NO. 24-1602

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,

JOSE A. TREVINO, et al.,

Intervenor–Defendants–Appellants.

APPELLEE STATE OF WASHINGTON'S OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL

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I. INTRODUCTION

This Court already denied Intervenor–Defendant–Appellees' (Intervenors) bid to stay the district court's ruling in December 2023, and the Court should do the same again here. DktEntry 45, *Soto Palmer v. Hobbs*, No. 23-35595 (9th Cir. Dec. 21, 2023). Previously, following a full trial, the district court concluded that Legislative District 15 violated Section 2 of the Voting Rights Act, by denying Hispanic voters in and around Washington's Yakima Valley the ability to elect candidates of their choice. Intervenors then asked this Court to stay that order and the remedial proceedings, making largely the same merits arguments they make in their current motion. Mot. to Stay, DktEntry 34-1, *Soto Palmer v. Hobbs*, No. 23-35595 (9th Cir. Dec. 5, 2023). Some things have changed since then—following extensive argument, several expert reports, and an evidentiary hearing, the district court (aided by a special master) ordered a remedial map that addresses the Section 2 violation; the Supreme Court rejected Intervenors' petition for certiorari before judgment, *Trevino v. Soto Palmer*, No. 23-484 (U.S. Feb. 20, 2024); and the Intervenors agreed to delay their own appeal of the merits. But one thing has not: Intervenors continue to deploy untenable arguments in their bid to delay—and meanwhile deny—Hispanic voters in the Yakima Valley from receiving the opportunity to elect candidates of their choice.

Just as it did once before, this Court should deny Intervenors' latest effort to

stay the district court's injunction and remedial map. Granting a stay would mean that the very district a court has already deemed illegal would be used again for the 2024 election. Intervenors bear the burden of justifying that drastic relief, and they come nowhere close. They can show no likelihood of success on appeal, they cannot show they will suffer irreparable injury, and their grievances with the court-entered remedy cannot outweigh the fundamental interests of Plaintiffs and voters in LD 15 in a districting map that complies with the Voting Rights Act.

The Court should deny the stay so state elections officers can prepare for the 2024 elections under a legal map without delay or disruption.

II. BACKGROUND AND PROCEDURAL HISTORY

Shortly after Washington's bipartisan Redistricting Commission adopted and the Legislature approved the state's legislative redistricting plan, Plaintiffs–Appellees brought suit. They alleged that LD 15 diluted Hispanic votes in violation of Section 2 of the Voting Rights Act. ECF No. 1, *Soto Palmer v. Hobbs*, No. 22-cv-5035-RSL (W.D. Wash. Jan. 19, 2022).[1] That case was assigned to Judge Lasnik of the Western District of Washington.

Around two months later, three individuals moved to intervene to defend LD 15 against Plaintiffs' Section 2 claims. The district court allowed Intervenors to permissively intervene and defend the map, despite determining they "ha[d] no right

[1] District court filings will be short cited as ECF No. __.

or protectable interest in any particular redistricting plan or boundary lines," because at the time there were no truly adverse parties.[2] ECF No. 69 at 4.

The State prepared to defend against Plaintiffs' challenge to LD 15. To that end, the State sought out a highly respected expert, Dr. John Alford, with a history primarily of working for government defendants in VRA cases. *See* Trial Ex. #601. After carefully reviewing the evidence, Dr. Alford submitted an expert report concluding that the three *Gingles* preconditions appeared to be met. *Id.* Based on Dr. Alford's conclusions, the factual findings in other recent federal and state VRA cases in the Yakima Valley, and other record evidence, the State notified the parties and court that it had concluded it could no longer "dispute at trial that *Soto Palmer* Plaintiffs have satisfied the three *Gingles* preconditions for pursuing a claim under Section 2 of the VRA based on discriminatory results[,]" or "that the totality of the evidence test likewise favors the *Soto Palmer* Plaintiffs[.]" ECF No. 194 at 10.

A. The District Court's Order and Intervenors' Appeal

After a bench trial, Judge Lasnik issued a Memorandum of Decision on August 10, 2023, finding that LD 15 had the effect of discriminating against Hispanic voters by denying them the right to elect candidates of their choice.

[2] Judge Lasnik separately ordered that the State of Washington be joined as a defendant to ensure that, if Plaintiffs were able to prove their claims, the Court would have the power to provide all of the relief requested, particularly the development and adoption of a VRA-compliant redistricting plan. ECF No. 68.

ADD-1–32. Following the Supreme Court's reaffirmance of the *Gingles* framework in *Allen v. Milligan*, 599 U.S. 1 (2023), Judge Lasnik analyzed the *Gingles* factors and concluded that the *Soto Palmer* Plaintiffs had satisfied them all. On the first *Gingles* factor, Judge Lasnik pointed to numerous "reasonably configured" districts presented by Plaintiffs that afforded Hispanic voters "a realistic chance of electing their preferred candidates." ADD-9. On the second *Gingles* factor, Judge Lasnik noted that "[e]ach of the experts who addressed this issue, including Intervenors' expert, testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied," with "statistical evidence show[ing] that Latino voter cohesion is stable in the 70% range across election types and election cycles over the last decade." ADD-11–12. And on the third *Gingles* factor, Judge Lasnik noted that both Plaintiffs' and the State's experts concluded "that white voters in the Yakima Valley region vote cohesively to block the Latino-preferred candidates in the majority of elections (approximately 70%)," and that "Intervenors d[id] not dispute the data or the opinions offered by" either expert. ADD-12.

