**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SUSAN SOTO PALMER, *et al.*,

Plaintiffs – Appellees,

v.

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

Defendants – Appellees,

and

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

Intervenor-Defendants – Appellants.

No. 24-1602

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

APPELLANTS' CONSOLIDATED REPLY TO RESPONSES IN SUPPORT OF ITS EMERGENCY MOTION FOR A STAY PENDING APPEAL AND RESPONSE TO PLAINTIFFS' MARCH 19 MOTION

**Relief Requested by:
March 25, 2024**

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GLOSSARY

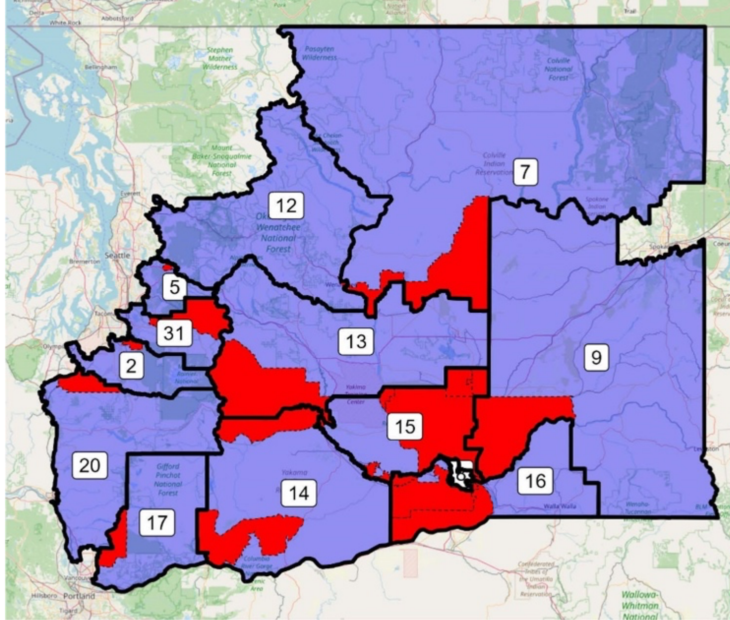
Term/Abbreviation	**Definition**
Appellants	Three Hispanic voters who intervened as defendants in the district court (Jose Trevino, Alex Ybarra, and Ismael G. Campos), who are Appellants here.
Appellees	Plaintiffs and the State (not including the Secretary unless context indicates otherwise)
Commission	Washington State's bipartisan, independent Redistricting Commission created by Wash. Const. art. II, §43.
CVAP	Citizen Voting Age Population.
Enacted Map	The now-permanently enjoined Washington State Legislative Map, as drawn by the Commission and amended by the Washington State Legislature in February 2022.
HCVAP	Hispanic Citizen Voting Age Population.
LD-15	Legislative District 15 of Washington's State Legislative Map, as enacted.
Plaintiffs/Appellees	The group of voters who originally brought this Section 2 case, who are Appellees here.
Remedial Map	The new Washington State Legislative Map as ordered by the district court in its remedial order/injunction issued on March 15, 2024.
State	The State of Washington, as appearing in this litigation and represented by the Attorney General.
Secretary	The Secretary of State of Washington.
VRA	Voting Rights Act, 52 U.S.C. §10301 *et seq.*

INTRODUCTION

The district court's mandatory injunction and Remedial Map rest on numerous legal errors, many of which are as unprecedented as they are egregious. For example, while Plaintiffs and the State attempt to downplay the significance of the district court's cure for alleged racial vote dilution with further racial vote dilution, neither can cite a *single instance* in the nearly 42 years since the 1982 VRA amendments were enacted where a district court has *ever* adopted such an affirmative-dilution remedy. Much as "the most telling indication of a severe constitutional problem … is a lack of historical precedent to support it," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020) (cleaned up), the complete absence of any district court *ever* approving an equivalent §2 affirmative-dilution remedy is deeply revealing of the severe incompatibility between that putative "remedy" and any violation of §2 itself.

Even more egregious are the sweeping and gratuitous changes adopted by the district court, altering *13 districts* (of 49) to cure a purported violation in *just one district* and with changes that nearly uniformly benefit the political party of the current executive branch officials who would otherwise defend the state's maps. That error is so indefensible that the State does not even attempt to offer a *single word* to justify those wanton alterations to its map. *See* State Opp.22-28 (remedial arguments silent on this). That silence is particularly notable given the State's willingness to fight Appellants on virtually every other issue, large and small. The State thus *should* be appealing here, rather than brazenly acquiescing in the vitiation of its own law.

