.

**9. Justification for Challenged Electoral Practice**

The ninth Senate Factor asks whether the reasons given for the redrawn boundaries of LD 15 are tenuous. They are not. The four voting members of the redistricting Commission testified at trial that they each cared deeply about doing their jobs in a fair and principled manner and tried to comply with the law as they understood it to the best of their abilities. The boundaries that were drawn by the bipartisan and independent commission reflected a difficult balance of many competing factors and could be justified in any number of rational, nondiscriminatory ways.

**10. Proportionality**

Section 2(b) specifies that courts can consider the extent to which members of a protected class have been elected to office in the jurisdiction (an evaluation performed under Senate Factor 7), but expressly rejects any right "to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). The Supreme Court recently made clear that

application of the *Gingles* preconditions, in particular the geographically compact and reasonably configured requirements of the first precondition, will guard against any sort of proportionality requirement. *Milligan*, 143 S.Ct. at 1518.

Other Supreme Court cases evaluate proportionality in a different way, however, comparing the percentage of districts in which the minority has an equal opportunity to elect candidates of its choice with the minority's share of the CVAP. It is, after all, possible that despite having shown racial bloc voting and continuing impacts of discrimination, a minority group may nevertheless hold the power to elect candidates of its choice in numbers that mirror its share of the voting population, thereby preventing a finding of voter dilution. *See Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994). In *De Grandy*, the Supreme Court acknowledged the district court's *Gingles* analysis and conclusions in favor of the minority population, but found that the Hispanics of Dade County, Florida, nevertheless enjoyed equal political opportunity where they constituted 50% of the voting-age population and would make up supermajorities in 9 of the 18 new legislative districts in the county. In those circumstances, the Court could "not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity." *De Grandy*, 512 U.S. at 1014. The Supreme Court subsequently held that the proportionality check should look at equality of opportunity across the entire state as part of the analysis of whether the redistricting at issue dilutes

the voting strength of minority voters in a particular legislative district. *LULAC v. Perry*, 548 U.S. 399, 437 (2006).[11]

The proportionality inquiry supports plaintiffs' claim for relief under Section 2 even if evaluated on a statewide basis. Although Latino voters make up between 8 and 9% of Washington's CVAP, they hold a bare majority in only one legislative district out of 49, or 2%. Given the low voter turnout rate among Latino voters in the bare-majority district, Latinos do not have an effective majority anywhere in the State. They do not, therefore, enjoy roughly proportional opportunity in Washington.

Intervenors argue that the proportionality inquiry must focus on how many legislative districts are represented by at least one Democrat, whom Latino voters are presumed to prefer. From that number, Intervenors calculate that 63% of

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[11] The Court notes that the record in *Perry* showed "the presence of racially polarized voting – and the possible submergence of minority votes – throughout Texas," and it therefore made "sense to use the entire State in assessing proportionality." 548 U.S. at 438. There is nothing in the record to suggest the presence of racially polarized voting throughout Washington, and almost all of the testimony and evidence at trial focused on the totality of the circumstances in the Yakima Valley region. A statewide assessment of proportionality seems particularly inappropriate here where the interests and representation of Latinos in the rural and agricultural Yakima Valley region may diverge significantly from those who live in the more urban King and Pierce Counties. Applying a statewide proportionality check in these circumstances "would ratify 'an unexplored premise of highly suspect validity: that in any given voting jurisdiction ..., the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class.'" *Perry*, 548 U.S. at 436 (quoting *De Grandy*, 512 U.S. at 1019).

Washington's legislative districts are Latino "opportunity districts" as defined in *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). The cited discussion defines "majority-minority districts," "influence districts," and "crossover districts," however, and ultimately concludes that a district in which minority voters have the potential to elect representatives of their own choice – the key to the Section 2 analysis – qualifies as a majority-minority district. *Bartlett*, 556 U.S. at 15. As discussed in Perry, then, the proper inquiry is "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." 548 U.S. at 426. *See also Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000) (describing "proportionality" as "the relation of the number of majority-Indian voting districts to the American Indians' share of the relevant population). The fact that Democrats are elected to statewide offices by other voters in other parts of the state is not relevant to the proportionality evaluation.[12]

Regardless, the Court finds that, in the circumstances of this case, the proportionality check does not overcome the other evidence of Latino vote dilution in LD 15. The totality of the circumstances factors "are not to be applied woodenly," *Old Person*, 230 F.3d at 1129, and "the degree of probative value assigned to proportionality may vary with other facts," *De Grandy*, 512 U.S. at 1020. In this case, the distinct history of and economic/social conditions

[12] Intervenors also suggest that a comparison of the statewide Latino CVAP with the number of Latino members of the state Legislature is the appropriate way to evaluate proportionality. No case law supports this evaluative method.

facing Latino voters in the Yakima Valley region make it particularly inappropriate to trade off their rights in favor of opportunity or representation enjoyed by others across the state. The intensely local appraisal set forth in the preceding sections shows that the enactment of LD 15 has diluted the Latino vote in the Yakima Valley region in violation of plaintiffs' rights under Section 2. "[B]ecause the right to an undiluted vote does not belong to the minority as a group, but rather to its individual members," the wrong plaintiffs have suffered is remediable under Section 2. *Perry*, 548 U.S. at 437.

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The question in this case is whether the state has engaged in line-drawing which, in combination with the social and historical conditions in the Yakima Valley region, impairs the ability of Latino voters in that area to elect their candidate of choice on an equal basis with other voters. The answer is yes. The three *Gingles* preconditions are satisfied, and Senate Factors 1, 2, 3, 5, 6, 7, and 8 all support the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates. While a detailed evaluation of the situation in the Yakima Valley region suggests that things are moving in the right direction thanks to aggressive advocacy, voter registration, and litigation efforts that have brought at least some electoral improvements in the area,[13] it remains the case that

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[13] As Ms. Soto Palmer eloquently put it in response to the Court's questioning:

the candidates preferred by Latino voters in LD 15 usually go down in defeat given the racially polarized voting patterns in the area.

Intervenors make two additional arguments that are not squarely addressed through application of the *Gingles* analysis. The first is that the analysis is inapplicable where the challenged district already contains a majority Latino CVAP, and the Court should "simply hold that, as a matter of sound logic, Hispanic voters have equal opportunity to participate in the democratic process and elect candidates as they choose." Dkt. # 215 at 13. The Supreme Court has recognized, however, that "it

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> So I agree with you, there is progress being made. But I believe that many in my community would like to get to a day where we don't have to advocate so hard for the Latino and Hispanic communities to be able to fairly and equitably elect someone of their preference, so that we can work on other things that will benefit all of us, such as healthcare for all, and other things that are really important, like income inequality, and so forth. . . . So it is my hope that every little step of the way, anything I can do to help us get there, that is why I'm here.

Trial Tr. at 307-08. Mr. Portugal similarly pointed out that while incremental improvement in political representation is possible, it will not come without continued effort on the part of the community:

> I think with advocacy and being able to continue organizing, and not give up, because it's a lot of things that we still have, in a lot of areas that are affecting our community, to get to the point where we can have some great representation. So, yes, [things can slowly improve] – they will continue, but we need to – we cannot let the foot off the gas . . . .

Trial Tr. at 842.

may be possible for a citizen voting-age majority to lack real electoral opportunity," *Perry*, 548 U.S at 428, and the evidence shows that that is the case here. A majority Latino CVAP of slightly more than 50% is insufficient to provide equal electoral opportunity where past discrimination, current social/economic conditions, and a sense of hopelessness keep Latino voters from the polls in numbers significantly greater than white voters. Plaintiffs have shown that a geographically and reasonably configured district could be drawn in which the Latino CVAP constitutes an effective majority that would actually enable Latinos to have a fair and equal opportunity to obtain representatives of their choice. That is the purpose of Section 2, and creating a bare, ineffective majority in the Yakima Valley region does not immunize the redistricting plan from its mandates.

Intervenors' second argument is that plaintiffs have not been denied an equal opportunity to elect candidates of their choice because of their race or color, but rather because they prefer candidates from the Democratic Party, which, as a matter of partisan politics, is a losing proposition in the Yakima Valley region. Party labels help identify candidates that favor a certain bundle of policy prescriptions and choices, and the Democratic platform is apparently better aligned with the economic and social preferences of Latinos in the Yakima Valley region than is the Republican platform. Intervenors are essentially arguing that Latino voters should change the things they care about and embrace Republican policies (at least some of the time) if they hope to

enjoy electoral success.[14] But Section 2 prohibits electoral laws, practices, or structures that operate to minimize or cancel out minority voters' ability to elect their preferred candidates: the focus of the analysis is the impact of electoral practices on a minority, not discriminatory intent towards the minority. *Milligan*, 143 S.Ct. at 1503; *Gingles*, 478 at 47-48 and 87. There is no indication in Section 2 or the Supreme Court's decisions that a minority waives its statutory protections simply because its needs and interests align with one partisan party over another.

