No. 23-467

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

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

JASON B. TORCHINSKY
Counsel of Record
PHILLIP M. GORDON
DREW C. ENSIGN
ANDREW PARDUE
CALEB ACKER
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
densign@holtzmanvogel.com
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

DALLIN B. HOLT
BRENNAN A. R. BOWEN
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
Esplanade Tower IV
2575 East Camelback Road
Suite 860
Phoenix, AZ 85016
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

ANDREW R. STOKESBARY
CHALMERS, ADAMS, BACKER
& KAUFMAN, LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
(206) 207-3920 (telephone)
dstokesbary@chalmersadams.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

This Court has "made clear that where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Abbott* v. *Perez*, 138 S. Ct. 2305, 2319 (2018) (citation omitted). So here. Mr. Garcia sought an injunction against Legislative District 15 ("LD-15") as an unconstitutional racial gerrymander. But rather than remedying or mooting those harms, the district court's order has exacerbated them. Accepting that racial gerrymander as a baseline, the single-judge district court in the related *Soto Palmer* case will now reshape LD-15's existing borders with more explicit race-based line-drawing. It will pile racial gerrymandering atop existing racial gerrymandering. That neither moots nor remedies Mr. Garcia's injuries. This Court has direct appellate jurisdiction to summarily reverse the judgment of dismissal below.

The State of Washington (the "State") never meaningfully grapples with the rules established by this Court in *Abbott* or in *Moore* v. *Harper*, 143 S. Ct. 2065 (2023), which establish this Court's appellate jurisdiction and this case's lack of mootness, respectively. Nor does the State even try to refute the cogent arguments on mootness in Judge VanDyke's dissent. That "silence is most eloquent." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266 (1979). Judge VanDyke's reasoning explaining why this action is not moot is thus both unassailable and, tellingly, not assailed.

Eschewing any serious discussion of this Court's on-point, recent precedents or the dissent below, the

State instead embraces as its foundation the baffling premise that Mr. Garcia "ha[s] already received the relief he sought." Wash.Mot.i. In the State's view, Mr. Garcia "has already obtained the relief he originally requested," *id.*, at 27, and "[t]he court below thus could not provide any further relief to Garcia[,]" *id.*, at 25. That is a nonsensical "position . . . 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*." App.27 (VanDyke, J., dissenting). Because the State's mootness argument ultimately boils down to a contention that intensifying Mr. Garcia's injuries cures and moots those harms, this Court can readily discard it. The district court's "cure" is not just worse than the disease; it is more of the very ill that Mr. Garcia's suit sought to eliminate.

This Court has appellate jurisdiction under *Abbott*, 138 S. Ct., at 2319 to declare this case not moot under *Moore*, 143 S. Ct., at 2077. Given the clarity of the error below, this Court should summarily reverse and remand for the three-judge district court to render a decision on the merits. See *Baker* v. *Carr*, 369 U. S. 186, 237 (1962).

1. Mr. Garcia did not, via proceedings in a separate statutory case to which he was not a party and which employs dissimilar legal standards, somehow receive the Equal Protection Clause relief he sought. The State's arguments on both the jurisdictional and mootness questions rest on the stunning premise that a finding of vote dilution under Section 2 of the Voting Rights Act ("VRA") and the ordering of race-based remedial maps remedy a separate claim of racial gerrymandering under the

Equal Protection Clause—that Mr. Garcia has "already received the relief he sought." Wash.Mot.i.

"But he didn't, of course." App.25 (VanDyke, J., dissenting). The State's essential conceit is that "*Soto Palmer* had resolved Garcia's asserted injury on statutory grounds." Wash.Mot.3. But Mr. Garcia advanced no statutory claims at all, and his constitutional claim was dismissed as moot. Mr. Garcia's claim was that LD-15, as is, was already racially gerrymandered in violation of the Equal Protection Clause, while the *Soto Palmer* plaintiffs' claim was effectively that LD-15 is insufficiently racially gerrymandered and thus violates the VRA. The district court's acceptance of the *Soto Palmer* plaintiffs' claim thus does nothing to remedy the "fundamental injury" that Mr. Garcia experiences from racial gerrymandering, see *Shaw* v. *Hunt*, 517 U. S. 899, 908 (1996), and, in fact, effectively guarantees that this injury will be compounded when remedial districts are drawn.

