No. _____

In The Supreme Court of the United States

JOSE TREVINO, ET AL.,

Petitioners,

V.

SUSAN SOTO PALMER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

Alongside Defendant State of Washington, Intervenor Defendant-Petitioners ("*Soto Palmer* Intervenors") defended against a Voting Rights Act ("VRA") Section 2 claim that challenged Legislative District 15 ("LD-15") of Washington's recently enacted state legislative map ("Enacted Plan"). Simultaneously, the State defended against a Fourteenth Amendment racial gerrymandering claim in the separate case *Garcia* v. *Hobbs*, which also challenged LD-15. Both cases were heard in a consolidated trial (the constitutional claim by a three-judge panel, the VRA claim by a single judge who also served on the panel). Both cases were submitted together on July 12, 2023, to the three judges comprising the two courts.

The single-judge *Soto Palmer* Court issued its Section 2 decision first, finding that the *majority-Hispanic* LD-15 diluted Hispanic voting power, even though the only election conducted in LD-15 resulted in a *35-point* victory for a Latina candidate. The *Soto Palmer* Court also ordered the creation of a remedial map that increases the district's Hispanic citizen voting age population ("HCVAP").

Then, a majority of the three-judge *Garcia* Court dismissed the constitutional racial gerrymandering claim as moot under the theory that the *Soto Palmer* injunction cut off any path to relief.

The questions presented are:

1. May a single-judge district court's ruling on a Section 2 claim, challenging a legislative district,

divest a 3-judge panel of jurisdiction to decide a Fourteenth Amendment challenge to that same district?

2. Did the lower court err by deciding *Soto Palmer* (the Section 2 claim) before the *Garcia* Court issued its opinion on the Fourteenth Amendment claim regarding the same legislative district?

3. Did the lower court err by finding that Plaintiffs satisfied the first *Gingles* precondition even though none of Plaintiff's experts analyzed whether the minority community was geographically compact enough to constitute a majority in a single-member district?

4. Did the district court err when it found that the Hispanic population of LD-15 was politically cohesive *and* preferred Democratic candidates, even though LD-15 is a majority-Hispanic district where a Latina Republican won by a 35-point margin in the only election held in the district?

5. Did the lower court err in finding that White voters—who comprise a *minority* portion of the citizen voting age population in LD-15—voted as a bloc against the Hispanic-*majority*'s preferred candidates, despite the lack of legally-significant racially-polarized voting?

6. Did the district court err in its totality of the circumstances analysis in light of *Brnovich* v. *DNC* and *Allen* v. *Milligan*?

7. Did the single-judge court have jurisdiction under 28 U. S. C. § 2284?

PARTIES TO THE PROCEEDING

Petitioners are Jose Trevino, Ismael Campos, and State Representative Alex Ybarra. Petitioners were Intervenor-Defendants before the district court.

Respondents are Susan Soto Palmer, Alberto Macias, Fabiola Lopez, Caty Padilla, and Heliodora Morfin. Respondents were Plaintiffs before the district court.

Steven Hobbs, in his official capacity as Secretary of State of Washington, and the State of Washington were Defendants before the district court but are not currently parties to this appeal—although they are appellees in the related *Garcia* appeal.

The relevant order is:

1. *Soto Palmer* v. *Hobbs*, No. 3:22-cv-05035-RSL (W.D. Wash. Aug. 10, 2023); App. 1.

The related order includes:

1. *Garcia* v. *Hobbs*, No. 3:22-cv-05152-RSL-DGE-LJCV (W.D. Wash. Sep. 8, 2023); App. 42.

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JURISDICTION

This Court has jurisdiction to resolve this application under 28 U. S. C. §§ 1331 and 2101(f), and the authority to grant certiorari before judgment under §§ 1254(1) and 2101(f).

STATUTORY PROVISIONS INVOLVED

Section 2 of the VRA, 52 U. S. C. § 10301(a), prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" from being "imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." A violation of Section 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

INTRODUCTION

The State of Washington, via its Redistricting Commission ("Commission"), enacted a state legislative district map that contained an HCVAP of at least 51.5% in LD-15—*i. e.*, a majority of individuals eligible to vote in LD-15 are Hispanic. In the only contested election held in LD-15, a Hispanic candidate, Nikki Torres, won her race by a 35-point margin. But *Soto Palmer* Plaintiffs claim that LD-15 is drawn in a way that dilutes Hispanic votes. Why? Because Nikki Torres is a Republican, and *Soto Palmer* Plaintiffs (as well as Defendants State of Washington and Secretary Hobbs) wish to see more Democrats elected.[1]

This litigation is a partisan's playbook on how to use race as a proxy for political preference to persuade a court to redraw a district's boundaries to favor one political party. This effort began shortly after the conclusion of Washington's redistricting process, when the State and Secretary Hobbs refused to defend Washington's map, see Trial Ex. 1060; App. 130–33, and continued through the eve of trial, when the State abruptly conceded its defense of Plaintiff's

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[1] The implicit and repugnant refrain of this litigation is that Nikki Torres, and Hispanic Republicans generally, are not the "right kind" of Hispanics. See, *e. g.*, Trial Tr. at 827:17–28:16 (Latino activist testifying that when Senator Torres ran for city council "we supported her" and "got behind and voted her" but when "we found that she was running as a Republican [for State Senate] . . . we were kind of, like, disappointed, and thought that something happened"). This claim is as morally dubious as it is nonjusticiable.

Section 2 effects claim, *Soto Palmer*, ECF No. 212 at 16–23.[2]

Unfortunately, the lower court entertained this partisan charade. Consequently, this case and the related case of *Garcia* v. *Hobbs* present a litany of substantive and procedural errors that must be corrected by this Court.

Substantively, the district court erred by asserting jurisdiction and ruling that a majority-Hispanic district, which resulted in the election of a Latina Republican (with a significant portion of Hispanic Voters supporting that candidate), dilutes Hispanic voting power in violation of Section 2 of the Voting Rights Act ("VRA"). *Soto Palmer*, ECF No. 218. The lower court's ruling essentially requires the creation of a supermajority-Hispanic district that elects Democrats. See *id.*, at 28–31 (explaining that the Latino-majority LD-15 does not allow Latinos to elect their preferred candidates—which the court implies are Democrats—and ordering a remedial map to remedy the purported discrimination). Neither the law nor the facts require such a remedy (or any remedy) here.

