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. 24-1602

D.C. No. 3:22-cv-5035-RSL
U.S. District Court for Western Washington, Tacoma

APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL

Relief Requested by: March 25, 2024

CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, Intervenor-Defendant-Appellants Jose Trevino, Alex Ybarra, and Ismael Campos ("Appellants") respectfully submit this certificate in connection with their emergency motion for a stay pending appeal of the mandatory injunction entered by the district court on March 15, 2024 implementing a remedial state legislative map.

This suit challenged a Washington state legislative district, Legislative District 15 ("LD-15"), a district centered in the Yakima Valley of Washington. LD-15 was drawn by Washington's Independent Redistricting Commission (the "Commission") as a district with a majority Hispanic citizen voting-age population ("HCVAP"). Plaintiffs alleged that LD-15 violated Section 2 of the Voting Rights Act ("VRA") by diluting the voting strength of Hispanic voters.

Plaintiffs filed this action on January 19, 2022 and sought a preliminary injunction. ECF Nos. 1; 70. The district court held a trial in June 2023, hearing evidence on the Section 2 claim. ECF Nos. 206–09. Post-trial briefing was completed on July 12. ECF Nos. 211-12, 214-15.

On August 10, 2023, the district court directed judgment to be issued for Plaintiffs and issued a permanent injunction against the Enacted Plan while stating it would give the State "an opportunity to adopt revised legislative district maps for the Yakima Valley region." ADD-1. After the district court read news articles reporting that legislative leaders were not inclined to reconvene the Commission, it told the parties it

would order a remedial map on its own to meet the Secretary of State's ("Secretary") March 25, 2024 deadline for having new maps in place to conduct primary and general elections for the 2024 cycle. ECF No. 230.

After the parties' experts submitted reports, including the submission of proposed maps and rebuttals, the district court held an evidentiary hearing on one specific Plaintiff proposal, Map 3A, on March 8, 2024. On March 15, 2024, the district court issued an order adopting Plaintiffs' Map 3B, containing slight revisions to Map 3A. ADD-33-43. Appellants filed a notice of appeal that same day. ADD-46.

FRAP 8(a)(2)(A)(ii) Statement: At a hearing regarding the remedial order, counsel for Appellants orally requested that the court stay the order pending appeal upon its issuance. ADD-48-52. The court constructively denied that motion by issuing its remedial order without any mention of the requested stay. *See generally* ADD-33-43. The district court thus "failed to afford the relief requested," but did not "state any reasons … for its action." Fed. R. App. P. 8(a)(2)(A)(2).

Appellants filed a notice in the district court on March 15, stating their position that the motion had been constructively denied by the district court and asking the court to clarify otherwise if a stay pending appeal is still being considered. ADD-53-55. The district court issued a response, ECF No. 293, referring to its earlier denial of a different motion to suspend remedial proceedings rather than the request for a stay pending appeal, ECF No. 258, which was denied at the February 9 hearing, ECF No. 27 at 31. In any event, the district court has now clearly denied Appellants' request for a stay

pending appeal of its March 15, 2024 remedial order, thereby satisfying the exhaustion requirement of Rule 8. ECF No. 293 at 1 ("The Court expressly denied the request for a stay at the February 9, 2024 hearing.").

Appellants now file this emergency motion for a stay pending appeal in this Court.

Contact Information Of Counsel

The office and email addresses and telephone numbers of the attorneys for the parties are included below as Appendix A to this certificate.

Nature Of The Emergency

Appellants are threatened with imminent irreparable injury in the form of being sorted into districts explicitly on the basis of race, which causes "'fundamental injury' to [Appellants'] individual rights." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (*Shaw II*). Indeed, "[w]here a plaintiff resides in a racially gerrymandered district … [he] has been denied equal treatment … and therefore has standing to challenge" it. *United States v. Hays*, 515 U.S. 737, 744–45 (1995).

If and when the Remedial Map is shown on appeal to be unlawful and enacted pursuant to a faulty Section 2 decision, it will be too late to stop the harms to the Appellants and to the Washington public. The Secretary has made clear that March 25, 2024 is the deadline for preparation for the 2024 cycle in Washington. There is no prospect that this Court could resolve Appellants' appeal through plenary review before

that date. Thus, absent a stay pending appeal, Appellants will suffer irreparable harm from the 2024 elections being conducted under an illegal Remedial Map.

Because Intervenors are likely to prevail on appeal, and because the timetable to get a map in place for 2024 is short, Intervenors seek this stay pending appeal of the remedial order and injunctions in this case on an emergency basis and request relief by the deadline that the Washington Secretary of State has provided for having maps in place: March 25, 2024.

Notification Of Counsel For Other Parties/Proposed Schedule

Appellants notified all parties of its intent to seek an emergency stay pending appeal on the same day that the district court's remedial injunction was entered and Appellants filed their notice of appeal (March 15). Appellants also proposed a schedule in which one business day would be permitted for each of the motion, response/opposition, and reply briefs (*i.e.*, March 18, 19, and 20, respectively). That proposed schedule is included below.

The Secretary took no position on the stay request or proposed schedule. The State opposes the motion to stay and did not take a position on the proposed schedule.

Counsel for Plaintiffs/Appellees opposed this motion as well as the proposed schedule, stating only "Plaintiffs oppose the requested 'emergency' stay as well as the proposed briefing schedule. Have a great weekend!"

Counsel for Appellants then asked Plaintiffs if they "ha[d] a counter-proposal for the briefing schedule…? With emergency motions like this, the Ninth Circuit

definitely appreciates it when the parties can agree upon a briefing schedule and I would like to do so if possible. If your position is that—despite the impending March 25 deadline—there is no need for urgency and the ordinary briefing schedule should apply, we will relay that position to the Ninth Circuit. Otherwise, if you have a proposed schedule, we can certainly consider that and see if some agreement can be reached."

Plaintiffs then responded in part: "We do not propose an emergency briefing schedule because we view the emergency, if there ever was one, as long since passed." (A copy of that email exchange is included as Exhibit 1 to this brief.)

Because Plaintiffs refused to provide any schedule for expedited consideration—and would not even commit to filing a response under the ordinary deadline (*i.e.*, without an extension)—Appellants respectfully request this Court enter their proposed schedule or set a similarly expedited schedule that would permit briefing to be completed and this Court to decide this request by March 25—the deadline set by the Secretary (not Appellants).