Put simply, Mr. Garcia did not seek to invalidate LD-15 as some sort of abstract legal challenge devoid of constitutional substance. Mr. Garcia's suit is to remedy a specific type of constitutional harm—the kind resulting from intentional race-based sorting. Specifically, Mr. Garcia sought an order from the district court that the State create a "new valid plan for legislative districts … that does not violate the Equal Protection Clause." See J.S.28. Mr. Garcia has, from his claim's genesis, asserted an individual constitutional right not to be gerrymandered on the basis of his ethnicity. See *Abbott*, 138 S. Ct., at 2314. The *Soto Palmer* district court has not provided even a scintilla of relief as to that injury. As the dissent explained, "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. Garcia requested the map be redrawn without violating the Equal Protection Clause." App.29 (VanDyke, J., dissenting) (citation omitted). That request for relief went "unfulfilled." *Id.*

Mr. Garcia and the *Soto Palmer* plaintiffs were not and are not on the same side. After all, a win for one is a loss for the other, because their objectives are diametrically opposed: Mr. Garcia seeks to have LD-15's lines drawn without the use of intentional race-based decision-making, while the *Soto Palmer* plaintiffs asked for a redrawing with even greater use of race (for the purpose, as their recent remedial proposals reveal, of electing more Democrats to the State Legislature). That both seek invalidation of LD-15 is a superficial similarity that vanishes upon any meaningful scrutiny as to the nature of the two divergent claims and the requested remedies paired with them.

This is a conflict that this Court recognizes: "compliance with the Voting Rights Act . . . pulls in the opposite direction" of the Equal Protection Clause because it "insists that districts be created precisely because of race." *Abbott*, 138 S. Ct., at 2314. As it currently stands, both VRA and Equal Protection Clause claims—and their respective accompanying prayers for equitable relief—can be made against the same map. But that in no way means that plaintiffs in each case seek the same relief or that their claims pull in the same direction. They do not, and the district court's contrary conclusion is precisely the sort of "manipulation" to

avoid this Court's appellate jurisdiction that this Court has refused to countenance. See *id*., at 2320.

Ultimately, the State's arguments rest on the facial contention that Mr. Garcia's "complaint asked that LD 15 be invalidated and redrawn. The *Soto Palmer* court ordered exactly that." Wash.Mot.2. It is the word "redrawn" that dooms the State's argument by raising the obvious question: Redrawn how? Mr. Garcia has been clear from his complaint up to now: Redrawn in a way "that does not violate the Equal Protection Clause" through racial classifications. See J.S.28. Instead, the district court ordered a redrawing with even greater use of race in the line-drawing. Remedies are not free-floating, unpaired things; they redress specific harms, not abstractions. That injunction in *Soto Palmer* did not provide Mr. Garcia "the relief he sought[,]" Wash.Mot.i, but rather ensured that his harms would both go unaddressed and be exacerbated to boot.

"As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox* v. *Serv. Emps. Int'l Union, Loc. 1000*, 567 U. S. 298, 307–308 (2012) (cleaned up). Here, Mr. Garcia's interest in being free from racial gerrymandering remains a live and acute interest. The district court's decision in *Soto Palmer* did not remedy the harm to that interest.

Because Judge VanDyke's conclusion that this case is not moot is correct (and all but ignored by the State), the district court's contrary order warrants summary reversal.

