No. 24-2603

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENANCIO GARCIA III,
Plaintiff-Appellant,

v.

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

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:22-cv-5152
Hon. Robert S. Lasnik, Hon. David G. Estudillo, Hon. Lawrence J.C. VanDyke

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

Appellant Benancio Garcia III is an individual natural person.

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INTRODUCTION

Appellant Benancio Garcia III presented clear and undisputed evidence at trial that he was districted on the basis of his Hispanic ethnicity and in violation of the U.S. Constitution during the post-2020-census drawing of Washington's Legislative District 15 ("LD-15"). In response, a majority of the empaneled three-judge district court waited a month for a single-judge district court (comprised of one third of the *Garcia* panel) to issue a decision in a separate case—*Soto Palmer*—that found a statutory Voting Rights Act § 2 violation in LD-15, then dismissed Mr. Garcia's Equal Protection Clause claim as moot on that basis. The panel majority thus abdicated its Article III duty to issue a merits decision in Mr. Garcia's case, instead opting to use docket management to generate pretextual mootness and dismiss the case. That has never been done before. And for good reason.

Mr. Garcia's claim is that he was unconstitutionally redistricted on the basis of his ethnicity. The purportedly mooting § 2 decision does not eliminate that racial classification but rather exacerbates it: ordering a new remedial map that makes *even greater* use of race. Indeed, the *Soto Palmer* district court, in approving the resulting Remedial Map,

forthrightly admitted that the "fundamental goal of the remedial process" was race-based rejiggering of Yakima Valley's population. *Palmer v. Hobbs*, No. 3:22-cv-05035-RSL, 2024 U.S. Dist. LEXIS 50419, at *10 & n.7 (W.D. Wash. Mar. 15, 2024). The Remedial Map thus took the existing LD-15's use of race as a starting point and then piled *yet more* race-based divvying up on top of it.

Far from eliminating Mr. Garcia's injury, the purportedly mooting decision instead added insult to constitutional injury. This case thus falls squarely within the Supreme Court's admonition that a case is not moot if "'the new [law] is sufficiently similar to the previously challenged [law] that it is permissible to say that the challenged conduct continues.'" *Cuviello v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019) (quoting *Northeast Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 n.3 (1993)) (cleaned up). As the dissent in this case astutely put it, the *Garcia* "majority's position is thus that an order directing the State to consider race *more* has 'granted … complete relief' to a plaintiff who complains the State shouldn't have considered race *at all*. This kind of logic should make us wonder if this case is really moot." 1-ER-29 (VanDyke, J., dissenting).

The error in the district court's mootness-based dismissal is particularly apparent given the nature of the injury at issue. Under the Equal Protection Clause, "[t]he racial classification itself is the relevant harm in th[is] context." *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1252 (2024). That's true "regardless of the motivations[,]" *id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 645 (1993) (*Shaw I*)), and regardless of whether such racial sorting is ultimately "permissible[,]" *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (*Shaw II*). For purposes of jurisdiction, it does not matter if the racial classification didn't predominate (a merits question), was justified (also a merits question), or was narrowly tailored (yet again a merits question).

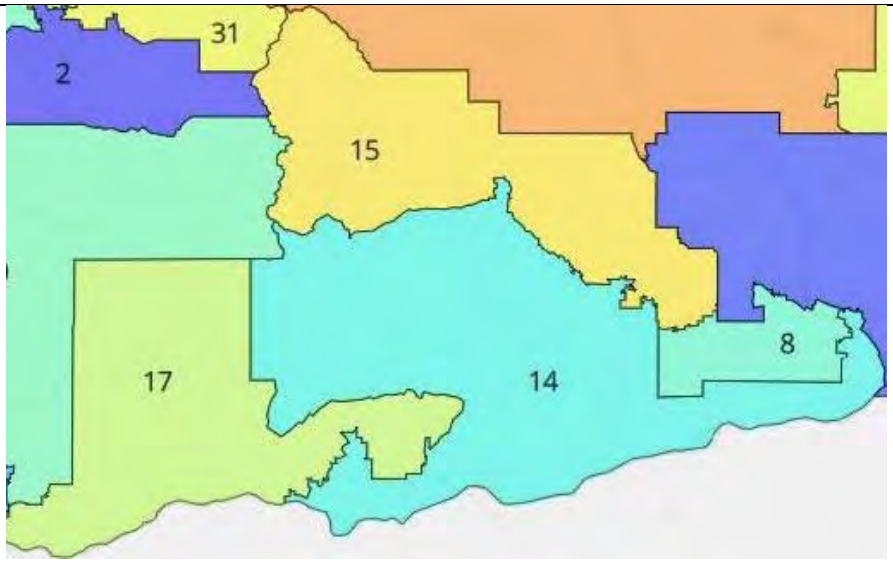
The only relevant questions for mootness must then be: Does Mr. Garcia continue to be classified on the basis of his Hispanic ethnicity? Does the Defendant Secretary continue to implement such classification? And can such harm be redressed by, as Mr. Garcia requested, an order for a "new valid plan for legislative districts … that does not violate the Equal Protection Clause"? 2-ER-105. The answer to all three questions is an indisputable "yes." Mr. Garcia is suffering even greater injury to his

Fourteenth Amendment rights than when this case was filed. As such, this case is not moot.

"A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (quotation marks omitted). Here, an injunction requiring LD-15 to be redrawn without any consideration of race will provide Mr. Garcia effectual—indeed complete—relief. That was true on the day Mr. Garcia's suit was filed, today, and every day in between. In fact, such an injunction would now provide him *even more* relief since the *Soto Palmer* Remedial Map actually augmented the use of race in drawing LD-15's contours, thereby exacerbating Mr. Garcia's non-moot injuries.

Indeed, the Remedial Map has elevated the use of race by Washington State to a grotesque level. Intervenors' expert in *Soto Palmer* aptly described the new district (renumbered LD-14) in the Remedial Map as an "octopus slithering on the ocean floor." 2-ER-53. Here is a picture of that Remedial Map:

Figure 1: Remedial Map Adopted (LD-14 is remedial district)



The remedial district's bizarre contours are the direct result of race-based line-drawing. The octopoid shape of the remedial district makes plain that the violation of Mr. Garcia's Equal Protection Clause rights is ongoing and worse than ever. Race-neutral redistricting would not require (or produce) any such monstrosity. And the district court's reasoning is akin to saying that a defendant could moot a challenge to an unlawful poisoning by compelling the plaintiff to drink yet more poison. That simply is not how Article III works.

Reversal and remand are warranted on those simple grounds alone. But an alternate (though more procedurally fraught) path exists: This case cannot be moot under *Moore v. Harper*, which held that a challenge

to a map invalidated by a lower court is not moot if a potential reversal by an appellate court would mean that the challenged map would "again take effect." 600 U.S. 1, 15 (2023). Because this Court could reverse the *Soto Palmer* district court's injunctions, resulting in the Enacted LD-15 map snapping back into effect, Mr. Garcia's constitutional claim cannot be moot until the *Soto Palmer* appeal ultimately ends, one way or the other. *See id*. *Moore* makes this appeal an easy case, and this Court could remand on that basis alone. But Mr. Garcia does request this Court, if it agrees, to instead resolve the mootness question on the exacerbation/continuation theory, thereby putting to rest any potential uncertainty about how a decision based on *Moore* would play out, since such a decision would continue to be dependent on the ongoing *Soto Palmer* litigation.