Turning to the totality-of-the-circumstances analysis, Judge Lasnik found that seven of the nine Senate Factors "all support the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates." ADD-28. Thus, the court concluded, although "things are moving in the right direction . . . it remains the case that the candidates preferred by

Latino voters in LD 15 usually go down in defeat given the racially polarized voting patterns in the area." *Id.* The court entered judgment for Plaintiffs and ordered the parties to engage in a remedial process to adopt a new legislative map. ADD-32.

Intervenors appealed Judge Lasnik's decision on the merits in September 2024. ADD-45. Nearly three months later, Intervenors moved to stay that order and the remedial process, raising most of the arguments they raise here, including that the district court: improperly found vote dilution in a majority-minority district; considered only the compactness of Plaintiffs' proposed maps and failed to consider the compactness of the Hispanic population; failed to give due weight to the election of a particular state senator; failed to consider whether racially polarized voting was a product of partisanship, rather than race itself; and was wrongly subjecting the Intervenors to a race-based remedial process. DktEntry 34-1, *Soto Palmer v. Hobbs*, No. 23-35595 (9th Cir.). This Court promptly denied the motion.

Meanwhile, Intervenors petitioned the Supreme Court for certiorari before judgment. *Trevino v. Soto Palmer*, U.S. No. 23-484. That petition raised many of the arguments from their stay motion, and also argued that 28 U. S. C. § 2284 mandated a three-judge panel in this case, such that Judge Lasnik lacked subject matter jurisdiction. Pet. at 19–21. The Court denied their petition on February 20, 2024.

B. The Remedial Process

Under Washington law, modifying a legislative plan requires reconvening the

Redistricting Commission, which in turn requires "an affirmative vote in each house of two-thirds of the members . . . ." Wash. Rev. Code § 44.05.120. And in this case, because Washington's Legislature was not in session when the district court entered its order—and not scheduled to reconvene until January 2024—reconvening the Redistricting Commission would have required the additional step of calling a special session of the Legislature. *See* Wash. Rev. Code § 44.04.012.

In its ruling enjoining the enacted plan, the district court provided the Legislature (and any reconvened Commission) approximately five months to complete this process. ADD-32. Intervenors falsely assert that "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." Mot. at 24. But the district court did nothing to prevent the Legislature from reconvening the Redistricting Commission to adopt remedial maps.

In reality, following news reports that the House Speaker and Senate Majority Leader were declining to call a special session to reconvene the Redistricting Commission, Judge Lasnik ordered the State to "file a status report . . . formally notifying the Court regarding the Legislature's position." ECF No. 224 at 2. Upon receiving conflicting reports—one from the State saying a special legislative session was unlikely (ECF No. 225) and another from non-party legislators expressing hope that it might yet occur (ECF No. 227), the court ordered the parties to begin a

remedial process *in parallel with* the Legislature. As the court explained, "[i]f . . . the Legislature is able to adopt revised legislative maps for the Yakima Valley region in a timely manner, the Court's parallel process . . . will have been unnecessary." ECF No. 230 at 2. But "[g]iven the practical realities of the situation as revealed by the submissions of the interested parties," the district court elected to "not wait until the last minute to begin its own redistricting efforts" to "allow a more deliberate and informed evaluation of those proposals." *Id.* This was entirely appropriate. And it was prescient: the Legislature never reconvened the Commission.

As part of its parallel process, the district court directed the parties to submit proposed remedial maps by December 1 and to identify candidates to serve as a special master. *Id.* at 3. On December 1, 2023, Plaintiffs proposed five remedial maps to the district court, and the parties submitted special master candidates. ECF Nos. 230, 244, 245. Neither the State nor Intervenors submitted proposed remedial maps. In the State's case, because the State explained that article I, section 43 of Washington's Constitution and Wash. Rev. Code § 44.05.120 provide a single mechanism for the State to propose redistricting plans: through the Redistricting Commission. It is unclear why Intervenors chose not to propose a map.

Over the following weeks, the district court appointed Karin Mac Donald, a respected, non-partisan redistricting expert to serve as the special master, and all parties had an opportunity to fully brief their positions on the proposed remedial

maps. ECF Nos. 246, 248–52, 254. As the State explained, because the State had no basis to "dispute Plaintiffs' assertion that each map 'is a complete and comprehensive remedy to Plaintiffs' Section 2 harms[,]' it "defer[red] to the Court on which remedial map best provides Latino voters with an equal opportunity to elect candidates of their choice while also balancing traditional redistricting criteria and federal law." ECF No. 250 at 1 (quoting ECF No. 245 at 2). However, the State urged the district court to carefully consider any input from the Yakama Nation, should they choose to be heard on the matter. *Id.* at 2.

While the remedial process was underway, Intervenors made further efforts to delay the proceedings. On January 22, they filed another motion to delay a remedy, this time asserting that the district court lacked jurisdiction over the remedial phase because the Intervenors had appealed the district court's liability finding. ECF No. 258. The district court properly denied that motion. ECF No. 265. Intervenors then successfully moved to hold their own liability appeal in abeyance—the appeal that raises most of the arguments they now raise by this "emergency" motion. DktEntry 48, 59, No. 23-35595 (9th Cir.).