Plaintiffs, unlike the State, at least attempt to defend the wholesale modifications, but their effort is no more persuasive than the State's silence. Even a cursory glance reveals how sweeping the Remedial Map's changes are:



(*changes are in red; remedial district 14 is the altered LD-15*)

It is undisputed that *thirteen* districts were altered, even though the alleged violation was confined to just LD-15. Over *two million people* live in those 13 modified districts, or more than *one quarter* of the State's population. Contrary to Plaintiffs' protestations (at 23-27), there is nothing modest about those extensive changes. And one need look no further than Plaintiffs' own submissions to see that they were *wholly* unnecessary: Plaintiffs *themselves* submitted a remedial map (#5/#5A)—self-described as a "complete and comprehensive remedy to Plaintiffs' Section 2 harms," No. 3:22-cv-5035, ECF No. 245 at 2—which changed *only four* districts (including LD-15). ADD-123-24. But the Remedial Map puts that number to shame. The illegality of the

Remedial Map is thus manifest even from Plaintiffs' own submissions.

Ultimately, Plaintiffs believe (and the district court accepted) that Hispanic voters' favored choice necessarily means a Democratic candidate regardless of the race of that candidate. Hence Senator Torres's landslide victory necessarily "highlights *the harm*" here. Pls' Opp.16. But that is wrong as a matter of fact, law, and public policy. The VRA does not protect any particular political party, and the district court was not free to ignore the overwhelming victory by a Hispanic candidate, which it did.

Given how indefensible the district court's merits and remedial holdings are, Plaintiffs and the State understandably place great weight on arguments about standing and the arcane procedure of Circuit Rule 27-10. Those contentions fail too. As for standing, neither Plaintiffs nor the State grapple with the fact that Appellants' standing is simply the mirror-image of Plaintiffs: being sorted into an unlawfully constructed district. That sufficed to establish standing for Plaintiffs, and it equally suffices for Appellants here—who, just like Plaintiffs, live in the districts that they are challenging as unlawful. And Plaintiffs' Circuit Rule 27-10 argument (which the State tellingly does not join) fails because of the large differences in the relief sought previously, the issues presented, and the context from which the prior stay request arose.

Because the district court's decisions rest on multiple legal errors and the remaining *Nken* factors are satisfied, this Court should stay the district court's injunction and Remedial Map pending appeal.

ARGUMENT[1]

I. Plaintiffs' Contention That Appellants Are Improperly Seeking Reconsideration Is Incorrect

Plaintiffs' arguments that Appellants' instant stay motion improperly seeks reconsideration of an order issued in a different appeal fail for four reasons.

First, this is a different appeal, and not just by the docket numbers. Appellants are appealing from the injunction adopting the Remedial Map and the harms it causes them; separately, they appealed the earlier injunction that was the premise for what became the Remedial Map. As a result, two separate stay motions were appropriate. The first concerned the district court's prohibitory injunction and order, and the second the court's mandatory injunction and remedial order. The two appeals are related but distinct; consolidation on briefing makes sense, but there remain two distinct injunctions raising distinct issues.

For that very reason, Appellants could not have raised their arguments concerning the Remedial Map before now. To state the obvious, the Remedial Map did not exist before March 15. Plaintiffs do not explain how Appellants could have sought a stay of the Remedial Map *before* it was adopted by the district court. Similarly, Plaintiffs'

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[1] Concerning the Secretary's filing, Appellants agree that March 25th is an important date—hence Appellants' filing an emergency motion requestion a decision by that date. But the deadline is not absolute, as the Secretary suggests, but rather the start date after which consequences become more costly.
Separately, the Secretary is correct that Appellants misstated that the Secretary submitted an expert report, not a declaration, during the remedial phase. We regret the inadvertent error.

contention (at 1) that Appellants "raise the precise same arguments again" as in the prior stay motion is demonstrably false; the challenges to the Remedial Map could not have been—and were not—raised previously.

Second, the relief sought was different: the prior stay order sought a stay of remedial proceedings and entry of *any* remedy due to threatened potential irreparable harm that *might* result from the remedial proceedings. But this motion comes with the certainty of the remedy specifically adopted by the district court, which eliminates much previous uncertainty. Indeed, the prior motions panel may fairly have doubted that the district court would actually do things so outlandish as to purport to remedy dilution with yet more dilution or redraw 13 districts that are home to more than two million residents to remedy an alleged violation in just one, and discounted Appellants' harms on that basis. But the district court has now done all of those things, and those harms are now presented sharply and starkly in a manner that was previously only hypothetical (though correctly predicted by Appellants).

Third, the prior two-judge motions panel declined to provide the basis for its denial, only citing to the *Nken* standard. There are thus no actual holdings of which Appellants could seek reconsideration. Instead, there is only an unreasoned *outcome* arising in a different context, involving a different request for relief and more speculative harms than are presented here.

Fourth, Plaintiffs' argument is premised on preclusive effect that this Court refuses to attach to its own stay decisions. Notably, even when a motions panel *specifically*

resolves issues in a *published opinion*, those explicit resolutions are not binding on subsequent panels—and this Court has never suggested that a party needs to seek reconsideration to contest them later in the same appeal (let alone a separate appeal). *See, e.g.*, *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1186 n.3 (9th Cir. 2021) (holding that a prior published opinion by a motions panel that granted a stay pending appeal was "'not binding here … because the issues are different'" (citation omitted)). But here the prior two-judge motions panel did not resolve *any* issue specifically, and its decision was unpublished. Plaintiffs' contention that this unreasoned, unpublished decision resolving no issue specifically has preclusive effect absent reconsideration under Circuit Rule 27-10 finds no support in this Court's precedents. Nor do Plaintiffs cite any cases so construing Circuit Rule 27-10.

