No. 24-2603

IN THE 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-05152
Hon. Robert S. Lasnik, David G. Estudillo, and Lawrence J.C. VanDyke

BRIEF OF SUSAN SOTO PALMER, FAVIOLA LOPEZ, ALBERTO MACIAS, HELIODORA MORFIN, AND CATY PADILLA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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STATEMENT OF INTEREST

Amici curiae Susan Soto Palmer, Faviola Lopez, Alberto Macias, Heliodora Morfin, and Caty Padilla ("*Soto Palmer* Plaintiffs") are Latino voters in Washington's Yakima Valley region. On August 10, 2023 in *Soto Palmer v. Hobbs*, the District Court for the Western District of Washington found that Washington's Legislative District 15 (LD15), also the subject of Appellant's racial gerrymandering challenge, diluted the votes of Latino citizens in violation of Section 2 of the Voting Rights Act. On March 15, 2024, the district court imposed a remedial map that resolved the Section 2 violation while also complying with state and federal law, and the 2024 election is taking place under the new, legal map. The *Soto Palmer* Plaintiffs have an interest in preserving the *Soto Palmer* judgment and remedial map, the frustration of which is the explicit driving force of the *Garcia* appeal.[1]

INTRODUCTION

Before this Court are two separate challenges to the same Washington state legislative district (LD15). In *Soto Palmer v. Hobbs*, LD15 was enjoined for violating Section 2 of the Voting Rights Act. With the challenged district no longer in existence, the *Garcia* district court correctly did not reach the merits and

[1] All parties have consented to the filing of this brief. No party or party's counsel authored any part of this brief, and no party or person contributed money to fund its preparation or submission.

dismissed this case as moot. This Court should affirm. Any remaining uncertainty about mootness here depends entirely on the outcome of the appeal in *Soto Palmer*, where the only party appealing lacks standing to do so. Furthermore, this entire suit arose from the same tangled web of machinations driving the participation of the *Soto Palmer* intervenors, who are represented by the same counsel as Appellant here. This Court should reject attempts to use this litigation for partisan and ideological ends, all part of an effort to prevent relief for Latino voters in the Yakima Valley experiencing the harm of racial vote dilution. In his opening brief, Appellant extravagantly claims the district court's dismissal of his case amounts to remedying a poisoning by "compelling the plaintiff to drink yet more poison." Br. at 5. But there was no poison, and if anything, the new district is an antidote since it complies with Section 2, the U.S. Constitution, and state law. The challenged district is gone, the case is moot, and Appellant's contentions otherwise are unfounded.

BACKGROUND

This appeal arises from a challenge to the same Washington state legislative district that was invalidated in *Soto Palmer v. Hobbs*, also currently on appeal before this Court. *See* Nos. 23-35595 & 24-1602. Following Washington's commission-led redistricting process, the State implemented the enacted map in November 2021. In January 2022, the *Soto Palmer* Plaintiffs filed suit challenging LD15 for violating Section 2 of the Voting Rights Act (VRA), by cracking the Latino community in the

Yakima Valley, where the *Soto Palmer* Plaintiffs live and work. *Soto Palmer*, 3-ER-350.[2] Nearly two months later, in March 2022, Benancio Garcio III filed suit challenging LD15 as a racial gerrymander under the Fourteenth Amendment. 2-ER-107. Pursuant to 28 U.S.C. § 2284(a), a three-judge panel was convened to hear Appellant's constitutional claim. 1-ER-4 n.1. A month after Appellant filed suit challenging LD15, three individuals filed a motion to intervene in *Soto Palmer* to defend LD15, and the *Soto Palmer* court granted them permissive intervention only. *Soto Palmer*, 1-ER-284–85. Despite their opposing stances on the legality of LD15, Appellant and the *Soto Palmer* intervenors are represented by the same attorneys.

The lawyers shared by Mr. Garcia and the *Soto Palmer* intervenors are part of a complex tangle. They include Representative Drew Stokesbary, previously a member and now the Republican leader in the state House, who voted to approve the enacted LD15. *Soto Palmer*, 3-PL-SER-337 at 65:18–66:19. Representative Stokesbary is also a friend and former colleague of Republican Commissioner Paul Graves. *Soto Palmer*, 4-PL-SER-495–96 at 718:18–719:15; *Soto Palmer*, 3-PL-SER-413–414 at 204:25–205:2. Shortly after the filing of the *Soto Palmer* lawsuit,

[2] Citations to "ER-__" refer to Plaintiff-Appellant Garcia's Excerpts of Record. Citations to "*Soto Palmer*, ER-__" refer to *Soto Palmer* Intervenors-Defendants-Appellants' Excerpts of Record, and citations to "*Soto Palmer*, PL-SER-__" refer to *Soto Palmer* Plaintiffs-Appellees' Excerpts of Record, already before this Court in the *Soto Palmer* consolidated appeal, Nos. 23-35595 & 24-1602.

