No. 24A__

In the Supreme Court of the United States

JOSE TREVINO, ISMAEL G. CAMPOS, AND STATE REPRESENTATIVE ALEX YBARRA,

Applicants,

v.

SUSAN SOTO PALMER ET AL.,

Respondents.

Emergency Application to the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit, For A Stay of Judgment and Injunction

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PARTIES TO THE PROCEEDING BELOW

Applicants (permissive intervenor-defendants below) are Jose Trevino, Alex Ybarra, and Ismael G. Campos.

Respondents are:

(1) Susan Soto Palmer, Alberto Macias, Fabiola Lopez, Caty Padilla, Heliodora Morfin, Plaintiff-Appellees below; and

(2) Steven Hobbs, in his official capacity as Secretary of State of Washington, and the State of Washington, Defendant-Appellees below.

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GLOSSARY

Term/Abbreviation	Definition
Commission	Washington State's bipartisan, independent Redistricting Commission created by Wash. Const. art. II, §43(2).
CVAP	Citizen Voting Age Population.
Enacted Map	The now-permanently enjoined Washington State Legislative Map, as drawn by the Commission and amended by the Washington State Legislature in February 2022.
HCVAP	Hispanic Citizen Voting Age Population.
LD-15	Legislative District 15 of Washington's State Legislative Map, as enacted.
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*.

EMERGENCY APPLICATION FOR STAY

To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, Applicants respectfully request a stay of the judgment and injunction issued by the U.S. District Court for the Western District of Washington, which permanently enjoined use of the duly enacted legislative map ("Enacted Map") and mandated use of its own map ("Remedial Map").

INTRODUCTION

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

Even stranger, in the only contested election held under the challenged district to date, a Hispanic candidate won in a landslide over a White opponent, winning

67.7%-32.1%—a 35.6% margin. Such a resounding electoral victory is hardly a sign of diluted Hispanic voting strength. Yet neither the district court's merits nor remedial orders *even disclose* the margin of that victory—let alone attempt to analyze it or explain how it is consistent with actual dilution of Hispanic voting strength.

Stranger still is the "solution" that Plaintiffs proposed, and the district court accepted: even though Plaintiffs alleged that the challenged district *diluted* Hispanic voting strength, the remedy adopted was to *dilute further* the number of Hispanic voters. Specifically, the Remedial Map challenged here reduces the Hispanic citizen-age voting population ("HCVAP") of the district from 52.6% to 50.2% in 2021 population numbers. And to effectuate this cure-dilution-with-more-dilution remedy, the district court made massive and gratuitous changes to *other* districts, altering a remarkable 13 districts in total (out of 49), and moving half a million people into different districts. Far from preserving the existing Enacted Map as much as practical, as binding precedent demands, the Remedial Map here made sweeping and needless alterations—almost all uniformly benefiting one political party.

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

Because the judgment below contorts the VRA beyond recognition and contradicts its anti-dilutive purposes, it unsurprisingly rests on numerous legal errors on issues of substantial importance that would warrant this Court's review if it were to be affirmed by the Ninth Circuit on appeal. This Court should therefore grant a stay of the judgment. A stay is particularly appropriate because legislative district maps need to be finalized imminently to conduct primary and general elections for 2024.

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

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

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

Fourth, the district court erred in purporting to remedy the alleged dilution that it found violated §2 with yet more dilution, reducing the Hispanic CVAP of LD-15 from 52.6% to 50.2%. If dilution is the VRA violation, it cannot also be the cure.

Indeed, employing the VRA affirmatively to effect dilution of minority voting strength makes a farce out of that landmark civil rights statute and dispenses entirely with the pretext that the VRA is being used for any purpose other than partisan gain.

Fifth, the district court violated this Court's mandate to craft a remedial map that minimizes changes to the districting plan enacted by the State. The district court made sweeping and gratuitous changes to a huge number of legislative districts: altering 13 of Washington's 49 total districts and moving half a million Washingtonians into different districts. Those changes were wanton, particularly, as Applicants' expert made clear, because a remedy accomplishing the district court's stated goal of performing for a Democratic candidate could be effected by altering just *three districts* and moving only 87,230 people and Plaintiff-Respondents themselves proposed a remedial map altering just four districts and moving only 190,745 people.

Sixth, the Remedial Map is an unconstitutional racial gerrymander. Like prior infamous racial gerrymanders, its bizarre shape reveals its unexplainable-except-by-racial-grounds nature—which the district court was completely explicit about in any case, declaring the map's "fundamental goal" to be race-based sorting. ADD-36, 38 n.7. Here, the Remedial Map's revised district was aptly described as an "octopus slithering along the ocean floor." ADD-99. And it belongs in the unconstitutional Hall of Shame every bit as much as the "sacred Mayan bird" and "bizarrely shaped tentacles" previously invalidated. *Allen v. Milligan*, 143 S. Ct. 1487, 1509 (2023).

Notwithstanding these patent errors, the Ninth Circuit denied a stay pending appeal because, in its view, Applicants "ha[d] not carried their burden to demonstrate

that they have the requisite standing to [appeal.]" CA9 Stay Order at 2.

But this Court has squarely held that "[w]here a plaintiff resides in a racially gerrymandered district … [he] has been denied equal treatment … and therefore has standing to challenge" it. *United States v. Hays*, 515 U.S. 737, 744–45 (1995). Applicant Jose Trevino—who lives in the both the original enacted district and in the remedial district—has established just that. Indeed, the district court forthrightly admitted that its "fundamental goal" in adopting the Remedial Map was a race-based one, uniting the "Latino community of interest in the region." ADD-36, 38 n.7. Under *Hays*, that readily establishes Article III standing. Yet the Ninth Circuit appears to have viewed the Washington Attorney General's collusive attempt to surrender away Washington's Enacted Map as somehow nullifying Applicants' injury or preventing it from being cognizable. That holding violates *Hays*. The Constitution's guarantee of equal protection for individuals does not disappear simply because the district court is holding the map-drawing pen and the State is in a surrendering mood.

Given the district court's patent errors, and because there is a reasonable probability that this Court would grant review if the Ninth Circuit were to affirm and because Applicants would suffer irreparable harm absent a stay, this Court should grant Applicants' request for a stay.

OPINIONS AND ORDERS BELOW

The district court's order and judgment holding that LD-15 of the Enacted Map violates §2 of the VRA are reproduced at ADD-1-32 and ADD-44, respectively. The district court's order adopting the Remedial Map is reproduced at ADD-33-43.

The Ninth Circuit's order denying a stay pending appeal is attached as CA9 Stay Order.

STATEMENT OF JURISDICTION

The district court issued an order holding that the Enacted Map violated §2 of the VRA and enjoining its use in future elections on August 10, 2023 and entered judgment the next day. ADD-1-32; ADD-44. Applicants filed a timely notice of appeal, and that appeal is pending before the Ninth Circuit. ADD-45. The district court subsequently adopted a Remedial Map on March 15 and ordered the State to conduct elections under it beginning with 2024's legislative elections. ADD-33-43. Applicants filed a notice of appeal the same day. ADD-46.