This Court routinely considers requests for stays pending appeal in election cases with imminent deadlines on an emergency basis. *See, e.g.*, *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1087 (9th Cir. 2020) (granting "Emergency Motions for a Stay Pending Appeal"); *Mi Familia Vota v. Hobbs*, 977 F.3d 948 (9th Cir. 2020) (granting emergency stay pending appeal of injunction issued 8 days prior); *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (granting emergency stay pending appeal of election-related injunction issued 13 days prior).

Plaintiffs' position here is manifestly unreasonable. The Secretary has made clear that maps need to be finalized by March 25. But under Plaintiffs' proposed unexpedited schedule, their response brief would not even be due until March 29 (assuming they did not seek an extension). In essence, Plaintiffs proposed schedule is: "We win by default."

That position is particularly pernicious, because it would effectively eliminate this Court's ability to exercise judicial review of the district court's injunction before the 2024 elections. This Court's appellate jurisdiction would thus be effectively eliminated, and the district court's injunction would become the final word for the 2024 elections simply due to Plaintiffs' manipulation of the briefing schedule.

Exercising appellate review here is particularly appropriate given the stakes presented. Millions of Washingtonians would vote in districts altered by the Remedial Map if a stay pending appeal is not granted. If that Remedial Map rests on legal errors—which it plainly does, as explained below—those millions of voters should not be saddled by an illegal map simply because the appellate court did not have sufficient time to consider those errors. Instead, federal courts owe it to the voters of Washington to permit stays pending appeal to be decided on the merits, rather than through happenstance of the schedule.

Moreover, Plaintiffs' apparent belief[1] that Appellants could have filed this request earlier is obviously incorrect. The district court's remedial order/Remedial Map was not entered until March 15. Appellants could not have appealed from it, or sought a stay of it, any earlier. Instead, Appellants filed their notice of appeal the very same day it was issued. And even if Appellants could have drafted this stay pending appeal instantaneously, they could not have filed it—their remedial appeal is not yet docketed. Without a docket number, no emergency stay request could be filed. *See*, Motions, U.S. Court of Appeals for the Ninth Circuit, https://www.ca9.uscourts.gov/staff-attorneys/motions/ ("[Y]ou will not be able to file your motion until the court opens the case.").

This emergency request is thus being filed on the *very first day* it could have been filed—*i.e.*, on the day of docketing. Plaintiffs' suggestion that this emergency motion was somehow delayed is thus unavailing.

For these reasons, this Court should enter Appellants' proposed schedule:

Proposed Schedule:

- Monday, March 18 – Appellants filed this emergency motion for a stay pending appeal.

[1] *See* Ex. 1 (faulting Appellants for seeking an emergency stay pending appeal "nearly 8 months after the district court's merits ruling in this case" which, in Plaintiffs' view, "preclude an 'emergency' review now on a remedial order that the district court was required to issue given the lack of any reversal or stay on the merits").

- Tuesday, March 19 – Proposed deadline for opposition/response brief by Plaintiffs and any other parties.
- Wednesday, March 20 – Proposed deadline for Appellants to file a reply brief.
- Monday, March 25 – Requested date of decision for this motion.

CERTIFICATE APPENDIX A

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GLOSSARY

Term/Abbreviation	Definition
Appellants	Three Hispanic voters who intervened as defendants in the district court (Jose Trevino, Alex Ybarra, and Ismael G. Campos), who are Appellants here.
Commission	Washington State's bipartisan, independent Redistricting Commission created by Wash. Const. art. II, §43(2).
CVAP	Citizen Voting Age Population.
Enacted Map	The now-permanently enjoined Washington State Legislative Map, as drawn by the Commission and amended by the Washington State Legislature in February 2022.
HCVAP	Hispanic Citizen Voting Age Population.
LD-15	Legislative District 15 of Washington's State Legislative Map, as enacted.
Plaintiffs/Appellees	The group of voters who originally brought this Section 2 case, who are Appellees here.
Remedial Map	The new Washington State Legislative Map as ordered by the district court in its remedial order/injunction issued on March 15, 2024.
State	The State of Washington, as appearing in this litigation and represented by the Attorney General.
Secretary	The Secretary of State of Washington.
VRA	Voting Rights Act, 52 U.S.C. §10301 *et seq*.

INTRODUCTION

The district court's injunction and Remedial Map turn the Voting Rights Act ("VRA") upside down. In a typical §2 vote dilution case involving redistricting, plaintiffs challenge a district in which racial minorities are outnumbered by other groups and allege that the minority group voters have "less opportunity … to elect representatives of their choice." 52 U.S.C. §10301(b). Not so here: the challenged district, which is alleged to dilute the voting power of Hispanic voters, is actually a *majority*-minority district in which Hispanic voters constitute 52.6% of the citizen-age voting population ("CVAP"). Such a challenge to a *majority*-minority is virtually unprecedented absent allegations (not established here) that (1) the majority is somehow "hollow" or a mere façade (such as being a majority of adults, but not adult citizens) or (2) part of a larger scheme of "cracking" or "packing" minority voters.

Even stranger, in the most recent election a Hispanic candidate won in a landslide over a White opponent, winning 67.7%-32.1%—a 35.6% margin. Such a resounding electoral victory is hardly a sign of diluted Hispanic voting strength. Yet neither the district court's merits order nor remedial order *even discloses* that margin of victory—let alone attempt to analyze it or explain how it is consistent with actual dilution of Hispanic voting strength.

Stranger still is the "solution" that Plaintiffs proposed, and the district court accepted here: even though Plaintiffs alleged that the challenged district *diluted* the voting strength of Hispanics, the remedy adopted was to *dilute further* Hispanic voting

power. Specifically, the Remedial Map challenged here reduces the HCVAP of the district from 52.6% to 50.2% in 2021 population numbers. And to effectuate this cure-dilution-with-more-dilution remedy, the district court made massive and gratuitous changes to *other* districts, altering fully 13 districts in total (out of 49), and moving half a million people into different districts (when, for context, a single legislative district contains about 157,000 people). Far from preserving the existing enacted maps as much as practical, as binding precedent demands, the Remedial Map here made sweeping and needless alterations—almost all uniformly benefiting one party.

This case thus makes a mockery of the VRA and federalism. It employs the VRA in a manner antithetical to its purposes: twisting its anti-vote-dilution prohibition into a tool for affirmative vote dilution, all to serve partisan ends. It further relies on federal courts to subvert States' roles in drawing their own districts. And it rests on paternalistic and odious racial stereotyping—*i.e.*, that Hispanic voters can only elect a candidate of "their" choice by diluting their votes with those of non-Hispanic voters.