II. Appellants Have Article III Standing To Bring This Appeal

Understandably eager to avoid this Court's scrutiny of the validity of the district court's orders, Appellees spill much ink disputing Appellants' standing to appeal. That effort at misdirection is misdirected. Appellants here have standing because (1) Mr. Trevino and Rep. Ybarra are voters in districts they allege have been unlawfully drawn—*i.e.*, the exact same basis upon which Plaintiffs established standing, and (2) Rep. Ybarra is an elected official representing a district substantially altered by the Remedial Map who will necessarily have to expend additional funds and personal efforts as a direct result of those alterations.

A. Because Appellants Live in Districts Altered by the Remedial Map They Contend Is Unlawful, They Have Standing to Challenge It

"The Supreme Court has articulated a broad conception of Article III standing to bring equal protection challenges." *Braunstein v. Arizona DOT*, 683 F.3d 1177, 1184 (9th Cir. 2012). "Voters in [racially gerrymandered] districts may suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 745 (1995). For that reason, "a plaintiff [that] resides in a racially gerrymandered district … has standing to challenge" it. *Id.* at 744-45. Indeed, being sorted into districts explicitly on the basis of race causes "'fundamental injury' to [Appellants'] individual rights." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (*Shaw II*).

Applying these principles, Appellants Trevino and Ybarra readily have Article III standing. It is undisputed that Mr. Trevino, as a resident of Granger, was in Enacted LD-15 (the original majority-minority district) and has been resorted into Remedial LD-14 (the new majority-minority district) by the district court's injunction. ADD-163. Similarly, Rep. Ybarra is a resident of LD-13, which was redrawn by the Remedial Map. ADD-149. Mr. Trevino and Rep. Ybarra thus "ha[ve] standing to challenge the [government entity's] action." *Hays*, 515 U.S. at 745.

The State appears to contest that the district court engaged in any racial sorting, contending (at 14) that there is no "'specific evidence showing Mr. Trevino is subject to a racial classification by the district court." But one need look no further than the district court's *description of its own actions* to see that the Remedial Map is based on racial

classifications. The district court was *explicit* about this: saying that the "fundamental goal of [its] remedial process" was to unite "Latino communit[ies] of interest" into a single district. ADD-36, 38 n.7. That is *a race-based goal* that could *only* be accomplished by sorting voters *based on race*—which is exactly what the district court did. Contrary to the State's understanding (at 14), *intentionally and explicitly* sorting voters into districts based on their race *is* "evidence … [of] racial classification by the district court."

Mr. Trevino and Representative Ybarra are among the thousands of Hispanic voters sorted on this basis. Inflicting this "fundamental" injury upon them via racial sorting, *Shaw II*, 517 U.S. at 908, is in manifest conflict with the district court's "fundamental" race-sorting goal. The district court's invasion of their right not to be sorted on racial grounds thus confers standing. That is unsurprising considering that "compliance with the Voting Rights Act ... pulls in the opposite direction" of the Equal Protection Clause because it "insists that districts be created precisely because of race." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018).[2]

Appellees also both tellingly fail to address Appellants' argument (at Mot.25) that "Ybarra's and Trevino's injuries are effectively just the mirror image of the harms that

[2] The State's standing arguments also improperly "conflate[] standing with the merits," *Lazar v. Kroncke*, 862 F.3d 1186, 1198 (9th Cir. 2017). For purposes of assessing Appellants' standing, this Court must assume that Appellants will prevail on their challenges to the district court's race-based sorting. *See, e.g.*, *Weichsel v. JP Morgan Chase Bank, N.A.*, 65 F.4th 105, 111 (3d Cir. 2023) (Federal courts thus "assume for the purposes of [their] standing inquiry that a plaintiff has stated valid legal claims."); *Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd* 554 U.S. 570 (2008) (same).

Plaintiffs allege … [to establish] standing." So if they are correct about Appellants' standing, the correct disposition here is outright dismissal of Plaintiffs' suit (and a stay pending that inexorable outcome). What's good for the goose is good for the gander.

Moreover, Appellees' silence concedes that Appellants could bring independent challenges to the new remedial map in separate litigation, since in those cases their standing would be *identical* to Plaintiffs' here. But there is no reason to believe that Article III demands the contrivance of a separate suit challenging the legality of the Remedial Map when adjudication of the same issues can instead occur in a single action.

Article III requires cognizable injury, not collateral litigation that maximizes judicial inefficiency. And being sorted into an illegally constructed district is just such cognizable injury—for Appellants here just as for Plaintiffs below.

B. Representative Ybarra Has Standing Based on Electoral Harms

Contrary to Appellees' contention that Representative Ybarra's injuries are somehow a generalized grievance, the Remedial Map "singled [him] out for specifically unfavorable treatment as opposed to other Members of" the Legislature. *Raines v. Byrd*, 521 U.S. 811, 821 (1997); *see also Newdow v. United States Cong.*, 313 F.3d 495, 498–99 (9th Cir. 2002).