Furthermore, this Court should resolve not only the mootness question but also the question of whether race predominated in the drawing of LD-15 in the Enacted Map. Although the panel majority formally disclaimed reaching that issue, the "full analysis" that the majority expressly offered on it in response to the dissent belies that disclaimer. 1-ER-7, 8 n.4. A remand on this issue would be an exercise in

futility because the district court has already made plain how it would rule on the issue—and the error in that *de facto* holding is already apparent. Moreover, the issue is legal in nature—a misapplication of the predominance test—making it fit for this Court's non-deferential review now.

Accordingly, this Court can and should proceed to the merits as to the issue of predominance and hold that race predominated in the drawing of LD-15 in the Enacted Map because the primary line-drawers made race the uncompromisable criterion in their negotiations. It should then remand for the district court to apply strict scrutiny given that holding.

JURISDICTION

The district court had federal question jurisdiction under 28 U.S.C. § 1331 for Mr. Garcia's Fourteenth Amendment Equal Protection Clause claim. A three-judge panel was appointed under 28 U.S.C. § 2284. The district court entered its final judgment dismissing Mr. Garcia's claim on September 8, 2023. 1-ER-3. Mr. Garcia filed a timely notice of appeal to the Supreme Court on September 28, 2023. 2-ER-155–56. The Supreme Court vacated and remanded on February 20, 2024 with instructions to

the district court to enter a fresh judgment from which an appeal could be taken by Mr. Garcia to this Court. *Garcia v. Hobbs*, 144 S. Ct. 994 (2024). The district court accordingly entered the amended judgment dismissing Mr. Garcia's claim on March 25, 2024. 1-ER-2. Mr. Garcia filed a timely notice of appeal to this Court on April 17. 2-ER-153–54.

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in holding that Mr. Garcia's Equal Protection Clause racial gerrymandering claim was moot pending the ongoing appeal of the *Soto Palmer* decision invaliding LD-15, when he continues to live in a district the contours of which were drawn on the basis of his race.
2. Whether race predominated in the process of drawing LD-15.

CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall … deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Factual and Procedural Background

Under Washington law, congressional and legislative districts are redrawn by an independent and bipartisan redistricting commission every ten years (the "Commission"). *See* Wash. Const. art. II, § 43(1); *see also* 1-ER-14–15. The Commission consists of four voting members (each, a "Commissioner") and one non-voting member, with each voting member appointed by the legislative House and Senate leaders of the two largest political parties. *See* Wash. Const. art. II, § 43(2). The four voting members in turn select the nonvoting chair. *Id.* Following the 2020 Census, the Commission's voting members were duly appointed, and they elected Sarah Augustine as the Chairwoman. 1-ER-15–16.

The Commissioners were statutorily tasked with creating compact and convenient districts with as-equal-as-practicable populations that respected communities of interest, minimized splitting of existing county and town boundaries, and encouraged electoral competition. *See* RCW 44.05.090. The Commission also had to agree by majority vote on a map by November 15, 2021, and then transmit the proposed plan to the Legislature. RCW 44.05.100(1). At that point, the Legislature had thirty

days from the beginning of the next legislative session to adopt limited amendments to the map by a two-thirds vote of both chambers or else the Commission's plan would become the final enacted plan. RCW 44.05.100(2).

The Commission unanimously agreed upon a map within the required timeframe. 1-ER-19–22 (VanDyke, J., dissenting) (recounting conclusion of the process); *see also Palmer v. Hobbs*, 686 F. Supp. 3d 1213, 1222 (W.D. Wash. 2023); Order Regarding the Washington State Redistricting Commission's Letter to the Supreme Court on November 16, 2021 and the Commission Chair's November 21, 2021 Declaration (Redistricting Order), No. 25700-B-676, at 4 (Wash. Dec. 3, 2021) ("[The] Commission met the constitutional deadline and substantially complied with the statutory deadline to transmit the matter to the legislature."). In February 2022, the Legislature adopted the map with limited amendments but no population changes to LD-15 (the "Enacted Map"). *Id.*

At the beginning of negotiations on the map in September 2021, the four Commissioners—April Sims, Brady Piñero Walkinshaw, Paul Graves, and Joe Fain—each released their own legislative redistricting

proposals. 1-ER-16 (VanDyke, J., dissenting). During those early stages, none of the four proposals contained a majority-Hispanic district anywhere in the State. *Id.* The following month, the Democratic-appointed Commissioners sought the assistance of Matt Barreto, a well-known Democratic Party consultant, UCLA academic and advisor on VRA compliance. Dr. Barreto presented a PowerPoint slide deck to the two Democratic Commissioners that contained a scatterplot of demographic figures and precinct-level results for some statewide races and concluded that Section 2 of the VRA mandated a "VRA-Compliant" district in the Yakima Valley. 1-ER-15 (VanDyke, J., dissenting); 2-ER-128–52 (Barreto PowerPoint).

After the Barreto PowerPoint labeled all four of the initial proposals illegal under federal law for failing to suggest the race-based drawing of a majority-Hispanic district, the negotiations shifted. On October 25, 2021, three weeks before the redistricting deadline, Commissioners Sims and Walkinshaw released new draft legislative map proposals that each included a majority HCVAP, majority-Democrat legislative district in the Yakima Valley region. The two Republican Commissioners, knowing that three votes were needed to pass any map, concluded that no map without

a majority-minority district could garner a majority of the Commission. 1-ER-17–19 (VanDyke, J., dissenting). Despite this, Commissioners Graves and Fain, per their testimony, never personally believed the VRA required a majority Hispanic district. 1-ER-47 (VanDyke, J., dissenting). The four Commissioners never engaged a shared VRA expert and instead relied on their respective partisan legal experts.

At trial, each Commissioner testified to his or her own intentions during the negotiations. For April Sims, reaching at least 50% Hispanic CVAP in LD-15 was a "priority." 2-ER-84. She recalled that the Commission's final "agreement entailed a majority Latino CVAP district in the 15th Legislative District," at least "over 50 percent[,]" 2-ER-87, and believed that the Commissioners "weren't going to reach an agreement on LD 15, unless" it contained a majority HCVAP, 2-ER-84.

Brady Walkinshaw, for his part, having proposed a majority-HCVAP district based on Dr. Barreto's presentation, answered the district court's question asking whether there was "discussion about racial situations" during negotiations by stating that there were a "lot of different pieces." 2-ER-80. He nonetheless conceded that LD-15, the majority-Hispanic district, "reflected a bipartisan compromise."

At least one other Commissioner, Graves, came to believe that a majority-HCVAP district would be necessary "to secure [Commissioner Walkinshaw's] vote for the final plan." 2-ER-64–65. Graves thought the same for Commissioner Sims. 2-ER-62–63. Graves, whose personal motivation concerned partisan balance, felt a "strong internal motivation" to make concessions on race to produce a final map. 2-ER-70–71. The racial composition and the partisan makeup of LD-15 were the "two predominant" metrics the Commissioners discussed, per Graves, and the majority HCVAP was "probably" the "primary one [they] were focusing on." 2-ER-67–68; 2-ER-66.

Commissioner Fain, similarly, was content to support the creation of a majority-Hispanic district because, as he explained: "I was very interested in getting agreement, that furthered the priorities that I had." 2-ER-77. He testified that HCVAP was "more widely discussed" in Yakima Valley than in other areas, and that racial composition for LD-15 was a "very important component of that negotiation[]"—more important in LD-15 than in any other district. 2-ER-72–73. So Fain supported and voted for a majority-Hispanic district in the Yakima

Valley, considering it "[c]ertainly" true that the majority-Hispanic district was needed to secure an agreement on any map. 2-ER-74.

The Commissioners ultimately agreed to draw a majority-minority district in the Yakima Valley, *i.e.*, a district with a majority Hispanic Citizen Voting Age Population (HCVAP). 1-ER-19–20 (VanDyke, J., dissenting). The result was LD-15, with an estimated HCVAP of 51.5% using 2020 U.S. Census figures. *Palmer*, 686 F. Supp. 3d at 1222.

