UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellees,

and

JOSE TREVINO, ISMAEL CAMPOS, and ALEX YBARRA,

Intervenor-Defendants – Appellants.

No. 23-35595

D.C. No. 3:22-cv-05035-RSL
U.S. District Court for Western Washington, Seattle

APPELLEES' RESPONSE TO APPELLANTS' MOTION TO HOLD BRIEFING IN ABEYANCE

INTRODUCTION

This Court should deny Intervenor-Appellants' ("Intervenors") request to hold the case in abeyance pending completion of the remedial proceedings below. Intervenors, three individuals present in the case by permissive intervention only, lack standing to appeal. Nothing from the remedial phase will change this basic jurisdictional deficiency. Moreover, the remedial phase is ongoing, with a deadline of March 25. Any alleged harm—and any standing to appeal any remedial district—is thus completely speculative, leaving no reason to delay liability briefing now. Indeed, Intervenors do not cite a *single case* to support their abeyance request. Finally, Intervenors' efforts to delay this case for months prejudice Plaintiff-Appellees ("Plaintiffs"), the State, and voters, who have an interest in legal voting districts and certainty leading up to the 2024 election. This Court should decline Intervenors' latest tactic to delay these proceedings and their attempt to elide the deficiencies in their liability appeal by combining it with an alleged challenge to district that does not yet exist.

BACKGROUND

After a full trial on the merits on August 10, 2023, the district court found that Legislative District 15 ("LD 15") violated Section 2 of the VRA because the boundaries of the district were drawn in way that denied Latino voters an equal opportunity to elect their candidates of choice. ECF No. 34-2 at 66. On September

8, Intervenors appealed the district court's decision and judgment to this Court. *Id*. at 99. The State of Washington did not appeal. On November 3, Intervenors filed a petition for certiorari before judgment with the U.S. Supreme Court. *Id*. at 100. *Three months* after the district court's decision and two months after their appeal to this Court, Intervenors asked the district court to stay the case pending appeal. The district court denied the request on November 27, as did this Court on December 21. *Id*. at 107; ECF No. 45. On December 21, Intervenors requested and were granted a streamlined extension for their merits brief in this case to the new due date of January 22, 2024.

Pursuant to the district court's orders, the remedial process is currently underway in the district court. On December 1, 2023, Plaintiffs, and no other party, submitted five proposed maps and accompanying expert reports. ECF No. 35-2 at 1, 10. On December 1, the parties also submitted names for a special master. *Id*. On December 22, Intervenors filed a response brief and expert report. On January 5, 2024, Plaintiffs filed five additional proposed maps and an accompanying expert report. Plaintiffs' mapping expert "did not consider race or racial demographics in drawing the remedial plans." ECF No. 35-2 at 14. The district court and special master have until March 25, 2024 to review the parties' submissions and adopt a remedial map. As such, no remedial district is yet in place.

ARGUMENT

I. Intervenors lack standing to appeal the liability determination.

Intervenors, individuals with no legally cognizable interest, lack standing to appeal the district court's finding of liability. This presents a fatal jurisdictional infirmity in Intervenors' liability appeal that will not change as a result of the district court's remedial order, and there is no reason for this Court to delay in so ruling. *See Ogunsalu v. Off. of Admin. Hearings*, No. 18-56579, 2018 WL 7501279, at *1 (9th Cir. Dec. 19, 2018) (denying motion to hold appeal in abeyance pending further action by district court where Ninth Circuit lacked jurisdiction over the appeal).

For standing, a litigant must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations omitted). Appellants seeking to defend on appeal must also meet this Article III requirement. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) ("[S]tanding 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance'") (internal citation omitted); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (citing *Wittman v. Personhuballah*, 578 U.S. 539 (2016)); *Diamond v. Charles*, 476 U.S. 54, 56, 68 (1986). This ensures that "the decision to seek review . . . is not to be placed in the hands of 'concerned

bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Id*. at 62 (internal citation omitted).

But Intervenors are attempting to use this appeal as just such a vehicle. In granting Intervenors only permissive intervention, the district court expressly found that "intervenors lack a significant protectable interest in this litigation." ECF No. 35-2 at 120. To begin, the district court has not ordered *Intervenors* "to do or refrain from doing anything." *Hollingsworth*, 570 U.S. at 705 (holding that non-governmental intervenor-defendants lack standing to appeal); *Republican Nat'l Comm. v. Common Cause of Rhode Island*, 141 S. Ct. 206 (2020) (Mem.) (denying stay of consent decree between state officials and plaintiffs because "no state official has expressed opposition" and intervenor "lack[s] a cognizable interest in the State's ability to enforce its duly enacted laws") (internal quotations omitted). The State has not appealed, and Intervenors have no role in enforcing state statutes or implementing any remedial plan.