Because the judgment below contorts the VRA beyond recognition and contrary to its anti-dilutive purposes, it unsurprisingly rests on numerous legal errors. The decision and Remedial Map adopted here are thus unlikely to survive appellate review, and their implementation should be stayed pending review. A stay pending appeal is particularly appropriate because maps need to be finalized imminently to conduct primary and general elections for 2024.

Here, the district court committed at least seven clear errors in its merits and remedial orders. *First*, Plaintiffs' §2 challenge to LD-15 is not cognizable, because that district is already a *majority*-minority district, and that majority is neither hollow/a façade, nor the product of cracking or packing.

Second, the district court erred by refusing to analyze the "*compactness of the minority population*" in Plaintiffs' illustrative maps and instead considering "the compactness of the contested district"—in direct violation of Supreme Court precedent. *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (emphasis added).

Third, the district court failed to perform the requisite partisanship-versus-race causation analysis that §2 and this Court's precedents demand. Indeed, the district court tellingly failed even to *acknowledge* the recent landslide victory of a Hispanic candidate in LD-15, let alone attempt to grapple with how Senator Torres's 35% margin of victory was consistent with alleged dilution "on account of race or color." 52 U.S.C. §10301(a).

Fourth, the district court's totality-of-the-circumstances finding rests on legal error and is untenable, particularly given that LD-15 is already a majority-minority district that produced a landslide victory for a minority candidate.

Fifth, the district court erred in purporting to remedy the alleged dilution that it found violated §2 with yet more dilution, reducing the Hispanic CVAP of LD-15 from 52.6% to 50.2%. If dilution is the VRA violation, it cannot also be the cure. Indeed, employing the VRA affirmatively to effect dilution of minority voting strength makes a farce out of that landmark civil rights statute.

Sixth, the Remedial Map adopted is an unconstitutional racial gerrymander. Like prior infamous racial gerrymanders, its bizarre shape reveals its unexplainable-except-by-racial-grounds nature—which the district court was completely explicit about in any case. Here, the Remedial Map's revised district was aptly described as an "octopus slithering along the ocean floor." ADD-99. And it belongs in the unconstitutional Hall of Shame every bit as much as the "sacred Mayan bird" and "bizarrely shaped tentacles" previously invalidated. *Allen v. Milligan*, 143 S. Ct. 1487, 1509 (2023).

Seventh, the district court violated the mandate to craft a remedial map that minimizes the changes to the map enacted by the State. Instead, the district court made sweeping and gratuitous changes to a huge number of districts: altering fully 13 of Washington's 49 total districts and moving half a million Washingtonians into different districts. Those changes were wanton, particularly, as Appellants' expert made clear, because a remedy accomplishing the district court's stated goal of performing for a Democratic candidate could be effected by altering just *three districts* and moving only 87,230 people.

Given these patent errors, and because Appellants will suffer irreparable harm absent a stay and the balance of equities and public interest favor issuance of one, this Court should grant Appellants' request for a stay pending appeal.

BACKGROUND

The Washington Constitution requires the State's legislative districts be drawn by an independent, bipartisan redistricting commission ("Commission"). Wash. Const.

art. II, §43(1). That Commission has four voting members, two appointed by each of the Democratic and Republican legislative leaders. Wash. Const. art. II, §43(2). Washington law also requires districts be drawn with equal (as practicable) populations that respect communities of interest, minimized splitting of county and town boundaries, and encouraged electoral competition. *See* RCW 44.05.090.

After the 2020 census, this redistricting process commenced. After the normal back-and-forth, including some political horse-trading and negotiations that led to an agreement to create LD-15 as a majority-minority district for Hispanics, the Commissioners agreed on a map by the statutory deadline. The Legislature adopted the map with slight modifications (with no population changes to LD-15) on February 8, 2022. ADD-1.

Plaintiffs quickly sued, alleging intentional discrimination against Hispanics as well as dilution of Hispanic voting strength in effect, both in alleged violation of Section 2 of the Voting Rights Act ("VRA"). Plaintiffs amended complaint focused on LD-15, alleging that it was a "façade" district. ECF No. 70. Although LD-15 was already a majority HCVAP district, Plaintiffs demanded, in the district court's words, "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." ECF No. 70 at 41. Three individuals, Hispanic voters from the region, Jose Trevino, Alex Ybarra, and Ismael G. Campos, joined the case as permissive intervenors (now Appellants). ECF No. 69. Alex Ybarra

is also one of two Representatives from an adjacent district, LD-13, which extends into Yakima County. Plaintiffs, Intervenors, and the State all retained experts on the *Gingles* legal framework.

Meanwhile, the 2022 elections proceeded under the Enacted Map. Nikki Torres, a Hispanic Republican, won the LD-15 Senate seat. It was not particularly close, with Torres winning 67.7%-32.1% victory over her White Democrat general election opponent. ADD-166. Per the parties' experts on each side, she took somewhere from 32 to 48 percent of the Hispanic vote, depending on the statistical model used. ADD-170; ADD-176.

A four-day bench trial was held in June 2023. ECF Nos. 206–09. On August 10, 2023, the district court held that the boundaries of LD-15 "violate[d] Section 2's prohibition on discriminatory results." ADD-3. The district court did not find that LD-15's Hispanic majority was "hollow" or a "façade." The district court permanently enjoined use of the entire State Legislative map and ordered the State to replace it. ADD-32. The district court then entered judgment for Plaintiffs and Appellants filed a notice of appeal. ADD-44-45. Appellants moved for a stay of remedial proceedings pending appeal, which this Court denied on December 21, 2023. ECF No. 247. Appellants then successfully moved in this Court to hold their merits-appeal in abeyance pending the district court's remedial proceedings so that merits- and remedies-based appeals could be consolidated and heard together. No. 23-35595, ECF No. 59.

The case proceeded to the remedial phase. Appellants, Plaintiffs, and the Secretary of State all submitted expert reports. Plaintiffs submitted five remedial map proposals, subsequently amending each to be slightly less incumbent-disruptive. ECF Nos. 245-1; 254-1. Although Plaintiffs had prevailed on a claim that LD-15 diluted Hispanic voting strength, all five of their proposed remedial maps diluted it further: reducing it from 52.6% HCVAP to between 46.9% to 51.7% based on 2021 numbers. ADD-125.

The district court held a half-day evidentiary hearing on March 8, 2024. At that hearing, the two experts for Plaintiffs testified, as did Appellants' expert. The district court ordered each side to present amended versions of their proposals, which were received by the court on March 13, 2024. ECF Nos. 288; 289.