Proceedings Below

Mr. Garcia, a resident of the Hispanic-majority district of LD-15, filed this suit on March 15, 2022. 2-ER-107–26. He named as Defendant Secretary of State of Washington Steven Hobbs (the "Secretary"), and the State of Washington was joined as a required party under Rule 19, Order of Joinder, ECF No. 13. Mr. Garcia's amended complaint alleged that the Commission violated the Equal Protection Clause of the Fourteenth Amendment by sorting voters in LD-15 on the basis of their race without sufficient justification. 2-ER-104 ¶¶ 72–77.

For redress, Mr. Garcia requested: (1) a declaration that LD-15 was an illegal racial gerrymander in violation of Mr. Garcia's constitutional rights; (2) a permanent injunction prohibiting the Secretary from using

LD-15 in future elections; (3) an order that any remedial "new valid plan for legislative districts" would "not violate the Equal Protection Clause"; and (4) attorneys' fees. 2-ER-105. That claim triggered 28 U.S.C. § 2284, and a three-judge district court, consisting of Ninth Circuit Judge Lawrence VanDyke, District Court Judge Robert Lasnik, and Chief District Judge David Estudillo, was empaneled to hear the *Garcia* challenge. ECF No. 18.

The *Garcia* three-judge district court set the case alongside *Soto Palmer* for a joint bench trial in June 2023. 1-ER-5 n.2. The district court heard testimony from the Commissioners and their staffers on their purposes in crafting the map, as well as the evidence they had before them on the need for a VRA district. ECF Nos. 73–75. The parties submitted post-trial briefing on July 12, 2023. ECF Nos. 77–79.

Twenty-nine days later, on August 10, 2023, the single-judge *Soto Palmer* district court issued an opinion holding that "LD 15 violates Section 2's prohibition on discriminatory results." *Palmer*, 686 F. Supp. 3d at 1221. Subsequently, a majority of the three-judge *Garcia* court, a member of which was the district judge that decided *Soto Palmer*,

dismissed Mr. Garcia's case as moot in light of the *Soto Palmer* decision. 1-ER-5.

Judge VanDyke dissented, arguing both that Mr. Garcia's claim was not moot and that it was meritorious, because race predominated in the formation of LD-15 and that intentional use of race did not satisfy strict scrutiny. 1-ER-13–50. Judge VanDyke also explained that since the Enacted Map was drawn in violation of the Fourteenth Amendment, it was unconstitutional and "void *ab initio*". 1-ER-23–24. As such, "the *Soto Palmer* decision amount[ed] to an advisory opinion on whether a void map would violate the VRA if it existed. [The *Soto Palmer*] decision should never have been issued." 1-ER-14.

Mr. Garcia sought to appeal directly to the United States Supreme Court under 28 U.S.C. § 1253, filing a notice of appeal on September 18, 2023, 2-ER-155–56, and filing a jurisdictional statement on October 31, 2023. *Garcia v. Hobbs*, No. 23-467 (U.S. Oct. 31, 2023).

After briefing, the Supreme Court concluded that it lacked jurisdiction over that appeal and directed the *Garcia* district court to enter a fresh judgment from which Mr. Garcia could appeal to this Court.

Garcia v. Hobbs, 144 S. Ct. 994 (2024). The district court did so, 1-ER-2, and this appeal now follows, 2-ER-153–54.

SUMMARY OF THE ARGUMENT

Mr. Garcia's suit challenges the use of race in the drawing of his legislative district, which the Supreme Court has recognized inflicts "'fundamental injury' to the 'individual rights of a person.'" *Shaw II*, 517 U.S. at 908 (quoting *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987)). Under the Remedial Map, Mr. Garcia's racial-classification injury has neither been remedied nor mooted; instead, it continues to exist to this day and, indeed, is worse than ever. The racial sorting he experienced under the Enacted Map was not, as the panel majority alleged, redressed by the *Soto Palmer* court's decisions. Rather the opposite: Mr. Garcia's injuries were entrenched by the single-judge district court's race-based remedy, which segregated Hispanic voters like Mr. Garcia on the basis of their ethnicity from Enacted LD-15—into which they had already been racially sorted—into the Remedial LD-14. Defendants continue to enforce and implement that racial sorting of Mr. Garcia. As such, Mr. Garcia continues to be injured "in the same fundamental way" and this case is not moot. *Jacksonville*, 508 U.S. at

662; *id.* at 662 n.3 (holding that a case is not moot where the "new [law] is sufficiently similar to the [superseded law] that it is permissible to say that the challenged conduct continues").

An injunction requiring the redrawing of Mr. Garcia's district without unconstitutional consideration of race would still remedy his injury—as was the case on the day when his suit was filed (though his injuries were then less severe than they are now in the wake of the *Soto Palmer* decisions). As such, it is hardly "impossible for a court to grant any effectual relief whatever" to him. *Knox,* 567 U.S. at 307 (quotation marks omitted). Instead, the injunction that Mr. Garcia sought at the start of this suit continues to be available and would still provide him effectual (and complete) relief.

Moreover, the continued pendency of the *Soto Palmer* case further precludes any finding of mootness. That ongoing consolidated appeal will determine LD-15's fate, and a reversal of the *Soto Palmer* court's decisions would result in LD-15's snapping back into place. That alone means Mr. Garcia's challenge to Legislative District 15 is still live, because his path to complete relief "runs through" the federal appellate

system until judicial review of LD-15 is itself complete. *Moore*, 600 U.S. at 15.

After concluding that this case is not moot, this Court can and should proceed to the first step in deciding the merits—predominance. The district court conceded that it engaged in a "full analysis" of the racial predominance issue, concluding erroneously that race did not predominate. 1-ER-7, 8 n.4. Such full analysis in response to the dissent belies the panel majority's formal disclaimer that it did not reach the issue. *See* 1-ER-8 n.4 (engaging in extensive factual analysis to rebut the dissent).

The panel majority's view that the individual Commissioners' subjective intent as to whether a factor predominated controls the Fourteenth Amendment inquiry is erroneous and contrary to the Supreme Court's repeated holding that race predominates whenever it becomes the criterion for line-drawers that "could not be compromised." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017) (quoting *Shaw II*, 517 U.S. at 907). The record is undisputed that the drawing of a majority-Hispanic district—which necessarily was a *race-based* objective—was the quite literally the dealbreaker for any map to

be approved by the Commission. It was, in other words, the *one* objective that "could not be compromised." *Id.* Agreement proved impossible without adoption of a majority-Hispanic district. Only once Commissioners Graves and Fain acceded to their two other voting colleagues' demands for that race-based district was the deadlock overcome and a compromise quickly reached.

The chronology thus makes plain what was already evident from the Commissioner's own statements: The use of a racial target to draw a majority-Hispanic district was the *sine qua non* for any legislative map. It was *the one thing* that could not—would not—be compromised. But after the Hispanic target number was agreed upon, final agreement was quickly reached, because other factors lacked that redline-that-shall-not-be-crossed status. If race did not predominate here, it never does anywhere.

Because the record evidence clearly showed that the Commissioners approved the map *only* because LD-15 was a majority-Hispanic district, the district court erred in its *de facto* holding that race did not predominate in the drawing of the Enacted Map. Specifically, the district court erred by supplanting the Supreme Court's objective could-

not-be-compromised test in favor of its own erroneous test that predominance can be evaded whenever line-drawers testify that they lacked improper subjective motivations—as virtually all line-drawers will do. Few, if any, lawmakers will ever outright admit that they employed racial classifications to the point of racial predominance. That is why the Supreme Court has directed lower courts to examine objectively whether a race-based objective was one that "could not be compromised." *Bethune-Hill*, 580 U.S. at 189—not whether the relevant line-drawers believed that they lacked unlawful subjective motivations.