Procedurally, the district court erred by ignoring the jurisdictional limitations of Section 2284 and deciding the Section 2 claim before the *Garcia* panel could issue its opinion on the Fourteenth Amendment challenge to LD-15. This order of operations ignores the fact that the Fourteenth

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[2] Filings from the *Soto Palmer* Court's docket are referred to as "*Soto Palmer*, ECF No ##," and filings from the *Garcia* Court's docker are referred to as "*Garcia*, ECF No ##."

Amendment inquiry is retrospective (based on the Commission's actions while drawing the map), while the Section 2 inquiry is prospective (based on the demographics of the challenged district during litigation). Moreover, that a single judge can hear a Section 2 challenge to a statewide legislative map is statutorily suspect under 28 U. S. C. § 2284.

When the State of Washington redistricted its state legislative map, the bipartisan Commission made race the predominant, non-negotiable criterion for the boundary lines of the Yakima area that would ultimately comprise LD-15. *Garcia*, ECF No. 81–1 at 28–34. The racial considerations that predominated in the drawing of LD-15 could not have been based on a reasonable belief that the VRA required a majority-minority district in the Yakima Valley because at least half the Commission *did not* believe that the VRA required a majority-minority district. *Id.*, at 34–38. Yet enacting a map with a HCVAP higher than 50% in LD-15 remained the Commission's priority. *Id.*

In the end, the Commission passed a state legislative map in which LD-15 has a HCVAP of around 51.5%. *Soto Palmer*, ECF No. 218 at 5–6. Significantly, in the only contested election held in LD-15, a Latina Republican, Nikki Torres, won her state senate race by a 35-point margin, receiving 68% of the vote. Trial Ex. 1055. And at trial, experts for both parties acknowledged that a significant portion of Latinos—somewhere between 32 to 48 percent, depending on the statistical method used—voted for Torres. *Soto Palmer*, ECF Nos. 215 at 22; 218 at 11.

Despite the majority-Latino composition of LD-15, Plaintiffs challenged the district under Section 2 as dilutive of Latino voting power in both effect and intent. *Soto Palmer*, ECF No. 70. Remarkably, the landslide election of a Latina in LD-15 did not cause Plaintiffs to drop their suit or amend their claims.

After *Soto Palmer* Plaintiffs filed their Section 2 claim, the *Garcia* Plaintiff filed his Fourteenth Amendment claim, asserting that the map-drawing process resulted in an unconstitutional racial gerrymander in LD-15. *Garcia*, ECF No. 14. Despite the efforts of *Soto Palmer* Intervenors to consolidate the claims of the two cases and have both considered before a three-judge panel, *Soto Palmer*, ECF No. 103, the cases remained separate, *Soto Palmer*, ECF No. 136. The Section 2 claims proceeded before a single-judge court helmed by U.S. District Judge Lasnik. *Id.* And a three-judge court was empaneled pursuant to 28 U. S. C. § 2284 to hear *Garcia*'s Fourteenth Amendment claim. *Garcia*, ECF No. 18. That panel consisted of Judges Lasnik and Estudillo of the U.S. District Court for the Western District of Washington, and Judge VanDyke of the U.S. Court of Appeals for the Ninth Circuit. *Id.*

Although the two cases remained technically separate, there was substantial overlap. Discovery was shared for both cases. The *Soto Palmer* Intervenors joined the *Garcia* Defendant in filing a joint pre-trial brief for both cases, *Soto Palmer*, ECF No. 197, and the State (as a defendant in both) likewise filed joint briefs, *Soto Palmer*, ECF No. 194. The Parties to both cases also filed a joint stipulated exhibit list covering both cases. *Soto Palmer*, ECF No. 203; *Garcia*, ECF No. 72. Both cases were tried

simultaneously, except that the *Soto Palmer* trial began one day earlier than the *Garcia* trial. *Garcia*, ECF No. 8 at 2 n.2. Post-trial briefing was conducted in the same joint fashion as pre-trial briefing. See *Soto Palmer*, ECF Nos. 212; 215. Finally, both cases—and consequently both decisions—shared a judge: Judge Lasnik.

Judge Lasnik issued his decision 29 days before the *Garcia* panel issued its Fourteenth Amendment decision, finding that the enacted LD-15 violated Section 2. *Soto Palmer*, ECF No. 218. Specifically, he found that each of the *Gingles* preconditions was satisfied, and that the totality of the circumstances demonstrated dilution of Hispanic voting power in the Yakima Valley. *Id.*

This is the first time any court has found that a majority-minority district—from which a minority candidate was elected—dilutes that minority group's voting power. Such a finding flies in the face of Section 2 jurisprudence and ignores the facts on the ground.

Following that decision, Judges Lasnik and Estudillo then formed the majority in *Garcia*, finding that Plaintiff Garcia's equal protection claim was moot because of Judge Lasnik' s prior decision in *Soto Palmer*. *Garcia*, ECF No. 81. Judge VanDyke dissented, concluding that the case was not moot and that LD-15 presented a textbook example of unconstitutional racial gerrymandering. See *Garcia*, ECF No. 81-1.

This Court must correct the jurisdictional, procedural, and substantive errors here and in the

related *Garcia* case. Specifically, the Court should reverse or vacate the *Garcia* majority's errant jurisdictional dismissal and remand that case to the three-judge district court for consideration of the merits[3]; simultaneously, the Court should grant this petition for writ of certiorari before judgment and hold this case in abeyance[4] pending the results of the related *Garcia* case, so that the cases may ultimately be decided together. See, *e. g.*, *Merrill* v. *Milligan*, 142 S. Ct. 879, 879 (2022) (construing one stay application as a jurisdictional statement and noting probable jurisdiction, and construing a separate stay application as a petition for writ of certiorari before judgment and granting it).

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[3] Alternatively, the Court could note probable jurisdiction and set briefing and argument on the mootness issue. Either way, the result should be a remand for consideration of the merits by the three-judge panel.

[4] Petitioners ask this Court to hold the entire *Soto Palmer* case in abeyance. Because the court-ordered remedial map is premised on the court's determination that a remedy is needed, *Soto Palmer*, ECF No. 230, the district court is divested of control of the remedy because the entire case is essentially involved in the appeal. See *Coinbase, Inc.* v. *Bielski*, 143 S. Ct. 1915, 1919 (2023) ("An appeal, including an interlocutory appeal, 'divests the district court of its control over those aspects of the case involved in the appeal.'" (quoting *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 58 (1982))).

