UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, *et al.*,

Plaintiffs – Appellees,

v.

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

Defendants – Appellees,

and

JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA,

Intervenor-Defendants – Appellants.

No. 23-35595

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

APPELLANTS' REPLY TO RESPONSES IN SUPPORT OF THEIR MOTION TO HOLD BRIEFING IN ABEYANCE

INTRODUCTION

Plaintiffs' opposition to the short abeyance that Appellants seek is curious. It reads more like a motion to dismiss an appeal that would typically be filed shortly after an appeal is docketed. Yet Plaintiffs filed no such motion and did not style their motion as seeking affirmative relief. The standing challenges they raise in opposition to Appellants' *purely procedural* motion are thus not properly presented here and should wait for resolution after full merits briefing. In any event, those standing arguments lack merit, particularly as Appellants rely in part on the exact same theory of standing as Plaintiffs: *i.e.*, that voters in LD-15 have standing to challenge the legality of the district's borders. If Appellants lack standing here, the necessary corollary is that Plaintiffs lack standing below and this entire suit should be dismissed.

Plaintiffs' concerns about potential delay are also misplaced. Contrary to Plaintiffs' suggestion, Appellees' Resp. to Appellants' Mot. 9–10, there is no genuine possibility that this Court would hear and decide a merits-only appeal before briefing in a consolidated appeal could be completed in mid-June/mid-July. Moreover, whether this Court grants or denies the abeyance/consolidation that Appellants seek, there is no

plausible prospect that this Court's decision on the ultimate merits (as opposed to motion practice) will affect the upcoming 2024 election cycle either way. Plaintiffs' postulated delay would thus cause them no prejudice.

Because of the manifest economies of hearing related appeals together, this Court should grant the request for a short abeyance.

ARGUMENT

I. PLAINTIFFS' STANDING CHALLENGES ARE BARRED HERE AND LACK MERIT

A. Plaintiffs' Standing Arguments Are Procedurally Improper

Plaintiffs' standing arguments are inappropriate in this posture and can be rejected on that basis alone. Here, the necessary result of accepting Plaintiffs' standing argument would not merely be the denial of Appellants' motion for a short abeyance, but outright dismissal of this appeal. Plaintiffs are thus not merely advancing arguments in opposition but seeking "affirmative relief." Fed. R. App. P. 27(a)(3)(B). But FRAP 27 specifically requires for any such request, "[t]he title of the response must alert the court to the request for relief." *Id.* Plaintiffs failed to satisfy this requirement here and thus forfeited the right to obtain affirmative

relief—which acceptance of their standing arguments would necessarily entail.

Plaintiffs' delay in asserting these standing arguments to this Court also undercuts them. This appeal was docketed on September 12, 2023. If Plaintiffs believe their standing arguments are the slam dunk that their response portrays them to be, Plaintiffs should have filed a motion to dismiss this appeal shortly after this case was filed. *Cf.* D.C. Circuit Handbook at 28 ("Absent leave of the Court, dispositive motions may not be filed more than 45 days after docketing."). They did not.

To be sure, jurisdictional arguments are not waivable and this Court will of course need to analyze its own jurisdiction before issuing any decision. But Plaintiffs' belated and procedurally inappropriate presentment of standing arguments need not be considered now. Instead, this Court should consider jurisdiction in this appeal as it considers that issue in virtually every appeal: after orderly briefing with full presentation in merits briefs—not as a shoehorned-in and procedurally-barred objection to a simple procedural motion seeking a short abeyance.

Indeed, the cherry-picked case that Plaintiffs cite for the proposition that this Court "should . . . decide the jurisdictional issue . . .

now" did no such thing. Appellees' Resp. 10. Instead, *Perry* reserved judgment on standing *even after full merits briefing and oral argument*, and instead certified an antecedent question to the California Supreme Court. *See Perry v. Schwarzenegger*, 628 F.3d 1191, 1193–1200 (9th Cir. 2011). *Perry* thus hardly establishes the putative necessity of resolving standing now before deciding a mere procedural motion.