This Court should thus reach the predominance issue—which the district court both disclaimed deciding and effectively decided anyway—and hold that race predominated in the drawing of the Enacted Map. It should then remand for application of strict scrutiny.

STANDARDS OF REVIEW

This Court "review[s] de novo a dismissal for mootness." *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1151 (9th Cir. 2019).

A district court's ultimate racial predominance finding is reviewed for "clear error, except when the court made a legal mistake." *Cooper v.*

Harris, 581 U.S. 285, 309 (2017). When a "trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Alexander*, 144 S. Ct. at 1240 (citation and quotation marks omitted).

ARGUMENT

I. THIS CASE IS NOT MOOT

A. Mr. Garcia's racial classification injury was continued and exacerbated, not remedied or mooted, by the *Soto Palmer* district court's decisions

Mr. Garcia's racial classification injury under the Equal Protection Clause remains live. The district court's Remedial Map layered upon the existing racial classification of the Enacted Map yet more racial classifications, with all such racial classifications implemented by Defendants. The prohibitory injunction in *Soto Palmer* did not provide Mr. Garcia the relief he sought; rather, it laid the groundwork for an entirely different "remedy" that, yet again, classified him on the basis of race, which the mandatory injunction then fully realized, thereby exacerbating the very harm he brought suit to redress. "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 567 U.S. at 307–08 (quoting *Ellis v. Railway Clerk*, 466 U.S. 435, 442 (1984)). And a "case becomes moot

only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* at 307 (quotation marks and citation omitted).

Here, Mr. Garcia's interest in being free from racial gerrymandering "remain[s] the subject of a live dispute," because Mr. Garcia asserts that he "remain[s] segregated on the basis of race." *North Carolina v. Covington*, 585 U.S. 969, 976 (2018) (per curiam). Indeed, the *Soto Palmer* court (1) did not even purport to try to eliminate the use of race in the Enacted Map—let alone succeed in doing so, (2) but instead piled *additional* consideration of race atop the Enacted Map to craft the even-more-racially-intensive Remedial Map.

Mr. Garcia alleges he was segregated into Enacted LD-15 on the basis of his Hispanic ethnicity for the primary purpose of creating a Hispanic majority district; he was then again segregated from Enacted LD-15 into Remedial LD-14 on the basis of his Hispanic ethnicity for the primary purpose of creating a "VRA-compliant" (*i.e.*, drawn-on-the-basis-of-race) Hispanic district. In other words, every time that Mr. Garcia has been placed within a new district it has been because of his race, and his injury caused by Defendants has persisted (albeit by means of the district

court's taking over the role of the State in redistricting for purposes of ordering the Remedial Map).

Furthermore, the Remedial Map does not necessarily moot any challenge to the Enacted Map. When a party continues to be injured "in the same fundamental way" under the replacement law, then the case is not moot. *Jacksonville*, 508 U.S. at 662; *id.* at 662 n.3 (holding that a case is not moot where the "new [law] is sufficiently similar to the [superseded law] that it is permissible to say that the challenged conduct continues."); *accord Cuviello*, 944 F.3d at 824.

Mr. Garcia sought relief in the first place to remedy a specific type of constitutional harm—the kind resulting from intentional race-based sorting, not a harm based on the specific lines of LD-15 (such as in vote dilution). For redress, Mr. Garcia sought an order from the district court that the State create a "new valid plan for legislative districts … that does not violate the Equal Protection Clause." 2-ER-105. Mr. Garcia has, from his claim's genesis, asserted an individual constitutional right not to be gerrymandered on the basis of his ethnicity, a right he continues to assert to this day. *See Abbott v. Perez*, 585 U.S. 579, 585–86 (2018).

Mr. Garcia's claimed injury is the racial classification itself performed by the government in the drawing of districts and imposed by the government in the implementation of the maps. Race-based redistricting causes a voter to experience "fundamental injury" to his individual Fourteenth Amendment Equal Protection Clause rights, regardless of a different court's implied conclusion that any racial gerrymandering was ultimately justified or "permissible." *See Shaw II*, 517 U.S. at 908 (recognizing that a racial classification is a "'fundamental injury' to the 'individual rights of a person,'" although such distinctions may, injury notwithstanding, sometimes be "permissible") (citation omitted).

The gravamen of Mr. Garcia's claim is the sorting on the basis of race, not the precise contours of the underlying line-drawing per se. *See Covington*, 585 U.S. at 976 ("[I]t is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims."). That race-based sorting continues to exist in the Remedial Map—just in heightened strength. And as the Supreme Court recently summarized: "The *racial classification itself* is the relevant harm in [the racial gerrymandering] context." *Alexander*, 144 S. Ct. at 1252 (emphasis

added). This is so "regardless of the motivations" for the use of race, *id.*, including the motivation to remedy a VRA violation, and regardless of the "line-drawing as such," *Covington*, 585 U.S. at 976.

An illustration from the Takings Clause context: No one "dispute[s] that even one dollar's worth of harm is traditionally enough to qualify as concrete injury under Article III." *United States v. Texas*, 599 U.S. 670, 688 (2023) (Gorsuch, J., concurring) (cleaned up). Accordingly, a plaintiff who has lost just one dollar because of the government's taking of the plaintiff's property has Article III standing to challenge that action under the Takings Clause. This is true even if such plaintiff loses on the merits because the government's taking was justified as for public use. The same principle holds true for the Equal Protection Clause: A Fourteenth Amendment racial gerrymandering plaintiff who has experienced racial classification alone has an Article III injury conferring standing to challenge the government in court, even if the government ultimately wins on the merits (*e.g.*, under the predominance or strict scrutiny prongs). Not that racial classification by itself should be minimized as if it were "just" a dollar in harm—racial harm under the Constitution is

arguably *the* most central harm targeted by our supreme governing document.

Here, as in *Covington*, the Remedial Map featured the same racial sorting "continuations" of the Enacted Map's initial racial sorting. The racial classification of Mr. Garcia, and other Hispanics who reside in the same areas, was manifest in the district court's remedial order. The district court drew the map with the primary purpose—what it called the "fundamental goal of the remedial process"—of "unit[ing] the Latino community of interest in the region." *Palmer*, 2024 U.S. Dist. LEXIS 50419, at *10 & n.7. The court defined these Hispanic communities referenced as those in "East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco." *Id.* at *7.

The primary line-drawer for the Remedial Map rightly understood the district court to order purposeful grouping of those Hispanic communities: "I was asked to draw maps that include an LD 14 that … unifies the population centers from East Yakima to Pasco that form a community of interest, including cities in the Lower Yakima Valley like Wapato, Toppenish, Granger, Sunnyside, Mabton, and Grandview." 2-ER-55. The district court rejected alternative proposed maps expressly

because they failed to sort these Hispanic communities together on the basis of race. *Palmer*, 2024 U.S. Dist. LEXIS 50419, at *10 n.7 (rejecting both Plaintiffs' Remedial Map 5 and Appellants' remedial expert's proof-of-concept map on this ground). Mr. Garcia, as a Hispanic Grandview resident, lived in Enacted LD-15, then was redistricted on the basis of his Hispanic ethnicity into the Remedial LD-14.