Grasping at straws, the State cites a district court decision from before the 1982 amendments and thousands of miles away: *Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980). Age aside, the State's reliance on *Klutznick* is doubly misplaced. First, the court there reasoned that "a person must show that some interest has been

infringed" by reapportionment. *Id.* at 672. Rep. Ybarra does not disagree; in fact, he has shown his interests are infringed monetarily and otherwise. *See* Mot.25-26. And *Klutznick*'s reasoning that "[a] legislative representative suffers no cognizable injury ... when the boundaries of his district are adjusted by reapportionment[,]" 503 F. Supp. at 672, is incorrect: "[T]he contours of the maps affect [legislators] directly and substantially by determining which constituents the [legislators] must court for votes and represent in the legislature." *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018).

*   *   *

None of the Appellants purports to "stand in for the State." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Thus, both the State's and Plaintiff's fixation with *Hollingsworth v. Perry* misses the point. In that case, the intervenors' only interest was an abstract desire to vindicate the law, and they had no "personal stake" in the outcome. 570 U. S. 693, 706 (2013). But Mr. Trevino and Rep. Ybarra both have personalized stakes in this controversy and bring this appeal to redress their *individualized* harms from the Remedial Map—not defend the State law in some abstract and generalized way. After all, for Rep. Ybarra, his interest in redistricting litigation undeniably "is different than that of [a State]'s citizenry at large or its Secretary of State." *Johnson*, 902 F.3d at 579. And both Rep. Ybarra and Mr. Trevino seek vindicate their *individual* Equal Protection Clause rights, not the State's separate sovereign interest in the validity of its own laws. Appellants' §2 arguments on appeal

are merely the method by which Appellants seek to vindicate their individualized interests in federal court.

To summarize, both Mr. Trevino and Rep. Ybarra supplied evidence establishing their individualized injuries from the Remedial Map. Both have established that they have been racially sorted by the district court (a well-established injury), and Rep. Ybarra has further established monetary costs (a well-established injury) resulting from the Remedial Map, as well as a harder reelection campaign as a result of the new map (a harm not yet resolved by the Supreme Court, but one readily conceptualized as concrete injury). Appellants thus have Article III standing to appeal.

III. Appellants Are Likely to Prevail on Appeal

Appellants are likely to prevail on the merits in their appeal both because (1) the district court's holding that LD-15 of the Enacted Map violates §2 of the VRA is untenable and (2) the Remedial Map is unlawful and a manifest abuse of discretion.

A. The District Court's Section 2 Liability Decision Is Not Likely to Survive Appellate Review

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

The text of §2 requires only that a minority group have equal "opportunity" to elect a candidate of its choice. 52 U.S.C. §10301(b). Thus, "the ultimate right of §2 is equality of opportunity, not a guarantee of electoral success." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). By definition, if a group is a majority by CVAP in a district and is not a hollow majority, then it necessarily possesses at least an equal—and indeed

better—opportunity than any other racial group to elect a candidate of its choice. That is just simple arithmetic. And Appellees do not even attempt to reconcile their arguments with §2's text.

The State's reliance (at 19) on *Perry* as rejecting Appellants' argument fails because *Perry* only found a §2 violation *because* the majority was a "bare majority … [and] only in a *hollow* sense" because Hispanic voters comprised only a majority of the *adult* population and not CVAP—thus constituting a mere "facade of a Latino district." *LULAC v. Perry*, 548 U.S. 399, 429, 441, 427 (2006) (emphasis added).

The necessity of the *Perry* majority finding the majority was "hollow" and a "façade" *before* finding a §2 violation thus directly supports Appellants' arguments here. But tellingly neither the State nor Plaintiffs addresses this fundamental aspect of *LULAC* and instead rely on it only for the superficial proposition that it endorsed any §2 challenge to a majority-minority district. Instead, they shift focus to cases not binding on this Court.

Ultimately, Appellees' arguments collapse into their contention that although Hispanic voters are a majority by CVAP in LD-15, Democratic candidates need to win more elections in that district to avoid violating §2—a proposition that the district court's remedial order explicitly accepted. ADD-42. Section 2, however, is "not a guarantee of electoral success." *Johnson*, 512 U.S. at 1014 n.11. The district court erred in holding otherwise and accepting a §2 challenge to a *majority*-minority district simply

because the existing majority was not producing the "electoral success" Plaintiffs for the political party that demanded.

2. The district court committed legal error in analyzing compactness

As Appellants explained (Mot.13-14), the district court legally erred by focusing on geographic, shape-based compactness instead of the minority population. *See Perry*, 548 U.S. at 433 ("The first *Gingles* condition refers to the *compactness of the minority population*, not to the compactness of the contested district." (emphasis added) (citation omitted)). Specifically, Appellants pointed to the district court's analysis that specifically analyzed only the compactness of the district's *shape*, and not the population of minority voters that lived therein. *See* Mot.13.