Commissioner Graves (who drew LD15) recruited Mr. Garcia to challenge the district and connected him with Representative Stokesbary as counsel. *Soto Palmer*, 5-PL-SER-814–823. Commissioner Graves testified that although he did not actually believe LD15 was a racial gerrymander, he tried to "light the fire" of this legal challenge for the purpose of forestalling relief in the *Soto Palmer* Plaintiffs' Section 2 suit. *Soto Palmer*, 3-PL-SER-413–414 at 204:9–205:13, 416 at 287:4–6.[3]

At the time this lawsuit was filed, Representative Stokesbary was also President of the Citizen Action Defense Fund (CADF), and Paul Graves was (and remains) a member of the board. *Soto Palmer*, 5-PL-SER-824–830, 835–836. CADF served as a fundraising and strategy vehicle for both the *Garcia* and *Soto Palmer* lawsuits. *Id.*[4] In emails and documents shared by Representative Stokesbary from his CADF email with Republican state legislators in early 2022, the partisan and strategic purposes behind this suit were made crystal clear: a memo to potential financial backers stated that "[i]f *Garcia* is successful, LD15 could be redrawn to stay reliably Republican until 2030." *Soto Palmer*, 5-PL-SER-836. Representative

[3] Despite his actions to catalyze this suit, Commissioner Graves maintains that it has no merit and LD15 was *not* a racial gerrymander, as he argued in an amicus brief in this Court. No. 23-35595, Doc.87.

[4] CADF also submitted an amicus brief in this Court, *Soto Palmer*, No. 23-35595, Doc.84, which conveniently made no mention of CADF's role in funding and orchestrating this case and *Soto Palmer*.

Stokesbary also explained that the "[l]egal argument is that the LD15 was drawn primarily on account of race, which violates the 14th Amendment. The practical outcome, if successful, is an order to draw new maps in Yakima area that ignore race, which would let us re-draw LD15 in a way that is much safer." *Soto Palmer*, 5-PL-SER-829. Representative Stokesbary also explained the strategic import of filing *Garcia* in addition to the *Soto Palmer* intervention: "if we consolidate the cases, we'd likely get the 3-judge panel meaning appeals go straight to the Supreme Court (which is better for us than going through the Ninth Circuit)." *Id.*

With this partisan strategy explained to allies and funders, litigation continued. Months after intervening to defend LD15, counsel for the *Soto Palmer* intervenors belatedly tried to add a crossclaim challenging LD15 as a racial gerrymander. *Soto Palmer*, 3-PL-SER-425–478. However, intervenors themselves testified that they did not want the district to change and did not think it was a racial gerrymander. *Soto Palmer*, 3-PL-SER-355 at 21:5–7 ("Q: And would it be your goal that the map, in fact, not change as a result of this litigation? A: Yes."); 3-PL-SER-371 at 121:8–10 ("Q: So do you understand the map that you voted on to be an illegal racial gerrymander? A: No."). As part of this misguided scheme, Mr. Garcia's attorneys represented that they would dismiss Mr. Garcia's case if they could add a crossclaim in *Soto Palmer* on behalf of their other clients. *Soto Palmer*, 3-PL-SER-

418. The motion to add a crossclaim was ultimately denied. *Soto Palmer*, 3-PL-SER-404–408.

Discovery for *Soto Palmer* and *Garcia* proceeded in tandem during late 2022 and early 2023. During the litigation, Mr. Garcia sat for a deposition on February 3, 2023. *Soto Palmer*, 3-PL-SER-329. It became clear during that deposition that Mr. Garcia had not authorized his counsel to dismiss his suit, and that he was not aware until asked about it *during his deposition*, that his attorneys were simultaneously representing individuals attempting to keep in place the very district he was challenging. Following these revelations, the State filed a motion for inquiry into potential conflicts in this representation scheme. *Soto Palmer*, 3-PL-SER-389–403. Mr. Garcia's counsel then filed an errata attempting to substantively change Mr. Garcia's testimony to their benefit 30 different times. *Soto Palmer*, 3-PL-SER-378–387. The court conducted an inquiry, required the intervenors and Mr. Garcia to file affidavits, and struck the errata filed on Mr. Garcia's behalf as sham testimony. *Soto Palmer*, 3-PL-SER-388, 375.