Applicants sought an emergency stay pending appeal from the Ninth Circuit on March 18, which was denied on March 22. CA9 Stay Order at 2. Per Supreme Court Rule 23.3, Applicants are parties to the judgment sought to be reviewed, and the relief now requested was first sought in the district court and Ninth Circuit below.

This Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 1254(1), 2101(e), and it has authority to grant the Applicants relief under the All Writs Act, 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the VRA (52 U.S.C. §10301) provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be 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, or in contravention of the guarantees set forth in section 4(f)(2) [52 USCS § 10303(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

The people of Washington have entrusted the drawing of their State's legislative district with an independent, bipartisan redistricting commission ("Commission"). Wash. Const. art. II, §43(1). That Commission has four voting members, one Commissioner appointed by each of the Democratic and Republican leaders of the State Senate and House of Representatives. *Id.* art. II, §43(2). Washington law also requires districts be drawn with equal (as practicable) populations that respect communities of interest, minimize splitting of county and town boundaries, and encourage electoral competition. See RCW § 44.05.090. After the 2020 census, this redistricting process commenced. After the normal back-and-forth, including some political horse-trading and negotiations that led to an agreement to create LD-15 as a Hispanic majority-minority district by CVAP, the Commissioners agreed on a map. The Legislature enacted the map into law ("Enacted Map") with slight modifications (with no population changes to LD-15) on February 8, 2022. ADD-1.

Plaintiffs sued, bring both intent and effects claims under Section 2 of the Voting Rights Act ("VRA"). Plaintiffs' amended complaint focused on LD-15, alleging that it was a "façade" district. ECF No. 70 ¶2. They asked that the Enacted map be

invalidated under Section 2 of the VRA and redrawn to "have a higher HCVAP percentage" so that "Latino-preferred candidates would have a real opportunity to elect their candidates of choice." *Id.* ¶28.

Three Hispanic voters from the region, Jose Trevino, Alex Ybarra, and Ismael G. Campos, joined the case as permissive intervenors (now Applicants here and Appellants at the Ninth Circuit). ECF No. 69. Ybarra is one of two State Representatives from an adjacent district, LD-13, which extends into Yakima County. Plaintiffs, Intervenors, and the State retained experts on the *Gingles* legal framework.

While the case was ongoing, the 2022 elections proceeded under the Enacted Map. Nikki Torres, a Hispanic Republican, won the LD-15 Senate seat with a 67.7%-32.1% victory over her White Democrat general election opponent. ADD-166. Per the parties' experts on each side, she received somewhere between 32 to 48 percent of the Hispanic vote (depending on the statistical model used). ADD-170; ADD-176.

After a four-day bench trial held in June 2023, the district issued an August 10, 2023 order holding that the boundaries of LD-15 "violate[d] Section 2's prohibition on discriminatory results." ADD-3. The district court permanently enjoined use of the Enacted Map and ordered the State to replace it. ADD-32. The district court then entered judgment for Plaintiffs and Applicants appealed. ADD-44-45. Applicants moved for a stay of the permanent injunction and a stay of the remedial proceedings pending appeal, which the Ninth Circuit denied on December 21, 2023. Concurrently, Applicants had filed a petition for writ of certiorari before judgment in this Court, arguing, *inter alia*, that this Court should hold the case in abeyance while

adjudicating a separate appeal in *Garcia v. Hobbs*, No. 3:22-cv-05152, in which a Hispanic voter brought a Fourteenth Amendment racial gerrymandering claim against LD-15 that had subsequently been dismissed as moot by a three-judge district court. This Court denied that petition on February 20, 2024. *Trevino v. Palmer*, 218 L.Ed.2d 58 (U.S. Feb. 20, 2024). The same day, this Court directed the *Garcia* district court to enter a fresh judgment from which Mr. Garcia could appeal to the Ninth Circuit. *Garcia v. Hobbs*, 218 L.Ed.2d 16 (U.S. Feb. 20, 2024).

In the district court's remedial proceedings, Plaintiffs submitted five remedial map proposals, subsequently amending each to be slightly less incumbent-disruptive. ECF Nos. 245-1; 254-1. All five of their proposed remedial maps reduced HCVAP from 52.6% to between 46.9% to 51.7% based on 2021 American Community Survey figures. ADD-125. The district court held a half-day evidentiary hearing on March 8, 2024. At that hearing, the two experts for Plaintiffs testified, as did Applicants' expert. The district court ordered each side to present amended versions of their proposals, which were received by the court on March 13, 2024. ECF Nos. 288; 289.

On March 15, 2024, the district court issued its remedial order. It adopted Plaintiffs' "Map 3B", finding that the map remedied the §2 violation by (1) "unit[ing] the Latino community of interest in the region[,]" ADD-38; and (2) making it "substantially more Democratic than its LD 15 predecessor[,]" ADD-42. The court conceded that "the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district," but found such dilution necessary for Hispanic

voters to "elect candidates of their choice to the state legislature" (*i.e.*, in the court's view, Democrats). ADD-36.

Applicants filed a notice of appeal and quickly moved in the Ninth Circuit for a stay pending appeal of the district court's mandatory injunction and order. Applicants requested a decision from the Ninth Circuit by March 25, 2024, the date that the Secretary had chosen as the deadline for implementing a revised statewide map, after which doing so becomes more costly and logistically difficult. ADD-203-207. The Ninth Circuit denied the stay. CA9 Stay Order at 2. The order stated: "Appellants have not carried their burden to demonstrate that they have the requisite standing to support jurisdiction at this stage of the proceedings. This denial is without prejudice to the parties renewing their respective arguments regarding appellants' standing, or to the parties making any other jurisdictional arguments, before the panel eventually assigned to decide the merits of this appeal." *Id.*

LEGAL STANDARD

This Court will grant a stay of a district court's order, including in a case still pending before the court of appeals, if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in

chambers); see also *Nken v. Holder*, 556 U.S. 418, 427–29 (2009); *West Virginia v. EPA*, 577 U.S. 1126 (2016); *Anderson v. Loertscher*, 582 U.S. 953 (2017).

REASONS FOR GRANTING THE STAY

I. APPLICANTS HAVE STANDING TO APPEAL THE DISTRICT COURT'S JUDGMENT AND INJUNCTION

The Ninth Circuit found that Applicants had not "carried their burden to demonstrate that they have the requisite standing to [appeal.]" CA9 Stay Order at 2. This preliminary and unexplained finding is wrong. Mr. Trevino and Rep. Ybarra each have standing under traditional, well-established Article III principles. The district court's decisions cause Mr. Trevino harm to his individual constitutional right not to be sorted by race, and a reversal would redress his harm. The decisions similarly cause Rep. Ybarra greater electoral difficulty and impose costs on him that would not exist were the district court to be reversed. And if the Ninth Circuit eventually dismisses Applicants' appeal on standing grounds, it will vitiate the ability of voters to assert their Equal Protection Clause rights not to be sorted unconstitutionally on the basis of their race.