2. This appeal is controlled by *Abbott*, not *Gonzalez* v. *Automatic Emps. Credit Union*, 419 U. S. 90 (1974). "[W]here an order has the 'practical effect' of granting or denying an injunction, it should be

treated as such for purposes of appellate jurisdiction[]" under 28 U. S. C. § 1253. *Abbott*, 138 S. Ct., at 2319. This Court has already laid out the standard for when cases are within *Abbott*'s ambit: whether the district court's action "was the practical equivalent of an order denying an injunction and threatened serious and perhaps irreparable harm if not immediately reviewed." *Id*. (citing *Carson* v. *Am. Brands*, *Inc.*, 450 U. S. 79, 83–84, 86–90 (1981)). That is precisely the case here, and this Court has long ago crossed the bridge post-*Gonzalez* permitting appeals where that "practical effects" condition is satisfied.

It may be possible—based on *Carson*'s "serious" rule—that jurisdictional dismissals exist outside that ambit and within the limited confines of *Gonzalez*'s rule on three-judge panel dissolution. The *Gonzalez* rule, however, has not, as the State claims, been followed by this Court for "decades." Wash.Mot.15. Rather, *Gonzalez* was decided decades *ago* and has had limited force ever since. *Carson* and *Abbott* reflect this Court's prevailing practice in the decades since—construing § 1253 sensibly as well as strictly. See *Abbott*, 138 S. Ct., at 2324.

This Court had little difficulty concluding a mere six years after *Gonzalez* that an order that had "the practical effect" of "refus[ing] an injunction" is appealable under § 1253. *Carson*, 450 U. S., at 83–84.

Post-*Abbott*, *Gonzalez* means—at most—that a jurisdictional dismissal that does not have the "practical effect" of denying an injunction is not appealable under § 1253. In other words, where a plaintiff seeks injunctive relief and the court issues an order dismissing the case for jurisdictional

reasons sufficient to dissolve a district court with no practical effect of serious harm against the plaintiff, then *Gonzalez* may still require dismissal of the appeal. But in many cases, including this one, jurisdictional dismissals may also have "the 'practical effect' of granting or denying an injunction," imposing serious and irreparable harm upon a plaintiff, and are thus within this Court's appellate jurisdiction under *Abbott* and *Carson*. *Abbott*, 138 S. Ct., at 2319 (quoting *Carson*, 450 U. S., at 83).

The procedural facts of this case place it definitively within the ambit of *Carson-Abbott*, not the shrinking sphere of *Gonzalez*. The dismissal on mootness had the practical effect of denying the injunction sought by Mr. Garcia—not the *Soto Palmer* plaintiffs—and causing irreparable consequences: Mr. Garcia sought an injunction to prevent elections from being conducted in a district drawn with unconstitutional racial motivation to sort voters. That effect, combined with the *Soto Palmer* district court's decision and order, will result in the challenged district being used as a baseline with yet more explicit race-based considerations layered upon it. In essence, Mr. Garcia sought an injunction to prevent serious and irreparable harms that would be caused by the existing racial gerrymander, and the district court not only denied that request but compounded that injury by ordering augmentation of the race-based decision-making. If a mere denial of injunctive relief with "'serious, perhaps irreparable, consequence[s],'" is appealable under § 1253, a denial combined with exacerbation of the challenged injury must be appealable *a fortiori*. *Carson*, 450 U. S., at 89–90.

At no point does the State even attempt to address whether *Gonzalez* and *Abbott* are reconcilable or how the *Abbott-Carson* "practical effects" rule applies to Mr. Garcia's case. And its contention that Mr. Garcia argues that this Court overruled *Gonzalez* sub silentio is a red herring; this Court had no reason to explicitly address *Gonzalez* in *Abbott*—it had already resolved 37 years earlier in *Carson* that *Gonzalez* does not preclude an appeal where the order below had the practical effect of denying an injunction and created "'serious, perhaps irreparable, consequence[s].'" *Carson*, 450 U. S., at 89–90.