The two cases were heard in a joint trial in June 2023. In August 2023, the *Soto Palmer* court ruled in the plaintiffs' favor and permanently enjoined the enacted LD15. Because the district Appellant was challenging was no longer in place, the district court below dismissed this case as moot. 1-ER-5. Mr. Garcia's attorneys then attempted to get both cases in front of the U.S. Supreme Court by filing a

jurisdictional statement in this case, No. 23-467 (U.S. Oct. 31, 2023), and a petition for a writ of certiorari before judgment in *Soto Palmer*, No. 23-484 (U.S. Nov. 3, 2023). In briefing before the Supreme Court, the State and the *Soto Palmer* Plaintiffs both pointed out that the Supreme Court lacked jurisdiction to entertain an appeal in this case because a mootness dismissal is not a grant or denial of an injunction, placing the appeal outside the narrow set of cases that receive mandatory Supreme Court review under 28 U.S.C. § 1253. The Supreme Court declined the invitation to bypass this Court's review, denying the petition for certiorari in *Soto Palmer*, and vacating the *Garcia* district court judgment and ordering that a fresh judgment be entered from which Mr. Garcia could appeal to this Court. *Garcia v. Hobbs*, 144 S. Ct. 994, 995 (2024) (mem.); *Trevino v. Soto Palmer*, 144 S. Ct. 873, 873 (2024) (mem.).

The *Soto Palmer* district court then held a robust remedial process, in which the *Soto Palmer* Plaintiffs submitted expert reports and several proposed maps. The *Soto Palmer* intervenors were active participants in this process, submitting expert reports responding to the proposed maps, and eventually a map of their own. They were represented throughout this process by the same attorneys representing Mr. Garcia. Following oral argument and an evidentiary hearing, the *Soto Palmer* district court, assisted by the court-appointed special master, selected one of the proposed maps as a complete remedy to the Section 2 violation while also complying with

traditional redistricting criteria and state and federal law. *Soto Palmer v. Hobbs*, No. 3:22-CV-05035-RSL, 2024 WL 1138939 (W.D. Wash. Mar. 15, 2024). At no point during the remedial process did Appellant attempt to intervene or submit any comment about the proposed maps.[5]

With the *Soto Palmer* remedial process complete, that case and this one are now both before this Court. Mr. Garcia and the *Soto Palmer* intervenors previously attempted to consolidate their separate appeals. Doc.10.1. The State pointed out this made no sense when the *Garcia* appeal addressed only the mootness holding, and the *Soto Palmer* appeal went to the merits, Doc.11.1, and the motion to consolidate was denied, Doc.13.1 That mootness holding is now the subject of this appeal.

SUMMARY OF ARGUMENT

The district court correctly dismissed this case as moot. Appellant challenged the enacted LD15 as a racial gerrymander, and when that district was invalidated in *Soto Palmer*, no live controversy remained in this case. Appellant attempts to recharacterize his alleged harm as general "racial classification" unconnected to the actual district lines, but doing so would deprive him of a concrete and redressable

[5] Mr. Garcia's attorneys did represent the views of *two other sets of clients* in the *Soto Palmer* remedial process—the *Soto Palmer* intervenors and proposed intervenor State Senator Nikki Torres. *See Soto Palmer*, 1-PL-SER-122, 1-PL-SER-124–125. Senator Torres's intervention was denied as untimely, but the court noted that her commentary about the maps would be considered. *Id.*

injury. Below, Appellant challenged the actual lines of only the enacted LD15, and he cannot change his claim or raise new ones on appeal. His main argument that this case is not moot depends on the unlikely success of the *Soto Palmer* appeal where the appellants lack standing, which is insufficient to revive this moot case.

In dismissing the case as moot, the district court properly refrained from deciding the merits, and this Court should do the same. A racial gerrymandering claim requires a fact-intensive analysis that must be conducted by the district court in the first instance. Contrary to Appellant's assertions, the district court here did not conduct that analysis, and this Court should not do so for the first time on appeal. If the case is not moot, it should be remanded to the district court to determine whether race predominated and then whether strict scrutiny was satisfied.

Finally, the *Soto Palmer* remedial district is not a racial gerrymander. Appellant never attempted to make that argument below, and no party in the *Soto Palmer* case did either. The remedial district was drawn without consideration of race and selected by the *Soto Palmer* district court as a complete remedy to the Section 2 violation, while conforming to state and federal law. This case is moot, and this Court need decide no more.