Nor can Intervenors establish standing based on generalized assertions about ensuring compliance with state and federal law. ECF No. 35-2 at 114. Intervenors have alleged no improper racial classification—nor could they—and a blanket interest in "proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [the intervenors] than it does the public at large[,] does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74;

Allen v. Wright, 468 U.S. 737, 754-55 (1984). Furthermore, two of the Intervenors (Campos and Ybarra) *do not even reside* in LD 15, and thus can suffer no harm at all. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995) (a voter who "resides in a racially gerrymandered district . . . has been denied equal treatment" but other voters "do[] not suffer those special harms"); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 265 (2015).

More fundamentally, Intervenors' standing arguments centered on alleged harms that *might* result from the district court's remedial order do nothing to establish standing to appeal the liability determination. Even if any of the asserted harms were sufficient to establish standing to appeal a remedial decision—and they are not—Intervenors could not use them to bootstrap standing to appeal *liability* in the first place. Intervenors' thinly-veiled attempt to elide this jurisdictional deficiency lacks merit.

Furthermore, Representative Ybarra's asserted harms to his electoral chances are both speculative and *not legally cognizable harms at all*. A legislator has no legally cognizable interest in a preferred district, and holds office "as trustee for his constituents, not as a prerogative of personal power." *Raines v. Byrd*, 521 U.S. 811, 821 (1997); *accord Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in the result) ("Whatever the realities of private ambition and vainglory may be," a legislator has no "judicially cognizable private

interest" in his office). Indeed, the Supreme Court has expressed deep skepticism about recognizing a legislator's interest in preferred district boundaries. *See Wittman*, 578 U.S. at 545; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (It is a "core principle of republican government . . . that the voters should choose their representatives, not the other way around.") (internal quotation marks omitted). Similarly, individual legislators have "no standing unless their own institutional position" is affected. *Newdow v. United States Cong.*, 313 F.3d 495, 498-99 (9th Cir. 2002). Nothing in this litigation impacts Representative Ybarra's institutional position or powers, and he is only one legislator of many, without the ability to assert harm on behalf of others. *Bethune-Hill*, 139 S. Ct. at 1953-54.

As such, Intervenors lack standing to appeal. Because standing is a threshold jurisdictional requirement, this Court should not delay for a separate, speculative remedial appeal to address it. Alternatively, if the Court decides to grant this request for an abeyance of the liability appeal briefing, it should still retain the existing briefing schedule to decide the crucial issue of Intervenors' standing and assure itself of its jurisdiction.

II. Any appeal from a remedial order is completely speculative and should proceed separately.

The remedial process is ongoing, with a deadline *months* away. It is impossible to know whether or how Intervenors will be affected by the map that is

ultimately adopted. Any claim that Intervenors *will* appeal a non-existing district and have standing to do so is thus speculative at best.

At the remedial stage, the only question is which new map will be put in place to completely remedy the VRA violation in the Yakima Valley. Despite no remedial map *even being put in place*, apparently Intervenors plan to appeal. But that appeal, if it comes to pass, must focus only on the appropriateness of the chosen remedial plan (and any party's standing to challenge it), not the merits of the liability determination. Intervenors' speculation that the remedial plan will subject them to racial classification is unfounded and contradicted by the record. ECF No. 35-2 at 14 (Plaintiffs' map expert stating that he "did not consider race or racial demographics in drawing the remedial plans"). Unsupported speculation about a remedy cannot rescue a lack of liability standing nor provide an avenue to relitigate the liability determination. ECF No. 35-2 at 115 ("[I]t would be premature to litigate a hypothetical constitutional violation…when no such violative conduct has occurred"); *Hays,* 515 U.S. at 745 ("[A]bsent specific evidence" showing a voter has been subject to a racial classification, voter would assert only a generalized grievance and lack standing); *Wittman*, 578 U.S. at 545 (a "party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more"). As such, any purely conjectural future appeal should have no impact on this one.

Intervenors complain that they will not be able to address remedial issues in their merits brief due in this Court on January 22. Br. at 5. But that makes sense—their current pending appeal is about the district court's *liability determination*, and whether as permissive intervenors below with no legally protectable interest, they have standing to appeal. Any quarrels they have with the remedial order can and should be adjudicated separately. Letting the remedial process continue while the appeal of an injunction enjoining the enacted plan is adjudicated is a standard practice in redistricting cases. *See, e.g., Bethune-Hill*, 139 S. Ct. at 1950 & n.1 (describing how remedial phase advanced as the Supreme Court entertained an appeal from injunction); *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (adjudication of liability on appeal from injunction); *North Carolina v. Covington*, 137 S. Ct. 1624 (2017) (adjudication of remedial phase, which proceeded after liability determination); *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (same); *Allen v. Milligan*, 599 U.S. 1 (adjudication of liability on appeal from preliminary injunction); *Allen v. Milligan*, No. 23A231 (attempted remedy appeal following liability decision).