Turning back to the remedial phase, on February 9, the district court heard oral argument on Plaintiffs' remedial proposals and Intervenors' objections. *Id.* Then, on February 23, nearly three months *after* the court-ordered due date for remedial proposals, Intervenors for the first time submitted their own proposed map.

ECF No. 273. On March 8, at Intervenors' request, the district court held a half-day evidentiary hearing at which the parties presented testimony from their experts and other witnesses. ADD-34. "The Court also reached out to the Confederated Tribes and Bands of the Yakama Nation ('Yakama Nation'), soliciting their written input and participation at the March 8th evidentiary hearing." *Id.*

On March 15, the district court ordered a new map, with a redrawn, newly labeled LD 14, in time for the March 25, 2024 deadline. In a detailed order, the court explained the remedy it adopted was necessary to remedy the VRA violation it previously found. ADD-33–43. Although acknowledging that "the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district," the court explained that "the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature, especially with the shift into an even-numbered district, which ensures that state Senate elections will fall on a presidential year when Latino voter turnout is generally higher." ADD-36. Although Intervenors try to characterize this reduction in Hispanic CVAP as "dilution," the unchallenged evidence was that enacted LD 15 did not permit Hispanic voters to elect candidates of their choice, while the new LD 14 will. *Compare* ADD-12–14, *with* ECF No. 278 at 2–3.

Following the district court's remedial order, Intervenors' filed this motion for a stay, raising arguments related not only to the remedial order, but to the district

court's seven-month-old liability order that this Court already declined to stay.

III. LEGAL STANDARD

A stay pending appeal is "an exercise of judicial discretion," not a "matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. In order to carry this burden here, Intervenors must (1) make "a strong showing" that they are likely to succeed on the merits and (2) demonstrate that they will be irreparably injured absent a stay. *See id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Intervenors must also show that (3) a stay will not "substantially injure . . . other parties interested in the proceeding[]" and (4) the public interest favors a stay. *See id.* (quoting *Hilton*, 481 U.S. at 776).

The district court's remedial order is reviewed for clear error. *See North Carolina v. Covington*, 585 U.S. 969, 979 (2018) (applying clear error review to court's adopted map).

IV. ARGUMENT

As this Court already found in denying Intervenors' last motion to stay, Intervenors fail to demonstrate their entitlement to a stay of the remedy. The State defers to Plaintiffs–Appellees to address Intervenors' likelihood of success on appeal of the remedial map entered by the district court and the harms to Plaintiffs. Moreover, the bulk of Intervenors' arguments go to the liability finding and were

already raised in their prior, unsuccessful stay motion. The State therefore makes just a handful of arguments regarding Intervenors' motion.

A. Intervenors Lack Standing

Intervenors' motion should be denied because they lack standing to appeal an order that does not require them to do anything. As the district court found in denying mandatory intervention but granting only permissive intervention, "intervenors lack a significant protectable interest in this litigation." ECF No. 69 at 10. Lacking a concrete interest in this suit, they now lack standing to appeal.

Hollingsworth v. Perry is dispositive. 570 U.S. 693 (2013). There, two couples challenged California's Proposition 8, which prohibited same-sex couples from marrying. *Id.* at 702. They sued state officials responsible for enforcing the law, but "[t]hose officials refused to defend the law." *Id.* And so "[t]he District Court allowed petitioners—the official proponents of the initiative—to intervene to defend it." *Id.* (citation omitted). Following trial, the district court declared Proposition 8 unconstitutional and enjoined its enforcement. After the district court judgment, intervenors sought to continue their defense via an appeal. *Id.* But this Court dismissed the intervenors' appeal, holding that they lacked standing to challenge the injunction enjoining state officials from enforcing Proposition 8. *Id.* at 715.

As the Supreme Court explained, "standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first

instance." *Id.* at 705 (quotation omitted). The district court's order only "enjoined the state officials named as defendants from enforcing" Proposition 8, but did "not order[]" intervenors "to do or refrain from doing anything." *Id.* Thus, intervenors "had no direct stake in the outcome of their appeal." *Id.* at 705–06 (quotation omitted). The Court likewise rejected intervenors' effort to claim standing on behalf of California, explaining that initiative sponsors had no authority under state law to represent the state in court, and had "participated in this litigation solely as private parties." *Id.* at 709–10 (distinguishing *Karcher v. May*, 484 U.S. 72 (1987)).

The Supreme Court reached a similar result in *Virginia House of Delegates v. Bethune-Hill*, holding that the Virginia House of Delegates, which had previously intervened and defended legislative redistricting, lacked standing to appeal after the state's Attorney General declined to do so. 139 S. Ct. 1945, 1950 (2019). The Court reasoned that the House had "no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." *Id.*

What was true for the initiative sponsors in *Hollingsworth* and the Virginia House of Delegates in *Bethune-Hill* is even more true for the three voters who intervened in this case. They "have no role—special or otherwise—in the enforcement of [new LD 14]. They have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of" Washington. *Hollingsworth*, 570 U.S. at 707 (quoting *Lujan v. Defenders of Wildlife*,

504 U.S. at 555, 560–561 (1992)). Nor, as the district court already found, do they have "standing in [their] own right" to defend the State's adoption of the now invalidated legislative maps. ECF No. 69 at 5.