On March 15, 2024, the district court issued its remedial order. It adopted Plaintiffs' "Map 3B" (reproduced below at 17), finding that the map remedied the §2 violation by (1) "unit[ing] the Latino community of interest in the region[,]" ADD-38; and (2) making it "substantially more Democratic than its LD 15 predecessor[,]" ADD-42. The court conceded that "the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district," but found it necessary to do so for Hispanic voters to "elect candidates of their choice to the state legislature," *i.e.*, Democrats. ADD-36.

Simultaneously to this case, a Hispanic voter brought a Fourteenth Amendment racial gerrymandering claim against LD-15, which was consolidated with *Soto Palmer* for the June trial. *Garcia v. Hobbs*, No. 3:22-cv-05152. After the *Soto Palmer* decision, the majority of the three-judge district court dismissed *Garcia* as moot, but Judge VanDyke dissented, believing the *Soto Palmer* district court lacked the power to decide that case. *Garcia v. Hobbs*, No. 3:22-cv-05152, ECF 81-1 at 12 ("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."). Mr. Garcia appealed directly to the Supreme Court, which vacated that order and directed the *Garcia* district court to enter a fresh judgment from which Mr. Garcia can appeal to this Court. *Garcia v. Hobbs*, 218 L.Ed.2d 16 (U.S. Feb. 20, 2024). The questions concerning the single-judge district court's jurisdiction in *Soto Palmer* remain at issue as a result of the *Garcia* appeal, which will commence once the appealable order is reentered by the three-judge district court.

LEGAL STANDARD

In evaluating a request for a stay pending appeal, this Court considers four factors: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in

the proceeding; and (4) where the public interest lies.'" *Duncan v. Bonta*, 83 F.4th 803, 805 (9th Cir. 2023) (en banc) (quoting *Nken v. Holder*, 556 U.S. 418, 425–26 (2009)).

ARGUMENT

I. Appellants Are Likely to Succeed on the Merits of Their Appeal.

Both the district court's liability and remedial orders under Section 2 are infected with multiple errors. Appellants are thus independently likely to succeed on appeal both because (1) the district court erred in holding that LD-15 violated VRA §2, and thus no remedy was warranted at all; and (2) the district court committed legal error and/or abused its discretion in adopting the Remedial Map that it did. Either way, the district court's injunction and judgment should be stayed pending appeal.

Preliminarily, and jurisdictionally, 28 U.S.C. §2284(a) demands that "[a] district court of three judges shall be convened … when an action is filed challenging … the apportionment of any statewide legislative body." As five judges of the Fifth Circuit have noted, "[t]he most forthright, text-centric reading of 28 U.S.C. § 2284(a) is that a three-judge district court is required to decide apportionment challenges—both statutory and constitutional—to statewide legislative bodies." *Thomas v. Reeves*, 961 F.3d 800, 810 (5th Cir. 2020*)* (Willett, J., concurring). The upshot of a single district judge's adjudication of a VRA challenge to a state legislative district is that "the district court lacked jurisdiction and that its judgment must be vacated." *Id.* at 827; *see also Shapiro v. McManus*, 577 U.S. 39, 43–44 (2015). Plaintiffs' allegations under Section 2 of the VRA and the requested relief in the Amended Complaint constitute an action challenging

"the apportionment of any statewide legislative body." *See* 28 U.S.C. §2284(a); ECF No. 70. The single-judge district court therefore lacked power over this case.

A. The district court's Section 2 liability decision is not likely to survive appellate review.

Under the *Gingles* framework, Plaintiffs had the burden to satisfy three preconditions to make out a case for violation of §2; then, the district court had to determine under the totality of the circumstances whether minority voters are deprived of an equal opportunity to participate in the political process. *Milligan*, 143 S. Ct. at 1503. The three *Gingles* preconditions are: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district (comporting with traditional districting criteria); (2) the minority group must be able to demonstrate it is politically cohesive; and (3) the minority group must be able to demonstrate that the White majority votes sufficiently as a bloc to enable the White majority to defeat the minority's preferred candidate. *Milligan*, 143 S. Ct. at 1503.

Here, the district court erred in analyzing the *Gingles* preconditions because it (1) wrongly concluded that Plaintiffs' challenge to a *majority*-minority district was cognizable absent proof of cracking or packing or that the majority was a façade, (2) failed to analyze the compactness of minority populations, rather than the geographic lines of the districts, and (3) failed to analyze causation, including by ignoring entirely the massive margin of victory by a Hispanic candidate. It further erred in analyzing the totality of the circumstances.

1. Plaintiffs' vote-dilution challenge to a *majority*-minority district is not cognizable here.

As a threshold matter, Plaintiffs' claim that LD-15—a *majority*-minority district—violated §2 is not cognizable. Such claims are only viable where §2 plaintiffs establish that multiple districts were cracked or packed, or that the district is a façade lacking a "working" majority. Normal §2 cases involve plaintiffs challenging a map or section of a map lacking a majority-minority district and seeking such a district as a remedy. Indeed, the *Gingles* framework itself is based on the premise that racial minorities in the district are in the minority of voters. *See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (*Gingles* I: "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a *majority* in a single-member district") (emphasis added); *id.* at 51 (*Gingles* III: factor considers whether "*white majority* votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate.") (emphasis added).

This case flips the *Gingles* script: Plaintiffs alleged the *majority*-minority LD-15 unlawfully diluted Hispanic voting strength. And as a putative remedy for the alleged dilution, Plaintiffs sought and got *yet more dilution*.

This approach subverts the VRA's text, which is violated when a minority group has "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(b). But, by definition, if a group constitutes a majority of the citizen-age voting population, then it

necessarily possesses *at least an equal opportunity* to do so. Indeed, that group possesses a *better* opportunity than all other groups, since it can simply outvote all other racial groups *combined* in that district.

The Supreme Court thus has permitted challenges to majority-minority districts only where the putative majority is a mere façade or is "hollow"; *e.g.*, where "Latinos … [we]re a bare majority of the voting-age population" but not a majority of the citizen voting-age population. *LULAC*, 548 U.S. at 429, 427. Hence "[n]o court has ever ruled that a majority-minority district violates §2 in isolation"—without being vacated at least. *Thomas v. Bryant*, 938 F.3d 134, 181 (5th Cir. 2019) (Willett, J., dissenting) ("I am unaware of any court decision holding that a majority-minority district can violate §2 in a vacuum, all by itself, unaccompanied by evidence—or even an allegation—of packing or cracking").[1]

Here, no evidence was presented that Hispanic voters were cracked or packed across multiple districts; nor did the district court rely on any such theory. Nor did the district court find that the Hispanic majority was somehow a façade or hollow. Therefore, Plaintiffs' claim that a *majority*-minority district violates §2 fails.