STATEMENT OF THE CASE

The result of this litigation is a court-ordered remedial map that must essentially be comprised of a supermajority of Latinos, so that Democrats can be elected in the Yakima Valley area. *Soto Palmer*, ECF No. 218 at 28–31. The Court's justification for this remedy? Under the Enacted Plan, LD-15 purportedly dilutes the Hispanic vote via its *Hispanic-majority* citizen voting age composition, which resulted in the election of a Latina Republican by a 35-point margin in the only contested election held so far. See *id.*, at 22. This racial-partisan-districting ouroboros is neither required by this Court's Section 2 jurisprudence, nor justified by the facts on the ground.

To untie this Gordian Knot, the Court should grant this petition, and hold this case in abeyance pending resolution of the equal protection claim in *Garcia* related to the same district. If the panel majority follows through on what it telegraphed concerning the merits of the *Garcia* claim—and if Mr. Garcia subsequently appeals—this Court would then have discretion and control over both cases.

A. The Process of Legislative Redistricting in Washington.

The State of Washington redistricts its "state legislative and congressional districts" after the decennial federal census and reapportionment. Wash. Const., Art. II, § 43(1); see also U. S. Const., Art. I, § 2. Washington redistricts via a Commission consisting of four voting Commissioners and one non-voting Chair. See Wash. Const., Art. II, § 43(2). Legislative leaders in each chamber each appoint one

Commissioner, resulting in four partisan Commissioners. *Id.* Those four Commissioners then select a fifth to serve as non-voting Chairperson. *Id.*

Three of the four voting Commissioners must agree to a final redistricting plan "no later than November 15th of each year ending in one." *Id.* § 43(6); see also Wash. Rev. Code § 44.05.100. After the Commission approves a redistricting plan, a two-thirds supermajority of both chambers of the State Legislature may make minor amendments to the plan or do nothing—in either case, the map is enacted with or without legislative amendment after "the end of the thirtieth day of the first session convened after the commission has submitted its plan to the legislature." See Wash. Const., Art. II, § 43(7); Wash. Rev. Code § 44.05.120. The Legislature lacks authority to reject the map. See Wash. Const., Art. II, § 43(2).

B. Washington's 2021 Redistricting Cycle.

In 2021, April Sims (Democrat), Brady Piñero Walkinshaw (Democrat), Paul Graves (Republican) and Joe Fain (Republican) were appointed to the Commission. *Soto Palmer*, ECF No. 197, 4–5. They chose Sarah Augustine as nonvoting Chairwoman and each released individual proposals for a legislative district map. *Id.* At that time, no proposal contained a majority HCVAP legislative district in the Yakima Valley. That did not last.

A month after the Commissioners released four map proposals lacking any majority-minority district in Central Washington, the Washington State Senate Democratic Caucus circulated a presentation by Dr.

Matt Barreto, a UCLA academic. Dr. Barreto's "presentation", a PowerPoint slide deck, contained a scatterplot of demographic figures and precinct-level results for a few statewide races and conclusory statements about the purported need for a "VRA-Compliant" district in the Yakima Valley. Trial Ex. 179; *Soto Palmer*, ECF No. 197 at 5. At the same time, the Washington State Republican Party hired a law firm, Davis Wright Tremaine, to conduct a legal analysis which ultimately reached the opposite conclusion. Trial Ex. 225.

After Barreto's PowerPoint criticized the four proposals released in September 2021, negotiations shifted. A majority-minority district in Yakima Valley—which eventually became LD-15 in the Enacted Plan—became a *non-negotiable criterion* in the statewide negotiations. *Garcia*, ECF No. 81–1 at 28–34. But at least two Commissioners—Graves and Fain—never thought a VRA district was actually required, nor did the full Commission ever hire a non-partisan expert to determine or even advise on what the VRA required in the Yakima Valley. *Id.*

C. Washington's 2021 Legislative Map.

Ultimately, the Commission adopted the Enacted Plan, under which LD-15 has a HCVAP of approximately 51.5 percent, according to data from the 2020 American Community Survey—in other words, not just a majority-minority district, but a majority Hispanic district by *citizen voting age* population. *Soto Palmer*, ECF No. 218 at 5–6.

D. The Resulting State and Federal Lawsuits.

In January 2022, *Soto Palmer* Plaintiffs brought a two-count Section 2 complaint against Secretary of State Hobbs, Speaker of the State House of Representatives Jinkins, and Majority Leader of the State Senate Billig. *Soto Palmer*, ECF No. 1. Count I alleged that LD-15 was a "façade" majority-HCVAP district that perpetuated Hispanic vote dilution in the Yakima Valley. *Soto Palmer*, ECF No. 70 ¶¶ 272–80. Count II alleged that the Commission *intended* to dilute the Hispanic vote in the Yakima Valley by creating a "façade" majority-HCVAP district. *Id.* ¶¶ 281–82. Three individuals intervened as Defendants, *Soto Palmer*, ECF No. 69, and the State was joined as a necessary party, *Soto Palmer*, ECF No. 68. Judge Lasnik was the sole judge presiding over *Soto Palmer*.

In March 2022, Benancio Garcia III brought a separate action against Secretary of State Hobbs and the State of Washington. *Garcia*, ECF No. 1. Mr. Garcia's one-count complaint alleged that the Commission violated the Equal Protection Clause of the Fourteenth Amendment by allowing race to predominate when it drew the boundaries for LD-15. *Garcia*, ECF No. 14 ¶¶ 72–77. Mr. Garcia's constitutional challenge triggered 28 U. S. C. § 2284, which resulted in assignment of *Garcia* to a three-judge panel (Ninth Circuit Judge VanDyke, and District Court Judges Lasnik and Estudillo). *Garcia*, ECF No. 18.

In June 2023, the *Soto Palmer* and *Garcia* Courts held a joint bench trial. *Soto Palmer*, ECF No. 218 at 2–3.

E. The *Soto Palmer* Court Strikes Down the Enacted Plan.

In a 32-page decision issued on August 10, 2023, the *Soto Palmer* Court found that "LD 15 violates Section 2's prohibition on discriminatory results," and, therefore, did "not decide plaintiffs' discriminatory intent claim." *Soto Palmer*, ECF No. 218 at 3. In reaching this conclusion, the court found that all three *Gingles* preconditions were met, and that the totality of the circumstances analysis favored Plaintiffs. *Id.*, at 6–32. Notably, the *Soto Palmer* Court spent only five pages analyzing the three *Gingles* preconditions, *id.*, at 9–14, which is supposed to be "'an intensely local appraisal' of the electoral mechanism at issue." *Allen* v. *Milligan*, 143 S. Ct. 1487, 1503 (2023). Moreover, in analyzing totality of the circumstances, the Court failed to draw any proper causal connection between the Enacted Plan and a purported discriminatory result. See *id.*, at 14–32.