III. Intervenors' continued efforts to delay harm Plaintiffs.

Below, Intervenors tried *three times* to stay the case, which the district court three times denied. *See, e.g.,* ECF No. 44-2 at 109 (third denial). Intervenors then asked this Court to stay proceedings pending action by the U.S. Supreme Court,

which this Court also denied. ECF No. 45. At the same time, Intervenors availed themselves of this Court's streamlined request for an extension to delay the due date of their opening brief on the merits of their appeal from December 22, 2023 to January 22, 2024. With that deadline now approaching, Intervenors are attempting to delay yet again. Intervenors base their new request for an abeyance in part on speculation about the Supreme Court's actions surrounding their petition for certiorari before judgment or the appeal of the related *Garcia* case. Br. at 5-6. But Intervenors already made these arguments in support of their previous stay request, which this Court denied. ECF No. 45 (citing *Nken v. Holder,* 556 U.S. 418, 434 (2009)). Nothing has changed in the last month, and this Court should again reject these recycled arguments.

Moreover, Intervenors' claim that their proposed schedule would leave "th[e] timetable unchanged" or even "accelerate[]" it. Br. at 6, 8. But that is nonsensical. This Court would have to hold the case in abeyance for two months (or more) alone before merits briefing would even *begin*. *Id*. at 7 (citing deadline of March 25, 2024 for remedial phase). Then, according to Intervenors' timetable, *id*. at 4, briefing would not be complete until *mid-July, 2024*.[1] That is a stark comparison to the current schedule, which requires briefing to be complete in mid-March (or mid-April

[1] This date accounts for any Appellee taking a streamlined extension per Circuit Rule 31.2-2(a).

if any party seeks an extension), and does not even allot time for oral argument and a decision. Particularly in light of Intervenors' purely speculative claims about any remedial appeal, such a delay makes no sense.

Finally, Intervenors' repeated efforts to delay the resolution of this case harm Plaintiffs and do not promote judicial efficiency. In arguing otherwise, Intervenors assume that this Court will not act on the current appeal before briefing is complete on an appeal from the district court's as-yet unissued remedial order. Br. at 6. But that claim is pure conjecture. As noted above, under the current schedule, briefing would be complete by mid-April at the latest; it would be entirely possible for this Court to hear argument and issue a liability decision before Intervenors' timeline under and abeyance and consolidation. But more fundamentally, this Court can and should decide the jurisdictional issue of whether Intervenors have standing to bring this appeal now. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1195 (9th Cir. 2011) ("This court is obligated to ensure that it has jurisdiction over this appeal before proceeding to the [merits]."). Delaying the certainty that would come with adjudication of the jurisdictional and merits questions causes prejudice to all parties and the public, who have an interest in "resolv[ing]" the litigation "in advance of the 2024 [] elections. *Robinson v. Ardoin*, No. 23A281, 2023 WL 6886438, at *1 (U.S. Oct. 19, 2023) (Jackson, J., concurring). Moreover, no information from the remedial order below would have any effect on Intervenors standing to appeal

liability. This Court should reject Intervenors' attempts to obfuscate the deficiencies in their appeals, and to delay timely resolution of this case.

CONCLUSION

For the foregoing reasons, Intervenors' motion to hold briefing in abeyance should be denied.

Dated: January 13, 2024

Respectfully submitted,

/s/Mark P. Gaber
Mark P. Gaber
Simone Leeper
Aseem Mulji
Benajmin Phillips
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
mgaber@campaignlegal.org
sleeper@campaignlegal.org
amulji@campaignlegal.org
bphillips@campaignlegal.org

Chad W. Dunn
Sonni Waknin
UCLA Voting Rights Project
3250 Public Affairs Building
Los Angeles, CA 90095
Telephone: 310-400-6019
Chad@uclavrp.org
Sonni@uclavrp.org

Edwardo Morfin
Morfin Law Firm, PLLC
2602 N. Proctor Street, Suite 205
Tacoma, WA 98407
Telephone: 509-380-9999

Thomas A. Saenz
Ernest Herrera
Leticia M. Saucedo
Erika Cervantes
Mexican American Legal Defense and Educational Fund
643 S. Spring St., 11th Fl.
Los Angeles, CA 90014
Telephone: (213) 629-2512
tsaenz@maldef.org
eherrera@maldef.org
lsaucedo@maldef.org
ecervantes@maldef.org

Annabelle E. Harless
Campaign Legal Center
55 W. Monroe St., Ste. 1925
Chicago, IL 60603
aharless@campaignlegal.org

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(B) and Circuit Rule 27-1(1)(d) because this Response contains 2428 words spanning 11 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f).

2. This Response complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font with Microsoft Word.

Dated: January 13, 2024

/s/ *Mark P. Gaber*
Mark P. Gaber

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will notify all registered counsel.

/s/ *Mark P. Gaber*
Mark P. Gaber