Intervenors make much of the fact that Justice Brennan was joined by only three other justices when opining that "[i]t is the difference between the choices made by blacks and white – not the reasons for that difference – that results in blacks having less opportunity than whites to elect their preferred representatives." *Gingles*, 478 U.S. at 63. But Justice O'Connor disagreed with Justice Brennan on this point only because she could imagine a very specific situation in which the reason for the divergence between white and minority voters could be relevant to evaluating a claim for voter dilution. Such would be the case, she explained, if the "candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made the candidate the preferred choice of the minority group." *Gingles*, 478

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[14] As noted above in n.8, there is evidence in the record that Latino voters in the Yakima Valley region did coalesce around a Republican candidate in the 2020 Superintendent of Public Institutions race. Intervenors do not acknowledge this divergence from the normal pattern, nor do they explain how it would impact their partisanship argument.

U.S. at 100. In that situation, the oddity that made the candidate unpalatable to the white majority would presumably not apply to another minority-preferred candidate who might then "be able to attract greater white support in future elections," reducing any inference of systemic vote dilution. *Gingles*, 478 U.S. at 100. There is no evidence that Latino-preferred candidates in the Yakima Valley region are rejected by white voters for any reason other than the policy/platform reasons which made those candidates the preferred choice, and there is no reason to suspect that future elections will see more white support for candidates who support unions, farmworker rights, expanded healthcare, education, and housing options, etc. Especially in light of the evidence showing significant past discrimination against Latinos, on-going impacts of that discrimination, racial appeals in campaigns, and a lack of responsiveness on the part of elected officials, plaintiffs have shown inequality in electoral opportunities in the Yakima Valley region: they prefer candidates who are responsive to the needs of the Latino community whereas their white neighbors do not. The fact that the candidates identify with certain partisan labels does not detract from this finding.

For all of the foregoing reasons, the Court finds that the boundaries of LD 15, in combination with the social, economic, and historical conditions in the Yakima Valley region, results in an inequality in the electoral opportunities enjoyed by white and Latino voters in the area. The Clerk of Court is directed to enter judgment in plaintiffs' favor on their Section 2 claim. The State of Washington will be given an opportunity to adopt revised legislative district maps

for the Yakima Valley region pursuant to the process set forth in the Washington State Constitution and state statutes, with the caveat that the revised maps must be fully adopted and enacted by February 7, 2024.

The parties shall file a joint status report on January 8, 2024, notifying the Court whether a reconvened Commission was able to redraw and transmit to the Legislature a revised map by that date. If the Commission was unable to do so, the parties shall present proposed maps (jointly or separately) with supporting memoranda and exhibits for the Court's consideration on or before January 15, 2024. Regardless whether the State or the Court adopts the new redistricting plan, it will be transmitted to the Secretary of State on or before March 25, 2024, so that it will be in effect for the 2024 elections.

Dated this 10th day of August, 2023.

/s/ Robert S. Lasnik
United States District Judge

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

SUSAN SOTO PALMER, et al.,
Plaintiffs,

v.

STEVEN HOBBS, et al.,
Defendants.

and

JOSE TREVINO, et al.,
Intervenor-Defendants.

**JUDGMENT IN A CIVIL CASE**
CASE NUMBER: 3:22-cv-05035-RSL

**Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.
THE COURT HAS ORDERED THAT:
Judgment is entered in favor of Plaintiffs on their Section 2 claim. The Court retains jurisdiction over the adoption of the new redistricting plan as set forth in the Memorandum of Decision.
DATED this 11th day of August, 2023.

RAVI SUBRAMANIAN,
Clerk of the Court
By: */s/ Victoria Ericksen*
Deputy Clerk

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**

SUSAN SOTO PALMER, et al.,
Plaintiff(s),

v.

JOSE TREVINO, et al.,
Intervenor-Defendants.

and

STEVEN HOBBS, et al.,
Defendant(s).

**NOTICE OF CIVIL APPEAL**
CASE NUMBER: 3:22-cv-05035-RSL

Notice is hereby given that Jose Trevino, Alex Ybarra and Ismael Campos appeals to the United States Court of Appeals for the Ninth Circuit from Judgment in a Civil Case entered in this action on 08/11/2023

Dated: 09/08/2023

Andrew R. Stokesbary
Chalmers, Adams, Backer & Kaufman LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
(206) 813-9322

/s/ Andrew R. Stokesbary

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

SUSAN SOTO PALMER, et al.,
Plaintiffs,
v.

STEVEN HOBBS, et al.,
Defendants.
and

JOSE TREVINO, et al.,
Intervenor-Defendants.

**ORDER**
CASE NO. 3:22-cv-05035-RSL

On August 10, 2023, the Court found that the boundaries of Washington Legislative District 15, in combination with the social, economic, and historical conditions in the Yakima Valley region, results in an inequality in the electoral opportunities enjoyed by white and Latino voters in the area. Judgment was entered in plaintiffs' favor on their Section 2 Voting Rights Act claim, and the State of Washington was given an opportunity to adopt revised legislative district maps for the Yakima Valley region pursuant to the process set forth in the Washington State Constitution and state statutes. When news reports indicated that the Majority Caucus Leaders of both houses of the Washington State Legislature had declined to reconvene the bipartisan redistricting

commission, the State was directed to file a status report notifying the Court of the Legislature's position. Having reviewed the State's submission and the responses of plaintiffs and the Minority Caucus Leaders, the Court finds as follows:

Given the practical realities of the situation as revealed by the submissions of the interested parties, the Court will not wait until the last minute to begin its own redistricting efforts. If, as the Minority Caucus Leaders hope, the Legislature is able to adopt revised legislative maps for the Yakima Valley region in a timely manner, the Court's parallel process, set forth below, will have been unnecessary. The likelihood that that will happen has lessened significantly since the Court issued its Memorandum of Decision, however. Establishing earlier deadlines for the presentation of alternative remedial proposals will allow a more deliberate and informed evaluation of those proposals.

The parties shall meet and confer with the goal of reaching a consensus on a legislative district map that will provide equal electoral opportunities for both white and Latino voters in the Yakima Valley regions, keeping in mind the social, economic, and historical conditions discussed in the Memorandum of Decision. If the parties are unable to reach agreement, they shall (a) further confer regarding nominees to act as Special Master to assist the Court in the assessment of proposed remedial plans and to make modifications to those plans as necessary and (b) file alternative remedial proposals and nominations on the following schedule:

December 1, 2023 -- Deadline for the parties[1] to submit remedial proposals,[2] supporting memoranda, and exhibits (including expert reports). December 1, 2023 – Deadline for the parties to jointly identify three candidates for the Special Master position (including their resumes/CVs, a statement of interest, availability, and capacity) and to provide their respective positions on each candidate.

December 22, 2023 – Deadline for the parties to submit memoranda and exhibits (including rebuttal expert reports) in response to the remedial proposals.

January 5, 2024 – Deadline for the parties to submit memoranda and exhibits (including sur-rebuttal expert reports) in reply.

IT IS SO ORDERED

Dated this 4th day of October, 2023.

/s/ Robert S. Lasnik
United States District Judge

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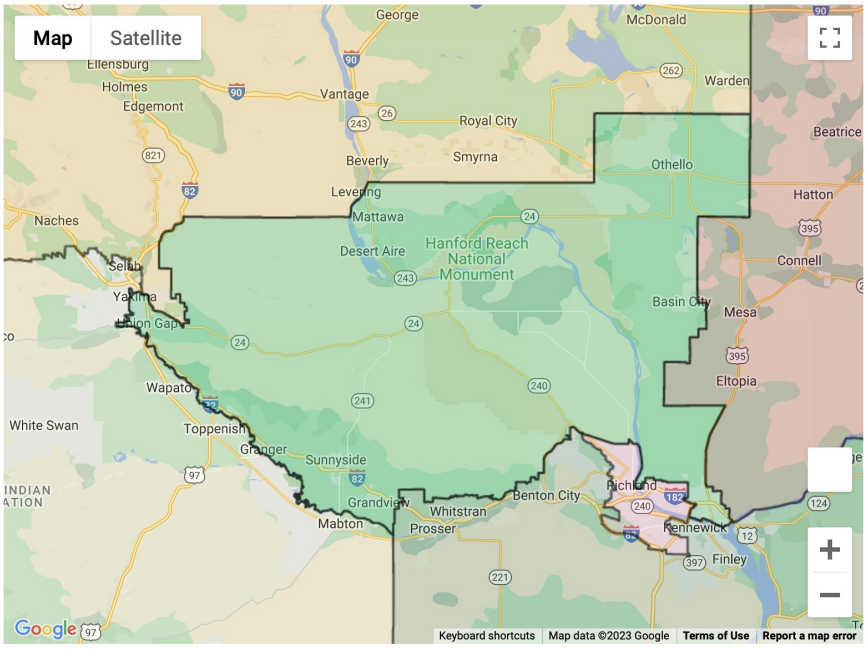
[1] No party has identified an individual or entity that has unique information or perspective that could help the Court beyond the assistance that the parties and their lawyers are able to provide, nor have they shown any other justification for the allowance of amicus briefs.

[2] The parties shall discuss the format and functionality of the remedial proposals, but the Court generally favors plaintiffs' suggestions that the maps include important roadways, important geographical markers, and voting precinct boundaries, that the maps be in a zoomable pdf format, and that the proposals include demographic data (e.g., total population per district and race by district of total population and citizen voting age population). Contemporaneous with the filing, all counsel of record shall be provided shapefiles, a comma separated value file, or an equivalent file that is sufficient to load the proposed plan into commonly available mapping software.