Based on this errant analysis, the *Soto Palmer* Court struck down the majority-HCVAP LD-15 as dilutive of the Hispanic vote in violation of Section 2. *Id.*, at 32. It then ordered the State to draw a new map. *Id.* Because the court found that Hispanic voters in the Yakima Valley prefer Democrats, and that a greater than 51.5% HCVAP was not enough to elect a Democrat candidate, the court's remedy—though not explicitly stated as such—effectively requires a super-

majority HCVAP district that elects Democrats. This is an extraordinary result.

F. The Three-Judge *Garcia* Panel Finds That It Has Been Divested of Jurisdiction.

Based on the *Soto Palmer* Court's decision to invalidate the Enacted Plan and order a new map drawn, the *Garcia* majority opined that the Equal Protection claim was moot. *Garcia*, ECF No. 81 at 1–2. That erroneous conclusion is analyzed in detail in the Jurisdictional Statement filed with this Court in the *Garcia* appeal, Juris. Statement in *Garcia* v. *Hobbs*, O.T. 2023, No 23-467. Importantly, Judge VanDyke not only would have addressed the merits, but would have found that the Commission's racial gerrymandering in LD-15 violated the Equal Protection Clause. *Garcia*, ECF No. 81-1.

G. *Soto Palmer* and *Garcia* Proceed on Separate Appellate Tracks.

Because of the incorrect rulings in *Soto Palmer* and *Garcia*, the cases now proceed on separate appellate tracks—*Soto Palmer* on appeal at the Ninth Circuit, *Soto Palmer*, ECF No. 222, and *Garcia* directly to this Court, Juris. Statement in *Garcia* v. *Hobbs*, O.T. 2023, No 23-467. Consequently, in the interest of judicial economy and obtaining a final remedy before the 2024 election cycle, *Soto Palmer* Intervenors filed the instant petition.

REASONS FOR GRANTING THE PETITION

This Court should grant immediate review because this case presents questions of "imperative public importance" that are directly affected by another case, *Garcia* v. *Hobbs*, that is already pending before this Court. This Court's Rule 11. This Court has regularly (and recently) granted certiorari before judgment in precisely this kind of situation, "where similar . . . issues of importance [are] already pending before the Court and where it [is] considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice §2.4 (11th ed. 2019) (listing cases).

These cases involved challenges to the same legislative district, they shared discovery and trial evidence, and they were tried simultaneously. What's more, this Court's determination in *Garcia* necessarily affects what, if any, claims or remedies remain here. See *infra* Sec. I.A.

Holding this case in abeyance while *Garcia* proceeds on the merits will allow this Court to address the procedural and substantive overlap between Section 2 and Fourteenth Amendment claims, an ambiguous and increasingly common issue in redistricting. See, *e. g.*, *LULAC* v. *Abbott*, 601 F. Supp. 3d 147, 158–164 (W.D. Tex. 2022) (addressing the interplay between the VRA and the Fourteenth Amendment in redistricting).

To fix the myriad issues presented by *Soto Palmer* and *Garcia*, this Court should (1) reverse or vacate the

Garcia majority's errant jurisdictional dismissal and remand that case to the three-judge panel for consideration of the merits; (2) simultaneously, the Court should grant this petition for writ of certiorari before judgment; and (3) hold this case in abeyance pending the results of *Garcia*. See, *e. g.*, *Merrill*, 142 S. Ct. at 879. This is the most efficient means to address the errors of the *Garcia* and *Soto Palmer* Courts.

If the *Garcia* Court reaches the correct decision, Mr. Garcia will be victorious, and the *Garcia* Court can order the State to redraw its legislative map without race as the predominant consideration for LD-15. If the State appeals, this Court can hear both cases. If the State does not appeal, and the panel's order becomes final and conclusive, this Court should then vacate the *Soto Palmer* decision and remand this case to the district court to be dismissed as moot because the Enacted Plan would be void *ab initio*, thereby eliminating the map that *Soto Palmer* Plaintiffs challenged. See *Garcia*, ECF No. 81-1 at 11–12.

If the *Garcia* Court incorrectly finds that Washington's Enacted Plan was not a racial gerrymander, the result would be an immediate appeal of the three-judge panel's merits decision to this Court. 28 U. S. C. § 2284. At that point, the Court could consider both cases simultaneously, and issue a

ruling that resolves the clash between equal protection and Section 2 claims.

I. A SINGLE JUDGE'S DECISION ON A SECTION 2 CLAIM CANNOT DIVEST A THREE-JUDGE PANEL OF JURISDICTION TO DECIDE A FOURTEENTH AMENDMENT CLAIM AGAINST THE SAME DISTRICT.

A. The Three-Judge *Garcia* Court Must First Decide Whether the Process of Enacting the Map Violated the Constitution (Fourteenth Amendment Claim) Before the *Soto Palmer* Court Decides Whether the Resulting Map Violates Federal Statute (Section 2 Claim).

It is a matter of sound logic, and constitutional adherence (not abdication), that a question about the constitutionality of a map-drawing process must be resolved before a court can decide whether the map produced by that process is legally valid.

The question before the *Garcia* Court was whether race predominated in the drawing of LD-15; and, if so, whether the Commission had a reasonable belief rooted in evidence that the VRA required such racial districting. See *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 193 (2017) ("When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, 'the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made.'" (quoting *Alabama Legis. Black Caucus* v.

Alabama, 575 U. S. 254, 278 (2015))); see also *Soto Palmer*, ECF No. 197 at 9–10.

The question before the *Soto Palmer* Court was whether, under the Enacted Plan, LD-15 had the practical effect of diluting Hispanic voting power in the Yakima Valley. See *Milligan*, 143 S. Ct. at 1502–04 (explaining how Section 2 analysis focuses on "electoral systems" and "districting schemes" and providing examples of how the Court has applied its *Gingles* analysis to challenged laws).