A. Mr. Trevino Has Standing Because He Was Sorted Based on Race

"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. Such race-based sorting inflicts "'fundamental injury' to [Mr. Trevino's] individual rights." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (*Shaw II*) (citation omitted).

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 and Remedial Map. ADD-163. Moreover, the district court was explicit about its racial sorting goal in the remedial process, saying that the "fundamental goal of [its] remedial process" was to unite "Latino communit[ies] of interest" (including those in Granger) into a single district. ADD-36, 38 n.7. Mr. Trevino does not need to establish, at this juncture, that LD-14 is in fact a racial gerrymander. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits."); see also *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."). Mr. Trevino only needs to "identif[y] record evidence establishing [his] alleged harm." *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016). By showing the district court's racial goals and his residence, he has done both.

The district court's decision thus readily establishes that the remedial district in which Mr. Trevino lives was drawn based on race-based sorting. Indeed, such racial sorting was explicitly the "fundamental goal" of its crafting. ADD-38 n.7. Such intentional racial sorting inflicts "'fundamental injury'" establishing standing. *Shaw II*, 517 U.S. at 908. "[I]t is a sordid business, this divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). Furthermore, this Court has already recognized that this *precise injury* is *expected* from this process, because "compliance with the Voting Rights Act ... pulls in the opposite

direction" of the Equal Protection Clause, because compliance "insists that districts be created precisely because of race." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018).

B. Representative Ybarra Has Standing to Appeal Because the Remedial Map Singles Him Out for Disfavored Treatment

Individual legislators have standing when they have "been singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies." *Raines v. Byrd,* 521 U.S. 811, 821 (1997). This Court has expressly left open whether individual legislators suffer cognizable injury from a "more difficult election campaign." See *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1956 (2019). But under ordinary Article III principles, such harms are cognizable.

While some legislators' incumbency and reelection chances are bolstered across the State by the Remedial Map, Representative Ybarra's are diminished. Over 30,000 of Representative's Ybarra's constituents are moved out of his district, LD-13, and replaced with a comparable number of new voters. ADD-103. Those new voters, the evidence shows, are more Democratic. ADD-95-96, 136. As a result, Representative Ybarra will need to spend money to introduce himself to his new constituents and time traveling to those new areas to campaign for their votes (and on a highly expedited basis). See *United States v. Texas*, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring) ("Nor does anyone dispute that even one dollar's worth of harm is traditionally enough to qualify as concrete injury under Article III.") (cleaned up). And the injection of Democrat voters in Representative Ybarra's district will not just create a more expensive campaign, but a more difficult one; it will be harder for Rep. Ybarra to win reelection than if he were campaigning in his unchanged district. This case is

thus unlike *Wittman v. Personhuballah*, where the legislators failed to submit "any evidence that an alternative to the Enacted Plan (including the Remedial Plan) will reduce the relevant intervenors' chances of reelection." 578 U.S. at 545. Here, Rep. Ybarra has submitted just such evidence. ADD-95-96, 103, 136.

Representative Ybarra will thus suffer financial and electoral harms as a direct result of the district court's adoption of the Remedial Map. Such harms establish Article III standing to appeal here. See *League of Women Voters of Mich.* v. *Johnson*, 902 F.3d 572, 579 (6th Cir. 2018) ("[T]he contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent in the legislature.").

C. Applicants' Harms Are the Mirror Image of Plaintiffs'

The Ninth Circuit's standing determination may have been premised on an assumption that Applicants purport to "stand in for the State." *Bethune-Hill*, 139 S. Ct. at 1951. If so, that was error. Applicants are asserting *their own personal constitutional rights*, not a generalized interest in defending Washington law or trying to advance the State's sovereign interest in maintaining the validity of laws.

This is not *Hollingsworth v. Perry*, where the intervenors' only interest was an abstract desire to vindicate the law while lacking any "personal stake" in the outcome. 570 U. S. 693, 706 (2013). 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—and are not seeking to defend State law in some abstract and generalized way. Applicants' §2 arguments on appeal are merely the method by which Applicants seek to vindicate their individualized interests in federal court.

Indeed, Mr. Trevino's injuries are effectively just the mirror image of the harms that Plaintiffs are allegedly suffering from the Enacted Map, which formed the basis for Plaintiffs' standing. In the end, being sorted into illegal districts either inflicts cognizable injury or it doesn't. If it does, Applicants have standing to appeal and will suffer irreparable harm from the unlawful Remedial Map. And if being drawn into illegal districts does not inflict cognizable harm—contra *Hays*—Plaintiffs here lack standing and their suit must be dismissed on that basis (and a stay issued pending that inevitable outcome). See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66–67 (1997) ("We may resolve the question whether there remains a live case or controversy with respect to [original plaintiff's] claim without first determining whether [intervenor-defendant] has standing to appeal.").

Moreover, if Applicants were precluded from defending their rights in this litigation, they would be forced into an inefficient attempt to do so in separate litigation. Respondents do not appear to contest that Mr. Trevino would have Article III standing to bring such a separate action. 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 judicial review of the very same issues can instead be secured 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 Mr. Trevino just as much as for Plaintiffs.

II. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THE COURT WOULD VOTE TO REVERSE THE DISTRICT COURT'S FINDING OF §2 VIOLATION AND ITS ADOPTION OF THE REMEDIAL MAP

If the Ninth Circuit were to affirm the district court's judgment that the Enacted Map violated §2 of the VRA and its resulting entry of the Remedial Map, there is at least a fair prospect that this Court would reverse *both* those merits and remedies determinations. Either would necessarily result in invalidation of the Remedial Map (since any remedy would be unwarranted if there is no VRA violation).

A. This Court Would Likely Reverse the District Court's Holding That LD-15 Violated the VRA

The district court's holding that LD-15 of the Enacted Map violates §2 of the VRA rests on at least three obvious errors: (1) holding cognizable a §2 claim against a single *majority*-minority district without any findings that (a) the majority was hollow or a façade or (b) the product of cracking or packing; (2) failing to analyze compactness of the minority population and instead analyzing the compactness of the illustrative district's geography; and (3) failing to analyze causation, as §2's text demands, by disentangling race from politics—including ignoring completely the recent landslide victory of a Hispanic candidate in the challenged district.[1]

1. Plaintiffs' Challenge To LD-15, a *Majority*-Minority District, Was Not Cognizable

As a threshold matter, Plaintiffs' claim that LD-15—a *majority*-minority district—violated §2 is not cognizable. Such a claim could not be cognizable unless (1) the

[1] Even if this Court did not ultimately reverse on any of these independently dispositive errors, Applicants would also likely win on totality of the circumstances because the cumulative effect of these considerations renders any totality-of-the-circumstances finding of a violation untenable.

majority were "hollow" or a mere "façade," *Perry*, 548 U.S. at 429, 441, or (2) part of multi-district cracking or packing.