Neither Appellee seems to dispute this error, thereby conceding it. Instead, Plaintiffs appear to suggest (at 12-13) that this uncontested error is harmless under *Perry* because the Hispanic communities in the region, in their view, are neither disparate in terms of geography nor in terms of needs and interests. But the district court made no specific findings on either issue. Moreover, the Pasco and East Yakima pockets of Hispanic communities are 80 miles apart. Adjusting for the population of the state legislative district (roughly 150,000) compared to the congressional district at issue in *Perry*, that is a greater distance than what the Court struck down in *Perry*. *Id.* at 434–35 (finding that a congressional district of approximately 700,000 people spanning 300 miles to connect two Hispanic populations was not compact).

Moreover, the district court also erred by examining the Hispanic communities

at an absurdly high-level of generality flirting with outright racial stereotyping. Neither Appellee disputes that, under the *extremely* generalized and high-level analysis supplied by the district court, a district running from San Diego to Redding, California—a distance of over 600 miles—would be "compact." Because the only analysis that the district court supplied would mean that *all* districts uniting far-flung Hispanic communities are *always* compact—a proposition that neither Plaintiffs nor the State meaningfully deny—the district court's compactness flouts *Perry*.

3. The district court erred by failing to analyze causation

The district court's analysis of causation is also woefully deficient—particularly in its refusal even to attempt to address how Senator Torres's landslide victory was consistent with its finding of causation.

This Court has made plain that "[t]he *most probative evidence* of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections *involving [minority] candidates*." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 553 (9th Cir. 1998) (emphasis added). But even though this evidence is supposed to be "most probative," the district court abjectly failed to analyze it for Senator Torres's victory—which both sets of Appellees conceded by silence.

As noted previously, the district court failed even to *disclose* the margin of victory –let alone meaningfully *analyze* its effect on the totality of the circumstances. To state the obvious: a district court cannot analyze evidence meaningfully (or at all) whose existence it steadfastly refuses to acknowledge.

Plaintiffs attempt to deflect this glaring omission (at 16 n.9) with irrelevant language about candidate of choice. But *Ruiz*'s "most probative evidence"—which both Appellees simply ignore—is not so easily evaded. 160 F.3d at 553.

Plaintiffs also attempt (at 16 n.8) to write off Senator Torres's landslide as a "special circumstance" election because the White Democrat was "severel [sic] underfunded" and was "nominated as a write-in." But bad candidates, underfunded candidates, and write-in candidates are all "representative of the typical way in which the electoral process functions," and do not qualify for the "special circumstances" carve-out. *Ruiz*, 160 F.3d at 557.[3]

Ultimately, this Court has specifically mandated what evidence *must* be considered as the "*most probative evidence*." *Id.* at 553 (emphasis added). But far from considering it seriously, the lower court ignored the landslide nature of Senator Torres's victory entirely. Because "most probative" is not synonymous with "entirely ignorable," that striking and conceded omission is quintessential reversible error.

4. The district court's totality finding is untenable

As explained previously, even if the district court's manifold errors were not independently fatal, they cumulatively render the district court's totality finding

[3] *See also Fusilier v. Landry*, 963 F.3d 447, 459 (5th Cir. 2020) (discussion of special circumstances for the uncontested election of a African-American judge who had been a local bar president, a local assistant district attorney, and a community member for years) and compare with the biography of Senator Torres: https://nikkitorres.src.wastateleg.org/about/ (local chamber of commerce president, local elected official, community involvement in numerous organizations, etc.)

untenable. *See* Mot.16.

B. The Remedy Map Is Not Likely to Survive Appellate Review

The district court's errors in adopting the Remedial Map are similarly egregious and underscore that the lower court's decision is unlikely to survive appellate review.

1. Remedying dilution with more dilution is unprecedented and unlawful under the VRA

Both Plaintiffs and the State attempt to paint the district court's cure-dilution-with-dilution remedy as an unexceptional—even perhaps typical—§2 remedy. But, quite strikingly, neither cites a *single instance* in which a court has *ever* ordered such a CVAP-reducing remedy. Indeed, to Appellants' knowledge, no VRA plaintiff has ever previously had the audacity *even to ask* for such an affirmative-race-dilution-resulting remedy. The district court's adoption of a remedy so dubious and counter-intuitive that no one appears even to have requested it in the four decades since the VRA amendments were adopted is thus no typical §2 remedy. That alone is a "most telling indication of a severe [legal] problem." *Seila Law*, 140 S. Ct. at 2201 (cleaned up).

Neither Plaintiffs nor the State grapples with the logical flaw inherent in the district court's remedy: if dilution is the violation, it cannot also be the cure. Indeed, by their tortured logic, a district court could "remedy" an equal-population violation by imposing a map with even greater malapportionment among districts.

Nor have Plaintiffs or the State cited a single case *in any context*—election or otherwise—where a federal court has purported to cure a violation by imposing more

of that same violation. Circuit courts, for example, would rightfully view with disdain an injunction purporting to "remedy" an antitrust monopolization violation by ordering the monopolizing company to *increase* its market share. Plaintiffs thus not only cannot point to any precedent for their affirmative-dilution remedy, they cannot even point to a case where a court has adopted an analogous remedy in *any legal context*.