Put differently, *Garcia* is a retrospective inquiry about the constitutionality of the Commission's intent and actions during its *map-drawing process*, *Bethune-Hill*, 580 U. S., at 187, 193, whereas *Soto Palmer* is a prospective inquiry about the lawfulness of the *resulting map* in existence at the time of suit, see *Milligan*, 143 S. Ct. at 1502–04. Put simpler still, *Garcia*'s process-focused inquiry should be decided before *Palmer*'s result-focused inquiry. Indeed, if the process was flawed, the result cannot stand.

Garcia should be decided first. *Soto Palmer* Intervenors raised this argument in their briefing below, *Soto Palmer*, ECF No. 197 at 9–10, but the *Soto Palmer* Court never addressed the argument, see *Soto Palmer*, ECF No. 218. However, the *Garcia* dissent agreed with *Soto Palmer* Intervenors. See *Garcia*, ECF No. 81–1 at 1–2.

As Judge VanDyke recognized, his "criticism that the *Soto Palmer* decision is an advisory opinion depends, of course, on [his] conclusion that the State of Washington violated the Equal Protection Clause,"

which he opined was "not a hard [question] on this record." *Id.*, at 23. He concluded by finding that had the *Garcia* majority "properly reached the merits, a straightforward analysis shows both that race predominated in the drawing of LD-15" and that, "because a majority of the Commission did not judge such racial ordering necessary under the VRA at the time the map was adopted, the map cannot survive strict scrutiny." *Id.*, at 38.

He is correct. This is a textbook example of racial gerrymandering. See *Cooper* v. *Harris*, 581 U. S. 285, 308 n.7 (2017) ("[I]f legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more 'sellable' as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny.").

Race predominated in the Commission's design of LD-15, as each Commissioner testified at trial that all other redistricting factors were subordinated to race in the Commission's effort to draw a majority-Hispanic district in the Yakima Valley. See *Soto Palmer*, ECF No. 215 at 34–41.

Moreover, the Commission's racial districting cannot survive strict scrutiny. See *Cooper*, 581 U. S., at 292–93 (explaining that when a state invokes the VRA to justify race-based districting, it must show that it had a strong basis in evidence for concluding that the statute required its action). Here, at least half the Commission did not believe the VRA required a majority-Hispanic district in the Yakima Valley. See

Soto Palmer, ECF No. 215 at 42–46. But they enacted one anyway.

As a result, it was error for the *Garcia* majority to dismiss the case as moot. *Garcia*, ECF No. 81–1 at 11. "Not only is the case not moot, but the panel should have acknowledged the map was enacted in violation of the Equal Protection Clause." *Id.* The proper remedy, continued the dissent, would be to find "in favor of *Garcia*, and direct[] the State of Washington to redraw the maps in a way that does not violate the Constitution" *Id.*[5] Once such a judgment was final, and all subsequent appeals finished, *Soto Palmer* Plaintiffs' case would be moot.

B. The History and Text Of 28 U. S. C. § 2284 Shows that Congress Never Intended for Section 2 and Fourteenth Amendment Claims—Against the Same Statewide Legislative Map--Would be Decided By Different Courts with Conflicting Decisions.

A three-judge court must be convened "when an action is filed challenging . . . the apportionment of any statewide legislative body." 28 U. S. C. § 2284(a). This requirement is jurisdictional. See *LULAC* v. *Texas*, 318 Fed. Appx 261, 264 (5th Cir. 2009) (per curiam) ("We agree with our sister circuits that the term 'shall' in § 2284 is mandatory and jurisdictional.").

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[5] The appellate fate of LD-15 notwithstanding, it remains an open question whether Mr. Garcia will continue to be segregated on the basis of race. Juris. Statement in *Garcia* v. *Hobbs*, O.T. 2023, No 23-467, at sec. I.B.

Consequently, when, as here, a statewide legislative body's apportionment is challenged (even under Section 2), a three-judge court must be empaneled. Judge Willett, in his concurring opinion in *Thomas* v. *Reeves*, 961 F. 3d 800, 811 (5th Cir. 2020) (en banc), determined through textual analysis and a series of interpretive canons that the word "constitutionality" only modifies "congressional districts." The "or the apportionment" provides two separate options, requiring a three-judge court to decide "(1) the constitutionality of the apportionment of congressional districts; or (2) the apportionment of any statewide legislative body." *Id*. Therefore, the text of the statute requires a three-judge court for *all* challenges to apportionment plans of statewide legislative bodies, but only for constitutional challenges to congressional plans. *Id.*, at 817 (Willett, J., concurring).

Moreover, the history surrounding Section 2284's enactment further supports the interpretation that any challenge to the apportionment of a *statewide legislative body* must be resolved by a three-judge court. *See Page* v. *Bartels*, 248 F. 3d 175, 189 (3d Cir. 2001) (explaining that Congress likely "made [no] deliberate choice to distinguish between constitutional apportionment challenges and apportionment challenges brought under § 2 of the Voting Rights Act").

Soto Palmer 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); see also *Soto Palmer*, ECF No. 70. Consequently, *Soto Palmer* Intervenors requested that a three-judge court be convened pursuant to Section 2284, which the lower court summarily ignored. Had a three-judge court been properly empaneled, the claims would have presumably been heard by the same three-judge panel hearing the related *Garcia* case. This would have forestalled any attempts by the *Soto Palmer* Court to divest the *Garcia* Court of jurisdiction because the courts would have been one and the same.

II. THE COURT BELOW MISAPPLIED THE *GINGLES* PRECONDITIONS TO CONCLUDE THAT LD-15, WITH AN HCVAP OF MORE THAN 50%, DILUTES THE VOTES OF HISPANIC MINORITIES IN THE YAKIMA VALLEY WHERE A LATINA REPUBLICAN WAS ELECTED IN LD-15.

Plaintiffs' alleged injury is that Democratic candidates cannot win in the majority-Hispanic LD-15. Their redress, then, can only be a map where Democratic candidates are guaranteed to win. But race cannot serve as a proxy for partisanship.

More to the point, Plaintiffs failed to satisfy each *Gingles* precondition because of basic misunderstandings by experts of the variances in racial voting caused by the identity of the candidates. And, above all, Plaintiffs failed to show that, looking at all facts on the ground, Hispanic voters in the Yakima Valley are denied an equal opportunity to participate in the political process.

"To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three 'preconditions.'"