In other words, the district court's remedial actions in *Soto Palmer* constituted racial gerrymandering. At a bare minimum, they at least constitute the type of race-based sorting that creates cognizable injury under Article III even if it might ultimately survive under strict scrutiny. As a result, the *Garcia* panel's holding in effect is that Mr. Garcia's racial gerrymandering claim regarding Enacted LD-15 has been mooted by the *Soto Palmer* order that explicitly called for and eventually resulted in the construction of a *more* racially gerrymandered district. As the dissent succinctly summed it up, "[t]he majority's position is thus that an order directing the State to consider race *more* has 'granted … complete relief' to a plaintiff who complains the State shouldn't have considered race *at all*. This kind of logic should make us wonder if this case is really moot." 1-ER-29 (VanDyke, J., dissenting).

This same exacerbation-of-the-injury dynamic in *Covington* kept that dispute live, even after the old maps were repealed and replaced. 585 U.S. at 976. Similarly, the *Soto Palmer* court's injunction against the Enacted Map and the implementation of the Remedial Map do not render Mr. Garcia's case moot. The precise shape of the lines does not matter; what matters is that the racial classification itself has been and continues to be experienced by Mr. Garcia.

The relief Mr. Garcia pursues from the federal courts is a "new valid plan for legislative districts … that does not violate the Equal Protection Clause." 2-ER-105. It therefore remains a valid and live claim for him to seek this relief in federal court with the implementer of such a map, the Secretary of State, as the named defendant.

At no point in this process has Mr. Garcia ever received the relief he requested in his lawsuit. The panel majority strangely reasoned: "The *Soto Palmer* court has … granted [Mr. Garcia] complete relief." 1-ER-9. That gravely misconstrued Mr. Garcia's injury and requested relief. Mr. Garcia was not attempting to have the Enacted Map thrown out on a lark merely to see if he could achieve that objective. Instead, he was seeking to have the Enacted Map redrawn for a *specific purpose*: eliminating the

use of race in drawing his legislative district, thereby eliminating a violation of the Equal Protection Clause. And, on that score, Mr. Garcia is even worse off than when he filed suit, since the use of race in the drawing of his district has become *even more intense*. Contrary to the majority's contention, that is not "complete relief" but rather heightened injury.

The panel seemed to believe that Mr. Garcia had his racial classification injury entirely remedied by the statutory claim's resolution in *Soto Palmer*. "But he didn't, of course." 1-ER-27 (VanDyke, J., dissenting). The *Soto Palmer* district court has not provided even a scintilla of relief as to Mr. Garcia's actual injury. Instead, the *Soto Palmer* court proceeded to make it worse.

As the dissent explained, "the court in *Soto Palmer* did not issue an order directing the State to avoid performing an illegal racial gerrymander when it redraws the map—that is, to avoid violating the Equal Protection Clause. Garcia requested the map be redrawn without violating the Equal Protection Clause." 1-ER-31 (VanDyke, J., dissenting) (citation omitted). That request for relief went "unfulfilled." *Id*. And the need for that precise relief has been made manifest, because

the *Soto Palmer* court, as explained above, did indeed redistrict on the basis of race and ordered Defendants to implement that race-sorting map.

Mr. Garcia and the *Soto Palmer* plaintiffs were not and are not on the same side. After all, a win for one is a loss for the other due to their diametrically opposed objectives: Mr. Garcia seeks to have his district's lines drawn without the use of intentional race-based decision-making, while the *Soto Palmer* plaintiffs asked for a redrawing under the theory that race had not been used enough.

That both parties seek invalidation of LD-15 is a superficial similarity that vanishes upon any meaningful scrutiny as to the nature of the two divergent claims and the requested remedies. This is an inherent, intractable conflict that the Supreme Court recognizes: "compliance with the Voting Rights Act ... pulls in the opposite direction" from the Equal Protection Clause because it "insists that districts be created precisely because of race." *Abbott*, 585 U.S. at 586. For now, both VRA and Equal Protection Clause claims—and their respective accompanying prayers for equitable relief—can be made against the same map. But that in no way means that the two different plaintiffs in

such a situation seek the same relief or that their claims pull in the same direction.

Mr. Garcia did not, via proceedings in a separate statutory case to which he was not a party, and which employs dissimilar legal standards, somehow receive the Equal Protection Clause relief he sought. That is a nonsensical "position ... that an order directing the State to consider race *more* has 'granted … complete relief' to a plaintiff who complains the State shouldn't have considered race *at all*." 1-ER-29 (VanDyke, J., dissenting). The district court's "cure" is not just worse than the disease; it is actually more of that *very same disease*.

Soto Palmer was decided on statutory grounds. But Mr. Garcia advanced no statutory claims at all, and his constitutional claim was dismissed as moot. Mr. Garcia's claim was that LD-15, as originally enacted, was already racially gerrymandered in violation of the Equal Protection Clause, while the *Soto Palmer* plaintiffs' statutory claim was effectively that LD-15 is insufficiently racially gerrymandered and thus violates the VRA. The district court's acceptance of the *Soto Palmer* plaintiffs' claim does nothing to remedy the "fundamental injury" that Mr. Garcia suffers from being subject to race-based decision-making by

the government and in fact guaranteed that this injury would be compounded when the remedial district was drawn. *See Shaw II*, 517 U.S. at 908.

Finally, (i) whether race predominated in the remedial map and (ii) whether Mr. Garcia's injury—racial sorting—was ultimately justified are both merits questions in *Garcia*, not something the *Soto Palmer* single-judge district court could resolve and then order. It matters not at all that the *Soto Palmer* court thought that the Voting Rights Act required more racial gerrymandering in the new map. That is the holding of *that* court. *See Callais v. Landry*, No. 3:24-CV-00122 DCJ-CES-RRS, 2024 U.S. Dist. LEXIS 79140, at *75–77 (W.D. La. Apr. 30, 2024) (three-judge panel) (finding that a map drawn with two majority-minority districts was an unconstitutional racial gerrymander even though a different single-judge district court found in separate litigation that Section 2 likely required two majority-black districts).

The *Garcia* court made no such finding under the strict scrutiny prong of Mr. Garcia's Fourteenth Amendment claim. Nor could it have done so: For mootness purposes in *Garcia*, the panel majority could not presume the merits determination that the State had a compelling

interest under the VRA. *See Chafin v. Chafin*, 568 U.S. 165, 174 (2013) (warning against "confus[ing] mootness with the merits"). To the contrary, the *Garcia* court should have presumed, for mootness purposes, that Mr. Garcia *would* be able to show the racial gerrymandering was unwarranted. *See Almaqrami v. Pompeo*, 933 F.3d 774, 779 (D.C. Cir. 2019) (for mootness purposes, courts "must assume that the plaintiff will 'prevail' unless [his] argument that the relief sought is legally available and that [he] is entitled to it is 'so implausible that it is insufficient to preserve jurisdiction.'" (quoting *Chafin*, 568 U.S. at 174)).

In any case, as established above, Mr. Garcia has continued injury in this case because he was sorted on the basis of his ethnicity—both today and on the day his suit was filed. It is the racial classification itself, regardless of motivation, justification, or predominance, that constitutes Article III injury, and that injury has been continued and worsened, not cured or mooted.

B. While *Soto Palmer* is on appeal, Mr. Garcia's case is live

Cases end when they end and not a moment before. For the reasons stated above, Mr. Garcia's case is not moot, whether the Enacted LD-15 is in effect or not. But even if, as the panel below thought, Mr. Garcia's

injury was linked in its entirety to LD-15, that too means the case is not moot. The one and only basis for the panel majority's mootness decision was that the single-judge court in *Soto Palmer* conclusively invalidated LD-15 for all time. But that was not true when the panel order was issued in September 2023, and it is not true now. Were this Court (or the United States Supreme Court) to reverse and vacate the decisions of the district court in *Soto Palmer*, that court's injunction against the originally enacted LD-15 would be lifted and the Enacted Map would once again take effect without any further action from the State Legislature or a reconstituted Commission. This would, in the evident view of the panel majority, work to "unmoot" Mr. Garcia's case. But that is not how mootness or appeals work. A case once mooted cannot later be "unmooted," and if a court order can still result in the reimposition of a plaintiff's original injury—as could still happen here—then the case was never moot at all.