But even if a district court could *ever* justify a cure-dilution-with-additional race dilution remedy, the district court's order here manifestly fails to do so. As Appellants previously explained, the district court's justification of its entirely unprecedented remedy was all of a single, conclusory sentence. *See* Mot.19 (citing ADD-36). And such vague generalities are woefully insufficient to sustain the extraordinary, never-before-seen remedy order. If such an unprecedented remedy were *ever* appropriate, a district court would have to offer something beyond mere talismanic invocation that it "provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature." ADD-36. If that suffices here, it would justify the district court's severely aberrational cure-dilution-with-more-dilution remedy in *all* §2 vote-dilution cases. That cannot be the law.

Both Plaintiffs and the State appear to argue that the district court's dilutive remedy is permissible because the injection of crossover voters from other racial groups will give Hispanic voters an effective majority that was purportedly lacking in LD-15. Pls' Opp.17-19; State Opp.22-23. But the Supreme Court has explained that §2 cannot be employed to mandate districts in which minority voters can form effective coalitions

with other groups: "nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality and controlling opinion under *Marks v. United States*, 430 U.S. 188, 193 (1977)).

Instead, "[t]here is a difference between a racial minority group's 'own choice' and the choice made by a coalition," *id.*—a difference that the district court's opinion obliterates. Moreover, the district court's use of §2 to compel inclusion of crossover votes—even at the cost of diluting HCVAP—creates severe constitutional concerns: "If § 2 were interpreted to require crossover districts throughout the Nation, 'it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.'" *Id.* at 21 (citation omitted).

For all of these reasons, the district court's adoption of a remedy that purports to cure dilution of Hispanic voting strength by affirmatively diluting the Hispanic CVAP of LD-15 is as unlawful as it is unprecedented.

2. The Remedial Map is an unconstitutional gerrymander

Both Plaintiffs and the State argue implausibly that race did not predominate in drawing the Remedial Map. Here, the truly bizarre shape of the remedial district—resembling something between a multi-tentacled sea creature and some horror straight out of Lovecraft is inexplicable but for race alone and demonstrates racial predominance. But the strange shape is secondary to what the district court *admitted* was its predominant goal: that its "fundamental goal of the remedial process" was to unite "Latino communit[ies] of interest" into a single district. ADD-36, 38 n.7. Neither

Plaintiffs nor the State even attempts to argue how a "fundamental goal" could be anything other than a race-predominant one.

Amazingly, however, Plaintiffs go so far as to argue that the district court did not "even consider[] [race] in drawing or adopting the remedial map." Pls' Opp.27 (punctation omitted). That is preposterous. The district court *outright admitted* that its "fundamental goal" was explicitly race-based: joining together individuals specifically based on their *race*. That Plaintiffs can, with an apparent straight face, contend that the district court did not even "consider" race *whatsoever* is deeply—if inadvertently—revealing of the unseriousness of their arguments.

Because race predominated in the drawing of the Remedial Map—*admitted* by the district court as its "fundamental goal"—the Remedial Map is subject to strict scrutiny. *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 188–89 (2017). And it fails under that standard because the Remedial Map is not narrowly tailored. As explained previously (at Mot.21-24) and below (at 20-23, the Remedial Map makes changes *far* beyond what was necessary. Those sweeping and gratuitous changes thus defeat any defense that the Remedial Map is narrowly tailored.[4]

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[4] Plaintiffs wrongly contend that this argument was waived. But Appellants made the racial predominance of Proposed Map 3A a central focus of their examination of Dr. Oskooii at the March 8, 2024 hearing, thereby preserving the issue. (The court reporter, in a criminal trial, could not produce the transcript under the compressed timetable.)

3. The Remedial Map violates *Upham*, *Abrams*, and *Perry* by making extensive and gratuitous changes to the Enacted Map

As Appellants explained (at Mot.21-24), the Remedial Map makes changes *far* beyond what is necessary, thus violating binding precedent. The State has no response. While contesting virtually every other issue—large and small—it simply cannot muster a word in defense of the gratuitous changes that the district court adopted in the Remedial Map. That silence should tell this Court all that it needs to know.

Plaintiffs do attempt a valiant (if foolhardy) defense of the indefensible. But what those arguments possess in chutzpah they lack in merit (as the State's silence conceded). Plaintiffs first suggest (at 24) that avoiding needless disruptions to the State's Enacted Map is purely a requirement of *state* law that Appellants lack standing to raise. Not so: the requirements of narrowly tailored remedies and federal courts avoiding unnecessary displacement of state law are fundamental requirements of federalism and equitable jurisprudence that apply in *all* federal cases and are not remotely unique to Washington law. *See Upham v. Seamon*, 456 U.S. 37, 41 (1982); *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). And *federal* law mandates that district courts "follow the policies and preferences of the State, as expressed … in the reapportionment plans proposed by the state legislature[,]" *Upham*, 456 U.S. at 41—a mandate flouted by the district court.

