

**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. 24-1602

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

**PLAINTIFFS-APPELLEES’  
MOTION TO CONSTRUE  
APPELLANTS’ EMERGENCY  
MOTION FOR A STAY PENDING  
APPEAL AS A MOTION FOR  
RECONSIDERATION AND  
TRANSFER TO ORIGINAL  
MOTIONS PANEL**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
BACKGROUND .....	2
ARGUMENT .....	5
CONCLUSION .....	7
CERTIFICATE OF COMPLIANCE.....	9
CERTIFICATE OF SERVICE .....	10

**TABLE OF AUTHORITIES**

Ninth Circuit Rule 27-10 .....1, 5, 6, 7

## INTRODUCTION

Appellants already sought a stay of the district court’s injunction, which this Court denied. The majority of the arguments raised in Appellants’ second emergency stay motion, filed yesterday in this new case number, are the exact same arguments a motions panel of this Court already considered and rejected. Appellants’ motion contravenes this Court’s rules in at least two ways: (1) it seeks the same relief a prior motions panel denied without following Rule 27-10’s procedure for seeking reconsideration and (2) it seeks to circumvent Rule 27-10’s time limit for seeking reconsideration absent leave of court extending that deadline. In sum, Appellants seek a second bite at the apple from a new motions panel having failed to persuade the first motions panel that a stay pending appeal is warranted.

The Court should construe Appellants’ “emergency stay motion” as a motion for reconsideration—and a motion for leave to file such motion out of time—pursuant to Rule 27-10. Under Rule 27-10(b), Appellants’ motion should be directed to the panel that adjudicated Appellants’ first stay motion.

Plaintiffs-Appellees sought the position of the parties regarding this motion. Appellants oppose this motion.<sup>1</sup> Appellee State of Washington and Secretary of State Steven Hobbs take no position on this motion.

---

<sup>1</sup> Counsel for Appellants requested that Appellees include the following two sentences regarding their position: “Appellants oppose the motion. Appellants further suggest that any such argument about putative reconsideration from an order

## BACKGROUND

On August 10, 2023, after a year and half of litigation and a four-day trial, the district court found that Washington’s 15th Legislative District (LD15) violated Section 2 of the Voting Rights Act. Add-32. Appellants—three individuals who were granted permissive intervention in the district court—filed a notice of appeal a month later, on September 8, 2023. Add-45. On November 3, 2023, Appellants filed a petition for certiorari before judgment with the Supreme Court, seeking to bypass this Court’s appellate review. *See* Petition for Certiorari Before Judgment, *Trevino v. Soto Palmer*, No. 23-484 (U.S. Nov. 3, 2023). On December 5, 2023—four months after the district court issued its decision and injunction, three months after its appeal in this Court was docketed, and one month after asking the Supreme Court to bypass this Court—Appellants filed a motion with this Court to stay the district court’s injunction and remedial proceedings. *See* Mot. to Stay Injunction and Lower Court Proceedings, *Susan Palmer, et al. v. Jose Trevino, et al.*, No. 23-35595 (9th Cir. Dec. 5, 2023), Dkt. 34-1 (“First Stay Motion”).

---

in a different appeal should instead be combined into an ordinary opposition brief in response [*sic*] our motion for a stay pending appeal, rather than having separate motions about motions.”

Plaintiffs-Appellees believe the Court should determine the panel that should consider Appellants’ second stay motion before expending resources reviewing its substance. Moreover, Plaintiffs-Appellees seek specific relief most appropriately sought in a motion.

Appellants' first stay motion argued, *inter alia*, that they were likely to succeed on appeal because of their contentions that (1) the legislative district enjoined by the district court as a violation of Section 2 of the Voting Rights Act ("VRA") was already majority Hispanic, *id.* at 6, (2) the district court failed to consider the compactness of the minority population as opposed to the compactness of the district, *id.* at 6-7, (3) the district court failed to consider causation, *id.* at 8, and (4) the district court's consideration of the Section 2 totality-of-the-circumstances factors was erroneous, *id.* at 8. Appellants also contended that any remedy necessarily would be an unconstitutional racial gerrymander, and thus the district court's ongoing remedial proceedings should be stayed. *Id.* at 9-11.

On December 21, 2023, a motions panel of this Court—Judges Rawlinson and Hurwitz—issued an order denying Appellants' motion for a stay, citing Appellants' failure to satisfy the stay factors set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2019). Order Denying Stay, *Susan Palmer, et al. v. Jose Trevino, et al.*, No. 23-35595 (9th Cir. Dec. 21, 2013), Dkt. 45.

Appellants' opening brief in this Court was due that same day—December 21, 2023—but Appellants sought and received a streamlined extension until January 22, 2024. *Id.*, Dkt. 47. Then, on January 5, 2024, Appellants filed a motion to hold their own appeal in abeyance pending the district court's remedial proceedings and their Supreme Court petition, *id.*, Dkt. 48, which this Court granted, *id.*, Dkt. 59. That is,

five months after the district court entered an injunction they contend imminently harmed them and necessitated a stay, Appellants sought to delay resolution of their own appeal. Thereafter, the Supreme Court denied their petition for certiorari before judgment on February 20, 2024. *See Trevino v. Soto Palmer*, No. 23-484.