[1] Although Judge Willett was dissenting, the Fifth Circuit subsequently vacated the panel decision en banc and then dismissed the case as moot. *Thomas v. Reeves*, 961 F.3d 800, 801 (5th Cir. 2020).

2. The far-flung Hispanic communities in the Yakima Valley are not compact.

The district court also committed legal error in analyzing the compactness of Plaintiffs' illustrative districts. "The first *Gingles* condition refers to the *compactness of the minority population*, not to the compactness of the contested district." *Perry*, 548 U.S. at 433 (emphasis added). In *Perry*, the Supreme Court made clear that a district is not compact when two Hispanic communities within it were (1) distinct in terms of distance and (2) distinct in terms of their respective needs and interests. *Id.* at 435.

The district court flouted this requirement, however, and analyzed compactness solely in terms of the district's geographic boundaries rather than the compactness of the minority populations within in it. The district court thus relied on Dr. Collingwood's analysis, which reasoned that the "*proposed maps* that perform similarly or better than the enacted map when evaluated for compactness." ADD-9. But that analysis from Dr. Collingwood was expressly analyzing the compactness of the district's *geography and boundaries*—not its minority population. ADD-10. The district court similarly relied on Dr. Alford's reasoning that Plaintiffs' illustrative examples were "among the more compact demonstration districts he's seen." ADD-10 (alteration omitted). But again, that was analyzing the compactness of the *district*, not its minority populations.

Had the district court conducted the inquiry mandated by the Supreme Court, it would have found that the minority populations were *not* compact. Plaintiffs' Demonstrative Map 1, for example (of which their Remedial Proposals 1 and 2 were

near-carbon copies, see ADD-81), featured two appendages reaching out to grab the Hispanic parts of Yakima in the north and Pasco on the exact opposite side in the east. The grabbing is the obvious result of an attempt to patch together three distinct Hispanic communities, one in parts of urban Yakima, another in suburban Pasco, and a third in rural farming towns along the Yakima River. Yakima and Pasco are more than eighty miles apart—roughly the distance between San Francisco and Sacramento.

In concluding that these far-flung communities were actually geographically compact, the district court simply listed off ubiquitous characteristics of Hispanic voters: language, religious and cultural practices, and significant immigrant populations. ADD-10. But if such high-level generalities sufficed, even a district stitching together Hispanic voters from Redding to San Diego, California would be "compact." That is not the law. *See Perry*, 548 U.S. at 434–35.

3. The district court erred by failing to analyze causation.

Section 2's text prohibits the "denial or abridgement of the right of any citizen of the United States … to vote *on account of race or color*." 52 U.S.C. §10301(a) (emphasis added). Plaintiffs thus "'must show a *causal connection* between the challenged voting practice and a prohibited discriminatory result.'" *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (citation omitted) (emphasis added) (collecting §2 cases rejecting claims for failure to establish race-based causation). *See also LULAC v. Clements*, 999 F.2d 831, 853–54 (5th Cir. 1993) (en banc) ("[C]ourts must "undertake the additional inquiry into the reasons for, or causes of," racial

polarized voting "in order to determine whether they were the product of 'partisan politics' *or* 'racial vote dilution,' 'political defeat' *or* 'built-in bias.'" (citation omitted)).

The evidence at trial made clear that racially polarized voting only existed in the Yakima Valley for partisan contests between White Democrats and White Republicans and disappeared in all other races. Indeed, the State's expert agreed with Intervenors' expert that the partisan signifier of the candidate drove any polarization.

The district court failed to analyze this issue of causation meaningfully, however. Most tellingly, the district court ignored the landslide, 35-point victory of a Hispanic candidate—evidence that this Court has held is the "most probative." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 553 (9th Cir. 1998) ("The most probative evidence … is derived from elections involving minority candidates." (cleaned up) (citation omitted)). Indeed, the district court's merits opinion does not even *disclose* Senator Torres's margin of victory, let alone attempt to analyze it within the mandatory causation analysis; nor does its remedial order. *See generally* ADD-1-32; ADD-33-43. Instead, the court relied on a very small set of elections, finding that the Hispanic-preferred candidate lost in seven out of ten elections, two of which had "quite small" margins. ADD-12. The district court never examined whether the electoral defeats were caused by partisanship, however. ADD-30-31. In doing so it committed reversible error. *Smith*, 109 F.3d at 595; *Clements*, 999 F.2d at 853–54.

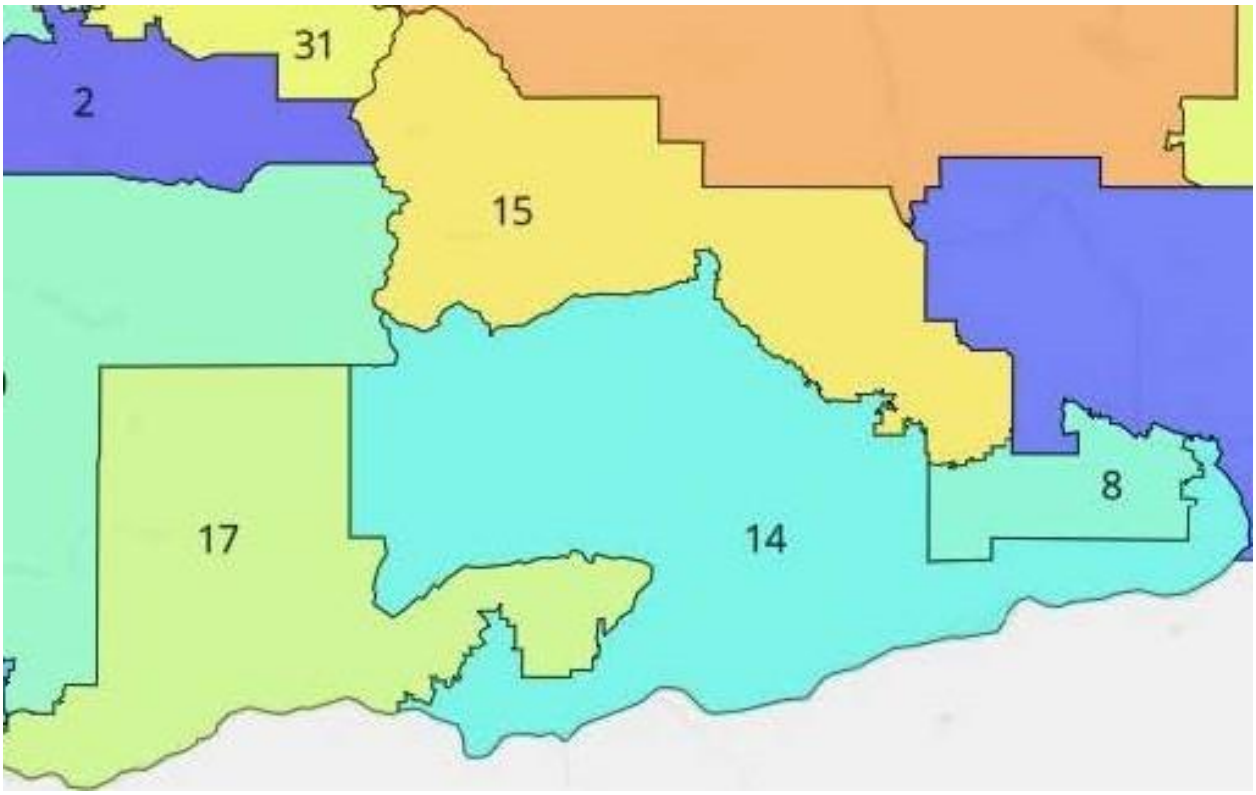
4. The district court's totality finding rests on legal errors and is clearly erroneous.