Turning to the individual Intervenors, Mr. Trevino is the only one who even lives in the new LD 14, but he has no role in the district's implementation or enforcement. To the extent he might claim to have standing to appeal the Section 2 judgment because the remedy will supposedly result in a racial gerrymander of his district, this argument was correctly rejected by the district court. As the court explained, Intervenors' asserted "interest in ensuring that any plan that comes out of this litigation complies with the Equal Protection Clause, state law, and federal law" no more affected Intervenors "'than it does the public at large," and thus "'does not state an Article III case or controversy.'" ECF No. 69 at 5 (citation omitted). Moreover, "it would be premature to litigate a hypothetical constitutional violation (i.e., being subjected to a racial gerrymander through a remedial map established in this action) when no such violative conduct has occurred." *Id.* Intervenors ask this Court to *presume* that the district court's remedy violates the 14th Amendment, Mot. at 19–21, but there is no basis for such a presumption, especially since the Supreme Court has reiterated that race may be considered as a factor in remedying a Section 2 violation. *Allen*, 599 U.S. at 41 ("[T]his Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain

circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2."). So here, "absent specific evidence" showing Mr. Trevino is subject to a racial classification by the district court, he only asserts "a generalized grievance against governmental conduct of which he . . . does not approve" and, thus, lacks standing. *United States v. Hays*, 515 U.S. 737, 745 (1995).

The next Intervenor, Alex Ybarra, has no connection to the newly-drawn LD 14 or its enforcement. While he serves in Washington's Legislature from LD 13, Mr. Ybarra "has not identified any legal basis for [his] claimed authority to litigate on the State's behalf," *Bethune-Hill*, 139 S. Ct. at 1951, or identified how his "institutional position" is affected, *Newdow v. U.S. Congress*, 313 F.3d 495, 499 (9th Cir. 2002). Nor has Mr. Ybarra ever sought to participate in this litigation in anything but his personal capacity. ECF No. 57 at 3, 6 (intervention motion describing Mr. Ybarra's interest as an elected official running for re-election in a separate district). *See Hollingsworth*, 570 U.S. at 713 ("When the proponents sought to intervene in this case, they did not purport to be agents of California."). He now attempts to premise his standing on the assumption that he will have to spend money and time to campaign in LD 13 based on altered boundaries—the natural consequence of remedying the neighboring district—but courts have consistently rejected this theory. *See, e.g.*, *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) (legislators suffered no cognizable injury when their district

boundaries are adjusted); *LULAC v. Abbott*, No. EP21CV00259DCGJESJVB, 2022 WL 4545757, at *5 (W.D. Tex. Sept. 28, 2022) (plaintiff "who pleads mere proximity to a diluted or gerrymandered district—or some connection between that district's boundaries and vote dilution or racial gerrymandering in [his] own district—does not thereby have standing to challenge the neighboring district").

As for the final Intervenor, Ismael Campos, he lives and votes in a different district and has no role in the implementation or enforcement of LD 14. Intervenors do not even attempt to argue Mr. Campos has standing.

In short, Intervenors have "no role—special or otherwise—in the enforcement of [LD 14]. They have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of" Washington. *Hollingsworth*, 570 U.S. at 707. Their generalized grievances mean they lack standing to appeal.

B. Intervenors Have Not Made a Strong Showing That They Are Likely to Succeed on Appeal

Intervenors fail to show that a stay is appropriate under *Nken*, 556 U.S. 418.

1. Intervenors' threshold argument—that the single-judge district court lacked jurisdiction to decide the state legislative redistricting challenge—flies in the face of statutory text, precedent, and history. They argue that only a three-judge panel may rule on a Section 2 redistricting claim under 28 U.S.C. § 2284. Mot. at 9–10. But no court has ever so held. If their position were correct, it would mean that

countless VRA decisions have been handed down by courts who lacked power to render them, and that the Supreme Court has repeatedly and recently erred in affirming such judgments. *See, e.g.*, *Allen*, 599 U.S. at 42 (affirming "[t]he judgment[] of the [single-judge] District Court").

Section 2284(a) provides: "A district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." This case, raising only a statutory challenge, was thus heard before a single judge.[3]

Intervenors rely on a single concurring Fifth Circuit opinion that argued that "[t]he statute allegedly contains an extra 'the.'" *Thomas v. Reeves*, 961 F.3d 800, 802 (5th Cir. 2020) (Costa, J., concurring). According to Judge Willett's concurrence in *Thomas*, on which Intervenors rely, the word "'the' . . . sets the last phrase ['the apportionment of any statewide legislative body'] apart" from the modifier "constitutionality of," "indicating that § 2284(a) requires three judges for *all* apportionment challenges to state maps, not just constitutional challenges." 961 F.3d at 813 (Willett, J., concurring). But Judge Willett's concurrence is not the law, and a greater number of the *Thomas* en banc panel joined a separate concurrence *expressly refuting* his reasoning. *Id.* at 802 ("a plain reading of the three-judge statute

[3] This is unlike Intervenors' cited case, *Shapiro v. McManus*, 577 U.S. 39 (2015), which alleged a First Amendment claim to a state redistricting plan, and thus a three-judge panel should have been convened to hear the case.