B. Plaintiffs' Standing Arguments Lack Merit

Although this Court's jurisdiction is an issue warranting ordinary (and full) merits briefing, rather than being resolved as incidental to a procedural request, Appellants offer a brief overview of their standing to bring this appeal. Here, both Intervenor-Appellants Representative Alex Ybarra and Jose Trevino independently[1] have standing to appeal based on cognizable interests that are injured by the district court's judgment. *See*, *e.g.*, *Beck v. U.S. Dep't of Com.*, 982 F.2d 1332, 1338 (9th Cir. 1992) (For intervenor appellate standing, "the test is whether the intervenor's

[1] In cases such as ours, where there are multiple Plaintiffs/Intervenors, the general rule is that once the court determines that one of the plaintiffs/intervenors has standing for a particular claim, it need not decide standing for others. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977)). As such, if *either* Rep. Ybarra *or* Mr. Trevino have standing, then *all Intervenors* have standing. *Id.*

interests have been adversely affected by the judgment.").

Representative Ybarra. An individual legislator has standing where he has "been singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies." *Raines v. Byrd*, 521 U.S. 811, 821 (1997). Just so for Representative Ybarra.

Representative Ybarra is an elected member of the Washington Legislature from LD-13, which is adjacent to the challenged LD-15—*i.e.*, the district that the district court held violated the VRA. In four of Plaintiffs' five proposed remedial maps, tens of thousands of Representative Ybarra's constituents are moved out of his district and the partisan composition of the district is made less favorable to his reelection. *See Soto Palmer v. Hobbs*, No. 3:22-cv-5035, ECF No. 251 at 40-41, 79-82.

As a result, Representative Ybarra will be required to expend additional resources to introduce himself to his new constituents and campaign for their votes on a highly expedited basis (*i.e.*, only discovering the identity of his constituents in March of an election year). Doing so will certainly cause Representative Ybarra to incur more than $3.76 in expenses—*i.e.*, the amount of financial injury that this Court held

sufficient to establish Article III standing in *Van v. LLR, Inc.*, 962 F.3d 1160, 1162 (9th Cir. 2020). *See also Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (recognizing that the loss of even "a dollar or two" is sufficient to confer Article III standing).

Similarly, Plaintiffs' fifth remedial proposal will likely either (1) create a costly primary battle for Representative Ybarra or (2) require him to move from his longtime home in Quincy, Washington to run in a different district. *See* Pet'rs' Reply Br., *Trevino v. Soto Palmer*, No. 23-484 (U.S. Jan. 2, 2024) (distributed for conference of Jan. 19, 2024), at *3–4. Either option would also cause him harm conferring standing.

Jose Trevino. Mr. Trevino, a resident and voter in enacted LD-15, also has standing to appeal the district court's §2 judgment. That judgment will cause the redrawing of his legislative district on the basis of race. That race-based redistricting inflicts "'fundamental injury' to the 'individual rights of a person,'" regardless of whether the racial classification is ultimately upheld. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (quoting *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987)).

Such race-based decision-making is the inevitable result of the district court's §2 holding. Indeed, "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 v. Perez*, 138 S. Ct. 2305, 2314 (2018). The district court's race-based remedial rejiggering of Mr. Trevino's district thus causes him "fundamental injury," *Shaw*, 517 U.S. at 908.

Notably, Plaintiffs' own standing is also specifically premised on Plaintiffs themselves being voters within LD-15, which they allege was illegally configured—*i.e.*, they assert the *exact same basis for standing* as Mr. Trevino. So, if Mr. Trevino lacks Article III standing based on his status as a voter in LD-15 arguing the district's boundaries are illegal, so too do Plaintiffs, and this entire action should be dismissed outright.

At a bare minimum, the obvious conflict between Plaintiffs' asserted standing as voters in LD-15 and their simultaneous contention that Mr. Trevino lacks standing on the same voter-in-LD-15 basis reflects an issue that should be resolved after full merits briefing, not as merely incidental to a procedural motion.

II. PLAINTIFFS' CONCERNS ABOUT DELAY ARE UNFOUNDED

Plaintiffs' other principal objection appears to be that a short abeyance will cause them prejudice due to delay. But those arguments

are premised on basic misunderstandings of how this Court operates.