The ultimate Section 2 determination under the totality of the circumstances was fatally infected with errors. Many of those legal errors are addressed above. But even if they are not individually fatal to Plaintiffs' claims, the cumulative effect of these considerations makes plain that Plaintiffs could not satisfy the totality-of-circumstances inquiry. The district court's contrary conclusion rests on legal error and is clearly erroneous. In particular, the district court's totality analysis: (1) failed to factor in the majority-minority nature of the district; (2) failed to disclose—let alone analyze—the smashing electoral success of Nikki Torres, a Hispanic candidate, and (3) failed to consider that Plaintiffs proposed to remedy the putative dilution of Hispanic voting strength through *more dilution*—in essence, gerrymandering in non-Hispanic Democratic voters so that Hispanic voters would have a "better" opportunity to elect a candidate of "their choice." ADD-14-28. These errors are particularly jarring, considering that minority electoral success and racial polarization are supposed to be "the most important" factors. *Gingles*, 478 U.S. at 48 n.15.

B. The remedy map is not likely to survive appellate review.

Here is the revised district as provided in the Remedial Map, with remedial LD-14:[2]

[2] This Reproduction is of Plaintiff's Map 3B, described in ECF No. 288, which the district court adopted on March 15, 2024 with five additional changes ordered of the



As Appellant's expert aptly described it, the remedy district's bizarre shape most closely resembles an "octopus slithering along the ocean floor." ADD-99. The district's tentacles even appear to curl up just like an octopus's might. This is an almost quintessential example of unlawful gerrymandering—*i.e.*, one featuring tentacles and weird shapes. *See Milligan*, 143 S. Ct. at 1509 (listing as unlawful examples districts with "bizarrely shaped tentacles" and a shape like "a sacred Mayan bird").

In adopting the Remedial Map, the district court committed three independent legal errors, all of which require reversal: (1) "remedying" alleged dilution of Hispanic voter strength with more dilution; (2) drawing a bizarrely shaped map that is an

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Secretary of State. These five census block shifts are immaterial to the legal and factual arguments in this Motion.

unconstitutional gerrymander, and (3) adopting gratuitous disruption to the State's original enacted plan unnecessary to remedy the putative Section 2 violation.

1. The district court erred in "remedying" vote dilution with more dilution.

As explained above (at 11-12), the district court erred in accepting Plaintiffs' theory that LD-15, a *majority* HCVAP district, somehow diluted Hispanic voting strength. But even accepting that dubious premise, the district court committed fundamental error by attempting to "remedy" the putative dilution by *further diluting* Hispanic voting strength: diluting HCVAP from 52.6% in the Enacted Map to 50.2% in the Remedial Map (both in 2021 numbers). ADD-125. A court cannot remedy dilution with more dilution any more than a firefighter can battle fires with napalm.

The underlying reality driving the bizarre fight-dilution-with-dilution remedy is that Democrats were not winning "enough" in the Yakima Valley, especially after Nikki Torres's 35-point triumph. Given that lopsided victory, it is doubtful that any map *increasing* Hispanic voting strength could be drawn to defeat Senator Torres. What is certain is that Plaintiffs did not even try. They instead proposed dilution as the putative cure, injecting non-Hispanic Democrats into the remedial district. By that dilution, the Remedial Map performs for Democrats in all hypothetical matchups run by Plaintiffs' expert.

Thus, the giveaway: for Plaintiffs, this is not about Hispanic voting strength in the Yakima Valley or ensuring that they have equal voting *opportunity*. Rather, it is about

ensuring that Democrats will win at all costs—even at the cost of employing the very evil that the VRA is supposed to combat: dilution of minority voting strength. Nor did the district court attempt to offer any defense of its bizarre cure-dilution-with-dilution remedy beyond this single conclusory sentence: "Although the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district, the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature." ADD-36.

But, of course, "the ultimate right of §2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). The district court disagreed, instead adopting a map that *lowers* Hispanic voting power to enhance Democratic electoral prospects. That flouts the VRA and rests on racial stereotypes and paternalism in a manner antithetical to the purposes of the VRA. The adopted Remedial Map literally relies on injecting non-Hispanic Democrats into the district to "assist" Hispanic voters with electing a candidate of "their" choice. And it flunks basic logic too: if dilution is the violation, it cannot also be the remedy.

2. The Remedial Map classifies citizens by race in violation of the Equal Protection Clause.

For decades it has been clear that race-motivated district lines with "bizarre shapes" are typically subject to strict scrutiny presumptively unconstitutional. *See Bush v. Vera*, 517 U.S. 952, 975 (1996); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*)

("[R]eapportionment is one area in which appearances do matter."). And court-drawn redistricting plans face even "stricter standards" than those drawn by States themselves. *Upham v. Seamon*, 456 U.S. 37, 42 (1982).

The remedial district's slithering-octopus shape obviously fails the Supreme Court's aesthetic test, taking on the classic attributes of a district that is a racial gerrymander, with boundaries "unexplainable" except by race-based criteria. *See Shaw I*, 509 U.S. at 644. Indeed, just as in *Bush*, the remedial district has a "northernmost hook … [that] is tailored perfectly to maximize minority population." *Shaw II*, 517 U.S. at 971. But we also know the explanation behind the inaesthetic shape: the district court's order that the remedial map combine together Hispanic populations spread throughout the 80-mile stretch of the Yakima Valley region. The district court deemed it a "fundamental goal of the remedial process" that the remedial district "unite the Latino community of interest in the region"—*i.e.*, explicitly used a race-based motive as the core purpose of the remedial district's lines. ADD-38 n.7, 38. Those Hispanic communities referenced are those in "East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco." ADD-36. That race-based motivation wrought the octopus. The east tentacle, as well as the abscess on top of the head of the octopus, are the direct result of the ethnic sorting to unite those far-flung Hispanic communities. It is simply unexplainable on any other grounds. Nor does the district court attempt to explain it otherwise, instead openly admitting its race-based purpose. ADD-38, 42.