as well as its ancestry reject the unprecedented notion that statutory challenges to state legislative districts require a special district court") (Costa, J., concurring); *id.* at 807–08 (legislative history likewise refutes Judge Willett's reading of the statute). The reason is clear: "[Congress] does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The ordinary meaning of Section 2284 is that three-judge panels are required only for *constitutional challenges* to the apportionment of congressional districts or statewide legislative bodies. Courts uniformly read the statute that way. *See, e.g.*, *Rural West Tenn. African-American Affairs Council v. Sunquist*, 209 F.3d 835, 838 (6th Cir. 2000) ("Because the amended complaint contained no constitutional claims [and only the Section 2 claim remained], the three-judge court disbanded itself."); *Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1354 (N.D. Ala. 2019) ("A claim solely alleging a Section 2 violation falls outside a plain reading of § 2284. Such a claim is neither a constitutional challenge nor 'when otherwise required by Act of Congress.'"). Indeed, the Supreme Court has parenthetically described Section 2284 as "providing for the convention of [a three-judge] court whenever an action is filed challenging the constitutionality of apportionment of legislative districts." *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 257 (2016).

In sum, Section 2284 requires three-judge courts *only* for constitutional challenges to legislative apportionment. Intervenors' anemic argument to wipe away

nearly forty years of VRA case law, relying on a single concurrence, fails to show they are likely to succeed on the merits of their appeal.

2. Intervenors next rehash their objections to the district court's liability order from their prior motion to stay. Although the Supreme Court has said "it may be possible for a citizen voting-age majority to lack real electoral opportunity," *LULAC*, 548 U.S. at 428, Intervenors argue that the district court erred in finding so here. Mot. at 12. But the district court's finding was based on its detailed analysis of the totality-of-circumstances factors. In particular, the district court concluded that "Senate Factors 1, 2, 3, 5, 6, 7, and 8"—that is: (1) a history of official discrimination in the Yakima region, (2) the extent of racially polarized voting, (3) voting practices that enhance the opportunity for discrimination, including off-year elections and nested districts, (5) the continuing effects of anti-Hispanic discrimination. (6) the use of racial appeals in political campaigns in the Yakima area, (7) the lack of success of Hispanic candidates in the Yakima area, and (8) the demonstrated lack of responsiveness of elected officials to Hispanic constituents—"all support the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates." ADD-28; *see also* ADD-29 ("[T]he evidence shows that . . . [a] majority Latino CVAP of slightly more than 50% is insufficient to provide equal electoral opportunity where past discrimination, current social/economic conditions, and a sense of hopelessness keep Latino voters from the

polls in numbers significantly greater than white voters."). Intervenors make no effort to show why this conclusion was clearly erroneous.

Instead, Intervenors try to invent a rule of law limiting Section 2 claims in majority-minority districts to narrow circumstances. Mot. at 11. But they don't cite any case for their proposed rule. And they simply ignore case law to the contrary. *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017); *Moore v. Leflore Cnty. Bd. of Election Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974)); *Thomas*, 919 F.3d at 309 ("Given the statutory mandate to focus on the 'totality of circumstances' . . . , it is not surprising that numerous courts have found dilution of the voting power of a racial group in districts where they make up a majority of the voting population."). "This per se rule [Intervenors] advocate—a bar on vote dilution claims whenever the racial group crosses the 50% threshold," *Thomas*, 919 F.3d at 308, has been repeatedly rejected by courts, including the Supreme Court. *LULAC*, 548 U.S. at 428; *see also Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1550 (5th Cir. 1992) ("[W]e hold that a protected class that is also a registered voter majority is not foreclosed, as a matter of law, from raising a vote dilution claim."); *Pope v. County of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934 (8th Cir. 2018). Intervenors are not likely to succeed on this point on appeal.

3. Intervenors badly miss the mark with their argument that the district court erred by failing to treat it as essentially dispositive that, in the first election in LD 15, Nikki Torres, a Hispanic candidate, won her race by a 35-point margin. Mot. at 15-16. The Voting Rights Act guarantees the right of minority voters "to elect representatives *of their choice*." 52 U.S.C. § 10301 (emphasis added). It does not mean that any Hispanic elected official is good enough for Hispanic voters, regardless of the voters' actual preferences. *See LULAC*, 548 U.S. at 423–29, 442 (finding dilution of Hispanic vote in a district designed to protect Hispanic Republican incumbent who was not the candidate of choice of Hispanic voters).

Every *Gingles* expert in this case, *including Intervenors' own expert*, "testified that Latino voters [in LD 15] overwhelmingly favored the same candidate in the vast majority of the elections studied." ADD-11. But, because of white bloc voting in the other direction, Hispanic voters' preferred candidates rarely win. ADD-12–13. Senator Torres's election did not singlehandedly repudiate that trend. Rather, the evidence reflected that Senator Torres was not the candidate of choice of Hispanic voters, but was elected *in spite of* Hispanic voter preferences. Intervenors concede as much, noting that Plaintiffs' expert found that only 32% of Hispanic voters voted for Senator Torres—meaning Hispanic voters preferred her opponent by *over two-to-one*. *See* Mot. at 6. Even Intervenors' own expert concluded that a majority of Hispanic voters in LD 15 voted *against* Senator Torres. *Id*. And this

despite the fact that Senator Torres ran against a political novice, who was a write-in candidate in the primary, and spent less than five percent of what Senator Torres spent. ECF No. 208 at 604:6–605:19. In light of the evidence, the district court did not clearly err in finding that the 2022 election demonstrated "moderate cohesion that was consistent with the overall pattern of racially polarized voting." ADD-11; *see also LULAC*, 548 U.S. at 427 ("The District Court's determination whether the § 2 requirements are satisfied must be upheld unless clearly erroneous.").