ARGUMENT

I. The *Garcia* case is moot.

This case is moot. Once the challenged district was invalidated in *Soto Palmer*, no live controversy remained in this case, and Appellant's arguments to the contrary are unavailing. The district court correctly dismissed this case as moot because the district Appellant was challenging ceased to exist. Appellant cannot now unmoot his case by recharacterizing the harm he alleged or by asserting new harms, unsupported by law or fact, that were never raised below. Nor can this case be unmooted by the filing of a longshot appeal in *Soto Palmer* by parties who lack standing to appeal.

A. The district court correctly dismissed this case as moot.

The district court correctly dismissed this case as moot. Mr. Garcia wanted the enacted district enjoined, and it was enjoined. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt,* 455 U.S. 478, 481 (1982) (*per curiam*)). When the *Soto Palmer* court invalidated LD15 and ordered a new, lawful district be drawn, there was no longer any live controversy for the district court to adjudicate, and the district court correctly exercised judicial restraint in declining to issue an advisory opinion. 1-ER-

6–7; *see also Newton-Nations v. Betlach*, No. CV-03-02506-PHX-ROS, 2012 WL 12893398, at *2 (D. Ariz. Apr. 16, 2012), *dismissed*, 569 F. App'x 525 (9th Cir. 2014) ("Plaintiffs' claim aimed at the now-superseded program is moot").

For the first time on appeal, Appellant seeks to recharacterize his claim as challenging a generalized "racial classification," not the specific lines of the challenged district. Br. at 25. This does not help his case. Appellant filed a racial gerrymandering claim. To have standing, he must suffer an injury arising from the boundaries of a specific district in which he lives. *See Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (citing *United States v. Hays*, 515 U.S. 737, 744–745 (1995)). The Supreme Court "ha[s] consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Alabama Legislative Black Caucus*, 575 U.S. at 255, 262-63 (emphasis in original); *see also Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 38 (2024) (same). If he is not challenging the lines of an actual district, Appellant did not have standing to bring his claim in the first place and this Court certainly lacks jurisdiction to hear it.[6]

Of course, Appellant seemed to understand this below, and his late-breaking attempt to recharacterize his alleged harm to avoid mootness is belied by the record.

[6] The claim itself also has no merit and has not been properly alleged or proven.

In his Amended Complaint, Appellant alleged that "[r]ace was the predominant factor motivating the Commission's decision to *draw the lines encompassing Legislative District 15*," that the Commission sorted voters "*in Legislative District 15*," and that elections "*based on Legislative District 15*" would harm him. 2-ER-104 ¶¶ 74–77 (emphasis added). In his prayer for relief, Mr. Garcia requested that LD15 be declared a racial gerrymander, that the court enjoin the State from "enforcing or giving any effect to the *boundaries of Legislative District 15*," and that the court order the creation of a new, legal district. 2-ER-105 ¶ 78 (emphasis added). When the lines constituting the boundaries of the enacted LD15 were permanently enjoined, and the district court ordered that a new, legal district be drawn, Mr. Garcia's claim was moot. He cannot now claim that he was complaining of and asking for something entirely different. *See Newcomb v. U.S. Off. of Special Couns.*, 550 F. App'x 532, 533 (9th Cir. 2013) (rejecting new claim raised for first time on appeal). Mr. Garcia's suit was based on an allegation that the Redistricting Commission engaged in racial gerrymandering by adopting enacted LD15, and the question on appeal is whether the court below correctly dismissed the case as moot when that district no longer existed. The answer is yes.

Appellant's contention that this case is not moot because the new, remedial district is a racial gerrymander is also meritless. To start, the remedial district is *not* a racial gerrymander, as explained *infra,* Sec. III. Nor can Appellant simply ask this

Court to assume that the *Soto Palmer* district court violated the U.S. Constitution in imposing a map that remedied the Section 2 violation. *See* 1-ER-9. Appellant seeks support from *Callais v. Landry*, No. 3:24-CV-00122, 2024 WL 1903930 (W.D. La. Apr. 30, 2024), in which a three-judge panel ruled that a remedial district ordered by a different district court was a racial gerrymander. But two important facts distinguish *Callais*. First, the remedial district was drawn by the legislature, not imposed by a federal court. And second, the *Callais* decision was rendered by a district court where plaintiffs filed suit challenging the actual newly drawn districts, and the *Callais* district court issued an opinion on the merits after a trial declaring the districts a racial gerrymander. Juris. Stmt., *Louisiana v. Callais*, No. 24-109 (U.S. Jul. 30, 2024). Nothing like that has happened here, and *Callais* is currently on appeal at the Supreme Court. Appellant's challenge was to the enacted district and when the enacted district was invalidated, this case was moot, as the district court correctly found. 1-ER-11–12.