A racial gerrymander like this is suspect, even if drawn with the laudable goal of remedying a VRA violation. As in *Miller v. Johnson*, the district court took a "shortsighted and unauthorized view of the Voting Rights Act," which resulted in drawing an ugly, unconstitutional district. *See Miller v. Johnson*, 515 U.S. 900, 927–28 (1995).

3. The Remedial Map is gratuitously disruptive.

The district court ordered remedial maps that were "revised legislative district maps for the Yakima Valley region." ADD-32. But the adopted Remedial Map is far more expansive in scope, instead revising a full one-quarter of the State's legislative districts, making changes to population, political leanings, and district shapes far outside the Yakima Valley region.

Court-ordered reapportionment plans are subject to "stricter standards than are plans developed by a state legislature." *Upham*, 456 U.S. at 42. Therefore, "a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed … in the reapportionment plans proposed by the state legislature." *Id.* at 41. Changes should only be made "to the extent" necessary to comply with the Constitution or the VRA. *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). The guiding light must be "the State's recently enacted plan[,]" which reflects "the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." *Perry v. Perez*, 565 U.S. 388, 393 (2012). This is true even when replacing a plan held to violate the law. *Id.*

The district court flouted these principles and made changes to the Enacted Map far beyond what was necessary to remedy the alleged violation in LD-15. The Remedial Map rewrites a quarter of Washington's state legislative map by district. ADD-148-150. Of all Plaintiffs' proposed maps, it was the most disruptive of the Enacted Map. ADD-146. The changes, incumbent pairings, shapes, shifts in population, changes in partisan balance, and more are all gratuitous, and far beyond what was required to achieve even the district court's view of a district that performs consistently for Democrats.

Cascading Population Displacement. The Remedial Map disrupts the boundaries of 13 of Washington's total 49 legislative districts, with changes not just in South Central Washington but across Western, North Central, and Eastern Washington. The majority of counties in the entire state are affected, and half a million Washingtonians are moved into a new district under the Remedial Map.

Incumbent Displacement. Incumbents are moved unnecessarily. Senator Torres is moved into LD-16—for the obvious reason that her electoral success in LD-15 needed to be "remedied"—while Senator Hawkins gets moved into LD-7, forcing him into a contest with Senator Short, and Senator King gets moved from LD-14, where he is already running for reelection in 2024, to LD-15, where the next state senate election is not scheduled until 2026. Representative Corry is moved from LD-14 into LD-15 where he would have to face either incumbent Representative Chandler or Sandlin, and Representative Mosbrucker is moved from LD-14 to LD-17 where she would have to face either incumbent Representative Harris or Waters.

Political Balance. Washington law requires the map to "provide fair and effective representation and to encourage electoral competition" and to "not be drawn purposely to favor or discriminate against any political party or group." RCW 44.05.090(5). The bipartisan Commission attempted to do just that, carefully and intentionally drawing a map to foster electoral competition. The Remedial Map needlessly throws that away, changing the partisan composition of ten districts outside the Yakima Valley region, and thirteen districts in total. For example, District 17 is shifted from a Republican lean to a Democrat lean. ADD-154. And Democrats gain advantages throughout the State as a result. ADD-155.

The wanton nature of these disruptions is evidenced primarily by Dr. Trende's illustrative remedial map ("Intervenors' Map"), which creates a majority-HCVAP district in the Yakima Valley that (as Plaintiffs' expert concedes) consistently performs for Democrats, and which keeps the Yakama Nation and its traditional lands together in a neighboring district. ADD-140. Intervenors' Map changes only *three* districts in total: moving only 87,230 of people in total. ADD-147, 152. It further limited partisan changes to two other districts in the area: LD-14 (more Republican) and LD-13 (more Democratic) and did not displace any incumbents. ADD-152, 154-157. The district court thus had before it a map that Plaintiff's expert acknowledged would provide an adequate remedy and that would have complied with disruption-minimization mandate of *Upham*, *Abrams*, and *Perry*. But it chose otherwise, thereby violating those precedents.

Last, the remedy is an end-run around Washington State law. As noted, remedial maps, especially those ordered by federal courts, must respect the laws of the State as much as possible in remedying the Section 2 violation. *See Upham*, 456 U.S. at 41. But the Remedial Map subverts the Washington Constitution's requirement that legislative districts be drawn exclusively by the bipartisan redistricting Commission. Wash. Const. Art. II, § 43(11). But the district court did not even give the Commission an opportunity to draw remedial maps, instead short-circuiting its own timeline based solely on various news reports. *See* ECF No. 230. The State, meanwhile, had announced at the eleventh hour that it was abandoning defense of the Commission's map. ADD-2. And the State now asserts that the Appellants lack standing on appeal, a clear attempt to insulate their circumvention of Washington law from judicial scrutiny.

II. The District Court's Injunction and Remedial Map Inflict Irreparable Injury on Appellants, Which Also Confers Article III Standing to Appeal.

As Hispanic citizen voters living in the Yakima Valley, Appellants Ybarra and Trevino suffer irreparable injury from being placed in illegally drawn maps. Appellants each possess an individual right under the Equal Protection Clause not to be sorted on the basis of their race—violation of which inflicts "fundamental injury to [Appellants'] 'individual rights.'" *Shaw II*, 517 U.S. at 908. Notably, "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). Because §2 remedial maps, like the one ordered in this case, by their

nature are put in place to provide ethnic or racial minorities electoral opportunity, they require racial classifications creating cognizable injury.

Moreover, the Remedial Map embodies explicit race-based sorting as explained above (at 19-21). And "[w]here a plaintiff resides in a racially gerrymandered district … [he] has been denied equal treatment … and therefore has standing to challenge" it. *United States v. Hays*, 515 U.S. 737, 744-45 (1995).[3] That alone gives Ybarra and Trevino standing to bring this appeal.