More fundamentally, the completely gratuitous nature of the district court's changes is patent even from Plaintiffs' own admissions. Plaintiffs themselves stated that their proposed Maps 4 and 5 were each "a complete and comprehensive remedy to

Plaintiffs' Section 2 harms that aligns with both traditional redistricting principles and federal law." No. 3:22-cv-5035, ECF No. 245 at 2. And the "performance analysis conducted by Dr. Collingwood show[ed] that in nine of the nine elections considered, the Latino-preferred candidate would win in LD 14" in each of the two proposals. *Id.* at 6–7. The State similarly admitted—unreservedly—that "each map [of Plaintiffs' five proposed remedial maps] 'is a complete and comprehensive remedy to Plaintiffs' Section 2 harms.'" ECF No. 250 at 1 (quoting ECF No. 245 at 2).

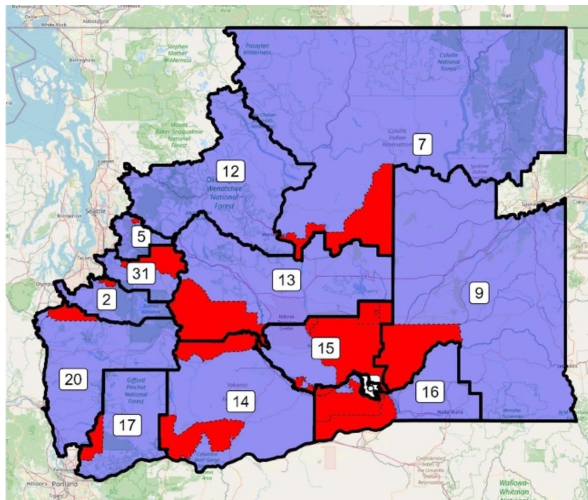
But neither Maps 4/4A nor 5/5A—which Plaintiffs and the State admitted would provide "complete and comprehensive" relief—made changes nearly so sweeping as the Remedial Map. Map 5/5A, for example, moved *far* fewer people (190,745), changed *only four districts*, all in the Yakima Valley region, impacted no new counties, made few changes to district partisanship, and did not pair any Senate incumbents. ADD-123-24. Given Plaintiffs' and the State's admission that map 5/5A was a "complete and comprehensive remedy," it beggars belief that the massive disruptions of the Remedial Map were "no more than is necessary." Pls' Opp.23.

Even more revealing, Plaintiffs proposed a map (#4) that had an *identical* remedial district (remedial LD-14) but differed from map 3/3A/3B in that it made fewer changes to other districts. As described by Plaintiffs themselves, Map 4 "ha[d] an identical configuration to LD 14 in Plaintiffs' Remedial Proposal 3." ECF No. 245 at 6. Yet it changes three fewer districts, moves 50,000 fewer people, and did not, unlike the Remedial Map, alter the fundamental partisan nature of District 12 (far away in North

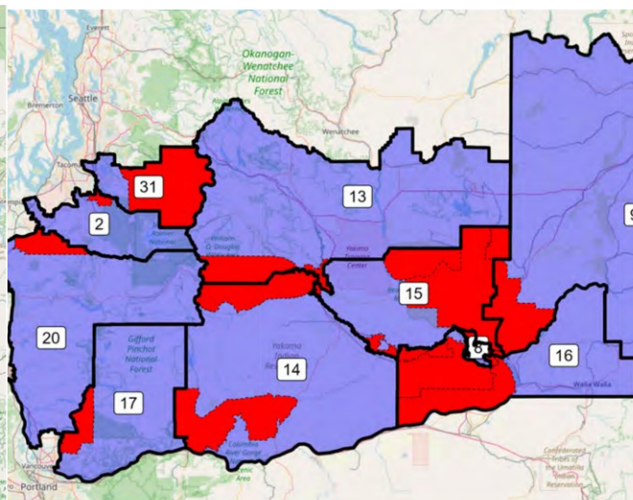
Central Washington) from a district carried by former President Trump into one carried by Joe Biden, ADD-106-107; 113-116. Indeed, it is hard to discern the reason why Map 4, which has the same remedial district as the Remedial Map, was not chosen either. And while Plaintiffs advance (at 25-26) the straw-man contention that remedial maps need not be completely partisan neutral, they cite nothing for the proposition that district courts can make *extensive, gratuitous, and unexplained* partisan changes.