# EXHIBIT 22

Map District Type:

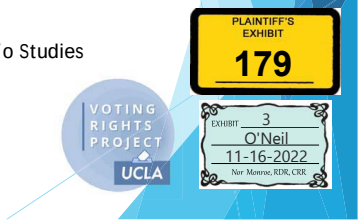
**Legislative** **Congressional**



October 19, 2021

# Assessment of voting patterns in Central / Eastern Washington and Review of Federal Voting Rights Act, Section 2 issues

Dr. Matt Barreto, UCLA Political Science & Chicana/o Studies
Faculty Director of the UCLA Voting Rights Project
matt@uclavrp.org 909.489.2955

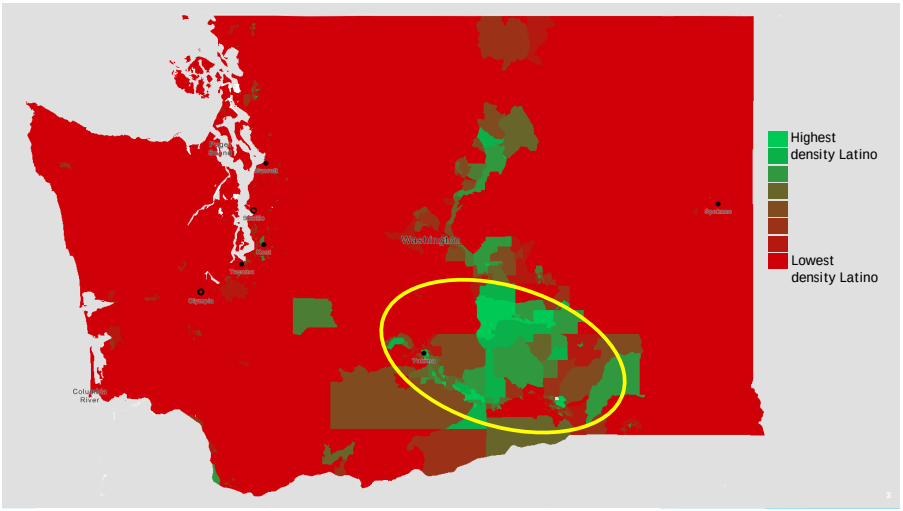


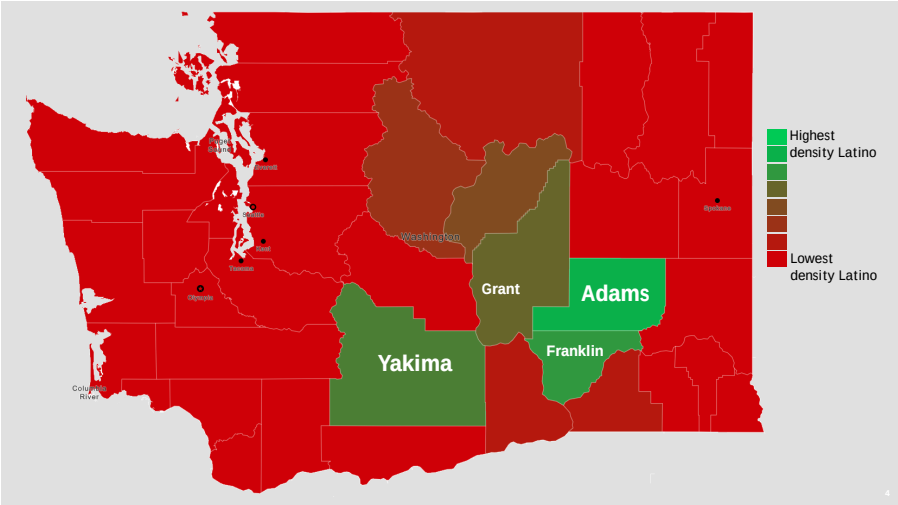
## Current Landscape in Washington

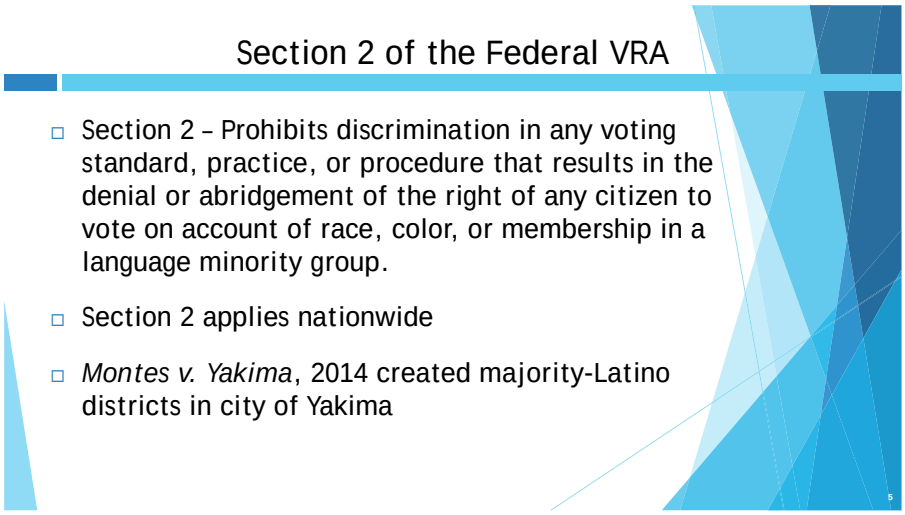
- Washington state Latino population surpassed 1 Million in 2020, now stands at 1,059,213, 12th largest of any state

| | 2010 | 2020 | Growth |
|---|---|---|---|
| Total | 6,724,540 | 7,705,281 | 980,741 (14.5%) |
| Latino | 755,790 | 1,059,213 | 303,423 (40.1%) |
| Non-Latino | 5,900,00 | 6,700,000 | 677,318 (11.3%) |

- The growth has been especially large in the Yakima Valley region and is quite concentrated


Highest density Latino
Lowest density Latino


Highest density Latino
Lowest density Latino
Grant
Adams
Yakima
Franklin


Section 2 of the Federal VRA
Section 2 – Prohibits discrimination in any voting standard, practice, or procedure that results in the denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group.
Section 2 applies nationwide
*Montes v. Yakima*, 2014 created majority-Latino districts in city of Yakima
5

## Section 2 of the Federal VRA

Section 2(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

## Section 2 of the Federal VRA

- Specifically, the VRA Section 2 prohibits districting plans that use racial gerrymandering to dilute minority rights to meaningful opportunity to elect candidates of choice
- Has been used by Black, Latino, AAPI, Native American, White plaintiffs to challenge districting schemes that draw lines in a way that "crack" or divide their population so it is too small to have influence
- State redistricting plans must comply with the Federal Voting Rights Act

## The Gingles Test: Factor 1

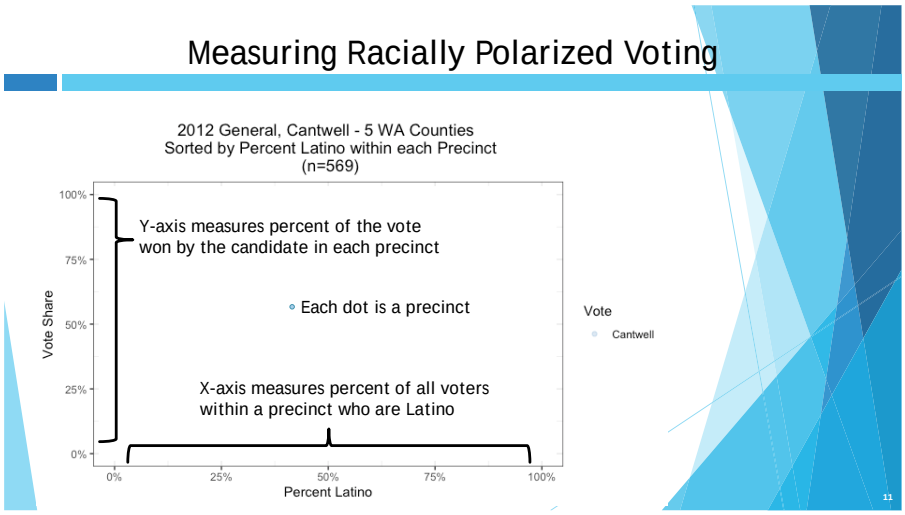
- Is the minority group sufficiently large and geographically compact to constitute a district?
- Can a sufficiently large and geographically contiguous district be drawn that will allow minority group to elect a candidate of their choice?
  - This is established using information from the Census Bureau and Statewide voter file
    - Decennial Census, ACS 1-year or 5-year for CVAP, Voter Reg Rates
  - District that is 50.1% or greater minority, among eligible voters

## The Gingles Test: Factors 2 – 3

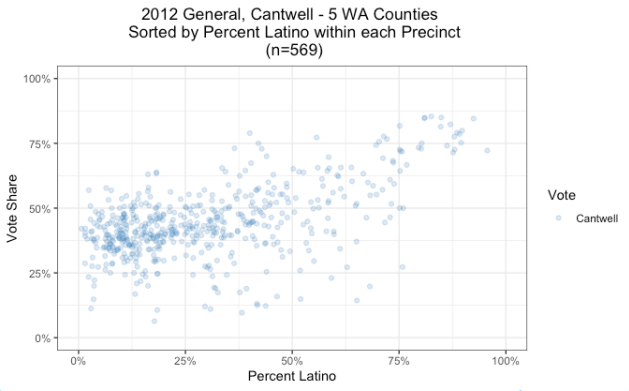
- Minority voters are politically cohesive in supporting their candidate of choice
- Majority votes in a bloc to usually defeat minority's preferred candidate
- This requires an analysis of voting patterns by race/ethnicity
  - Question the courts will ask us to answer is: Is there evidence of "racially polarized voting"?