Typical §2 redistricting lawsuits challenge the lack of a majority-minority district and demand one as a remedy. The entire *Gingles* framework is built upon that premise. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (*Gingles* I: "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a *majority* in a single-member district") (emphasis added); *id.* at 51 (*Gingles* III: whether the "*white majority* votes sufficiently as a bloc [in the existing district] to enable it … usually to defeat the minority's preferred candidate.") (emphasis added). This Court has assumed the same as recently as last term. See *Milligan*, 143 S. Ct. at 1512 n.7 ("The very reason a plaintiff adduces a map at the first step of *Gingles* is precisely because of its racial composition—that is, because *it creates an additional majority-minority district that does not then exist*.") (emphasis added).

This Court has previously allowed §2 challenges against a majority-minority district only where the putative majority is "hollow" or a mere "façade"—for example, where a district has a majority-minority voting age population (VAP) but *not* a majority-minority citizen voting age population. *Perry*, 548 U.S. at 429, 441. This Court has never explored its dicta in *Perry* stating "it may be possible for a citizen voting-age majority to lack real electoral opportunity," *id.* at 428, but allowing challenges outside the "hollow" or "façade" context subverts the VRA's text. By its own terms, Section 2 is violated only when a minority group has "less opportunity than other members of the electorate to participate in the political process and to elect

representatives of their choice." 52 U.S.C. §10301(b). By definition, if a group constitutes a majority of the citizen-age voting population, then the majority group necessarily possesses *at least* an "equal opportunity" to elect representatives of its choice—and its chances exceed those of all other racial groups within the district, since the majority group can simply outvote them.

For these reasons, "[n]o court has ever ruled that a majority-minority district violates §2 in isolation"—without subsequently being vacated on appeal, at least. *Thomas v. Bryant*, 938 F.3d 134, 181 (5th Cir. 2019) (Willett, J., dissenting) ("I am unaware of any court decision holding that a majority-minority district can violate §2 in a vacuum, all by itself, unaccompanied by evidence—or even an allegation—of packing or cracking").[2]

Here, the district court did not hold that the existing Hispanic majority in LD-15 was hollow or a mere façade, nor did it make any findings regarding cracking or packing. Instead, the court found that §2 was violated based on Democrats' failing to win a sufficient number of elections. ADD-28.

That does not suffice under §2's text. After all, §2 is "not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). But the district court's reasoning ultimately was based on its view that although Hispanic voters are a majority by CVAP in LD-15, Democratic candidates need to win more elections to avoid violating §2—a

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

proposition that the district court's remedial order made explicit. ADD-42.

The district court's acceptance of Plaintiffs' §2 claim—even though LD-15 had a *majority* HCVAP, which was not found to be hollow or the product of cracking or packing, and premised overwhelmingly on the failure of Democrats to win a sufficient number of elections in the district—would likely be reversed by this Court.

2. The District Court Erred in Analyzing Compactness

This Court would also likely reverse the district court's analysis of compactness. "The first *Gingles* condition refers to the *compactness of the minority population*, not to the compactness of the contested district." *Perry*, 548 U.S. at 433 (emphasis added). In *Perry*, this Court made clear that a district is not compact when two Hispanic communities within it were (1) distinct in terms of distance and (2) distinct in terms of their respective needs and interests. *Id*. at 435.

But rather than analyze the compactness of the minority population, the district court instead analyzed the geographic shape of Plaintiffs' proposed illustrative maps. The district court thus relied on Plaintiffs' expert's presentation of "proposed maps that perform similarly or better than the enacted map when evaluated for compactness[.]" ADD-9. But that analysis from Dr. Collingwood was expressly analyzing the compactness of the district's *geography and boundaries*—not its minority population. ADD-10. The district court similarly relied on Dr. Alford's reasoning that Plaintiffs' illustrative examples were "among the more compact demonstration districts he's seen." ADD-10 (alteration omitted). But again, that was analyzing the compactness of the *district*, not its minority populations.

This error is not harmless, because the district court made no specific findings

on either (1) the distance between different clusters of Hispanic voters or (2) the needs and interests of those communities. Instead, in concluding that these far-flung communities were geographically compact, the district court simply listed off characteristics common to many Hispanic voters: language, religious and cultural practices, and significant immigrant populations. ADD-10. But if such high-level, generalized stereotypes sufficed to establish compactness for purposes of the first *Gingles* precondition, this Court would have upheld the three-hundred-mile-long majority-Hispanic District 25 in *Perry*, but it did no such thing. See 548 U.S. at 432 ("Under the District Court's approach, a district would satisfy § 2 no matter how noncompact it was, so long as all the members of a racial group, added together, could control election outcomes.").

3. The District Court Failed to Analyze Causation Adequately

Section 2's text prohibits the "denial or abridgement of the right of any citizen of the United States … to vote on *account of race or color*." 52 U.S.C. §10301(a). Plaintiffs thus "'must show a causal connection between the challenged voting practice and a prohibited discriminatory result.'" *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (citation omitted) (collecting §2 cases rejecting claims for failure to establish race-based causation); see also *LULAC v. Clements*, 999 F.2d 831, 853–54 (5th Cir. 1993) (en banc) ("Courts must "undertake the additional inquiry into the reasons for, or causes of," racial polarized voting "in order to determine whether they were the product of 'partisan politics' *or* 'racial vote dilution,' 'political defeat' *or* 'built-in bias.'"). There is a circuit split on applying this

requirement to the preconditions, see *infra* at 36-37, but the district court failed to analyze causation meaningfully at all.

The evidence at trial made clear that racially polarized voting only existed in the Yakima Valley for partisan contests between White Democrats and White Republicans and disappeared in all other races lacking these conditions. ADD-196-201.

The district court refused even to attempt to address how Senator Torres's landslide victory was consistent with its finding that Hispanic voters were denied equal opportunity on the basis of race. The Ninth Circuit has declared—logically—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). Considering the context and history of Section 2, that rule makes good sense. But the district court declined to even *disclose* Senator Torres's over-35-point margin of victory over her White Democrat opponent—let alone *analyze* how such a landslide was consistent with vote-dilution caused by race.

Below, Plaintiffs (following the district court's example of discounting Sen. Torres's victory) attempted to write off her election as a one-off "special circumstances" election because her Democrat opponent had poor fundraising and had run a write-in campaign in the Democrat primary. ADD-261 n.8. But bad candidates, underfunded candidates, and write-in candidates are all "representative of the typical way in which the electoral process functions," *Ruiz*, 160 F.3d at 557, and are not akin to this Court's exemplar list of "special circumstances" in *Gingles*, including "the

absence of an opponent, incumbency, or the utilization of bullet voting." 478 U.S. at 57. This Court would thus likely reverse on this "special circumstances" carve-out alone. In any event, the failure to analyze causation meaningfully—including the refusal to disclose or analyze the margin of victory of a minority candidate—would be unlikely to survive review in this Court.