4. Intervenors' claim that the district court was required to, but did not, disentangle the effects of race and partisanship is doubly wrong. *Contra* Mot. at 14–15. As a legal matter, "[i]t is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, . . . only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters." *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986) (plurality op.).[4] As a factual matter, contrary to Intervenors' claims, the district court explicitly *did* consider partisanship as part of its totality-of-circumstances analysis. ADD-30 ("Especially in light of the evidence showing significant past discrimination against Latinos, on-going impacts of that

[4] *Smith v. Salt River Project Agricultural Improvement & Power District*, on which Intervenors rely, did not concern a dilution claim or racially polarized voting. 109 F.3d 586 (9th Cir. 1997).

discrimination, racial appeals in campaigns, and a lack of responsiveness on the part of elected officials, plaintiffs have shown inequality in electoral opportunities in the Yakima Valley region: they prefer candidates who are responsive to the needs of the Latino community whereas their white neighbors do not. The fact that the candidates identify with certain partisan labels does not detract from this finding."). Intervenors make no effort to explain why the district court's factual findings were wrong.[5]

5. Intervenors also challenge the district court's remedy. They must show, but cannot, that they are likely to succeed on the merits of the argument that the district court clearly erred in adopting the remedial map.

Intervenors' repeated contention that the remedial map has the perverse effect of further diluting the Hispanic vote, Mot. at 18–19, fails because it is contrary to the evidence. The Voting Rights Act guarantees the right of minority voters "to elect representatives of their choice." 52 U.S.C. § 10301. Here, the undisputed evidence showed that Hispanic voters in former LD 15 couldn't do that because of racially polarized voting: while they voted cohesively for particular candidates, non-Hispanic voters voted cohesively in the other direction, resulting in the Hispanic-

[5] Intervenors misstate things when they say the State's expert "agreed . . . that the partisan signifier of the candidate drove any polarization." Mot. at 15. The State's expert concluded that "non-Hispanic White voters demonstrate cohesive opposition to" Hispanic-preferred candidates in partisan elections, and that this "opposition is modestly elevated when those [Hispanic-preferred] candidates are also Hispanic," although he noted that "in contests without a party cue, non-Hispanic White voters do not exhibit cohesive opposition to Hispanic candidates." Trial Ex. #601 at 17–18.

preferred candidates losing. ADD-11–14. What's more, the evidence shows this racially polarized voting reflected and reinforced a longstanding (if improving) pattern of discrimination against Hispanic voters in the Yakima Valley area, resulting in "less opportunity" for Hispanic voters "to "participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301; ADD-14–29. This is the Section 2 violation the district court was tasked with remedying.

The evidence shows that the new LD 14 likely succeeds in remedying it. Plaintiffs' expert demonstrated that, in contrast to enacted LD 15, Hispanic-preferred candidates would likely win in the version of LD 14 ultimately adopted by the district court. ECF No. 278 at 2–3. For all his criticisms of Plaintiffs' maps, Intervenors' expert agreed, finding that Hispanic-preferred candidates tended to lose in the enacted LD 15, but tended to win in the new LD 14. ECF No. 273 at 18.[6] The new LD 14 thus remedies the Section 2 violation.

Unable to address the actual evidence, Intervenors wave their arms about how "bizarre" this all is. Mot. at 18. But they don't point to any authority to support their implied proposition that a remedy that nominally reduces minority CVAP, but increases minority voters' ability to elect candidates of their choice, is *per se*

[6] Because Plaintiffs' (and ultimately the court's) remedial district changed the numbering of the relevant district from 15 to 14, interpreting Figure 11 in ECF No. 273 requires comparing enacted district 15 with remedial district 14.

unacceptable.[7] Lacking legal authority, they turn to a colorful analogy, claiming "[a] court cannot remedy dilution with more dilution any more than a firefighter can battle fires with napalm." *Id*. Apparently, Intervenors are unaware that fire is in fact an important tool in fighting fire. *See, e.g.*, Bureau of Land Management, *Oregon/Washington Prescribed Fire*, https://www.blm.gov/programs/public-safety-and-fire/fire/state-info/oregon-washington/prescribed-fire (last visited March 20, 2024). The point, of course, is not to debate fire-management strategies but to highlight that, as Voltaire put it, "a witty saying proves nothing." Evidence is what proves things. And here the evidence shows—and Intervenors do not dispute—that the prior version of LD 15 did not permit Hispanic voters to elect their candidates of choice, but remedial LD 14 does. The remedial map thus remedies the violation.