In the meantime—and following this Court’s denial of Appellants’ motion to stay the trial court’s remedial proceedings—the district court held a robust remedial process, with briefing and expert reports, a special master, and an evidentiary hearing at which the parties were able to present expert and lay witness testimony. On March 15, 2024, the district court ordered in place Map 3B, which remedied the Section 2 violation while respecting the priority of the Washington Redistricting Commission to simultaneously unite the Yakama Nation Indian Reservation with its off-reservation trust lands in Klickitat County near to and along the Washington/Oregon border. Add-36. Appellants filed a new notice of appeal, which resulted in the new appellate case number in which Appellants now file their second motion for a stay.

At the end of business hours on March 18, 2024, Appellants filed an “emergency” motion for a stay of the district court’s August 2023 injunction and its subsequent remedial order. *See* Dkt. 7.1 (“Second Stay Motion”). The motion “contains 7,154 words spanning 29 pages.” Second Stay Motion at 31. Five of the seven arguments raised in Appellants’ second stay motion were already raised and

rejected by this Court in denying their first stay motion. *Compare* First Stay Motion at 6-11, *with* Second Stay Motion at 3-4, 10-16, 19-21.

After waiting four months to file their first motion for a stay of the district court’s injunction, detouring to the Supreme Court, and asking this Court to hold their own appeal in abeyance—Appellants now ask this Court to order Appellees to respond within 24 hours to their 29-page stay motion, the vast majority of which raises arguments a motions panel of this Court has already considered and rejected. This comes *seven months* after the district court’s injunction was issued—during which time Appellants have asked this Court *not to decide* their appeal.

### **ARGUMENT**

Appellants’ emergency motion for a stay should be processed under Ninth Circuit Rule 27-10, which governs motions for reconsideration. Rule 27-10 provides that “[u]nless the time is shortened or expanded by order of this Court, a motion for . . . reconsideration of a [non-dispositive] court order . . . must be filed within 14 days after entry of the order.” 9th Cir. R. 27-10(a)(2). Such a motion must “state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood.” 9th Cir. R. 27-10(a)(3). The Rule likewise sets forth the “Court Processing” for motions for reconsideration, providing that motions for reconsideration “of an order issued by a motions panel shall be decided by that



panel.” 9th Cir. R. 27-10(b). Responses are not permitted unless directed by the Court, but such motions are not ordinarily granted without ordering a response. *Id.*

The majority of Appellants’ latest “emergency” motion for a stay is merely a repackaging of their first motion for a stay—raising precisely the same merits arguments regarding the district court’s liability order and injunction. They likewise raise the same argument that any remedy is a racial gerrymander. And they seek, *inter alia*, the *same relief* they sought in their first motion—a stay of the district court’s August 2023 injunction. *See* Second Motion for Stay at 9. Although their motion is longer this time and raises two new arguments related to the remedial order, the vast majority of their Second Stay Motion is the same as their First Stay Motion, only 11 pages longer. The Court’s rules do not permit parties to simply re-file successive motions in different case numbers (regarding the same district court order) seeking the same relief and hope for a different result from a different motions panel. Rather, the Rules require parties who think their prior motion was erroneously denied to follow Rule 27-10’s procedure for seeking reconsideration from the panel that adjudicated their original motion.

Because the vast majority of Appellants’ latest motion is in fact a motion for reconsideration, the Court should treat it as such to prevent Appellants from circumventing the Court’s rules and gaining a second bite at the apple from a different panel.

## **CONCLUSION**

Pursuant to Rule 27-10, the Court should construe Appellant's emergency motion for a stay as a motion for reconsideration of this Court's December 21, 2023, Order (in case number 23-35595) denying their first stay motion (and a motion for leave to file out of time), and direct Appellants' motion to the panel that adjudicated their first motion (Judges Rawlinson and Hurwitz).

March 19, 2024

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

Thomas A Saenz  
Ernest Herrera  
Mexican American Legal Defense and  
Education Fund  
643 S. Spring St., 11th Fl.  
Los Angeles, CA 90014  
(213) 629-2512  
tseanz@maldef.org  
eherrera@maldef.org

Edwardo Morfin  
Morfin Law Firm, PLLC  
2602 N. Proctor St., Ste. 205  
Tacoma, WA 98407  
(509) 380-9999

Respectfully submitted,

/s/ Mark P. Gaber

Mark P. Gaber  
Aseem Mulji  
Simone Leeper  
Benjamin Phillips  
Campaign Legal Center  
1101 14th St. NW, Ste. 400  
Washington, DC 20005  
(202) 736-2200  
mgaber@campaignlegal.org  
amulju@campaignlegal.org  
sleeper@campaignlegal.org  
bphillips@campaignlegal.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 motion contains 1,535 words spanning 7 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 Times New Roman size 14-point font with Microsoft Word.

Dated: March 19, 2024

/s/ Mark P. Gaber  
Mark P. Gaber

**CERTIFICATE OF SERVICE**

I hereby certify that on March 19, 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