B. The Remedial Map Rests on Egregious Error and Would Almost Certainly Be Reversed by This Court

The district court's adoption of its Remedial Map rests on even more patent errors. If the Ninth Circuit were to affirm the district court's Remedial Map, this Court would likely reverse for at least three reasons: (1) the injunction attempted to remedy alleged dilution of Hispanic voting strength by *affirmatively diluting* the HCVAP of the remedial district; (2) the Remedial Map makes gratuitous, sweeping, and unnecessary disruptions to the State's original Enacted Map; and (3) the bizarre, octopoid shape, combined with the district court's explicit race-based goals, reveal the Remedial District to be an unconstitutional racial gerrymander.

1. The District Court Committed Unprecedented Error by Purporting to Cure Alleged Vote Dilution through Diluting Hispanic Voting Strength

The remedy that the district court adopted here is utterly without precedent. Although Plaintiffs prevailed on a §2 claim that LD-15 diluted Hispanic voting strength, it is undisputed that the Remedial Map further dilutes the HCVAP of the district from 52.6% to 50.2%. ADD-125. Neither Plaintiffs nor the State has identified *any* instance where a district court has ever purported to remedy vote dilution by diluting the relevant minority's voting strength further. Indeed, to Applicants' knowledge, no VRA plaintiff has ever before had the audacity even to *ask* for such a

cure-dilution-with-more-dilution remedy. That is unsurprising, since that would be akin to a district court claiming to remedy an equal-population violation by imposing a map with even greater malapportionment among districts, or issuing an injunction to remedy an antitrust monopolization violation by ordering the monopolizing company to increase its market share.

It is doubtful that any such cure-dilution-with-more-dilution remedy could ever be appropriate. But even assuming it could, this one cannot possibly pass muster. The only rationale that the district court offered for its entirely unprecedented remedy was this single conclusory sentence: "Although the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district, the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature." ADD-36. Such a rote invocation that a remedy imposing affirmative dilution "provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature" does not suffice.

This tortured and perverse outcome is a direct result of injecting non-Hispanic Democrats, mostly Native American voters, into the new district, while attempting to replace Republican-leaning White voters with more Democrat-leaning voters. ADD-195. As a result of this kind of coalition or crossover district riding on a bare Hispanic majority, the Remedial Map performs for Democrats in all hypothetical matchups run by Plaintiffs' expert. *Id.*

Both Plaintiffs and the State appeared 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. ADD-262-264; ADD-232-233. But this 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).

The district court's remedy similarly runs afoul of this Court's decision in *Cooper v. Harris*, 581 U.S. 285 (2017). There, this Court held that "[w]hen a minority group is not sufficiently large to make up a majority in a reasonably shaped district, §2 simply does not apply." *Id.* at 305. Here, Plaintiffs' claim is that the existing Hispanic majority in LD-15 is too small to be an effective one. But Plaintiffs did not even attempt to offer a remedial map in which *increased* Hispanic voting strength would provide an effective majority—instead relying on injection of *other* racial groups to assist Hispanic voters with electing a candidate of "their choice."

Even accepting Plaintiffs' premises, there is no way to draw an effective Hispanic majority in the Yakima Valley. Thus, "§2 simply does not apply." *Id.* And, as a result, the necessity of *diluting* Hispanic voting strength to achieve a putative remedy simply demonstrates that there was no §2 violation to begin with.

2. The Remedial Map Violates This Court's Precedents by Making Sweeping and Unnecessary Changes

The district court's Remedial Map purports to satisfy its call for "revised legislative district maps for the Yakima Valley region." ADD-32. But it is *far* more expansive than that, instead revising about one-quarter of the State's legislative districts (13 of 49), and making significant changes to the population, political leanings, and shapes of districts far beyond the contested Yakima Valley region.

This Court has for decades made the guardrails clear: "court-ordered reapportionment plans are subject … to stricter standards than are plans developed by a state legislature." *Upham v. Seamon*, 456 U.S. 37, 42 (1982). Therefore, "a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed … in the reapportionment plans proposed by the state legislature." *Id.* at 41. Changes should only be made "to the extent" necessary to comply with the Constitution or the VRA. *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). The guiding light must be "the State's recently enacted plan[,]" which reflects "the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." *Perry v. Perez*, 565 U.S. 388, 393 (2012). This is true even when replacing a plan held to violate the law. *Id.*

Scope of Disruptions. The district court made no attempt to limit the scope

of its alterations, and instead adopted one of Plaintiffs' proposals making the most extensive changes. The Remedial Map alters a quarter of Washington's state legislative districts. ADD-148-150. Its changes are not limited to South Central Washington but extend to Western, North Central, and Eastern Washington. *Id.* Half a million Washingtonians are moved into a new district under the Remedial Map and more than two million live in districts altered by the Remedial Map. *Id.*

Multiple incumbents are moved into new districts, forcing unnecessary primary fights. At the same time, the Map ditches the State law requirement that the districts "provide fair and effective representation and [] encourage electoral competition" and "not be drawn purposely to favor or discriminate against any political party or group." RCW § 44.05.090(5). The Commission had tried to do so, but the district court had an unstated—but unmistakable—appetite for partisan changes, virtually all of which redounded to one political party's benefit.

The Remedial Map thus changes the partisan composition of ten districts outside the Yakima Valley region in the Democrats' favor; those changes include redrawing District 12, far away in North Central Washington, from a district carried by former President Trump into one carried by President Biden, and changing District 17 in the Portland suburbs of Southwest Washington from a district where Republican candidates won by 0.9% on average to one where Democrats would have a 2.0% advantage on average. ADD-106-107; 113-116; 160.

Comparison to Plaintiffs' and Applicants' Proposed Maps. The wanton and unnecessary nature of the district court's changes can be seen simply by

examining Plaintiffs' own proposed remedial maps. And the gratuitous nature of the district court's changes is patent even from their own admissions.

Plaintiffs submitted five proposed maps and admitted each was "a complete and comprehensive remedy to Plaintiffs' Section 2 harms that aligns with both traditional redistricting principles and federal law." ADD-182. The State similarly admitted that "each map [of Plaintiffs' five proposed remedial maps] '[wa]s a complete and comprehensive remedy to Plaintiffs' Section 2 harms.'" ADD-190 (citing ADD-182). And the "performance analysis conducted by [Plaintiffs' expert] show[ed] that in nine of the nine elections considered, the Latino-preferred candidate would win in LD 14" in each of the proposals. ADD-185-186.