6. Nor have Intervenors' demonstrated a strong likelihood of success that Judge Lasnik violated the 14th Amendment by creating a racial gerrymander. *Contra* Mot. at 19–21. To allege, let alone prove, a racial gerrymandering claim, Intervenors "face[] an extraordinarily high burden." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1215 (C.D. Cal. 2002); *accord Easley v. Cromartie*, 532 U.S. 234, 241 (2001). And courts apply a presumption of good faith, given "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make." *Miller*

[7] *Johnson v. De Grandy*, 512 U.S. 997 (1994), says nothing about the appropriate remedy for a VRA violation.

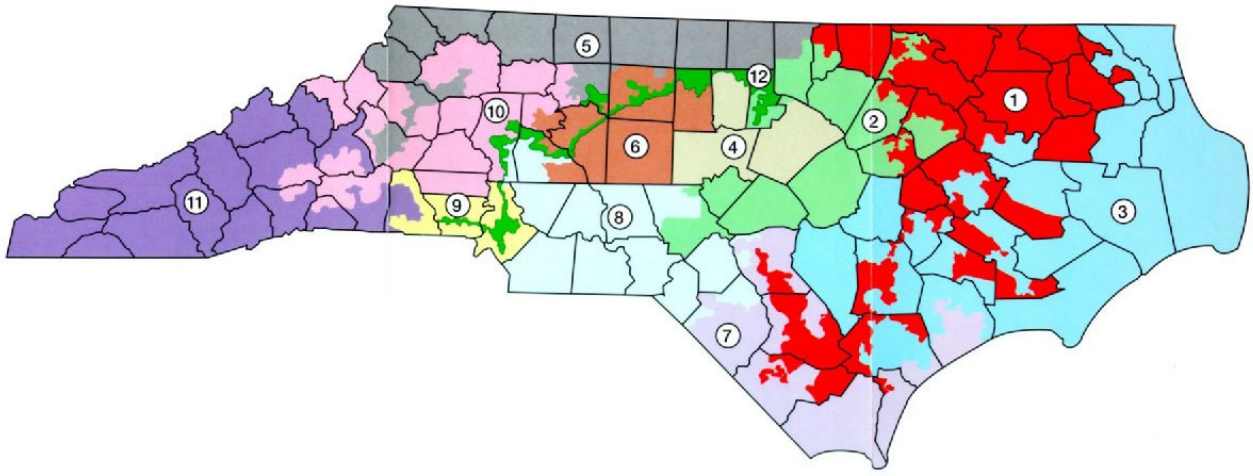
v. Johnson, 515 U.S. 900, 916 (1995). Intervenors' argument requires "two-step analysis." *Cooper v. Harris*, 581 U.S. 285, 291 (2017).[8] "First, [they] must prove that race was the predominant factor motivating the [court's] decision to place a significant number of voters within or without a particular district." *Id*. (cleaned up). To make this showing, they would have to show the district court "subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id*. (cleaned up). It is not enough that race played a role in decisionmaking—it must overwhelm other factors. *See Easley*, 532 U.S. at 253 (finding no evidence of racial predominance in a legislator's statement that a map provided "geographic, racial and partisan balance" because at worst "the phrase shows that the legislature considered race, along with other partisan and geographic considerations"). "Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Cooper*, 581 U.S. at 292. At this stage in the inquiry, the burden "shifts to the" party defending the map to establish that any "race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Id*. (cleaned up). Courts have long considered compliance with the VRA to be a compelling interest. *Id.*

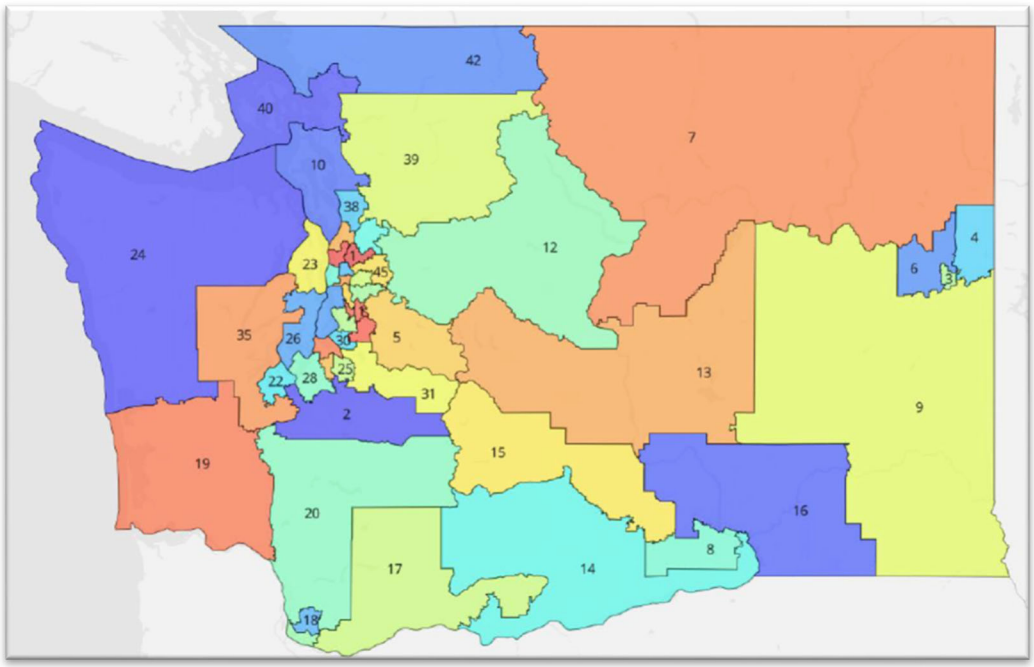
[8] In the limited time given to respond to Intervenors' motion, the State has not yet found a case scrutinizing whether a court-crafted remedial map was a racial gerrymander that violated equal protection. For purposes of this response, the State assumes the same analysis applies as when a legislature or redistricting commission enacts a redistricting plan in the first instance.