## Defining Racially Polarized Voting

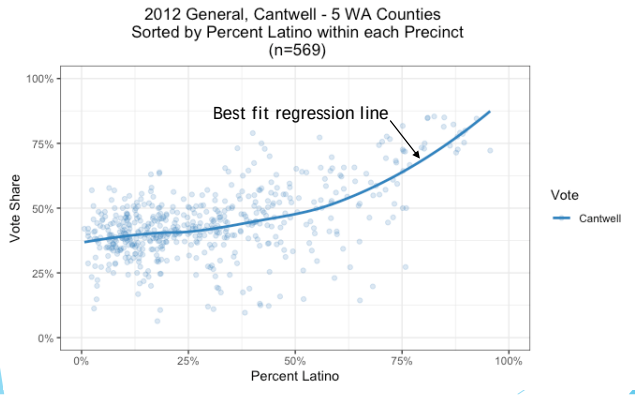
- Racially polarized voting exists when voters of different racial or ethnic groups exhibit very different candidate preferences in an election.
- It means simply that voters of different groups are voting in polar opposite directions, rather than in a coalition.
- RPV does not necessarily mean voters are racist, it only measures the outcomes of voting patterns and determines whether patterns exist based on race/ethnicity


Measuring Racially Polarized Voting
2012 General, Cantwell - 5 WA Counties
Sorted by Percent Latino within each Precinct
(n=569)
Y-axis measures percent of the vote
won by the candidate in each precinct
Each dot is a precinct
X-axis measures percent of all voters
within a precinct who are Latino
Vote Share
100%
75%
50%
25%
0%
0%
25%
50%
75%
100%
Percent Latino
Vote
Cantwell
11

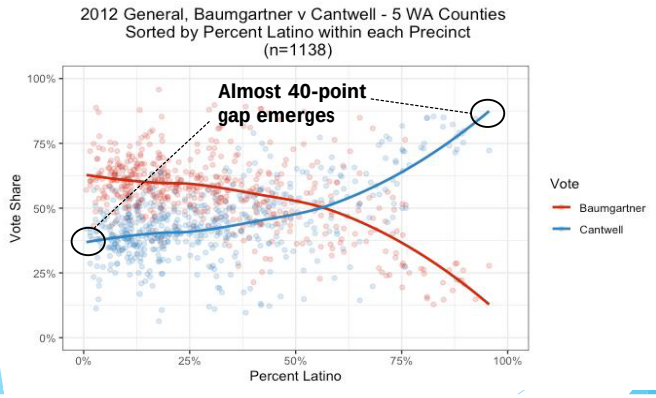
## Measuring Racially Polarized Voting



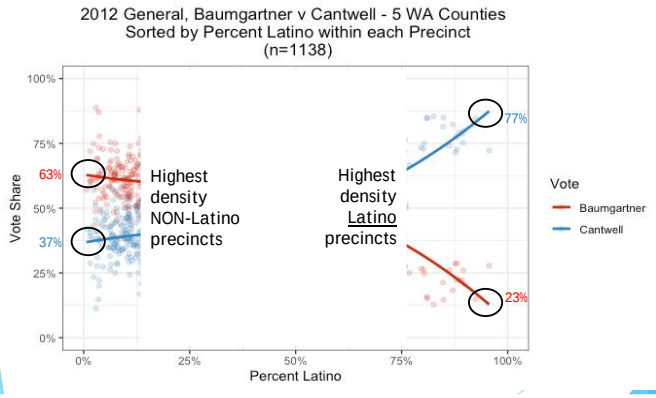
## Measuring Racially Polarized Voting



## Measuring Racially Polarized Voting

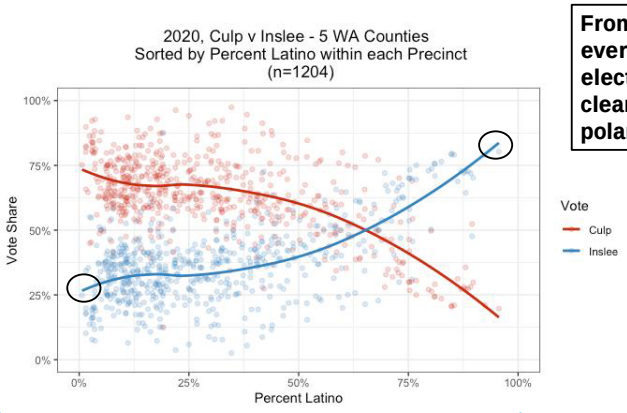


## Measuring Racially Polarized Voting




15

## Voting Patterns in Yakima Valley Region: 2020




**From 2012 to 2020 – every single major election analyzed shows clear pattern of racially polarized voting**

## Evaluating Different Maps

- Latest analysis is crystal clear – there is a strong finding of racially polarized voting in this 5-county region
  - Federal Court agreed in *Montes* lawsuit 2014, State Court agreed in WVRA Yakima County settlement in 2021
- Question for maps are the following:

1. Is it possible to create a majority-CVAP Latino district in the Yakima Valley region?

2. Do the proposed maps dilute or crack Latino voting strength?

3. Do the proposed maps "perform" to allow election of Latino candidates of choice, or will Latino-favored candidates lose?

4. What is the strongest Latino performing map that is VRA-compliant and not dilutive?

## Evaluating Different Maps

- House Republicans – Commissioner Graves
  - https://washington.mydistricting.com/legdistricting/comments/plan/1185/15
  - Text-book "cracking" of Latino population into 3 districts (14, 15, 16)
  - Latino Total Pop: 14th = 37% / 15th = 54% / 16th = 41%
  - Latino CVAP: 14th = 22% / 15th = 34% / 16th = 23%
- Senate Republicans – Commissioner Fain
  - https://washington.mydistricting.com/legdistricting/comments/plan/1186/15
  - Obvious racial gerrymander/cracking, likely an "intent" finding
  - Text-book "cracking" of Latino population into 4 districts (13, 14, 15, 16)
  - Latino Total Pop: 13th = 33% / 14th = 23% / 15th = 55% / 16th = 42%
  - Latino CVAP: 13th = 16% / 14th = 13% / 15th = 34% / 16th = 23%

18

## Evaluating Different Maps

- House Democrats – Commissioner Sims
  - https://washington.mydistricting.com/legdistricting/comments/plan/1182/15
  - Latino Total Pop: 15th = 65% / 16th = 48%
  - Latino CVAP: 15th = 45% / 16th = 28%
  - TODAY Latino CVAP: 15th = 47.6%
- Senate Democrats – Commissioner Piñero Walkinshaw
  - https://washington.mydistricting.com/legdistricting/comments/plan/1183/15
  - Latino Total Pop: 14th = 61% / 15th = 34%
  - Latino CVAP: 14th = 40% / 15th = 16%
  - TODAY Latino CVAP: 14th = 43.2%

19

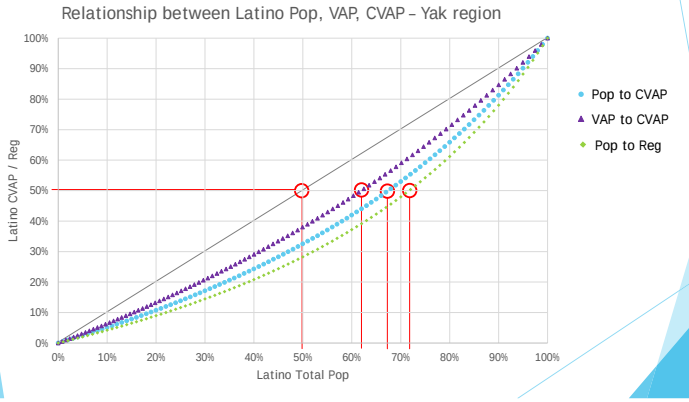
## Comparing Latino Pop, VAP, CVAP & Reg

- Total Population is used to balance all Senate districts across the state to the same total population size
  - Courts allow a total population deviation of 10% from largest to smallest district
- However, Citizen Voting Age Population (CVAP) is required by the Courts to establish a performing VRA-compliant district

Majority-Latino Population DOES NOT WORK. Courts have recognized this.