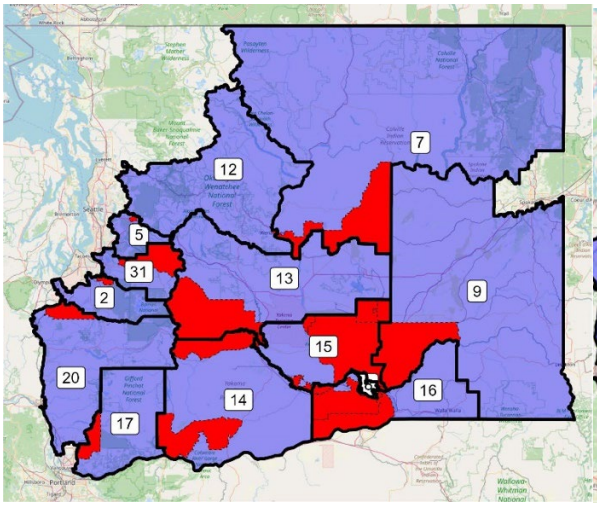
The wanton nature of the district court's changes is particularly obvious from Plaintiffs' proposed map 4/4A, which "ha[d] an identical configuration to LD 14 in Plaintiffs' Remedial Proposal 3," ADD-186—*i.e.*, the court-adopted Remedial District. Yet despite having the *exact same remedial district*, map 4/4A altered three fewer districts, moved 50,000 fewer people, and would not, unlike the Remedial Map, transform the partisan nature of District 12, which crosses over into the distant Seattle suburbs, ADD-106-107; 113-116. Unless partisan changes were the point, it is difficult to understand why the district court would have adopted a variant of Map 3 instead of 4/4A since both had the *exact same* remedial district and the latter's changes to the Enacted Map were more modest.

Plaintiffs' Map 5/5A made even more modest changes: it moved far fewer people (only 190,745), changed only four districts instead of 13 (Map 3) or 10 (Map 4), all

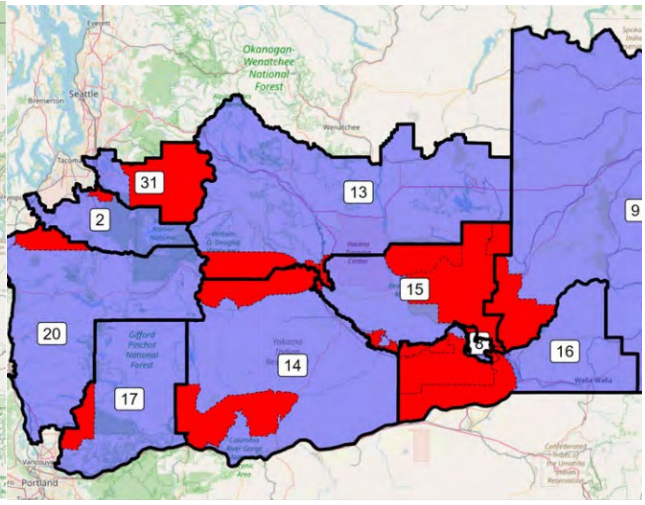
in the Yakima Valley region, impacted no new counties, made few changes to district partisanship, and did not pair any Senate incumbents. ADD-123-24. Given Plaintiffs' and the State's admission that Map 5/5A was a "complete and comprehensive remedy," the unnecessary nature of the Remedial Map's changes is manifest.

A pictorial comparison of proposed Maps 3, 4, and 5 readily shows how unnecessary the changes made by the Remedial Map (Map 3) are. Here are those three maps, with changes to district boundaries indicated in red:

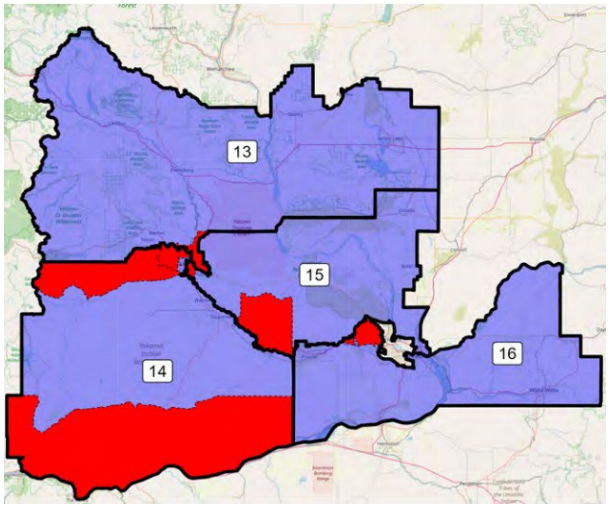
Map 3



Map 4



Map 5



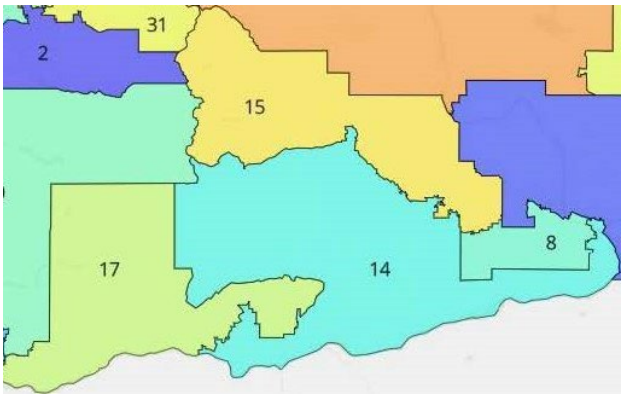
Additionally, Applicants' expert introduced a proof-of-concept map to show that a Democrat-performing map was possible without widespread and wanton disruption. Applicants' map creates a majority-HCVAP district in the Yakima Valley that consistently performs for Democrats, while keeping the Yakama Nation and its traditional lands together in a neighboring district. ADD-140, 147, 152, 154-157.That map changes only three districts, moves only 87,230 people total, makes partisan changes in only two other districts, and displaces zero incumbents. *Id.*

Despite so many options available to limit the disruption, the district court instead adopted a remedial map that *maximized* the alterations of the Enacted Map—thereby flouting *Upham*, *Abrams*, and *Perry*. If the Remedial Map reached this Court, it would almost certainly reverse these wanton and unjustifiable changes.

3. The Remedial Map is an Unconstitutional Racial Gerrymander

The district court also erred in adopting the Remedial Map because its remedial district is an unconstitutional racial gerrymander. Indeed, the inexplicable-except-for-race nature of the district is apparent from the map's bizarre shape alone.

Here is a reproduction of the current shape of the Remedial Map's LD-14, the new remedial district corresponding to LD-15 of the Enacted Map:



As Applicants' expert aptly described it, the remedy district's bizarre shape most closely resembles an "octopus slithering along the ocean floor." ADD-99. This is an almost quintessential example of unlawful gerrymandering—*i.e.*, a district featuring tentacles and peculiar shapes. See *Milligan*, 143 S. Ct. at 1509 (listing as unlawful examples districts with "bizarrely shaped tentacles" and a shape like "a sacred Mayan bird"). Race-motivated district lines with "bizarre shapes" are typically subject to strict scrutiny and presumptively unconstitutional. See *Bush v. Vera*, 517 U.S. 952, 975 (1996); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*) ("[R]eapportionment is one area in which appearances do matter."). And as noted, court-drawn redistricting plans face even "stricter standards" than those drawn by State legislatures themselves. *Upham*, 456 U.S. at 42.