Intervenors ignore this demanding standard, and make essentially no effort to satisfy it. Instead, their argument is based on two things: their hired expert's characterization of the new LD 14's shape as octopus-like and Judge Lasnik's conclusion that the district's shape was necessary to remedy the enacted map's division of a Hispanic community of interest in the Yakima Valley area. Mot. at 20. Not only do they vastly overstate the strangeness of the district's shape, and disregard that uniting communities of interest is a well-recognized—indeed, *statutorily mandated*—redistricting criteria, RCW 44.05.090, they also simply ignore evidence and testimony that the district was reasonably compact and initially drawn by Plaintiffs' mapdrawing expert without considering race or racial demographics.[9] *See, e.g.*, ECF No. 277 at 10; ECF No. 245-1 at 4–5. Their central premise—that considering race is verboten in remedying a VRA violation—has been definitively rejected by the Supreme Court. *See Allen*, 599 U.S. at 32–33 ("The contention that mapmakers must be entirely 'blind' to race has no footing in our § 2 case law."); *id.* at 41 (citations omitted). Intervenors come nowhere near showing that race predominated over other redistricting criteria in Judge Lasnik's mind.

[9] Intervenors' criticism of the map's shape also ignores obvious, non-racial explanations for its shape. For example, both the northwest and southwest legs are necessary to keep together Reservation and Off-Reservation Trust Land of the Yakama Nation—a recognized community of interest whose preservation in a single district all parties agreed was a critical goal. And the small appendage at the northernmost point of the district goes into Yakima, the population center of the district, and is necessary to grab enough population for the district.

Intervenors compare this case to *Shaw v. Reno*, where North Carolina's congressional map was "so extremely irregular on its face" that plaintiffs could state an equal protection violation. 509 U.S. 630, 641 (1993). But even the quickest glance at District 12, a majority-minority district at issue in *Shaw*, and LD 14 adopted by the district court, show why Intervenors cannot meet the extraordinarily high burden of establishing that race predominated here:





Compare id. at 659, *with* ECF No. 288-3.

But even if they could, that still wouldn't prove Judge Lasik violated the Constitution. Instead, it would just mean the map was subject to strict scrutiny. *Cooper*, 581 U.S. at 292. And if strict scrutiny did apply, Judge Lasnik's order would satisfy it. The new LD 14 serves the undeniably compelling interest of remedying a VRA violation, and, for all the reasons detailed in his order, the new district is narrowly tailored to remedy the violation. ADD-38–41.

C. The Balance of Harms and the Public Interest Tip Decisively Against Denying Hispanic Voters Relief for the Upcoming Election Cycle

Intervenors cannot demonstrate that the balance of harms or the public interest favor a stay. Perhaps most fundamentally, a stay of the remedial process will harm the public interest. A stay will force voters in the Yakima Valley area to vote in a legislative district the district court determined discriminates against Latino voters in violation of federal law. No subsequent relief could redress that harm. Intervenors make no serious effort to justify this harm.[10]

Intervenors' contention that they are injured absent a stay relies on their thinly argued and unproven claim that the new LD 14 is a racial gerrymander. Mot. at 26–28. For the reasons detailed above, they have fallen far short of meeting their "extraordinarily high burden" of showing a racial gerrymander. *Cano*, 211 F. Supp.

[10] For the reasons detailed above, their assertions that voters will suffer no harm because the district court erred in finding a VRA violation (Mot. at 27) are incorrect. Moreover, this Court already denied Intervenors' request to stay the remedial phase pending Intervenors' liability appeal.

2d at 1215. And to the extent Intervenors hinge their stay request on inconvenience to incumbents seeking reelection, they cannot seriously contend that any (voluntarily assumed) inconvenience justifies denying voters their rights under the VRA.

Intervenors also argue the State will be harmed absent a stay. Mot. at 28. The State disagrees. The State declined to propose a remedial map, the Secretary of State made clear the deadlines by which it needed the district court to adopt a revised map in order to hold elections in an orderly manner, and the district court met that deadline and adopted a map that complies with the VRA. It is no undue hardship to conduct elections in compliance with the Voting Rights Act.

Finally, Intervenors' assertion that the Attorney General "collu[ded]" with Plaintiffs to "end-run around state law" is laughable. Mot. at 29. The Attorney General's Office represents multiple state parties, including the Secretary of State. The State ultimately declined to defend LD 15 at trial because the evidence—including all parties' expert reports—showed that enacted LD 15 likely did dilute Hispanic votes. And the State did not propose its own remedial map because the Legislature opted not to. Intervenors' insinuation that the State is somehow part of a conspiracy with Plaintiffs is not a serious argument.

V. CONCLUSION

The Court should deny Intervenors' stay motion.

RESPECTFULLY SUBMITTED this 20th day of March 2024.

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