- For Latinos in the Yakima Valley 37% are UNDER 18 and can not vote
- For Whites in this same region, 17% are UNDER 18 and can not vote
- For Latino Adults, 40% are not currently U.S. citizens and can not vote
- In Yakima County 125,816 Total Latinos → 76,989 Adults → 46,611 Citizen Adults
- In Yakima County 105,255 Total Whites → 86,584 Adults → 85,629 Citizen Adults

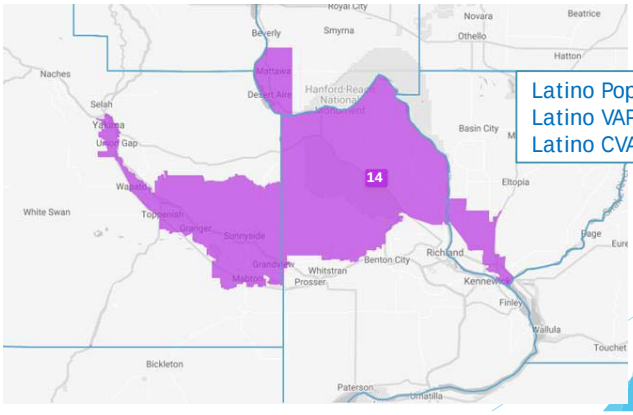
# Comparing Latino Pop, VAP, CVAP & Reg

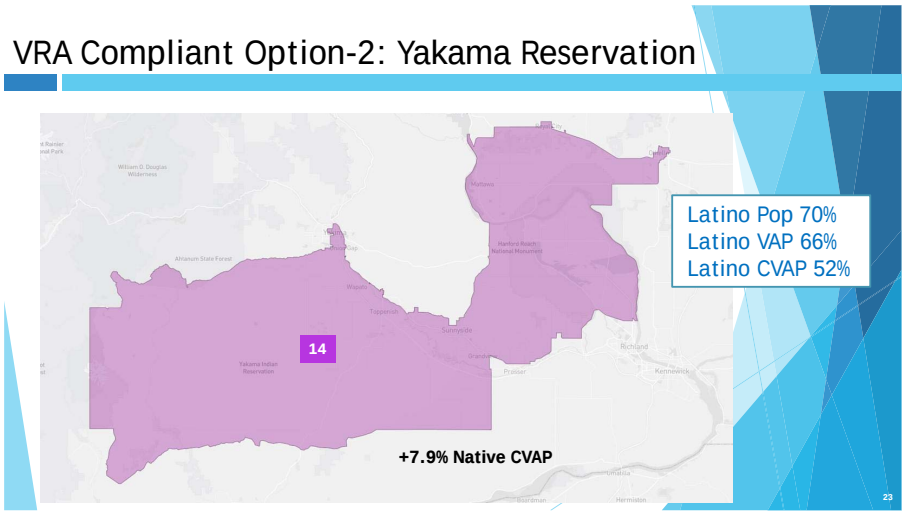



Based on 2019 1-year ACS VAP and Citizenship for Latinos in Yakima Region

21

## VRA Compliant Option-1: Yakima-Columbia River Valley




VRA Compliant Option-2: Yakama Reservation
Latino Pop 70%
Latino VAP 66%
Latino CVAP 52%
14
+7.9% Native CVAP
23

## Evaluating Different Maps

| District Plan | Latino Pop | Latino CVAP '19 | Latino CVAP now | Predict Dem | Predict Rep | Biden '20 margin |
|---|---|---|---|---|---|---|
| Graves | 54 | 34 | 35.9 | 38 | 62 | -8,925 |
| Fain | 55 | 34 | 36.1 | 43 | 57 | -2,833 |
| Sims | 65 | 45 | 47.6 | 50 | 50 | 4,607 |
| Walkinshaw | 61 | 40 | 43.2 | 52 | 48 | 6,299 |
| Yak-Rez | 70 | 52 | 54.5 | 54 | 45 | 8,104 |
| Yak-Col Riv | 76 | 58 | 60.4 | 59 | 40 | 11,375 |

* Partisan scores based on Campaign Legal Center election analysis and reconstituted precincts into proposed districts by Dr. Barreto


THANK YOU
Dr. Matt Barreto, UCLA Political Science & Chicana/o Studies
Faculty Director of the UCLA Voting Rights Project
matt@uclavrp.org 909.489.2955

Davis Wright Tremaine LLP

Suite 3300
920 Fifth Avenue
Seattle, WA 98104-1610

**Robert J Maguire**
**Harry JF Korrell**
**David Nordlinger**

**MEMORANDUM**

To: Commissioners Graves and Fain, Washington Redistricting Commission
From: Rob Maguire, Harry Korrell, and David Nordlinger
Date: November 4, 2021
Subject: Legal Analysis of Arguments Regarding Creation of a Majority-Minority District

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## I. INTRODUCTION

You asked us to evaluate Dr. Matt Barreto's Assessment of Voting Patterns in Central / Eastern Washington and Review of Federal Voting Rights Act, Section 2 Issue ("the Assessment"), dated October 19, 2021, proposing a majority-minority district be drawn in a five-county region. Since then, both Democratic Commissioners have proposed revised maps including the "Yakama Reservation" district suggested by the Assessment. This memorandum responds to the arguments pressed by the Assessment, summarizes the law regarding the creation of majority-minority districts, and discusses some of the evidence courts have considered in evaluating to majority-minority districts under the Equal Protection Clause of the U.S. Constitution. As we discussed, our analysis is predominantly legal, rather than factual, and we have not endeavored to conduct factual research regarding demographic trends, voting behavior, election results, or the other factual assertions in the Assessment.

## II. SUMMARY

§ 2 does not require the creation of the majority-minority district advocated by the Assessment. The Assessment advocates creation of a new majority-minority legislative district spread across a five-county region in Central and Eastern Washington, arguing that doing so is required by § 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("§ 2"). As explained below, the Assessment's arguments have fundamental flaws. Contrary to the Assessment's assertions, § 2 does not require the creation of the proposed majority-minority district.

If this district is challenged under the Equal Protection Clause of the Constitution, a court will likely review the State's decision to draw this district with strict scrutiny. While creation of a majority-minority district is not required, § 2 and the Equal Protection Clause of the U.S. Constitution allow states to create majority-minority districts, provided that traditional, race-

neutral districting criteria are not "subordinated" to race. Courts adjudicating Equal Protection Clause challenges to the creation of majority-minority districts look at several categories of evidence in deciding whether a redistricting plan is so predominantly race-based that it triggers "strict scrutiny" under the Equal Protection Clause: the shape of the district, direct evidence (testimony and contemporaneous communications) of legislative intent, and the data used to evaluate and draw potential districts. In this case, there is strong direct evidence that race is the predominant motivating factor for this proposed district, and so a court will likely adjudicate an Equal Protection Clause challenge to this district by applying strict scrutiny. There has been no critical analysis of the Assessment despite members of the Commission redrawing their maps on the basis of race. For example, both districts proposed by the Assessment set an approximate 60% minority CVAP threshold, yet the Commissions has not asked whether approximately 60% CVAP is needed to give Latino voters a functional majority. This lack of questioning of the Assessment will not survive strict scrutiny.

The Commission lacks a strong basis in evidence to believe the State would be in violation of § 2 unless it draws a district on the basis of race. The Assessment does not establish violations of the three *Gingles* preconditions. As an initial matter, both the "Yakima-Columbia River Valley" and the "Yakama Reservation" districts are not compact. The districts take slices from four and five counties respectively. They both have tortured shapes that include finger-like extensions into certain Latino-communities, and they divide communities of interest, particularly the Hanford Site from the Tri-Cities. As to the second *Gingles* precondition, the Assessment has not made a sufficient showing that Latino voters at the precinct level across the five-county region will form a coalition when voting for a state representative. Additionally, as the "Yakama Reservation" district intends to form a coalition of Latino and Native American voters, there must be a heightened level of scrutiny. Again, no such analysis of the proposed coalition has been conducted by the Commission. Finally, the third *Gingles* precondition is not met because a race-neutral, Democrat-leaning district can readily be created in Yakima County. There can be no § 2 liability where a race-neutral district can prevent legally significant racial bloc voting. The Assessment shows that the Democratic Commissioners have already proposed race-neutral, Democrat-leaning districts; and the Republican Commissioners contend that their proposed maps similarly create competitive districts in the region. Because § 2 does not require these proposed majority-minority districts, if one of the two districts is drawn in the final map it should not survive strict scrutiny.

## III. THE PROPOSED MAJORITY-MINORITY DISTRICT

The Assessment advocates the creation of a majority-minority legislative district spanning at least four counties across Central and Eastern Washington. The Assessment argues that there is a growing, concentrated Latino population in a five-county region of Central Washington, that a sufficiently large and contiguous majority-minority Latino district can be drawn, and that there is racially polarized voting in this five-county region. Therefore, the Assessment states that § 2 of the Voting Rights Act compels a minority-majority district and the only way to comply with this requirement is to draw a district that has a Latino citizen voting age population (CVAP) over 50%. It proposes an option of two majority-minority Latino districts: (1) "Yakima-Columbia River Valley" with a 60% Latino CVAP; and (2) "Yakama Reservation" with a 52% Latino CVAP plus a 7.8% Native American CVAP. Both Democratic Commissioners revised their

proposed maps to include the "Yakama Reservation" district without any changes. There are fundamental flaws with the Assessment's arguments as well as strong concerns regarding the swift manner in which the Assessment's map was adopted without critical questioning.

The fact that it is possible to create the proposed district does not mean it is required by § 2. *See Johnson v. DeGrandy*, 512 U.S. 997 (1994) (maximization of majority-minority districts not required by VRA). For § 2 to require the creation of a majority-minority district, it must be the case that Washington would violate § 2 if it failed to create such a district. *See Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009) (plurality opinion) (rejecting state's claim that creation of minority crossover district was justified where state could not demonstrate violation of § 2 in absence of such a district). The analytical framework for such a claim is well-established, *see, e.g.*, NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010, 54-64 (Nov. 2009); BRUCE M. CLARKE & ROBERT TIMOTHY REAGAN, REDISTRICTING LITIGATION: AN OVERVIEW OF LEGAL, STATISTICAL, AND CASE-MANAGEMENT ISSUES, 14-18 (2002), and the Assessment has not demonstrated that creation of either one of its proposed districts is necessary to avoid a violation of § 2.