Here, the remedial district's slithering-octopus shape flunks this Court's aesthetic test, taking on the classic attributes of a district that is a racial gerrymander, with boundaries "unexplainable" except by race-based criteria. See *Shaw I*, 509 U.S. at 644. It even has a "northernmost hook … [that] is tailored perfectly to maximize minority population." *Vera*, 517 U.S. at 971.

Admitted Racial Predominance. Even if the Remedial District's shape alone left any doubts as to the motivation underlying its design, the district court's own *explicit reasoning* dispels any doubts as to the predominance of race. The district court explicitly announced that it prioritized sorting together Hispanic populations spread throughout the 80-mile stretch of the Yakima Valley region, calling it a "*fundamental goal* of the remedial process" that the remedial district "unite the Latino

community of interest in the region." ADD-38 n.7. In other words, the district court explicitly used a race-based motive as the Remedial Map's core purpose. *Id.*

The Hispanic communities referenced are those in "East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco." ADD-36. That race-based motivation wrought the octopus. The east tentacle, as well as the abscess on top of the octopus's head, are the direct result of ethnic sorting to unite those far-flung Hispanic communities. It is simply unexplainable on any other grounds. Instead, the district court openly admitted its "fundamental goal" was to unite "Latino communit[ies] of interest" into a single district. ADD-38 n.7, 42.

Lack of Narrow Tailoring. Because racial considerations predominated in the drawing of the Remedial Map—by the district court's own admissions—the Remedial Map violates the Constitution unless it satisfies strict scrutiny. See *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 188–89 (2017). But as explained above, the Remedial Map made sweeping and gratuitous changes to the Enacted Map, and did so on explicit race-based grounds. *Supra* at 26-29. The unnecessary nature of those changes thus precludes any conclusion that the Remedial Map was narrowly tailored. Instead, it was expansively tailored to make changes to 13 districts to remedy a violation found in only one.

The district court thus took a "shortsighted and unauthorized view of the Voting Rights Act," which resulted in drawing an ugly, unconstitutional district. See *Miller v. Johnson*, 515 U.S. 900, 927–28 (1995). For all these reasons, the Remedial Map is illegal under the Equal Protection Clause.

III. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL CONSIDER THESE ISSUES SUFFICIENTLY MERITORIOUS TO GRANT CERTIORARI

Because the district court's judgment and injunction invalidate enacted law of Washington State and gratuitously redraw the legislative map for roughly one-fourth of the State, there is a reasonable probability of obtaining review on that ground alone. See*, e.g.*, *Maricopa Cnty. v. Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (Thomas, J., respecting denial of certiorari) ("[W]e often review decisions striking down state laws, even in the absence of a disagreement among lower courts."). If the Ninth Circuit were to affirm, review would further be warranted because such an affirmance would squarely conflict with this Court's holding in *Upham* that courts "should follow the policies and preferences of the State, as expressed in … reapportionment plans" and "should not pre-empt the legislative task nor intrude upon state policy any more than necessary." 456 U.S. at 41–42 (cleaned up).

Indeed, in *Upham*, the violation was redrawing *four* out of 27 districts to remedy objections to only *two*. *Id.* at 38, 40. But here the district court redrew *13* out of 49 districts to remedy a violation in a *single one*.

This case also presents several other issues that have at least a reasonable probability of obtaining this Court's review.

Standing. The Ninth Circuit's standing rationale, if adopted by a merits panel, would warrant this Court's review. This Court has squarely held that "[w]here a plaintiff resides in a racially gerrymandered district … [he] has been denied equal treatment … and therefore has standing to challenge" it. *Hays*, 515 U.S. at 744–45. Applicant Trevino lives in the new remedial district, into which he was sorted from

the enacted LD-15. *Supra* at 12. Indeed, the district court forthrightly admitted that his "fundamental goal" in drawing the Remedial Map was raced-based sorting of Hispanic voters along an eighty-mile corridor that includes Granger, where Mr. Trevino lives. *Supra* at 12. That should easily have sufficed to establish standing.

The Ninth Circuit's contrary conclusion effectively eliminated Applicants' ability to vindicate their Fourteenth Amendment rights against racial gerrymandering (at least without the contrivance of a separate suit). The Ninth Circuit's stay denial likely rested on a misreading of *Hollingsworth v. Perry*, 570 U.S. 693 (upon which Respondents relied heavily below). But *Hollingsworth* involved appellants who "ha[d] no 'personal stake' in defending [the challenged law] that is distinguishable from the general interest of every [State] citizen." *Id.* at 707. In stark contrast, Mr. Trevino and Rep. Ybarra are not asserting Washington's general sovereign interest in the validity of its laws, but rather advancing *their own* personal rights. The Ninth Circuit's apparent misreading of *Hollingsworth*, contradicting *Hays*, warrants review. So does its vitiation of Mr. Trevino's Fourteenth Amendment rights.

Moreover, the standing issue squarely presents a concern that has underlain two recent grants of certiorari: executive branch officials obtaining desired policy ends through the unseemly expedient of strategic capitulation in litigation. *See Arizona v. San Francisco*, 142 S. Ct. 1926 (2022); *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1312 (2023). In both cases, however, this Court did not reach the merits, either due to (1) confounding procedural factors creating a "mare's nest" of complexity (*San Francisco*, 142 S. Ct. at 1928 (Roberts, C.J., concurring in dismissal of writ)) or

(2) intervening mootness (*Mayorkas*, 143 S. Ct. at 1312). In both cases, whether a protectable interest existed in defending a government action that the government itself was eagerly attempting to surrender into oblivion warranted review. So too here.

The actions at issue here are, if anything, even more obviously collusive than in either *San Francisco* or *Mayorkas*. Washington legislative maps are *supposed* to be drawn initially by an independent, bipartisan Commission and receive final approval from the Washington legislature. But for a vast swath of the map, the Attorney General's ability and demonstrated willingness to capitulate in litigation against the State's duly-enacted law arrogates that power to himself—so long as he can keep intervenors from appealing to vindicate their own rights.

As explained above, the district court gratuitously redrew *13* of 49 districts to remedy a violation found in only a single district. That decision flouted this Court's decision in *Upham*—particularly as Plaintiffs *themselves* had submitted proposed maps that changed as few as *four* districts, and which Plaintiffs (and the Attorney General) admitted were "complete and comprehensive remed[ies] to Plaintiffs' Section 2 harms." ADD-182. Indeed, that error is so egregious that the Attorney General was unable to offer a *single word* defending the sweeping changes in opposing a stay in the Ninth Circuit. ADD-209-240.

In that circumstance, his oath to defend Washington law should have all but compelled an appeal. Instead, he shamelessly and collusively acquiesced in the vitiation of Washington law—which just so happened to provide substantial partisan

gains for his party that more modest changes would not have.

Much like the United States did in *San Francisco* and *Mayorkas*, the State here is attempting to shield its collusive actions from review by claiming that intervenors lack cognizable interests in the law/rules that the executive was trying to eliminate collusively. Those issues continue to warrant this Court's review, and there are none of the procedural complications or impending mootness issues that frustrated review in *San Francisco* and *Mayorkas*, particularly because the 2030 redistricting cycle is far into the future.