Mr. Garcia thus does not ask this Court to overrule *Gonzalez* sub silentio, but simply asks this Court to apply the cabined reading of that decision that has prevailed for the last four decades. Indeed, that narrow construction of *Gonzalez* was well-established enough by *Abbott* as not to require discussion. But if the "practical effects" rule is indeed irreconcilable with *Gonzalez*'s primary holding when serious and irreparable harm is in play, Mr. Garcia now respectfully requests this Court to recognize that fact and provide *Gonzalez* with a formal burial.

In any case, as the Jurisdictional Statement explained, even if *Gonzalez*'s rule (which is not a per se rule concerning all jurisdictional dismissals) did apply, this appeal would stand because the docket manipulation below works to defeat the congressional purposes of § 1253. And, due to that very manipulation, the supposed mootness arose after the case was submitted, so it's far from clear that such a situation—qualitatively different from

that in *Gonzalez*—would warrant dissolution of the three-judge panel.

Finally, to the extent that this Court wishes to explore fully the interaction of *Gonzalez* and *Abbott*, it may note probable jurisdiction and order full briefing on the jurisdictional (and mootness) issues in this thorny case.

3. The State does not and cannot distinguish *Moore* v. *Harper*'s "again take effect" rule. Instead of facing the mootness law in *Moore*, the State (once again) falls back on its contention that "Garcia has already obtained the relief he originally requested." Wash.Mot.27. That alone, in the State's view, distinguishes *Moore*, rendering it "inapplicable." *Id*. This facile already-received-complete-relief premise fails for the reasons stated above, leaving unrebutted *Moore*'s rule that plaintiffs like Mr. Garcia retain a "personal stake in the ultimate disposition" throughout an appeal when a final appellate reversal could result in a map "again tak[ing] effect." 143 S. Ct., at 2077.

It is further black-letter law that this case also cannot be mooted by the *Soto Palmer* action because the latter case is still on appeal. The State tries (at 28–29) to flyspeck the lower court cases that Mr. Garcia cited in support of that proposition, but the State's distinctions-sans-differences never effectively contest the bottom-line controlling principle set forth in *Moore*.

Under that venerable principle, the question is whether this Court or the Ninth Circuit *could*, not necessarily will, reverse the *Soto Palmer* district court's injunction against LD-15. Either court could, of course, despite the amici's flatly incorrect assertion that "there is no possibility of the

injunction against LD 15 . . . changing." Soto Palmer et al. as *Amici Curiae* Br.7.

That injunction was premised on an unprecedented Section 2 holding that is not likely to survive an appeal. The *Soto Palmer* decision makes a mockery of the VRA: Plaintiffs' claim was that a majority-minority district with an over-51.5% Hispanic citizen voting age population ("HCVAP") unlawfully dilutes the voting strength of Hispanic voters. The *Soto Palmer* district court's agreement with that theory is outright bizarre against the backdrop of the most recent election: In 2022, a Hispanic (Republican) candidate won a 35-point victory in the district over a White (Democratic) candidate.

Things take an even stranger turn in *Soto Palmer's* remedial proceedings: Every one of the *Soto Palmer* Plaintiffs' five proposed maps dilutes Hispanic voting strength, decreasing the HCVAP in the proposed opportunity district from its estimated 52.6% in 2021 to anywhere from 46.9% to 51.7%. Trende Report, *Soto Palmer* ECF No. 251, at 70. To the *Soto Palmer* plaintiffs, the "cure" for alleged dilution of Hispanic voting strength is more dilution—specifically diluting Hispanic votes with those of Democrats to achieve more favorable partisan outcomes.

It is hardly improbable that the Ninth Circuit or this Court might find legal fault with these novel and dubious legal holdings. And were either Court to reverse the district court judgment in *Soto Palmer* and vacate the permanent injunction, the LD-15 map enacted by the State defendants would again take effect. Appellant's "path to complete relief runs through" the federal appellate process, which will

dictate "the ultimate disposition" and fate of LD-15 and Appellant's challenge thereto. *Moore*, 143 S. Ct., at 2077. *Moore* controls this case and establishes no mootness.