To establish that §2 would be violated in the absence of a new majority-minority district, a party must show (1) that the minority group is sufficiently large and geographically compact to constitute a majority in the district, (2) that the minority group is politically cohesive, and (3) that bloc voting by the white majority usually defeats the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752 (1986). If these three necessary preconditions are not satisfied, there is no violation of § 2. *Bartlett*, 55 U.S. at 10, 129 S. Ct. 1231 ("only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances"). If a plaintiff challenging under §2 meets its burden as to all three *Gingles* preconditions, then a court will look at the totality of the circumstances to determine if "as a result of the challenged practice or structure, [the minorities at issue] do not have an equal opportunity to participate in the political process and to elect candidates of their choice." *Gingles*, 478 U.S. at 44, 106 S. Ct. 2752. Only then would a court determine that there has been a violation of § 2. *E.g.*, *Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075 (1993).

The Assessment calls for the creation of a district predominantly motivated by race, and as such a court should review with strict scrutiny if a plaintiff makes an Equal Protection Clause challenge. It lacks the deep, fact-specific analysis required to assess § 2 violation claims and is wrong that the three *Gingles* preconditions are satisfied.

(1) Race is the Predominant Motivating Factor in Drawing this District and A Court will Likely Review the Decision to Draw this District with Strict Scrutiny

The Equal Protection Clause bars redistricting on the basis of race without sufficient justification. *Abbott v. Perez*, 138 S. Ct. 2305, 2314, 201 L. Ed. 2d 714 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641, 113 S. Ct. 2816 (1993)). Given that the Voting Rights Act often compels the consideration of race in redistricting, the intentional creation of majority-minority districts does not necessarily violate the Equal Protection Clause. *Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941 (1996); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd in part,*

*appeal dismissed in part*, 515 U.S. 1170, 115 S. Ct. 2637 (1995). However, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination . . . ." *Miller v. Johnson*, 515 U.S. 900, 904, 115 S. Ct. 2475 (1995) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 98 S. Ct. 2733 (1978) (opinion of Powell, J.)).

In reviewing an Equal Protection Clause challenge to a redistricting decision, courts will apply a two-step analysis. First, a plaintiff challenging under the Equal Protection Clause bears the burden of proving that race was the predominant motivating factor in drawing the district. *Vera*, 517 U.S. at 959, 116 S. Ct. 1941; *Hunt v. Cromartie*, 526 U.S. 541, 547, 119 S. Ct. 1545 (1999). There are three principal categories of evidence at a plaintiff's disposal to make this showing: (1) district shape and demographics, (2) testimony and correspondence stating the legislative motives, and (3) the nature of the data used. *See Shaw v. Hunt*, 517 U.S. 899, 905, 116 S. Ct. 1894 (1996); *Vera*, 517 U.S. at 961-63, 116 S. Ct. 1941; *Miller*, 515 U.S. at 916, 115 S. Ct. 2475.

Second, if a court finds that race was the predominant motivating factor in drawing the district, the burden shifts to the state to prove that the proposed district serves a compelling interest and is narrowly tailored. *Cooper v. Harris*, 137 S. Ct. 1455, 1464, 197 L. Ed. 2d 837 (2017). Simply put, the state's decision to draw district lines predominantly on the basis of race must withstand strict scrutiny. It is well established that compliance with § 2 is a compelling state interest. *Abbott*, 138 S. Ct. at 2315, 201 L. Ed. 2d 714 (citing *Bethune-Hill v. Virginia State Bd. Of Election*, 137 S. Ct. 788, 800-01, 197 L. Ed. 2d 85 (2017); *Shaw II*, 517 U.S. at 915, 116 S. Ct. 1894). However, that does not relieve a state of its burden of showing its decision was narrowly tailored. For a state to meet its burden, it must show that it had a "strong basis in evidence" to conclude that § 2 required its action. *Cooper*, 137 S. Ct. at 1464, 197 L. Ed. 2d 837 (quoting *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278, 135 S. Ct. 1257, 1274 (2015)). A district drawn predominantly based on race is not narrowly tailored if a state does not carefully evaluate whether a §2 plaintiff could establish the *Gingles* preconditions in a new district created without race-based sorting. *Id.* at 1471. Additionally, a state's action must be narrowly tailored to remedy the anticipated harm and not go beyond that goal. *See Shaw I*, 509 U.S. at 655, 113 S. Ct. 2816 (stating that a reapportionment plan would not be narrowly tailored if it went beyond the goal of avoiding retrogression).

There is overwhelming, likely undisputed, direct evidence that race is the predominant motivating factor in drawing this district. On September 21, 2021, in anticipation of their November 15, 2021, deadline, all four Commissioners proposed legislative district maps. Not a single map contained either district proposed by the Assessment. On October 19, 2021, Dr Matt Barreto released the Assessment. Three days later, both the Democratic Commissioners stated their intent to provide new maps in response to the Assessment. Commissioner Walkinshaw stated, "I think for me, as the first ever Latino commissioner, it has been extremely important for me to lift up and elevate Hispanic voters, and undo patterns of racially polarized voting, particularly in the Yakima Valley." Melissa Santos, *Proposed WA redistricting maps may violate Voting Rights Act*, Crosscut (Oct. 21, 2021, 11:16 AM), https://crosscut.com/politics/2021/10/proposed-wa-redistricting-maps-may-violate-voting-rights-act. Both Commissioners proposed revised maps on October 25, 2021, including the Assessment's "Yakama Reservation" district without any major alterations to its boundaries.

Upon issuing revised maps, the Washington State Senate Democrats publicly stated that any new map "must include a majority-Hispanic district in the Yakima Valley or face a likely successful lawsuit in federal court for non-compliance with the federal Voting Rights Act[]." Senate Democrats, *Walkinshaw releases new VRA-Compliant Legislative map*, (Oct. 26. 21), https://senatedemocrats.wa.gov/blog/2021/10/26/following-new-analysis-commissioner-walkinshaw-releases-new-legislative-map-compliant-with-voting-rights-act/. Because race is the predominant motivating factor for this district, a Court will likely review the decision to draw this district with strict scrutiny.

As an initial matter, the speed with which Commissioners moved to draw a district solely on the basis of race is concerning. The Commissioners have not asked any questions of the Assessment's assertions, data, or proposals. As Justice Alito stated in *Abbott*, "one group's demands alone cannot be enough" because that group "may come to have an overly expansive understanding of what § 2 demands." 138 S. Ct at 2334, 201 L. Ed. 2d 714. It is beyond the purview of this memo to conduct statistical analysis, but there are at least four major question marks that the Commission has not assessed.

First, the approximate 60% minority CVAP threshold for the majority-minority district is unexplained. Both districts presented by the Assessment set an approximate 60% minority CVAP threshold. In the §5 context, the Supreme Court has been skeptical of percentage thresholds. *Compare Bethune-Hill*, 137 S.Ct. at 802, 197 L. Ed. 2d 85 (upholding a percentage threshold for one district where the legislature had a good reason to be fear retrogression if the black voting age population fell below 55%), *with Alabama Legislative Black Caucus*, 575 U.S. at 279, 135 S. Ct. 1257 (holding the legislature's plan was not narrowly tailored because its goal was to maintain a minority population percentage rather than ask what percentage was needed to maintain a minority's ability to elect candidates of its choice). The Assessment claims that not drawing this district will violate § 2's vote dilution prohibition. Yet, there has been no analysis that a 60% minority CVAP is needed to provide Latino voters a functional majority. In fact, Commissioner Walkinshaw's first proposed district would have voted for President Biden by a 6,299 margin despite a 43.2% Latino CVAP. The adoptions of an approximate 60% minority CVAP threshold without more analysis and questioning is arbitrary and not narrowly tailored.

Second, the "Yakama Reservation" district's boundaries are explicitly drawn to include both Latino and Native American voters; yet there has been no analysis presented for the combined bloc of Native Americans and Latino voters in the five-county region. The Assessment presented two options for a majority-minority district: (1)"Yakima-Columbia River Valley" with a 60% Latino CVAP; and (2) "Yakama Reservation" with a 52% Latino CVAP plus a 7.8% Native American CVAP. The Democratic Commissioners' current proposals include the "Yakama Reservation" district: combining Latino and Native American voters to get to that approximate 60% minority CVAP threshold. Even if there is good reason to believe there would be a § 2 violation as to Latino voters, that does not mean that the State can sort Native American voters into the district. Yet, there is no analysis regarding the combination of Latino and Native American voters. And while keeping the Yakama Reservation in one district is laudable, putting the Yakama Reservation in this proposed majority-minority district is neither a race-neutral decision nor a narrowly tailored remedy for any alleged § 2 violation suffered by Latino voters.