Compactness. As explained above, the district court's refusal to analyze the compactness of the minority populations rather than the district's shapes violates this Court's decision in *Perry*. *Supra* at 19-20.

Causation. The causation issue arises from an longstanding, intractable circuit split as to whether the federal courts must decide whether the electoral losses of a minority group were caused by partisanship or racial vote dilution. This question was raised in *Gingles* itself. In *Gingles*, five Justices, across concurring and dissenting opinions, stressed the "distinction between vote dilution and partisan politics and [] their opposition to Justice Brennan's attempt [in the four-justice plurality opinion] to expunge this teaching from the bloc voting inquiry." *Clements*, 999 F.2d at 857.

Despite this stark conflict in *Gingles*, this Court has never returned to the issue to resolve it, and a circuit split as to whether (1) proof of racial causation is required as part of the *Gingles* preconditions or (2) merely a factor to be considered as part of the totality of the evidence has developed. Compare *Clements*, 999 F.2d at 856–57

(requiring Section 2 plaintiffs to show racial causation as part of the *Gingles* preconditions) with *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 493 (2d Cir. 1999) ("agree[ing] with the Fourth Circuit[] … [that] the best reading of the several opinions in *Gingles* … is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions but relevant in the totality of circumstances inquiry" (citation omitted)); *United States. v. Charleston Cnty., S.C.*, 365 F.3d 341, 348 (4th Cir. 2004) (collecting cases setting forth split).

That split is starkly presented here. As explained above (at 21), partisanship causes the weak polarization observed in voters in the Yakima Valley. If the Ninth Circuit were to join the Second and Fourth by affirming and holding that proof of causation is not a part of the *Gingles* preconditions, but rather only a factor in the totality-of-the-circumstances analysis, this case would present an even more entrenched split warranting this Court's review.

Curing Dilution with More Dilution. As explained above, the district court's decision is unprecedented in purporting to "cure" dilution of Hispanic voting strength by further diluting Hispanic voting strength, decreasing HCVAP from 52.6% to 50.2%. And by relying on the injection of members of other racial groups to create an "effective" Hispanic majority, the district court's remedy conflicts with this Court's decisions in *Bartlett* and *Cooper*. See *supra* at 24. This conflict would warrant this Court's review if the Ninth Circuit were to affirm.

For all these reasons, there is "a reasonable probability that four Justices will consider the[se] issue[s] sufficiently meritorious to grant certiorari." *Hollingsworth*,

558 U.S. at 190.

IV. THE REMAINING FACTORS SUPPORT ISSUING A STAY

A. Applicants Will Suffer Irreparable Harm Absent a Stay

Here, as established above, race-based sorting inflicts "fundamental" injury. *Shaw II,* 517 U.S. at 908; *see also Hays*, 515 U.S. at 744–45. The district court was explicit that its "fundamental goal" was a race-based one: to unite "Latino communit[ies] of interest" into a single district. ADD-38 n.7. Mr. Trevino will thus suffer irreparable harm absent a stay.

Similarly, Representative Ybarra will suffer his harms of increased campaign costs and a more difficult reelection effort under the Remedial Map absent a stay. Because he cannot recover those harms as damages, those irrecoverable injuries constitute irreparable harm. See*, e.g.*, *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021).

B. The Balance of Equities and Public Interest Favor Issuing a Stay

The balance of equities and public interest further support issuance of a stay here. *Hollingsworth*, 558 U.S. at 190 ("In close cases, the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."). As set forth above, Applicants will suffer irreparable harm absent a stay. *Supra* § IV.A.

Harm to Plaintiff-Respondents. Plaintiffs' harms are premised on their contention that LD-15 of the Enacted Map violates §2 of the VRA. But as explained above, that premise is incorrect and contravenes this Court's precedents. *Supra* § II.B. Moreover, Plaintiffs' alleged harm is *dilution* of Hispanic voting strength in

LD-15. But a stay would actually *prevent* dilution by staying the district court's affirmative-dilution "remedy."

Harm to the Secretary. A stay granted shortly after the March 25 soft deadline will not impose substantial harm upon the Secretary. As the Secretary's staff declared below, March 25 is the deadline for the adoption of *new* legislative district maps. ADD-203. But retaining the Enacted Map for the 2024 elections would simply require the Secretary's administration of the already-used Enacted Map.

Moreover, March 25 is not an absolute deadline. It is an important date—hence Applicants' filing an emergency motion in the Ninth Circuit requesting a decision by that date and filing this Application as soon as possible after the denial of that motion. March 25 is the start date after which consequences become more costly.

The next hard deadline is May 6, the day candidate petitions are due. ADD-204-205. A stay issued by this Court in the next week or two would still permit candidates a month to file such petitions.

In any event, "[c]orrecting an erroneous lower court injunction of a state election law does not itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election law. That would be absurd and is not the law." *Merrill v. Milligan*, 142 S. Ct. 879, 882 n.3 (2022) (Kavanaugh, J., concurring). Thus, the benefit of freeing Washington voters from unwarranted federal court interference premised on multiple legal errors outweighs any "collateral effects" from that correction. *Id.* at 881 n.1.

Harms to the State. This Court has made plain that enjoining a "State from

conducting [its] elections pursuant to a [legal] statute enacted by the Legislature … would seriously and irreparably harm the State, and only an interlocutory appeal can protect that State interest." *Abbott*, 138 S. Ct. at 2324; see also *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" (citation omitted)). Granting a stay would avoid these harms to the State (even the State's Attorney General welcomes them).

Public Interest. A stay would also serve the public interest. In particular, it would serve the interests of federalism by avoiding erroneous federal interference with Washington law and gratuitous changes to its electoral map. See*, e.g.*, *R.R. Comm'n. of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) ("Few public interests have a higher claim … than the avoidance of needless friction with state policies.").

The public interest would also be served by preventing the Washington Attorney General's collusive end-run around Washington law. By (1) refusing to defend the Commission's map against Plaintiffs' §2 voter-dilution claim and then (2) acquiescing in Plaintiffs' maximalist remedial plan that undoes far more of the Commission's work than was necessary, the Attorney General has effected a transfer of power from the independent, bipartisan Commission into his own hands and exploited the federal courts as an instrument of that power grab. And the wholesale changes of the Remedial Map just so happen to make partisan changes to multiple districts *almost uniformly* benefiting the political party to which the Attorney General belongs.

Given that, the State should be appealing itself. The State's refusal to do so is

so shocking that it has drawn sharp criticism from such unlikely quarters as the former bassist of Nirvana.[3] Yet the State shamelessly surrenders to the massive alterations of the *State's own maps* for which it cannot apparently even mouth a defense. Such actions are plainly collusive in nature. It is not in the public interest for federal courts to permit such actions to succeed. And the State will not suffer cognizable harm from federal courts' rebuffing the Attorney General's partisan ploy.

CONCLUSION

For the foregoing reasons, the emergency application for stay of the district court's judgment and injunction should be granted.

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

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