Milligan, 143 S. Ct. at 1503 (quoting *Thornburg* v. *Gingles*, 478 U. S. 30, 50 (1986)). "First, the 'minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district.'" *Id.* (quoting *Wisconsin Legis.* v. *Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam)). "Second, the minority group must be able to show that it is politically cohesive." *Id.* (quoting *Gingles*, 478 U. S., at 51). Third, "a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Wisconsin Legis.*, 142 S. Ct. at 1248. Additionally, once a plaintiff demonstrates these three preconditions, they must also show that, under the "totality of circumstances," the political process is not "equally open" to minority voters (using the so-called "Senate Factors"). *Milligan*, 143 S. Ct. at 1503 (quoting *Gingles*, 478 U. S., at 45–46).

Importantly, before a court can find a violation of Section 2, it "must conduct an intensely local appraisal of the electoral mechanism at issue, as well as a searching practical evaluation of the past and present reality." *Id.* (internal quotation marks and citations omitted).

The *Soto Palmer* Court failed to engage in such a searching evaluation, and its appraisal was anything but intense. Compare *id.*, at 1502 (affirming a three-judge district court which "received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and upwards of 350 exhibits, and considered arguments from the 43 different lawyers who had appeared in the litigation," resulting in a *227-page opinion*), *with Soto Palmer*, ECF No. 218 (issuing only *a 32-page decision* where comparable levels of

argument and evidence were presented—"the Court heard live testimony from 15 witnesses, accepted the deposition testimony of another 18 witnesses, considered as substantive evidence the reports of the parties' experts, admitted 548 exhibits into evidence, and reviewed the parties' excellent closing statements"). The *Soto Palmer* decision was as conclusory as it was incorrect.

A. Hispanic Voters Have Equal Opportunity to Participate in The Democratic Process and Elect the Candidates They Choose Because LD-15 is Already Majority-Hispanic by CVAP.

Before ascending into a "complicated analysis involving . . . an indeterminate nine-factor balancing test," *Garcia*, ECF No 81-1 at 2, this Court may simply hold, as a matter of logic, that Hispanic voters in the Yakima Valley have equal opportunity to participate in the democratic process because LD-15 already has a majority-Hispanic CVAP.

Each *Gingles* precondition refers to the "minority" racial group, see *Gingles*, 468 U. S., at 46–51, based on the implicit assumption that a *minority* group constitutes less than half of the eligible voting population, thereby reducing the group's ability to elect its candidate of choice and illustrating the need for a Section 2 remedy. See *Milligan*, 143 S. Ct. at 1503.

But here, White voters in LD-15 are the *minority* by CVAP. Plaintiffs are turning *Gingles* jurisprudence on its head.

For example, Plaintiffs contend that LD-15's majority-minority CVAP is merely a "façade," yet the case on which Plaintiffs rely concerns a district that possessed only majority-Hispanic *Voting Age Population* ("VAP"), but not majority-Hispanic *CVAP*. See *LULAC* v. *Perry*, 548 U. S. 399, 429, 441 (2006). The *LULAC* Court found that the Latino district was a "façade" because the State intentionally drew the District to have a nominal Latino *voting-age majority* "without a *citizen* voting-age majority." *Id.*, at 441 (emphasis added).

This case is not analogous. Rather, the Commission drew a *citizen* Hispanic voting-age majority district in LD-15. *Soto Palmer*, ECF No. 218 at 5–6. The whole point of *Perry*'s "façade" was that a HCVAP-majority district was not actually created. 548 U. S., at 441. Consequently, *Perry* is inapposite as is plaintiffs' façade theory.

And to undersigned counsel's knowledge, the only courts that have found Section 2 violations resulting from majority-minority districts—or drew majority-minority districts with higher percentages of a minority population than the challenged maps—did so when the minority population possessed a majority *VAP* but not CVAP or the court was presented with a minority coalition district (*i. e.*, combining different minority groups to form a majority-minority district). See, *e. g.*, *Terrazas* v. *Slagle*, 789 F. Supp. 828, 835 (W.D. Tex. 1991) ("This Court's interim plan also increased the Black VAP in District 15 from 14.9% to 15.9%, boosting the combined Black and Hispanic VAP in that district by almost 2%.").

And "[t]hough it may be possible for a citizen voting-age majority to lack real electoral opportunity," *Perry*, 548 U. S., at 428, that is simply not the case here, where there is no evidence that Hispanics lack "equal access to the polls." See *Smith* v. *Brunswick County*, 984 F. 2d 1393, 1402 (4th Cir. 1993). And in this case, a Hispanic candidate won with substantial support from Hispanic voters.[6] Because Washington does not bar Hispanics from equal access—say, through poll taxes, literacy tests, or even English-only materials—the majority-minority group has the opportunity to vote cohesively and elect a candidate.

Here, the issue of coalition districts was not raised, and Hispanic voters already possess a majority-CVAP in the challenged district. It is a mathematical reality that Hispanics in LD-15 have the opportunity to turn out to vote as a cohesive bloc to elect any candidate they prefer. The *minority* of White voters cannot prevent them from so doing, unless Hispanic voters are not cohesive or do not vote. The former failure dooms Plaintiffs' claim under the second prong of *Gingles* (minority cohesion). And the latter issue should be challenged under the *Anderson-Burdick* doctrine,[7] see *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983); *Burdick* v. *Takushi*, 504 U. S. 428 (1992), not used here to bypass Section 2's requirements for vote-dilution plaintiffs. In either event, Plaintiffs' Section 2 claim is dead on arrival.

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[6] An expert for Plaintiffs determined that Senator Torres received about 40% of the Hispanic vote, while Intervenors' expert determined that Senator Torres received about 50% of the Hispanic vote. See *Soto Palmer*, ECF No. 218 at 11.

[7] Plaintiffs never asserted this theory.

B. LD-15's Minority Community is not Geographically Compact.

As *Soto Palmer* Intervenors argued, *Soto Palmer*, ECF No. 215 at 15, the diverse Hispanic population spread across the Yakima Valley region is not compact in the manner required by *Gingles* I: "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 (quoting *Bush* v. *Vera*, 517 U. S. 952, 997 (1996)).

Yet the court erred by considering only the compactness of the boundaries in Plaintiffs' demonstrative maps, and not the compactness of Hispanic voters within those boundaries. See *Soto Palmer*, ECF No. 218 at 10.