Indeed, Ybarra's and Trevino's injuries are effectively just the mirror image of the harms that Plaintiffs allege that they are suffering from the Enacted Map, which formed the basis for Plaintiffs' standing. In the end, being sorted into illegal districts either inflicts cognizable injury or it doesn't. If it does, Appellants here have standing to appeal and will suffer irreparable harm from the district court's unlawful Remedial Map. And if being drawn into illegal districts does not inflict cognizable harm—*contra Hays*—Plaintiffs here lack standing and their suit must be dismissed.

Separately, Representative Ybarra further faces a specific and individual injury to his position as a legislator. While some legislators' incumbency and reelection chances are bolstered across the State by the Remedial Map, Representative Ybarra's are diminished. Under the Remedial Map, over 30,000 of Representative's Ybarra's

[3] Jose Trevino, who resides in Granger, was in Enacted LD-15. The Remedial Map moves him into Remedial LD-14 on the basis of his race. *See* ECF No. 245-1 at 4 (listing Hispanic populations to be redistricted which include Granger's).

constituents are moved out of his district, LD-13, and replaced with a comparable number of new ones. ADD-103. Those new ones, the evidence shows, are more Democratic. ADD-95-96, 136. As a result, Representative Ybarra will need to spend money to introduce himself to his new constituents and time traveling to those new areas in order to campaign for their votes (and on a highly expedited basis). Such campaign expenditures will certainly exceed $3.76, the minimal benchmark that this Court has held satisfies Article III standing. *See Van v. LLR, Inc.*, 962 F.3d 1160, 1162 (9th Cir. 2020). Moreover, the net movement of Democrats into Representative Ybarra's district makes for a "more difficult election campaign," a harm that the Supreme Court has not yet explicitly endorsed but has left open for lower courts to recognize. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1956 (2019). Because Representative Ybarra is treated differently and worse, not all "member[s] of the body politic" in Washington share these harms, *Newdow v. United States Cong.*, 313 F.3d 495, 498–99 (9th Cir. 2002). Therefore, the Remedial Map has "singled [Rep. Ybarra] our for specifically unfavorable treatment as opposed to other Members of" the Legislature, thereby conferring Article III standing on him. *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

The Appellants thus face irreparable injury from the Remedial Map, satisfying both the second *Nken* factor as well as Article III standing to appeal.

III. The Balance of Equities and Public Interest Favor a Stay Pending Appeal.

The final two factors concern harm to the other parties, which here are Plaintiffs, the Secretary, and the State. As to the State and Secretary, "the balance of the equities

and public interest factors merge" because "the Government is a party." *Doe #1 v. Trump*, 984 F.3d 848, 861–62 (9th Cir. 2020) (cleaned up) (citation omitted). Those merged considerations support a stay pending appeal here for six reasons.

First, Plaintiffs' alleged injuries are predicated on the VRA Section 2 violation that the district court found. But, as explained above, that finding rests on manifest legal error. The necessary premise for Plaintiffs' harms is lacking here, leaving little harm to balance against Appellants' "fundamental" injuries. *Shaw II*, 517 U.S. at 908.

Second, Plaintiffs' harms are severely undermined—and rendered outright incoherent—due to the paradox that lies at the heart of their §2 claim. Because Plaintiffs' harms are alleged *dilution* of Hispanic voting strength, Plaintiffs will actually benefit—and certainly not be harmed—by issuance of a stay that prevents *further dilution* of HCVAP from 52.6% in the Enacted Map to 50.2% in the Remedial Map. Having relied on alleged dilution as the basis for their harms, Plaintiffs cannot fairly complain about a stay that prevents further dilution.

Third, "it is always in the public interest to prevent the violation of a party's constitutional rights." *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). As set forth above, Appellants will suffer "fundamental injury to [their] individual rights" under the Equal Protection Clause from the district court's race-based Remedial Map. *Shaw II*, 517 U.S. at 908. Indeed, "[n]umerous cases have described the immense harm caused by racial gerrymandering." *Jacksonville Branch of the NAACP v. City of Jacksonville*, No. 22-13544, 2022 U.S. App. LEXIS 30883, at *14 (11th Cir. Nov. 7, 2022).

Fourth, enjoining the "State from conducting [its] elections pursuant to a [legal] statute enacted by the Legislature … would seriously and irreparably harm" the State. *Abbott*, 138 S. Ct. at 2324. A stay pending appeal would avoid those harms. And although, for reasons political or otherwise, the State is unwilling to press those harms itself, they are properly considered as part of the balance of equities and public interest. *See Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (it remains "ultimately necessary … to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." (quotation marks omitted)).

Fifth, the public interest favors adherence to the VRA and Equal Protection Clause and avoidance of racial classifications where not required to comply with the VRA. "The public has an interest in ensuring compliance with federal laws, namely the VRA." *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027, 1034 (D.S.D. 2005). That is why the Supreme Court has routinely stayed injunctions in §2 redistricting cases, allowing elections to be held under enacted maps. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022); *Ardoin v. Robinson*, 142 S. Ct. 2892, 2892 (2022). Similarly, "the public has no interest in enforcing unconstitutional redistricting plans," *Jacksonville*, 2022 U.S. App. LEXIS 30883, at *14. For these reasons, the public interest favors conducting elections under a map that comports with the VRA and Constitution, rather than under an illegal, unconstitutional map.

Sixth, a stay would serve the interests of federalism and thus the public interest. *See, e.g.*, R.R. *Com. of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) ("Few public interests

have a higher claim … than the avoidance of needless friction with state policies."). Washington law provides for districts to be drawn by a bipartisan independent commission, rather than elected officials or federal courts. But the district court's order needlessly redraws the Commission's map far more than is necessary.

Moreover, by (1) refusing to defend the Commission's map against Plaintiffs' voter-dilution §2 claim and then (2) acquiescing in Plaintiffs' maximalist remedial plan that undoes far more of the Commission's work than was necessary, the State has effected a transfer of power from the independent Commission into the hands of an elected and political attorney general. It cannot be that the public interest favors allowing federal courts to be exploited by state officials seeking to circumvent mandates of state law. The attorney general's collusive attempted end-run around state law is thus not in the public interest—but staying it would be.

CONCLUSION

For these reasons, Appellants respectfully request this Court stay the district court's order adopting the Remedial Map pending appeal, and that this Court do so before the Secretary's preferred date of March 25, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief contains 7,154 words spanning 29 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f). Appellants have concurrently filed a motion for leave to file a brief exceeding the limits of Federal Rule of Appellate Procedure 27(d)(2)(B) and Circuit Rule 27-1(1)(d).

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 Garamond size 14-point font with Microsoft Word.

Dated: March 18, 2024

/s/ Jason B. Torchinsky
Jason B. Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on March 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 B. Torchinsky
Jason B. Torchinsky