Plaintiffs assert that it is "pure conjecture" that "this Court will not act on [*i.e.*, decide] the current appeal before briefing is complete" in a remedial appeal, which it contends would be "mid-July." Appellees' Resp. 9–10.

As an initial matter, Plaintiffs' date calculations are misleading or erroneous. Briefing may not be complete in a merits-only appeal until May 15, and Plaintiffs could ensure briefing is complete in a consolidated appeal by June 15 by simply filing within their ordinary allotted time.[2]

More fundamentally, there is essentially no chance that this Court will have resolved an appeal on the merits by mid-June. This Court typically calendars appeals for the next available, site-appropriate panels that are at least 8 weeks after completion of briefing. This Court is not sitting in Seattle in June. So even if a merits-only appeal were fully

[2] If Plaintiffs are genuinely concerned about delay, they could forgo taking the streamlined extension in a remedial-only appeal. Briefing would then be complete by mid-June under Appellants' proposed schedule. Plaintiffs are also incorrect in asserting that briefing in a merits-only-appeal "would be complete by mid-April at the latest." Appellees' Resp. 9–10. Both Plaintiffs/the State and Appellants each may take 30-day streamlined extensions on their answering and reply briefs, respectively, which would push briefing completion out until mid-May. And Plaintiffs acknowledge that they may do so. *Id.* at 9 n.1.

briefed in mid-April, and this Court severed it from the remedial appeal with then-ongoing briefing, this Court would likely calendar the appeals for no earlier than the July 8–12 sitting in Seattle. Nor is this Court likely to resolve a high-profile, multi-party, multi-issue case in about a week.

In addition, the putative delay here will not cause Plaintiffs any prejudice. As a practical matter, there is no chance that this Court would decide this case and issue its mandate in time to affect the August 6th primary election. Indeed, based on election timelines presented by Defendant Secretary of State Steven Hobbs, the district court below has made clear that it requires final maps by March 25 to hold the August primary under a new map. *See Soto Palmer v. Hobbs*, No. 3:22-cv-5035, ECF No. 218 at 32.

Thus, whether the merits and remedies appeals are consolidated or not, this Court's resolution after full-blown merits briefing will not affect the maps to be used for the 2024 cycle, and the short abeyance sought here will not prevent resolution in time for the 2026 cycle. Any action by this Court that would affect the 2024 election cycle will be by emergency motions for a stay or injunction pending appeal—the timing of which is not implicated by Appellants' instant motion.

The upshot is that an abeyance/consolidation, as well as the resulting timing of merits briefs here, will simply have no impact on the upcoming 2024 election cycle. Thus, even if Plaintiffs were correct that an abeyance would cause any meaningful delay (and they are not), that delay will not cause them prejudice.[3]

CONCLUSION

For the foregoing reasons, this Court should grant Appellants' motion to hold briefing in abeyance.

[3] The State filed a response that "qualifiedly opposes" Appellants' request for an abeyance. While heavy on speculation and innuendo about Appellants' motives, the State's ultimate concern appears to be that consolidation (which an abeyance would permit) will cause this Court to make errors of law: *i.e.*, the State expressly fears that consolidation "might cause this Court to overlook Intervenors' lack of standing on their merits appeal." Appellees' Resp. 6. But the obvious answer to that concern is not to deny a procedural motion because it might cause this Court to commit legal errors, but rather for this Court simply to decide standing issues correctly (here, by holding that Appellants have standing).

The State's lack of faith in this Court to decide legal issues correctly hardly provides a basis for denying an abeyance (and eventual consolidation). Nor are the State's it-might-cause-you-to-commit-error fears a valid reason to avoid the significant judicial economies that consolidation would permit.

Respectfully submitted,

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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 motion contains 2,077 words spanning 10 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f).

2. This brief 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 Century Schoolbook size 14-point font with Microsoft Word.

Dated: January 18, 2024

/s/ Jason Torchinsky
Jason Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 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/ Jason Torchinsky
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