Rather, the fate of LD-15—and Mr. Garcia's claims thereto—remains unsealed at least until the entire federal appellate process is complete in *Soto Palmer*. The mere possibility that a decision from this Court (or perhaps eventually the Supreme Court) in *Soto Palmer* could

vacate the injunction against LD-15 and the injunction imposing the Remedial Map is sufficient to prevent Mr. Garcia's injury from becoming moot. Mr. Garcia still has a legally cognizable interest for which the federal courts can grant a remedy. He asks—present tense—that, if and when *Soto Palmer* is overturned on appeal and LD-15 is thereby reinstated, the federal courts should redress his injury of being racially sorted by the State during the original creation of that reinstated LD-15 by ordering implementation of a new map that does not violate the Constitution's Equal Protection Clause.

This follows directly from the Supreme Court's mootness holding in *Moore v. Harper*, 600 U.S. 1 (2023). There, the Supreme Court found no mootness where the originally challenged 2021 North Carolina maps enacted by the state legislative defendants would have "again take[n] effect" had the Court reversed. *Id.* at 15. A snapback was possible, depending on what happened in the federal appellate process. *Id.* Those plaintiffs therefore maintained a "personal stake in the *ultimate disposition*" throughout the appeal when the final appellate decision *could* reinstate the challenged map that had been invalidated by a lower court. *Id.* at 15–16 (emphasis added) (citation omitted); *cf. Hunt v.*

Cromartie, 526 U.S. 541, 545 n.1 (1999) ("Because … the State will revert to the 1997 districting plan upon a favorable decision of this Court, … this case is not moot."); *Thomas v. Bryant*, 938 F.3d 134, 144 (5th Cir. 2019) (State's appeal was not moot where appellate court could "reverse the district court's judgment" and the State would "then revert to using its original map[,]" remedial map notwithstanding).

The *Moore* snapback was possible due to a North Carolina state law reinstating the map, not a reviewing federal appellate court's vacatur of an injunction of a lower federal court, but the result is functionally equivalent. The *Soto Palmer* district court's order enjoining LD-15, and its order to implement the Remedial Map, have been appealed. That means that LD-15 will snap back into effect if this Court vacates the permanent injunction against LD-15 in *Soto Palmer*. Mr. Garcia's "path to complete relief" in his challenge to LD-15 "runs through" the federal appellate process in *Soto Palmer*, *see Moore*, 600 U.S. at 15, because LD-15 must still run through that process. In other words, an injury based on a challenge to a law is not mooted until a final judgment finding that law unconstitutional in a separate case has either been (1) ultimately affirmed (or certiorari has been denied) by the final appellate court; or (2)

not timely appealed by the losing party. In each of those scenarios, the appellate process has concluded—for good. Accordingly, only after the ultimate disposition of *Soto Palmer* could the question of Mr. Garcia's complete relief concerning LD-15 be definitively answered.

Of course, a *final* judgment invalidating a certain law may well moot a separate challenge to the same law—but that judgment must be in fact *final*; cases still on appeal do *not* suffice. *See* 15 Moore's Federal Practice - Civil § 101.93 ("When pending litigation involves a legal issue that is later disposed of in another forum, the resolution of the issue or claim may render the pending lawsuit moot, *provided that the resolution of the claim in the other forum is conclusive*." (emphasis added)). Cases have an appellate lifecycle, and only once appellate review is truly over can a "conclusive" end occur and thereby moot related claims. That makes sense; after all, an issue on appeal by definition remains an unresolved question. On the other hand, when the final arbiter of law in our system—the United State Supreme Court—definitely speaks on something, it puts to rest that issue for all other cases. *See, e.g.*, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999) ("As this decision also resolves the substantive issues

presented by [a companion case at the Court], that case no longer presents a substantial federal question. The appeal in that case is therefore dismissed."). But for lower courts earlier in the appellate process, which do not have the final say, the principle does yet not apply.

This Court and others have recognized this reality. For example, this Court found moot a federal challenge to a California rule only once the petition for certiorari was denied (marking the ultimate disposition) in the state court case holding the same rule invalid. *Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1254 (9th Cir. 1984); *accord Gagliardi v. TJCV Land Trust*, 889 F.3d 728, 732–33 (11th Cir. 2018) (finding a constitutional challenge moot based on a Florida circuit court decision only because "Florida's Fourth District Court of Appeal denied a writ of certiorari, *and there the case ended*, inasmuch as the parties did not seek certiorari review in the Florida Supreme Court.") (citation omitted) (emphasis added); *Moore v. Louisiana Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014) (waiting to hold case moot until the Louisiana supreme court had affirmed the trial court's decision declaring the federally challenged law unconstitutional). In other words, those federal courts all declined to find the injury mooted until after the

highest, final court in the related case had definitively spoken as to the purportedly mooting case.

Under this principle, the question is whether this Court (or the Supreme Court) *could*, not necessarily will, reverse the *Soto Palmer* district court's injunction against LD-15. In *Moore v. Harper* itself, the Supreme Court affirmed after noting that the case was not moot because it *could have* reversed. *Compare Moore*, 600 U.S. at 15 ("Were we to reverse the judgment in *Harper I*—a step not taken by the North Carolina Supreme Court—the 2021 plans enacted by the legislative defendants would again take effect.") *with id.* at 37 ("[T]he judgment of the North Carolina Supreme Court [in *Harper I*] is affirmed"). But even if the principle were about whether a reversal in *Soto Palmer* were likely, there too Mr. Garcia's case would not be moot, for all the reasons laid forth by the three Appellants' opening brief in the *Soto Palmer* appeal, Nos. 23-35595 & 24-1602, explaining that the injunction against LD-15 stands on terribly unstable ground.

A separate case cannot moot an injury until the appellate process on the challenged law has run its full course. (And, even then, it might not moot the case, as here, where Mr. Garcia's injury is not about the

specific boundary lines of LD-15 but the continued racial classification imposed upon him under each version of the map that has been implemented so far.)

The fate of LD-15 thus remains an open question at least until this Court rules in *Soto Palmer* and until the Supreme Court denies certiorari or the losing party declines to appeal this Court's decision. That is how appeals work. Cases featuring appealed injunctions are "cases and controversies" under Article III, even as the order being appealed is in effect during the appeal. An injury to any given plaintiff-appellee does not disappear on appeal, because if the plaintiff-appellee suffers a reversal, they lose their complete relief, even if that reversal occurs in a separate case.

Mr. Garcia's case is as live as the *Soto Palmer* appeal. If his injury rises and falls with LD-15, as the *Garcia* panel majority wrongly indicated, then by the majority's own logic, the fate of that injury must be the same as LD-15 on appeal. On that ground alone, regardless of the arguments made in Part I.A *supra*, the order below must be vacated, and this should be sent back for a merits determination.

* * *

Mr. Garcia's racial classification injury, first claimed in the context of the racial target in the drawing of LD-15 and now reasserted against the Remedial Map's purported remedial racial gerrymandering, remains live. Under a straightforward application of *Moore v. Harper*, this case is not moot, because a reversal in *Soto Palmer* would snap the Enacted LD-15 back into place. This case should go back for merits determination on that basis alone. But because that rule leaves some uncertainty in its dependency on ongoing appellate proceedings, this Court should put to rest any mootness concerns by correctly defining Mr. Garcia's injury as the "racial classification itself," continued and exacerbated by the *Soto Palmer* remedial proceedings.