B. The pending *Soto Palmer* appeal (where the appellants lack standing) does not revive this moot case.

Appellant also claims that his case is not moot based on the possibility of what may happen in *Soto Palmer* on appeal. *See* Br. at 34. While Appellant now suggests that the connection between his case and *Soto Palmer* is some errant "thought" of the *Garcia* panel, *id.*, in reality, the dependence of *Garcia* on *Soto Palmer* was something he and his attorneys argued repeatedly throughout the proceedings below.

See, e.g., *Soto Palmer*, 3-PL-SER-420 ("[R]esolution of the claim in *Garcia* necessarily turns on the claims in [*Soto Palmer*]."). Indeed, notwithstanding his brand-new argument about an injury separate from the actual lines of LD15, Appellant all but concedes that without a reversal in *Soto Palmer*, this case is moot. Br. at 35. However, the parties bound by the *Soto Palmer* court's judgment, the State of Washington and Secretary Hobbs, have not appealed that decision. Recognizing this reality, Mr. Garcia's attorneys are attempting to keep this case alive by appealing the *Soto Palmer* ruling on behalf of their other clients and asking this Court to reinstate a legislative district they are arguing here is unconstitutional. But this scheme has a fatal flaw: the *Soto Palmer* intervenors lack standing to appeal because they have no legally cognizable interest.

The *Soto Palmer* Plaintiffs explained in detail in their Answering Brief why this Court lacks jurisdiction to entertain the appeal from the *Soto Palmer* intervenors. *Soto Palmer*, No. 23-35595, Doc.96. In brief, to have standing, a litigant must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Intervenors seeking to appeal must also meet this Article III requirement. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). This ensures that "the decision to seek review . . . is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value

interests,'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (internal citation omitted)—or, as here, as a vehicle to reinstate a district to revive a separate, moot case for the benefit of a litigant's attorneys' other client.

The *Soto Palmer* intervenors cannot establish standing to appeal either the liability or remedial order from the *Soto Palmer* district court. Intervenor Trevino cannot establish standing to appeal the remedial map with general allegations of racial classification raised for the first time on appeal for which he provides no "specific evidence." *Hays*, 515 U.S. at 745. Simply living in a VRA remedial district is not evidence of racial classification. Intervenor Ybarra's status as a legislator running for reelection this year or in a speculative future one in an adjacent district does not confer standing to appeal the remedial map as he cannot "do more than simply allege a nonobvious harm." *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663 (2019) (citing *Wittman v. Personhuballah*, 578 U.S. 539, 543–45 (2016)). There is no evidence that he will face a harder or costlier reelection and he is running uncontested in a strongly favorable district. And Intervenor Campos is completely unaffected by either the enacted or remedial map.

While the *Soto Palmer* intervenors' arguments for standing to challenge the remedial district are weak, their arguments for standing to challenge the liability determination are virtually nonexistent. But for the *Soto Palmer* appeal to revive this moot case, a reversal of liability (and not just remedy) is necessary, since LD15 is

enjoined. However, in granting only permissive intervention, the district court found that the intervenors "lack a significant protectable interest in this litigation," *Soto Palmer*, 2-ER-285, and when permanently enjoining LD15, the court did not order the *Soto Palmer* intervenors "to do or refrain from doing anything." *Hollingsworth*, 570 U.S. at 705. In denying the *Soto Palmer* intervenors' stay motion covering both liability and remedy, a motions panel of this Court likewise found that they had not sufficiently demonstrated standing to support jurisdiction. No. 24-1602, Doc.18.1 at 2. *Soto Palmer* intervenors' arguments for standing to challenge the district court's liability determination are nothing but the kind of "generalized grievance" that is "insufficient to confer standing." *Hollingsworth*, 570 U.S. at 706.

This is fatal for Mr. Garcia's appeal, since even an unlikely win by the *Soto Palmer* intervenors on the remedial determination *still* would not undo the injunction against the enacted district that mooted his case. To the extent that any questions remain about the finality of the *Soto Palmer* decision, however, this case should be held in abeyance pending the resolution of *Soto Palmer*.