What's more, aside from Dr. Owens (Intervenors' expert), not a single expert in this case considered the compactness *of the minority community*. Dr. Collingwood never even examined whether doing so was possible. Trial Tr. 110:9–14 (Collingwood).[8] Dr. Alford admitted that he only found the demonstrative district to be compact "in appearance" but "without [conducting any] sort of extensive analysis." Trial Tr. 857:3–14. And he misapplied the *Gingles* I requirements by looking "to the compactness of the [demonstrative] district itself, as opposed to the compactness of the Latino community within it." Trial Tr. 858:14–19. Dr. Barreto's PowerPoint contained nothing more than a heat map of the state's Hispanic population, without any analysis of the compactness of the Yakima Valley Hispanic population,

[8] Trial transcripts are located at *Soto Palmer*, ECF Nos. 206–09.

communities of interest, or any traditional districting principles. Trial Ex. 179.

The Court's conclusory findings of compactness were, therefore, incorrect as a matter of law.

C. There Is No Legally Significant Racially Polarized Voting In LD-15.

Gingles preconditions II and III involve racially polarized voting—essentially, the political cohesiveness of Whites and Hispanics—which exists when a "minority group has expressed clear political preferences that are distinct from those of the majority." *Gomez* v. *Watsonville*, 863 F. 2d 1407, 1415 (9th Cir. 1988). "The second and third preconditions are often discussed together" because racially polarized voting does not exist unless both communities are cohesive. See *LULAC* v. *Abbott*, 2022 U. S. Dist. LEXIS 224928, at *10–12 (W.D. Tex. Dec. 14, 2022) (three-judge district court). The ultimate question is whether a minority group votes cohesively, with White voters overwhelming the choices of minority voters. *Id.*; *Milligan*, 143 S. Ct. at 1503.

The *Soto Palmer* Court's *Gingles* II analysis runs a grand total of one paragraph and a footnote. Not only is this woefully short of the required "intensely local appraisal," it flatly ignores the "present reality" in the Yakima Valley—namely, the landslide election of a Latina Republican over a White Democrat. See *id.* (quoting *Gingles*, 478 U. S., at 45–46). Put differently, the court's dismissal of the election results in the only contested election held in LD-15 is incorrect as a matter of law. *Id.*

What's more, the court also refrained from grappling with Intervenors' argument that partisanship, not race, drives election results in the Yakima Valley. See *Soto Palmer*, ECF No. 218 at 13.

But Section 2 is "a balm for racial minorities, not political ones." *Baird* v. *Indianapolis*, 976 F. 2d 357, 361 (7th Cir. 1992). Indeed, in Justice White's *Gingles* concurrence, he explained that race of the successful candidate might illustrate that partisanship, not race, is driving election results in the jurisdiction. See *Gingles*, 478 U. S., at 80 (White, J., concurring) (critiquing Justice Brennan's test, which would find a Section 2 "violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters" even though "[t]his is interest-group politics rather than a rule hedging against racial discrimination").

The assertion that candidate's race must be the causal factor for the purported discrimination—as opposed to the candidate's political affiliation—flows from the text of Section 2 itself:

> No voting . . . practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a 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).

Failure of a minority group to elect representatives of its choice that are caused by partisanship, rather

than race, provide no grounds for relief under the VRA: "Courts must undertake the additional inquiry into the reasons for, or causes of, these electoral losses in order to determine whether they were the product of 'partisan politics' *or* 'racial vote dilution,' 'political defeat' *or* 'built-in bias.'" *LULAC* v. *Clements*, 999 F. 2d 831, 853–54 (5th Cir. 1993) (citation omitted); see also *Baird*, 976 F. 2d at 361 ("[The VRA] does not guarantee that nominees of the Democratic Party will be elected, even if [minority] voters are likely to favor that party's candidates.").

1. Dr. Owens' analysis reveals voting polarization is attributable to partisanship, not race.

Dr. Owens' conclusion wasn't that racially polarized voting never exists in the Yakima Valley; rather, that it *only exists* in races between a White Democrat and a White Republican. See Trial Tr. 538:22–539:5. This is not inconsistent with the conclusions of the other Parties' experts.

Dr. Owens' key finding is that whenever there is an election where those conditions don't exist, racially-polarized voting patterns either reverse themselves or disappear entirely:

- <u>In partisan races between two candidates from the same party</u> (a phenomenon that can occur in Washington's "Top Two" primary system), Dr. Owens' analysis shows that the Hispanic vote splits evenly. Trial Tr. 539:7–14; see also Trial Ex. 1001, at 9, tbl. 1; but cf. Trial Tr. 69:19–70:15 (Owens: noting that Dr. Collingwood's reports did not include the 2020

lieutenant governor race involving two candidates from the same party).

- When a partisan race involves a White Democrat and Hispanic Republican, Hispanic voters were much less supportive of the Democratic candidate. Trial Tr. 539:22–540:2; see also Trial Ex. 1001, at 9, tbl. 1; accord, Trial Tr. 69:19–70:15 (Collingwood: reporting that racially polarized voting was not found in this type of election).

- For nonpartisan races, Dr. Owens reported that Hispanic voters were less cohesive. Trial Tr. 541:22–542:15; accord, Trial Tr. 69:19–70:24 (Collingwood); 861:22–863:25 (Alford: reporting his findings that in nonpartisan elections, Hispanic voters are "slightly less cohesive" and white voters show "essentially no evidence of cohesion at all."); see generally Trial Tr. 864:6–13 (Alford: explaining that nonpartisan elections are probative for polarized voting analysis because it shows whether minority or Anglo reaction to a minority-preferred candidate is "a function of the party of those candidates, versus the ethnicity of those candidates").

When trying to distinguish between correlation and causation, this pattern points to partisanship as the driver of polarization, not race itself. See Trial Tr. 546:13–16 (Owens: "It most often is going to be the partisanship of the candidates" that is driving Hispanic vote choice, not race.). And real-world results confirm Dr. Owens' conclusions.

2. The sole contested legislative election held in LD-15 confirms Dr. Owens' analysis.

A real election, by its very nature, is more probative than hypotheticals constructed by an expert. See, *e. g.*, *Milligan*, 143 S. Ct. at 1513 n.8 ("[C]ourts should exercise caution before treating results produced by algorithms as all but dispositive of a §2 claim.").

In the only contested election held in LD-15 under the Enacted Plan, Nikki Torres—a Latina Republican—received 68% of the vote, winning by 35 points. See Trial Ex. 1055.