II. THIS COURT SHOULD HOLD THAT RACE PREDOMINATED IN THE DRAWING OF THE ENACTED MAP

Although the panel majority formally disclaimed doing so, it effectively resolved the issue of whether race predominated in the drawing of the Enacted Map by offering explicit reasoning that race did not predominate. That was error. But even if the lower court did not resolve that issue definitively, this Court should avoid a pointless and futile remand for the district court to reiterate what it has already said

on that precise issue. That would be an empty formalism that wastes judicial resources and needlessly prolongs the violations of Mr. Garcia's Fourteenth Amendment rights.

On the merits, this Court should hold that race predominated because the record makes plain that the racial objective of drawing a majority-Hispanic district was in fact an objective that "could not be compromised." *Bethune-Hill*, 580 U.S. at 189 (quoting *Shaw II*, 517 U.S. at 907). Indeed, it was the *literal dealbreaker* to any map. And once all voting Commissioners had acquiesced in that goal, a compromise was quickly reached on all other issues—which were thus demonstrably secondary to the predominant issue of race. Here, the record compels a conclusion that race was the *one thing* that "could not be compromised," *id.*, which in turn compels a conclusion that race predominated in the drawing of the Enacted Map.

A. The district court stated that it completed a "full analysis" of racial predominance on the merits

The panel majority has effectively already decided predominance. All the while disclaiming any issuance of an advisory opinion, the district court opined that "a full analysis of the record presented does not yield" that Appellant established an Equal Protection violation. 1-ER-7. The

court then proceeded to explain the "full analysis" in which it engaged, specifically that it "disagree[d] with the dissent's summary and interpretation of the facts surrounding the creation of LD 15." *Id*. In other words, the panel majority held that it found no racial predominance because it came to the opposite conclusion from the dissent's would-be finding of racial predominance. In footnote 4, the panel majority expressed its view that the subjective motivation of the Commissioners as to whether they used race improperly controlled, including their personal, legal views about whether other factors like politics predominated over race. 1-ER-8 n.4.

By its own plain language, then, the panel majority (i) conceded it had engaged in a "full analysis" of the facts, (ii) concluded that race did not predominate, and (iii) gave specific grounds for that conclusion, *i.e.*, that the Commissioners' subjective intent was controlling evidence supporting no racial predominance.

Trial (combined with *Soto Palmer*) created a complete record on the Equal Protection claim in this case, including the contemporary purposes of the Commission as well as the facts they had before them concerning the expert-alleged need for a VRA district. Every voting Commissioner

took the stand at trial, as did Democratic consultant and Professor Matt Barreto (who had told the Commissioners a VRA district was required during the process) and the parties agreed on what deposition testimony to admit from Commission staffers. No more facts can or need be developed from a remand on predominance. Remanding would simply result in the three-judge court's mostly reiterating its prior majority and dissenting opinions. No additional discovery, testimony, or anything would be needed. Accordingly, it would be pointless—indeed inane—to remand on predominance where this Court can already be certain as to the result of that remand and resulting necessity of another appeal.

B. The district court applied the wrong legal test for predominance

The panel majority applied an erroneous predominance test by relying on the testimony of the Commissioners as to the Commissioners' subjective understanding of whether their own racial motivations (or lack thereof) in drawing LD-15's lines was lawful and/or putatively benign/beneficial. That was error. *See Bethune-Hill*, 580 U.S. at 187–88, (remanding under de novo review after concluding that the district court committed legal error and "misapplied controlling law" in finding that race did not predominate). The test is ultimately an objective one: Race

predominates when it is the criterion for the line-drawers that "could not be compromised." *Id.* at 189 (quoting *Shaw II*, 517 U.S. at 907). That is the controlling law here, regardless of how convincingly decision-makers might be able to testify as to the purity of their subjective motivations.

That is why using racial targets for a more "sellable" VRA compliant district "still triggers strict scrutiny." *Cooper*, 581 U.S. at 308 n.7. When the racial composition of a district is a *sine qua non* requirement for the votes of the relevant decisionmakers, as here, that is enough. Race need not be the *only* important factor at play, as the panel majority below implied. "Race may predominate even when a reapportionment plan respects traditional principles." *Bethune-Hill*, 580 U.S. at 189. Race may predominate even when the ultimate objective is non-racial (*e.g.*, advancing "political" goals). *Cooper*, 581 U.S. at 291 n.1. "The basic question is whether" the government entity drew the boundaries "because of race rather than because of political behavior (coupled with traditional, nonracial districting considerations)." *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

"This showing [of predominance] can be made through some combination of direct and circumstantial evidence." *Alexander*, 144 S. Ct.

at 1234 (citation omitted). "Direct evidence often comes in the form of a relevant state actor's express acknowledgment that race played a role in the drawing of district lines. Such concessions are not uncommon because States often admit to considering race for the purpose of satisfying our precedent interpreting the Voting Rights Act." *Id.*

Accordingly, the Supreme Court has reversed a finding of no predominance where there was "strong, perhaps overwhelming, evidence that race did predominate as a factor" because the "extensive record testimony" showed that the line-drawers "in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 273–74 (2015). The Court found important "considerable evidence that this [race-target] goal had a direct and significant impact on the drawing of at least some of" the boundaries in the contested district. *Id.* In other words, when a racial target for a district that controlled the actual boundaries of the adopted map is directly evidenced in the record, then race predominates. That is so even when the line-

drawers believe that they used race purely in a lawful and/or benign manner.

The panel majority here engaged in a "full analysis" on predominance. 1-ER-7. It concluded race did not predominate by homing in on the testimony of the Commissioners at trial as to what each would describe as the "most important factor." 1-ER-8 n.4. For example, the panel points to Commissioner Sims' after-the-fact opinion that race was not "the most important factor." *Id*. Or again, Commissioner Walkinshaw's post hoc legal conclusion that "none of those [factors] were predominant." *Id*. The panel majority asked the wrong question. It focused on other factors that were also *important* in the subjective views of each Commissioner. Instead, it should have asked what the Supreme Court has made clear is the right question: which factor was *uncompromisable* during negotiations at the time? It is the collective intent of the Commission in drawing the line,[1] as evinced by their

[1] The full Washington Legislature's intent does not control. As stated in the background section, the Commission primarily and substantively holds the map-drawing pen in Washington, with the Legislature only permitted to make limited modifications during a limited time period. (And in this case, the Legislature changed only a few census blocks within LD-15, none of which contained any people). The lower court left open the possibility that it could decide this case solely on the fact that

negotiations to come to a consensus, that controls the predominance inquiry, not the subjective legal opinions of any individual Commissioner regarding which factor predominated.

Race is not demoted from the level of the nonnegotiable simply because a Commissioner personally thought it was not the "most important" factor. As a matter of logic, a factor could be objectively uncompromisable for a negotiated compromise (meaning, negotiations would fail but for the factor making being incorporated into the final product) and still be thought less important—or even unimportant—by any given individual taking part in these negotiations. A fifty percent-plus-one racial target as an uncompromisable negotiating criterion satisfies *Shaw* prong one, regardless of the importance of other criteria and the Commissioners' later (litigation-influenced) personal views of

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Washington's Legislature evinced no racial intent in passing the Commission's map, and the State took up that offer in its post-trial briefing, *see generally* ECF No. 78. Any such holding would be error. Under the Supreme Court-affirmed approach in *Covington*, the intent of those who "substantially carried out" the districting controls. *Covington v. North Carolina*, 316 F.R.D. 117, 128 (M.D.N.C. 2016) (three-judge court). The Supreme Court precedentially affirmed that approach when it "summarily affirmed the [*Covington*] District Court's ruling on the merits of the plaintiffs' racial-gerrymandering claims." *North Carolina* v. *Covington*, 581 U.S. 486, 487 n.* (2017).

which factor was the most important. The Supreme Court's test makes clear that subjective beliefs as to the purity of one's motives yields to the objective question of whether a race-based objective was something that "could not be compromised." *Bethune-Hill*, 580 U.S. at 189 (quoting *Shaw II*, 517 U.S. at 907).