Finally, Appellant's reliance on *Moore v. Harper* is unavailing. In *Moore*, the mootness question hinged on whether the parties were still bound by the part of the state supreme court decision enjoining the use of the challenged maps. *Moore v. Harper*, 600 U.S. 1, 18 (2023). The U.S. Supreme Court held that although the reasoning of that decision had been overturned, the injunction against the maps

remained in place, and thus a live controversy remained. *Id.* at 18–19. In contrast, the map that Appellant challenged is *not* in place, so no "ongoing controvers[y] between litigants" exists. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988).

II. The district court did not reach the merits, and neither should this Court.

As Appellant previously conceded, this appeal "is solely concerned with the mootness holding." Doc.10.1 at 4. It is therefore inappropriate to ask this court to address merits arguments that are not the subject of the appeal, and which the court below did not reach. *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below").

The district court did not determine whether race predominated in the drawing of the enacted district because the case was moot. The dissent below opined that race predominated, and the majority opinion responded briefly to point out that a "full analysis" of the record did not support the dissent's conclusion. 1-ER-7. But the district court did not go on to affirmatively conduct that full analysis, because to do so would have constituted an advisory opinion. *Id.* Appellant claims at least seven times that the district court conducted a "full analysis," but cites only a single footnote quoting some of the commissioners' testimony about the various priorities

they had during the map negotiations. This single one-paragraph footnote is not a full analysis of racial predominance that is ripe for review.[7]

This Court should decline Appellant's request to decide racial predominance for the first time on appeal. A racial gerrymandering claim requires a fact-intensive analysis that must be conducted by the district court in the first instance. That is because the district court, not an appellate court, "is best positioned to determine in the first instance the extent to which, under the proper standard, race directed the shape" of the challenged district. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 193 (2017); *see also Cooper v. Harris*, 581 U.S. 285, 293 (2017) (racial gerrymandering finding a question of fact reviewed for clear error). An appellate court "do[es] not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). This is particularly so where the issues involve a detailed factual analysis, and credibility determinations of witnesses.

Appellant asks this Court to plunge ahead and make factual findings about racial gerrymandering based on a truncated record and the one-sided analysis of the

[7] The only specific racial discrimination Mr. Garcia testified to supports a Section 2 violation—*i.e.*, that the political process is not equally open to Latinos, as Mr. Garcia himself testified that he experienced racial discrimination from the Washington State Republican Party during his campaign for Congress in the region. *Soto Palmer*, 3-PL-SER-339-340, 343. This says nothing about the enacted map.

dissenting judge below. This Court should not undertake this task. While Appellant spends several pages attempting to litigate the merits of his moot racial gerrymandering claim in this Court, he omits crucial details necessary for the required "holistic analysis." *Bethune-Hill*, 580 U.S. at 191. To provide just one example, the desire of the Yakama Nation for the Yakama Reservation and as much off-reservation trust land as possible to be unified in one district was a significant topic throughout the redistricting process and was mentioned repeatedly at trial. *See, e.g.*, 1-ER-8, n.4. Appellant makes no mention of the Yakama Reservation, nor does the dissent on which Appellant heavily relies. This is just one example of the fact-intensive inquiry necessary to find a racial gerrymander and why this Court should not engage in that fact-bound inquiry for the first time on appeal.[8] If the case is not moot, a remand is necessary to determine the merits in the first instance. *See Bethune-Hill*, 580 U.S. at 193.

[8] To provide another example of this fact-bound endeavor, , Mr. Garcia's lawyers suggest elsewhere that the remedial map is improper because it affects more of the surrounding districts than another of the proposed maps. *Soto Palmer*, No. 24-1602, Doc.82.1 at 20. But they fail to mention that this alternative map includes an additional district spanning the Cascade Mountains, something Mr. Garcia's lawyers argued was critical to avoid. *See Soto Palmer*, 2-PL-SER-179. Details like these make an appellate court the wrong forum to litigate the intricacies of map-drawing in the first instance.

III. The remedial district is not a racial gerrymander.

This is an appeal of a mootness determination, stemming from a challenge to the enacted district, not a forum to litigate a racial gerrymandering claim of an entirely different district that did not exist, and this Court should not entertain Appellant's attempt to do so. But at any rate, the remedial district is not a racial gerrymander.

A. The remedial district was never challenged as a racial gerrymander in the district court.

No party suggested below that the remedial district was a racial gerrymander. Certainly Mr. Garcia did not, as he was not a party to the *Soto Palmer* litigation. Nor did his attorneys make that argument on behalf of their other clients who were active participants in the *Soto Palmer* remedial process. The Ninth Circuit considers arguments waived when raised for the first time on appeal. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) ("These arguments are raised for the first time on appeal, and because they were never argued before the district court, we deem them waived."); *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) ("[This Court] will not reframe an appeal to review what would be in effect a different case than the one decided by the district court.").