Both Drs. Collingwood and Owens supplemented their reports based on this election. See Trial Exs. 2, 1002a, 1002b. They estimated Hispanic support for Nikki Torres around 32 to 48 percent (depending on which statistical methodology was used). See Trial Ex. 2, at 4 fig. 1; Trial Tr. 548:22–549:14; see also Trial Ex. 1002b at 3, tbl. 1. Thus, using either experts' numbers, a substantial portion of the Hispanic community voted with White voters to elect Mrs. Torres. This is the exact scenario that Justice White opined would indicate partisanship, not race, as the underlying cause, and therefore not constitute a violation of Section 2. See *Gingles*, 478 U. S., at 83 (White, J., concurring).

III. THE "SENATE FACTORS" ARE NOT PRESENT HERE IN LIGHT OF *BRNOVICH* V. *DNC* AND *ALLEN* V. *MILLIGAN*.

Regardless of the *Gingles* preconditions, the purpose of Section 2 analysis is to determine whether,

under the "totality of the circumstances," Hispanic voters in the Yakima Valley have less opportunity to participate in the political process. The totality of the circumstances inquiry is no "empty formalism." *Clark* v. *Calhoun County*, 88 F. 3d 1393, 1397 (5th Cir. 1996). Courts must look for the "crucial" proof of "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) (internal citation omitted).

Put differently, a Section 2 challenge "based purely on a showing of some relevant statistical disparity between minorities and whites," without any evidence that the challenged rule *causes* that disparity between races, will be rejected. *Gonzalez* v. *Arizona*, 677 F. 3d 383, 405 (9th Cir. 2012) (en banc); see also *NAACP* v. *Fordice*, 252 F. 3d 361, 367 (5th Cir. 2001) ("Absent an indication that these facts actually hamper the ability of minorities to participate, they are, however, insufficient to support a finding that minorities suffer from unequal access to Mississippi's political process.") (cleaned up); *Clements*, 999 F. 2d at 866 ("Texas' long history of discrimination . . . [is] insufficient to support the district court's 'finding' that minorities do not enjoy equal access to the political process absent some indication that these effects of past discrimination actually hamper the ability of minorities to participate."); *Carrollton Branch of NAACP* v. *Stallings*, 829 F. 2d 1547, 1561 (11th Cir. 1987) ("[A] history of official discrimination did exist in Carroll County but [] the plaintiffs failed to establish there was a lack of ability of blacks to participate in the political process.").

Although much can be written about the *Soto Palmer* Court's failure to apply the correct legal standards in its totality of the circumstances analysis, three failings stand out: (1) the court found the "usual burdens of voting" evidenced an abridgment of the right to vote, contra, *Brnovich* v. *DNC*, 141 S. Ct. 2321, 2338 (2021) (internal citation omitted); (2) the court's appraisal was neither "intense[]" nor "local," nor did it take into account "past and present realities," *Milligan*, 143 S. Ct. at 1503; and (3) the court continuously failed to identify the required causal connection between the challenged map and the purported discriminatory result, see *supra* Sec. II.C.

For example, in applying the first Senate Factor (a history of official discrimination), the court relied on examples such as (1) "English-only election materials," *Soto Palmer*, ECF No. 218 at 15; (2) "[s]eemingly small, everyday municipal decisions, like which neighborhoods would get sidewalks," *id.*, at 16; and (3) "the significant percentage of the community that is ineligible to vote because of their immigration status," *id.* English-only election materials and adherence to the constitutional requirement for citizenship as a prerequisite to voting are exactly the type of "usual burdens of voting" that *Brnovich* dictates are not violations of Section 2. *Brnovich*, 141 S. Ct. at 2338. And it is anyone's guess how the court connected the dots between sidewalk placement and vote abridgement, particularly when Washington's elections have been conducted exclusively through mail since 2011. Wash. Rev. Code § 29A.40.010.

Again, in analyzing Senate Factor 3 (voting practices that may enhance the opportunity for discrimination), the Court relied on usual burdens on the right to vote, such as holding non-presidential-year elections in LD-15, at-large districts, and ballot signature verification. *Soto Palmer*, ECF No. 218 at 17–18; but see *Brnovich*, 141 S. Ct. at 2338. The Court made a simple legal error, holding that off-year elections are per se hindering the franchise. And the court held that some at-large voting schemes "may" dilute minority strength but failed to describe *how* Washington's current districts do so, which was the entirety of the district court's "intensely local" factfinding. *Soto Palmer*, ECF No. 218 at 17.

In analyzing Senate Factor 5 (continuing effects of discrimination), the court found evidence that "unequal power structure between white land owners [sic] and Latino agricultural workers suppresses the Latino community's participation in the electoral process out of a concern that they could jeopardize their jobs and, in some cases, their homes if they get involved in politics or vote against their employers' wishes." *Id.*, at 20. This conclusion was based on the rank hearsay testimony of partisans who did not even reside in LD-15. See Trial Tr.; 22:8–23:24; 26:6–25; 198:20–199:14; 201:1–14. This is not the "intensely local appraisal" that Section 2 requires, *Milligan*, 143 S. Ct. at 1503, nor should this testimony have been admitted into evidence. Plus, the sole expert's testimony on this factor never even attempted to make a causal connection between Hispanic-White social disparities and the ability of Hispanics to participate in the political process.

When analyzing Senate Factor 6 (overt or subtle racial appeals in political campaigns), the court below relied on testimony that *voters* made "[a]ssertions that 'non-citizens' are voting in and affecting the outcome of elections." *Soto Palmer*, ECF No. 218 at 20. Although the court omitted a citation, this was hearsay testimony about an individual door knocker who purportedly said of a Latino candidate, "I'm not voting for him, I'm racist." Trial Tr. 293:15–25. Assuming this event occurred—which is dubious—the Court's use of a *voter's* purported racial appeal misunderstands the legal standard, which is about a *political campaign's* racial appeals, *Gingles*, 478 U. S., at 37.

The Court's totality of the circumstances analysis was a dismal failure, and its decision is so clearly erroneous that it should "strike [this Court] as wrong with the force of a five-week old, unrefrigerated dead fish." *Ocean Garden, Inc.* v. *Marktrade Co.*, 953 F. 2d 500, 502 (9th Cir. 1991) (internal citation omitted).

CONCLUSION

For these reasons, Petitioners respectfully ask the Court to grant this petition for writ of certiorari before judgment, hold this case in abeyance, and (eventually) consider this case alongside the direct appeal in *Garcia*. The issues in these cases are inextricably linked, and this remedy best advances judicial economy.

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