The waywardness of the district court's approach is evident in its consequences. Allowing Commissioners to offer conclusory testimony that they did not meet the legal standard of predominance, then finding no predominance on that basis alone, as the court did here, would engender all sorts of mischief and gamesmanship on the part of racially motivated line-drawers. Holding as sufficient a line-drawer's testimony that "my thoughts were pure" would permit the most egregious racial gerrymanders. That simply is not the law under *Bethune-Hill* and *Shaw II*.

C. The record evidence clearly showed the Commissioners would not have agreed to an Enacted Map without the inclusion of a majority-HCVAP district in the Yakima Valley

Viewed with the correct legal standard, race predominated in the passage of the Enacted Map during the 2021 Washington redistricting process. Each Commissioner may have held differing personal views as

to what exactly the most important factor was, but it was uncontested at trial that in the runup to the final vote on the map, the existence of a majority-Hispanic district in the Yakima Valley became the principal and overwhelming sticking point for all negotiations among the Commissioners. As Judge VanDyke concluded in dissent, the fifty percent-plus-one HCVAP became "a nonnegotiable criterion around which other factors and passage of the map itself must fall." 1-ER-42 (VanDyke, J., dissenting). The dissent laid out the uncontested history of the negotiations:

> Commissioner Sims believed that a majority HCVAP in LD-15 was required by the VRA and also believed that the Commission must follow the law. *Garcia* Dkt. No. 73 at 48, 51. One of Commissioner Walkinshaw's draft maps included a note that the map "[c]reate[d] a majority Hispanic district" in the Yakima Valley. *Garcia* Dkt. No. 73 at 132. And one of Walkinshaw's staff stated that a district that "perform[ed] for Latino voters" should be nonnegotiable." *Garcia* Dkt. No. 75 at 110–11. Making LD-15 a majority HCVAP was critical to Commissioner Fain because he "belie[ved] that "the Hispanic CVAP was a metric that was important to Democratic commissioners" and he was "willing to give [an increase in Hispanic CVAP in LD-15] in order to secure support for a final compromise map." *Garcia* Dkt. No. 74 at 49–50. Commissioner Graves wanted LD-15 to be a majority HCVAP so that he could get a map that obtained a majority of the Commissioners' votes; it was "[v]ery hard for [Commissioner Graves] to see three of the voting commissioners voting for a map that did not have a majority Hispanic CVAP district in the Yakima Valley." *Garcia* Dkt. Nos. 73 at 186–87; 75 at 73.

1-ER-42–43 (VanDyke, J., dissenting).

The direct testimony of the Commissioners was confirmed by other testimony. First, one staffer, Anton Grose, corroborated the Commissioners' testimony about the negotiations, concluding that "[a]s time went on, it became apparent that a Yakima Valley district that was majority Hispanic, by citizens of voting age population, that that would be a requirement to get support from both Republicans and Democrats." 2-ER-78. A member of the panel addressed Mr. Grose at trial, asking if the Commissioners and staff were "designing the map to hit a certain racial minimum number." Mr. Grose replied that staff were "cognizant" of that because "we thought that a Hispanic majority CVAP district would likely be necessary, to get the votes of all four commissioners." 2-ER-77.

Second, the circumstances and timing of the entry of the majority-minority district into negotiations shows that the racial target became the uncompromisable criterion. After Dr. Barreto presented the PowerPoint slide deck to the two Democratic Commissioners calling for a "VRA-Compliant" district in the Yakima Valley, 2-ER-128–52, the negotiations shifted among the Commissioners, and, as the dissent put

it, "the racial composition of the Yakima Valley district became an enduring focus of the Commission." 1-ER-16 (VanDyke, J., dissenting). Specifically, Commissioners Sims and Walkinshaw soon released new draft legislative map proposals that each included a majority HCVAP, majority Democrat legislative district in the Yakima Valley. The two Republican Commissioners concluded that it would be impossible to agree upon any map that did not include a majority-Hispanic district. 1-ER-42–43 (VanDyke, J., dissenting). It was this change that triggered Commissioner Fain to believe that his support for the increase in Hispanic CVAP was needed "in order to secure support for a final compromise map[,]" 2-ER-74, and Commissioner Graves to believe that it was "[v]ery hard for me to see three of the voting commissioners voting for a map that did not have a majority Hispanic CVAP district in the Yakima Valley." 2-ER-59.

Further, it was undisputed at trial that the Enacted Plan, adopted on November 15, 2021 moments before the midnight deadline, was at first an unwritten, handshake "framework." 2-ER-60–61 (Walkinshaw). As one staffer testified, this framework was "an agreement upon the partisanship numbers in ... four [or] five districts." 2-ER-56 (O'Neil). The

"final Hispanic CVAP [percentage] for Legislative District 15 [was] one of the components of this framework" but LD-15 was the *only* one of the forty-nine districts the racial composition of which was *stipulated* in the handshake framework, 2-ER-60–61—a clear giveaway that racial considerations predominated in LD-15, even if they did not in the rest of the Enacted Plan's districts.

To summarize that record testimony: but for meeting that 50%-plus-one racial target in LD-15, the map simply would not have passed. The creation of a majority-Hispanic district was thus *the dealbreaker*. That fact remains true regardless of the ultimate motives of each individual Commissioner or each subjective view of "importance." That, and that alone, means race predominated.

The direct evidence in this case showed that the racial target in LD-15 was the one criterion controlling whether or not the entire map would be adopted. Without such a district, there would be no map. And once such a district was accepted, *all* other issues proved readily susceptible to compromise and negotiation, and a map was swiftly agreed to. But the 50%-plus-one HCVAP in LD-15 was the but-for criterion to get the map approved; race thus predominated.

* * *

The race-based objective of drawing a majority-Hispanic district was manifestly the one objective for the Commission that "could not be compromised." *Bethune-Hill*, 580 U.S. at 189. This Court should therefore hold that race predominated in the drawing of the Enacted Map and remand the case for the district court to apply strict scrutiny given that predominance holding.

CONCLUSION

The district court's decision dismissing Mr. Garcia's claim as moot should be reversed. Further, this Court should hold that race predominated in the drawing of the Enacted Map and direct the district court to apply strict scrutiny on remand.

Respectfully submitted,

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Dated: August 14, 2024

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant Garcia lists the appeals in *Palmer et al. v. Hobbs et al.*, Nos. 23-35595 (merits) and 24-1602 (remedy) as related appeals, for the reasons set forth in this brief, in the opening brief in those consolidated appeals, and in the joint motion to consolidate all of these cases. This Court has ordered that "[t]his appeal, No. 24-2603, will be calendared before the same panel assigned to consider the merits of consolidated appeal Nos. 23-35595 and 24-1602." No. 24-2603, Dkt. No. 13.

CERTIFICATE OF COMPLIANCE

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9th Cir. Case Number(s): 24-2603.

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CERTIFICATE OF SERVICE

I, Jason B. Torchinsky, hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on August 14, 2024, which will send notice of such filing to all registered ACMS users.

s/ Jason B. Torchinsky
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