4. This case is further not moot, because the remedial proceedings in the district court in *Soto Palmer* are more than likely to inflict additional harm to Mr. Garcia. Therefore, some effective relief can still be granted. Mr. Garcia alleged LD-15 is a racial gerrymander, and the *Soto Palmer* court has made plain that it intends to build upon that existing district and adopt a map adding more racial gerrymandering to it. Trende Report, *Soto Palmer* ECF No. 251, at 25 ("[T]he maps nevertheless carve out Hispanic areas and Democratic areas with razor-like accuracy across a wide swath of south-central Washington, creating appendages that wrap into heavily Hispanic and Democratic areas in order to build the district.").

That is a "fundamental injury," regardless of a different court's implied conclusion that any racial gerrymandering was justified. *Shaw*, 517 U. S., at 908 (recognizing that a racial classification is a "'fundamental injury' to the 'individual rights of a person,'" although such distinctions may, injury notwithstanding, sometimes be "permissible") (quoting *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 661 (1987)). As Mr. Garcia has already explained, whether that racial sorting is justified is a merits question for *his* case, not something the *Soto Palmer* single-judge district court can resolve and then order. J.S.29-30. Mr. Garcia can thus obtain effective relief by invalidating LD-15 as an unconstitutional gerrymander. That would prevent the enacted

district from being the template for still more racial gerrymandering.

CONCLUSION

For these reasons, Appellant respectfully requests that this Court reverse or vacate the district court's order dismissing this case as moot and remand for the three-judge court to consider the merits. Alternatively, Appellant asks that the Court note probable jurisdiction and set the case for briefing and argument on the appellate jurisdictional and mootness questions.

December 28, 2023 Respectfully submitted,

JASON B. TORCHINSKY
Counsel of Record
PHILLIP M. GORDON
DREW C. ENSIGN
ANDREW PARDUE
CALEB ACKER
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
densign@holtzmanvogel.com
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

DALLIN B. HOLT
BRENNAN A. R. BOWEN
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
Esplanade Tower IV
2575 East Camelback Road,
Suite 860
Phoenix, AZ 85016
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

ANDREW R. STOKESBARY
CHALMERS, ADAMS, BACKER
& KAUFMAN, LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
(206) 812-9322 (telephone)
dstokesbary@chalmersadams.com

Counsel for Appellant

No. 23-467

In The
Supreme Court of the United States

BENANCIO GARCIA III,

Appellant,

V.

STEVEN HOBBS, ET AL.,

Appellees.

CERTIFICATE OF WORD COUNT

I hereby certify on this 28th day of December, 2023, that excluding those parts allowed by rule, the above referenced Brief Opposing Motion to Dismiss or Affirm contains 2,975 words.

Respectfully submitted,

/s/ Jason B. Torchinsky

JASON B. TORCHINSKY
Counsel of Record
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jtorchinsky@holtzmanvogel.com

No. 23-467

In The
Supreme Court of the United States

BENANCIO GARCIA III,

Appellant,

V.

STEVEN HOBBS, ET AL.,

Appellees.

CERTIFICATE OF SERVICE

On this 28th day of December, 2023, a copy of the above referenced Brief Opposing Motion to Dismiss or Affirm was sent by U.S. mail and email to:

Noah Guzzo Purcell
Office of the Attorney General
PO Box 40100
1125 Washington St., SE
Olympia, WA 98504-0100
noah.purcell@atg.Wa.Gov

Mark P. Gaber
Simone Leeper
Aseem Mulji
Benjamin Phillips
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
mgaber@campaignlegal.org

Andrew R. W. Hughes
Attorney General's Office
800 5th Ave Ste 2000
Seattle, WA 98104-3188
Andrew.Hughes@atg.Wa.Gov

Respectfully submitted,

/s/ Jason B. Torchinsky

JASON B. TORCHINSKY
Counsel of Record
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jtorchinsky@holtzmanvogel.com