Third, the Assessment relied upon data from the 2019 American Community Survey (ACS) 1-year data set instead of the more recent and comprehensive 2020 Census data set. Generally, the ACS's goal is measuring changes in social and economic characteristics; the 2020 Census's goal is to provide counts of people for congressional apportionment. To that end, while the 2020 Census is a comprehensive assessment from all individuals in the United States, the 2019 ACS 1-year data derive from a sample of the population. The two data sets contain differences on highly relevant numbers to the § 2 analysis. Compared to the 2019 ACS 1-year data, 2020 Census data shows a higher Latino, and lower White, population in Yakima County. For example, the 2020 Census shows a Yakima County Latino population of 130,049 compared to 125,816 presented by the 2019 ACS 1-Year survey. The contours of the proposed majority-minority map depend on population numbers, which in turn depend on what dataset is used. But there has been no discussion as to why the "Yakama Reservation" district boundaries were not drawn using the 2020 Census data or what margins of error were accounted for when using the less comprehensive 2019 ACS 1-Year.

Fourth, the Assessment lacks the type of detailed local analysis required to adjudicate fact-dependent § 2 cases. The Assessment analyzes primarily statewide elections, but makes no showing whether those elections are consistent across all five counties in other elections. For example, the "Yakama Reservation" district includes current Legislative District 13, but there is no assessment whether Latino voters in Legislative District 13 vote in a bloc against Representative Ybarra. If Legislative District 13 voters do not suffer a § 2 violation, then it is unclear how including those voters in this district is narrowly tailored. This is just one example of the local analysis that the Commissioners lack to form a good reason to believe the State will face § 2 liability unless this district is drawn. And no doubt an expert could raise a number of additional questions about the assessment's data, or lack thereof; but that critical assessment has not been conducted by the Commission.

(2) The Assessment Does Not Demonstrate the Existence of a Geographically Compact Minority Group

A state cannot remedy a § 2 violation through the creation of a noncompact district. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 431, 126 S. Ct. 2594 (2006) (citing *Shaw II*, 517 U.S. at 916, 116 S. Ct. 1894). The Supreme Court has identified two critical concerns with relaxing the geographic compactness inquiry. First, there would be "serious constitutional concerns" by expanding the geographic area and forcing courts to predict political variables through race-based assumptions. *Bartlett*, 556 U.S. at 13, 129 S. Ct. 1231. Second, relaxing the geographic compactness inquiry creates the risk of substantially increasing the number of mandatory districts drawn predominantly with race in mind. *Id.* at 17 (quotations and citation omitted).

When analyzing whether a § 2 district is compact, a court will ask if "the proposed minority district reasonably comports with traditional districting principles such as contiguousness, population equality, maintaining communities of interest, respecting traditional boundaries, and providing protection to incumbents." *Montes v. City of Yakima*, 40 F.Supp.3d. 1377, 1392-93 (E.D.Wash. 2014). Courts consider the shape of the district in determining compactness. *See Shaw II*, 517 U.S. at 905-06, 116 S. Ct. 1894; *Cf. Kilbury v. Franklin Cty. ex rel. Bd. Of Cty.*

*Com'rs*, 151 Wash. 2d 552, 564, 90 P.3d 1071 (2004) ("as compact as possible does not mean as small in size as possible, but rather as regular in shape as possible.").

Both proposed districts have strained, non-compact shapes. The "Yakima-Columbia River Valley" district's shape is designed to capture three majority Latino populations: Yakima to Grandview along I82, Mattawa, and East Pasco. In order to include these Latino voters and exclude White voters, the district contains contortions on every boundary and contains three finger-like extensions. The shape cannot be explained by natural or artificial boundaries; evidenced by the fact it takes slices of four separate counties. The "Yakama Reservation" district, presently adopted by two Commissioners, is similarly strained. It contains large indents into both its northern and southern borders, such that it is essentially two districts separated by the Hanford Nuclear Site. The district's western portion is designed to include the Yakama Reservation, Yakima, and communities along I82; the district's north-east portion is designed to include Mattawa to Othello. Like the "Yakima-Columbia River" district, it contains a number of finger-like extensions into Othello, Wanapum Dam, and Yakima. The district is designed to avoid the most convenient route between Yakima and Mattawa; and instead adjoins the two districts by the Hanford Site. Again, this district's shape cannot be explained by natural or artificial boundaries: it slices from many separate counties, but fully incorporates no single county.

Both districts' strained shapes negatively impact surrounding districts. Proposed maps that incorporate the "Yakama Reservation" district show its implications on the Central and Eastern Washington area. For example, to accommodate this district, both Democrat Commissioners proposed maps that split the former Legislative District 13 between five other districts. Whereas Grant County is currently entirely incorporated into Legislative District 13, Commissioner Walkinshaw divides the County between four districts. These changes threaten incumbents in a number of surrounding districts. Yet, there has been no assessment whether a more narrowly tailored district can be drawn to accommodate these traditional districting principles.

Neither the "Yakima-Columbia River Valley" nor "Yakama Reservation" district can claim to maintain communities of interest. The districts divide a number of communities. The most jarring example is how both districts separate the Tri-Cities, especially Richland, from the Hanford Site. Inclusion of the Hanford Site in a majority-minority district does not seem to be necessary to remedy any § 2 violation: the 2020 Census data shows a very few Latino individuals live at the Hanford Site. As is well known, the Hanford Site is undergoing an extensive clean-up operation to remove contamination from its past nuclear operations. The Tri-Cities are located immediately down-river from the Site; and have a strong interest in its clean-up operations because they lay in the path of potential contamination. For decades this interest has been acknowledged and Richland's legislative district has included the Hanford Site. It defies traditional districting principles to strip Richland's representative from oversight of the Hanford Site. The only logical explanation for dividing the Hanford Site from Richland is that doing so makes both districts look less bizarre and non-compact. After all, the Hanford site is relatively large and sparsely populated. That cuts against the notion that either district is compact or narrowly tailored to remedy the alleged violation.

The proposed districts are prime examples of the Supreme Court's stated concern with expanding the acceptable geographic area in making a compactness determination. The two districts cross into a number of counties and cover distant rural and urban communities. Such districts will force courts to predict political variables through race-based assumptions and create the risk of substantially increasing the number of mandatory districts drawn with race in mind. *See Bartlett*, 556 U.S. at 13, 129 S. Ct. 1231. Ultimately, there has been no assessment whether the Commission can draw a compact, Democrat-leaning district in Yakima County. It appears that this is entirely possible and it must be explored prior to any decision to draw a majority-minority district.

3) The Assessment Does Not Demonstrate the Existence of a Politically Cohesive Minority Group or a Politically Cohesive Coalition of Minority Groups

The second *Gingles* requirement is the existence of a politically cohesive minority group. Minority political cohesion cannot be assumed but must be specifically proven. *E.g.*, *Growe*, 507 U.S. at 41, 113 S. Ct. 1075; *Gingles*, 478 U.S. at 46, 106 S.Ct. 2752; *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 372 (S.D.N.Y. 2004), *aff'd*, 543 U.S. 997, 125 S. Ct. 627 (2004). That burden is heavier when the proposed minority group is combined with an additional minority group. Assuming without deciding that a minority-coalition can satisfy *Gingles*, the "Supreme Court has instructed that, when voting rights claims are based on a combination of distinct ethnic and language minority groups, 'proof of minority political cohesion is all the more essential' and must be held to a 'higher-than-usual' standard." *Rodriguez*, 308 F. Supp. 2d at 443 (quoting *Growe*, 507 U.S. at 41, 113 S. Ct. 1075).

The Assessment's main thrust is that Latino voters form a cohesive group for Democratic Party candidates generally. In making this argument, the Assessment does not analyze local elections, instead it looks at statewide elections in which Latinos voted primarily for winning candidates. While the Assessment points to *Montes* and the 2021 WVRA Yakima County Settlement as evidence that Latino voters form a cohesive group (and that there is racially polarized voting), both proposed districts extend well beyond the Yakima County boundaries. Political cohesion cannot be assumed. There is no questioning whether these statewide elections are representative of local elections. There has been no showing that Latino voters in rural areas share preferences with Latino voters in urban areas in different counties. And there has been no evidence presented that Latino voters in the different legislative districts, including Representative Ybarra's district, all form one cohesive group.

To compound the problem of a lack of analysis, the "Yakama Reservation" district proposes a coalition of Latino and Native Americans to meet an approximate 60% minority CVAP threshold. A district drawn with the intent of combining two different minority groups –Latino and Native American voters – requires a heightened showing that Native American voters will form a cohesive group with Latino voters in the five-county area. *See Rodriguez*, 308 F. Supp. 2d at 421 ("plaintiffs have not proven that Hispanics and blacks in the Bronx have 'worked together and formed political coalitions'") (quoting *Concerned Citizens of Hardee Cty. v. Hardee Cty. Bd. Of Comm'rs*, 906 F.2d 524, 527 (11th Cir. 1990)). The Assessment does not address this coalition. And the Commission has not conducted additional analysis regarding whether Native American voters will form a coalition with Latino voters across the five-county region.

At present there cannot be a good reason to believe the second *Gingles* precondition has been met where the Commission has not conducted analysis, let alone particularized analysis, of the issue.