The failure to raise a racial gerrymandering claim against the remedial district below—by Mr. Garcia or anyone else—dooms that claim here. In *Bethune-Hill*, the Supreme Court declined an invitation to conclude, after correcting the district court's

legal errors in adjudicating racial gerrymandering claims, that various Virginia legislative districts were unconstitutional racial gerrymanders. *Bethune-Hill*, 580 U.S. at 192-93. The Supreme Court explained that the district court was best positioned to decide that, and that "if race did predominate, it is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied." *Id.* at 193.

Here, unlike in *Bethune-Hill*, no racial gerrymandering claim against the challenged district has been adjudicated. This alone dooms Appellant's claim. Furthermore, at no point during the district court's lengthy remedial proceedings did Mr. Garcia attempt to intervene in the remedial process to allege that the remedial map was a racial gerrymander or have his voice heard on this issue. This is curious because Mr. Garcia's counsel were actively involved in the remedial proceedings on behalf of their other clients, and even filed a motion to intervene on behalf of yet another client, Senator Torres. *Soto Palmer*, 1-PL-SER-122.[9] Indeed, despite having access to Plaintiffs' proposed remedial plans and expert reports for months, and counsel to advocate for him during the remedial process, Mr. Garcia did not intervene, submit a statement of interest, or file *anything* that alleged that the district

[9] Senator Torres *also* raised no racial gerrymandering concerns about the proposed remedial maps.

court would be imposing an unconstitutional racial gerrymander were it to adopt any of the proposed maps.

Appellant cannot now ask this Court to make factual findings regarding the map drawer's motivations to advance a legal claim that he failed to raise until his appeal.[10] Indeed, courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller,* 515 U.S. at 916. That is doubly so here, where the map was imposed by an Article III court. Procedurally, Appellant would have had to raise his claim against the remedial plan in the district court (which he did not do) or file a new suit against the remedial plan (which he has not done). Given these procedural defects, this Court should find that Appellant waived his claim alleging that the remedial district is a racial gerrymander.

B. Garcia's racial gerrymandering claim against the remedial plan is unsupported by the record evidence.

In addition to being waived, Appellant's racial gerrymandering claim against the remedial plan is unsupported by the record. To show that a map is an unconstitutional racial gerrymander, a party must "prove that 'race was the predominant factor motivating the [mapdrawer's] decision to place a significant

[10] Notably, Mr. Garcia's attorneys argued on behalf of their other clients that *partisanship* (not race) was the predominant motivation in the configuration and selection of the remedial maps. *Soto Palmer*, 2-PL-SER-180-83; *Soto Palmer*, 1-PL-SER-76-77; No. 24-1602, Doc.82.1 at 27.

number of voters within or without a particular district.'" *Cooper*, 581 U.S. at 291 (quoting *Miller v. Johnson,* 515 U.S. 900, 919 (1995)). This showing "entails demonstrating that the [mapdrawer] "subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id*. (internal quotation marks omitted). The burden on the party claiming racial gerrymandering is "demanding." *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

Appellant has provided no evidence to support his assertion that race predominated in the drawing of the remedial map—nor could he. First, the drawer of the remedial map did not use nor consider racial demographics in drawing any remedial plans. Indeed, *Soto Palmer* Plaintiffs' remedial expert Dr. Kassra Oskooii testified that he "did not consider race or racial demographics in drawing the remedial plans" and "did not make visible, view, or otherwise consult any racial demographic data while drawing districts." *Soto Palmer*, 2-PL-SER-273, 1-PL-SER-139. Second, Appellant complains of "bizarre contours" and an "octopoid shape" to the district that he claims "make[] plain" his accusation of racial gerrymandering. Br. at 5. But the shape of the remedial district is not bizarre, and in any event, the "[t]he Equal Protection Clause does not prohibit misshapen districts." *Bethune-Hill*, 580 U.S. at 189. Indeed, as the record makes clear, the shape is easily explained as an effort to remedy the Section 2 violation while complying with other

criteria and unifying the Yakama Reservation and off-reservation trust lands—a traditional districting principle and something Mr. Garcia's counsel repeatedly requested during the remedial process. *See Soto Palmer*, 1-PL-SER-94-95, 114-121. As explained in greater detail in the *Soto Palmer* Plaintiffs' Answering Brief, the selected map was a variation of another map that was modified to include more of the off-reservation trust lands and fishing villages. *Soto Palmer*, 2-PL-SER-274-278, *see also* 2-ER-65 (map of trust lands). The resulting district shape was a product of these modifications, and necessary adjustments for population equality and minimization of political subdivision splits as Washington law requires. *Soto Palmer*, 1-PL-SER-9-11 at 32:22-34:12.