Compare the changes made in Maps 3, 4, and 5 (in order):

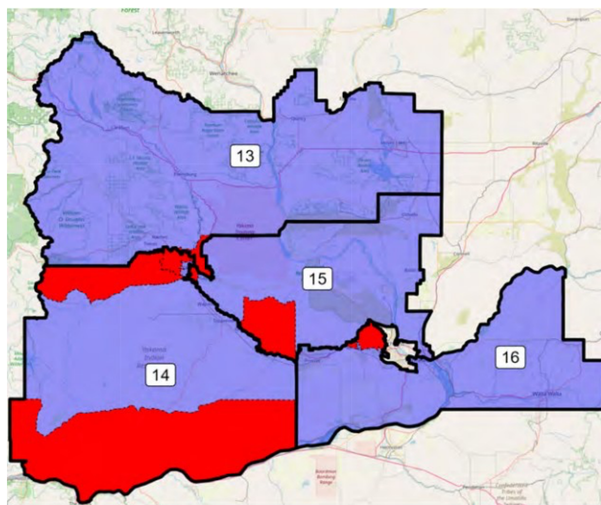
Map 3



Map 4



Map 5



Given Plaintiffs' and the State's concessions that Maps 4 and 5 provided "complete and comprehensive" relief, the district court's adoption of a variant of Map 3—which made *far* greater changes—is the clearest possible error.

IV. The Remaining *Nken* Factors Favor a Stay Pending Appeal

A. Appellants Will Suffer Irreparable Harm Absent a Stay

The State wisely does not even try to contest that Appellants will suffer irreparable harm absent a stay. Plaintiffs, for their part, deny irreparable harm based on their contention that the district court did not "even consider[] [race] in drawing or adopting the remedial map." Pls' Opp.27 (punctation omitted); *accord id.* (contesting that "race had been considered at all in adopting the remedial map"). That is specious.

The district court not only considered race *explicitly*, but further declared outright that its "fundamental goal" was a race-based one: to unite "Latino communit[ies] of interest" into a single district. ADD-36, 38 n.7. As explained above (at 18-29), that explicit race-based objective not only demonstrates that race was *considered* but that it predominated. Indeed, declaring a race-based objective to be the "fundamental goal" *by definition* means that it predominated.

Race-based sorting inflicts "fundamental" injury. *Shaw II,* 517 U.S. at 908. Appellants will thus suffer irreparable harm absent a stay.[5]

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[5] Plaintiffs' arguments about putative delay (at Pls' Opp.28) are unavailing. Appellants filed this motion for a stay the next business day after the district court's order and the *same day* that their appeal was docketed (*i.e.*, the first possible day to do so, since the

B. The Balance of Equities and Public Interest Favor A Stay

Plaintiffs' arguments about the final two *Nken* factors (at Pls' Opp.28-29) simply restate their merits arguments and fail for the same reasons. And Plaintiffs' attempt (at 29 n.13) to distinguish *Merrill* and *Ardoin* on the basis that they involved preliminary and not permanent injunctions is unavailing. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction.").

The State's arguments also largely just rehash their merits arguments.[6] It does add a contention (at State Opp.29) that it is "laughable" that its conduct could ever be considered collusive. Amazingly, the Attorney General does so (on behalf of the State) despite: (1) swearing an oath to defend Washington law and then (2) filing a 29-page brief with the singular and brazen goal of ensuring that Washington law goes completely *un*defended and remains invalidated. And, despite his protestations (*id.*), the effect of the Attorney General's action is just such an "end-run around state law" to achieve a more partisan-favorable map through strategic surrender than the Attorney General's party could receive from the bipartisan Commission.

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notice of appeal was filed on the same day as the remedial order). Moreover, Appellants' prior motion to stay remedial proceedings raised distinct issues. *Supra* at 4-6.

[6] The State (at 29) may "disagree" with Appellants that it will be harmed by the district court's injunction. But the Supreme Court disagrees with it. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (holding that enjoining the "State from conducting [its] elections pursuant to a [legal] statute enacted by the Legislature … would seriously and irreparably harm" the State). That the State is ardently acquiescing in these well-established harms does not change controlling precedents recognizing them.

The collusive effect of the Attorney General's actions is underscored by the fact that the State cannot muster even a *single word* defending the sweeping nature of the district court's remedy that gratuitously altered *13 total districts* home to two million residents. *Supra* at 2. That "silence is most eloquent." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979). Given the State's apparent inability to muster *any* colorable defense on this issue, the State should be appealing that aspect of the remedy itself. The State's refusal to do so is so shocking that it has drawn sharp criticism from such unlikely quarters as a bassist for the band Nirvana.[7] Yet the State shamelessly surrenders to the massive alterations of the *State's own maps* for which it cannot apparently even mouth a defense—which just so happens to result in purely partisan gains for a single party. Such actions are plainly collusive in nature. Federal courts giving them effect is not in the public interest.

CONCLUSION

Appellants' motion for a stay pending appeal should be granted.

[7] *See* Krist Novoselić, *Redistricting in Washington, Pt. 2* (March 20, 2024), https://wa.forwardparty.com/the-summit/redistricting-in-washington-pt-2/.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief contains 6,190 words spanning 25 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f). Appellants have concurrently filed a motion for leave to file a brief exceeding the limits of Federal Rule of Appellate Procedure 27(d)(2)(B) and Circuit Rule 27-1(1)(d).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Garamond size 14-point font with Microsoft Word.

Dated: March 21, 2024

/s/ Jason B. Torchinsky
Jason B. Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will notify all registered counsel.

/s/ Jason B. Torchinsky
Jason B. Torchinsky