4) The Analysis Shows That a Democrat-Leaning District Can Be Drawn in the Region Using Traditional Race-Neutral Districting Principles

The Assessment suggests the third *Gingles* precondition is met if there is "racially polarized voting." However, the appropriate question is not whether there is statistically significant racial bloc voting, but whether there is "legally significant racial bloc voting." *Covington v. North Carolina*, 316 F.R.D. 117, 170-71 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017). Legally significant racial bloc voting occurs when the white majority group votes as a bloc "usually to defeat the minority's preferred candidate." *Growe*, 507 U.S. at 40, 113 S. Ct. 1075 (quoting *Gingles*, 478 U.S. at 50–51, 106 S. Ct. 2752). This analysis is both forward and backward looking. If either proposed district is drawn, the State will only survive strict scrutiny if it could show legally significant white bloc voting in a new, race-neutral district. *Cooper*, 137 S. Ct. at 1471, 197 L. Ed. 2d 837.

This proposed district will likely not survive strict scrutiny because a race-neutral, Democrat-leaning district can readily be drawn in Yakima County. The Assessment's message is clear that Latinos' preferred candidates are Democratic Party candidates generally. There is no indication or analysis that there are specific Latino-preferred candidates within the Democratic Party, or that there are local-preferred candidates that are not making it out of the Democratic Party primaries. Thus, if a new district in Yakima County, drawn by traditional districting principles, leans Democrat then that will negate legally significant racial bloc voting. Both Republican Commissioners believe they have already proposed competitive, race-neutral districts in the region; and, according to the Assessment, both Democrat Commissioners have already proposed race-neutral, Democrat districts. For example, Commissioner Walkinshaw's district would have had a 6,000 margin in favor of President Biden in the 2020 General election and the Assessment gives it a "Predict Dem" score of 52%. Because a Democratic district can be drawn in a race-neutral fashion, the third *Gingles* precondition cannot be met.

Additionally, the Assessment's data does not bear on the question of whether there is legally significant racial bloc voting. It references a number of elections, mostly by the Latino-preferred candidates. There is no analysis of legally significant bloc voting across the five-county region. Moreover, the data highlight racially polarized voting in homogenous precincts. There is no analysis at the precinct level, especially whether the homogenous precincts are representative of heterogenous precincts. The Commission cannot have strong reason to believe § 2 will be violated based on this brief analysis.

(5) There Has Been No Analysis of the Totality of the Circumstances Consideration

If a §2 plaintiff meets its burden of showing the presence of all three *Gingles* preconditions, a Court proceeds with a totality of the circumstances analysis. A plaintiff succeeds in making this showing if the evidence shows that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . 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." *Gingles*, 478 U.S. at 36, 106 S. Ct. 2752 (quoting 42 U.S.C. §1973). Courts have looked to a number of factors compiled in the Senate Judiciary Committee Majority Report that accompanied the bill.

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> "2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> "3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> "4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> "5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> "6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> "7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

*Gingles*, 478 U.S. at 36–37, 106 S. Ct. 2752 (quoting S.Rep., at 28–29, U.S.Code Cong. & Admin.News 1982, pp. 206–207.).

"[I]t 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 established a violation of § 2 under the totality of circumstance." *Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp.3d 368, 378 (S.D.N.Y. 2020), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021). But, § 2 does not "insulate minority candidates from defeat at the polls" and the totality of the circumstances analysis cannot merely be assumed. *Ibid*. There has been no evidence presented regarding the totality of the circumstances analysis. A number of factors weigh against creating this proposed district. For example, the Latino voters' preferred party has been entrenched in power at the state-level for quite some time. Presently, the Democratic Party controls the House, the Senate, and the Governor's Office; it also controls the Attorney General's Office. There should at least be an assessment of these factors before proposing a map based on race alone.

## IV. POTENTIAL LIABILITY FROM PARTISAN GERRYMANDERING

If a majority-minority Latino district is drawn, the surrounding districts must be drawn to maintain their present incumbents to avoid engaging in unlawful partisan gerrymandering. Washington Constitution Article II, §42 bans partisan gerrymandering:"[t]he commission's plan shall not be drawn purposely to favor or discriminate against any political party or group." Washington State Statute provides the Commissioners with the appropriate factors that they must consider in redistricting, including that "[t]he commission's plan shall not be drawn purposely to favor or discriminate against any political party or group." RCW 44.05.090(5). As the Supreme Court stated, partisan gerrymandering "is incompatible with democratic principles." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506, 204 L. Ed. 2d 931 (2019) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791, 135 S.Ct. 2652, 2658 (2015)).

Presently, the Democratic Party controls the Washington State House, Senate, and Governor's Office. Power is firmly entrenched -- Washington State has not been a Republican Governor since 1985. Yet, proposed maps that include the majority-minority district go beyond accommodating the district; they actively seek to weaken surrounding Republican incumbents. Districts in Central Washington are stretched to King County, Vancouver, and Spokane. The majority using redistricting to strip the minority party of a meaningful opportunity to compete in Washington State's political process is exactly what the Washington Constitution bans. If the Commission or Legislature puts forward such a partisan map, there is a high risk that it will be challenged in Court.

Opinion

The Seattle Times

# Why I resigned as chair of the redistricting commission

March 11, 2022 at 2:00 pm | *Updated March 11, 2022 at 2:42 pm*

Sarah Augustine resigned as chair of the Washington State Redistricting Commission.

By Sarah Augustine

*Special to The Times*

On Monday, I resigned as chair of the Washington State Redistricting Commission because the Secretary of State and the legislative leaders refuse to defend in federal court the

legislative district plan created by the independent commission.

By doing so, they refuse to defend the interests of thousands of those who engaged in the redistricting process that are reflected in the plan, and Washington state law. Their refusal to act undermines the legitimacy and independence of the commission, and therefore the process enshrined in our constitution. Worse, it undermines the values that drive the redistricting process in Washington state: Independence from political influence, collaboration and bipartisan compromise.

When I was asked to consider serving as chair, I agreed because, while we live in a time when our nation faces widening political polarization, I believe in democratic institutions. I believed that, by engaging voting commissioners in a process that asked them to serve the public good by rising above their own individual or political interests, we had an opportunity to demonstrate collective representation in action.

As chair, I prioritized engaging as many Washingtonians as possible in the process. Commission staff undertook the largest and most accessible outreach effort in redistricting history that resulted in more than 6,000 electronic comments, hundreds of thousands of engagements through social media and more than 400 state residents providing public testimony.

The 2021 redistricting commission was also the first to adopt a tribal consultation policy, guaranteeing constructive communication with federally recognized tribal governments, acknowledging tribal sovereignty and respecting the government-to-government relationship. The interests of thousands of individuals, communities and interest groups were heard by commissioners, and their interests are memorialized in the maps.

The four voting members of the redistricting commission arrived at consensus on final congressional and legislative redistricting plans, albeit late, and the House and the

Senate approved final plans on Feb. 2 and Feb. 8, respectively. These plans, and the final maps they contain, are now Washington state law.

Washington state is one of only a handful of states with an independent commission, where the minority and majority leaders of the Senate and the House each appoint one registered voter to the commission. To ensure the commission's independence, appointees must not have served in public office, or as an officer in a political party, in the two-year period preceding their tenure. Together, the four appointees are empowered to draw legislative and congressional boundaries across the state on behalf of all Washingtonians. For a redistricting plan to become the law, it must be affirmed by at least three voting commissioners, requiring bipartisan agreement.

This intentionally bipartisan process is meant to ensure a spirit of collaboration over partisanship, and compromise over winner-takes-all. It is Washington state's attempt to avoid gerrymandering, which occurs in states where the legislature draws the maps and the party that holds the majority in the legislature can draw boundaries to its political advantage.

There is a community that feels they must challenge the Washington legislative district map, specifically asking for the 15$^{th}$ and 14$^{th}$ districts to be redrawn. Their lawsuit is part of the due process guaranteed to all Americans, and I affirm the rights of the community seeking relief to be heard in federal court. However, by refusing to defend the legislative plan in question, Washington leaders undermine the values enshrined in it: Independence from political influence, bipartisan compromise and public engagement; they are dismissing the interests of thousands of those who engaged in the redistricting process that are reflected in the map.

The responsibility of the Secretary of State, Speaker of the House and Senate Majority leader is, I believe, to stand up for the process — and the independent bipartisan compromise reached, rather than seeking to gain political advantage through a redrawn district that ignores the enormous public input that influenced the compromise.

It has been suggested that the argument over the 15$^{th}$ and the 14$^{th}$ districts is a justice issue for vulnerable communities of color; a coalition of Latino voters believes the current district boundaries will not allow Latinos the chance to elect candidates of their choice. However, their suit directly demands splitting the Yakama Reservation by bringing towns on the Yakama Reservation into the 15$^{th}$ district, in direct opposition to the interests of the Yakama Nation reflected in the current plan. In government-to-

government consultation, the Yakama Nation required that Yakama territories be contained in one district. By refusing to defend the law, aren't Washington leaders hanging out to dry communities of color, like the Yakama Nation, whose interests are expressed in the final map?

If Washington leaders will not defend the interests expressed in the map, are individual community members who live in the 14th and 15th districts expected to do this? Do we expect communities of interest in this rural area to raise the cash for a defense of the law in federal court, when Washington state is obligated to do so? It appears this way to me.

Unfortunately, since many vulnerable communities of color will not have the opportunity to raise hundreds of thousands of dollars in a matter of weeks, their interests will go undefended. Meanwhile, contrary to the spirit of our redistricting framework, a political advantage may be gained through a court process without defendants, undermining faith in yet one more democratic process.

I did not sign up for that!

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