Third, unable to dispute that Dr. Oskooii did not consider race in drawing the remedial district, Appellant contends that race unconstitutionally predominated in the district court's selection of the map. Br. at 27. This is so because the district court observed that a "fundamental goal of the remedial process" was to "unite the Latino community of interest in the region." *Id.* But the Section 2 violation was a result of the enjoined map cracking these Latino populations into two legislative districts. *Soto Palmer*, 1-ER-3-4. It is hardly surprising—and certainly not unconstitutional—that the district court would select a remedial map that resolved that cracking. Appellant cannot explain how this retroactively converts the *mapdrawer's* process into one in which race predominated, nor how that factor alone could make race the

predominant consideration. And at any rate, the argument that a Section 2 remedial district that considered race *at all* violates the Fourteenth Amendment "is not persuasive in light of the [Supreme] Court's precedents." *Allen v. Milligan*, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring in part). Finally, after falsely contending that the shape of the remedial district is a slam dunk in proving a racial gerrymander, Appellant claims that "the precise shape of the lines does not matter," reasserting a generalized "racial classification" argument. Br. at 29. But if he is not asserting that race predominated in the drawing of the actual lines of the remedial district (and it did not), he has no claim. Nor has Appellant provided any evidence of how he was allegedly racially classified by the remedial map.

C. The remedial plan is not a continuation of the enacted plan.

The remedial plan is not a continuation of the enacted plan, but a complete Section 2 remedy. In fashioning a Section 2 remedy "a court, as a general rule, should be guided by the legislative policies underlying the existing plan to the extent those policies do not lead to violations of the Constitution or the [VRA]." *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). The *Soto Palmer* district court's chosen remedy, Map 3B, does exactly this. The remedial plan makes sufficient changes to the district to remedy the Section 2 violation by correcting the enacted plan's cracking of the Latino community and not retaining the violative district configuration.

In *North Carolina v. Covington,* 585 U.S. 969 (2018), the Supreme Court affirmed the district court's finding that remedial districts drawn by the North Carolina legislature did not cure the racial gerrymander in four districts because those remedial districts continued to utilize the core shape of the illegal districts to split apart predominately Black areas. *Id.* at 973-74. In preserving the core and key aspects of the districts that the district court already found to be evidence of discrimination, the legislature perpetuated the discrimination in the new remedial plans.

The remedial plan here does not perpetuate the Section 2 violation, nor Appellant's alleged racial gerrymandering violation, because the remedial plan does not perpetuate the cracking of the Latino community of interest in the Yakima Valley that the district court found at issue. *See Soto Palmer*, WL 1138939, at *2. Furthermore, in *Covington*, the new districts that were "mere continuations of the old, gerrymandered districts" were drawn and adopted by the legislature, just as the previous ones had been. 585 U.S. at 976. Here, the new district was drawn by a new mapdrawer who did not consider race—Dr. Oskooii—and adopted by a new decision maker—the *Soto Palmer* district court with the aid of a special master—further undermining Appellant's continuation argument.

The remedial map is sufficiently changed to ensure that the discriminatory aspects are removed. *See Abrams,* 521 U.S. at 79. Furthermore, while Appellant

argues that the remedial plan changes too little of the enacted map, his counsel argues on behalf of their other clients that the district lines have changed too much. *See Soto Palmer*, No. 24-1602, Doc.82.1 at 19. Neither is so. The remedial plan is not a continuation of the enacted map, but instead a complete remedy that complies with Section 2, the U.S. Constitution, and Washington law.

CONCLUSION

For the reasons stated above and those set forth in the brief of the State of Washington, the decision of the district court dismissing this case as moot should be affirmed. Otherwise, this case should be held in abeyance pending a final disposition in *Soto Palmer*. If this Court reverses the mootness decision, it should remand for a determination on the merits of whether race predominated in the drawing of LD15 in the enacted plan.

Respectfully Submitted,

October 23, 2024 /s/ *Chad W. Dunn*

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FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s) No. 24-2603

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I hereby certify that on October 23, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system, which will notify all registered counsel.

/s/ *Chad W. Dunn*