No. _______

In The
Supreme Court of the United States

BENANCIO GARCIA III,
Appellant,
V.

STEVEN HOBBS, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Western District of Washington

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Plaintiff-Appellant Garcia challenged Legislative District 15 of Washington State's House map as a racial gerrymander; meanwhile, a separate group of plaintiffs brought a Voting Rights Act Section 2 claim against the same map in a different case. Both cases were heard in a consolidated trial (the constitutional claim heard by a three-judge panel, the VRA claim heard by a single judge who also served on the three-judge panel), and both cases were submitted together on July 12, 2023 to the three judges comprising the two courts.

The one-judge district court issued its Section 2 decision first, enjoining use of the enacted map and ordering the creation of a remedial map. Then the three-judge district court dismissed Mr. Garcia's constitutional claim as moot under the theory that the single judge's injunction cut off any path to relief.

The questions presented are:

1. Whether this Court has appellate jurisdiction under 28 U. S. C. § 1253 over the order of the three-judge district court empaneled under 28 U. S. C. § 2284 that dismissed Appellant's Equal Protection claim as moot, when that dismissal had the practical, literal effect of denying the requested injunction; and

2. Whether a majority of the three-judge district court erred in finding this case moot because of the one-judge district court decision enjoining Legislative District 15, which is currently in dispute in a separate appeal,

when it remains an open question whether Appellant and others will continue to be illegally racially sorted under either old or new district lines.

PARTIES TO THE PROCEEDING

Appellant is Benancio Garcia III. Appellant was the plaintiff before the three-judge court.

Appellees are Steven Hobbs, in his official capacity as Secretary of State of Washington, and the State of Washington. Appellees were defendants before the three-judge district court.

The relevant order is:

Garcia v. *Hobbs*, No. 3:22-cv-05152-RSL-DGE-LJCV, 2023 U. S. Dist. LEXIS 159427 (W.D. Wash. Sept. 8, 2023), ECF No. 81.

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INTRODUCTION

When a three-judge panel facilitates one judge's collateral attack on the jurisdiction of that panel through a fundamentally flawed view of this Court's mootness doctrine, it abdicates its constitutional duty to adjudicate cases and controversies. That constitutional abdication is the fundamental issue before this Court now. This case boils down to twenty-nine days—the period during which the panel majority could have decided this ripe, live case on the merits, but declined. That's the amount of time between the date this constitutional case was submitted for decision to the three-judge district court and the date a single-judge district court in the consolidated-at-trial statutory case issued its opinion.[1] At any point in those twenty-nine days, the panel could have decided this case on the merits, at which point a direct appeal to this Court would have inarguably been available.

But that's not what happened. Instead, one of the three judges empaneled under 28 U. S. C. § 2284 released the merits decision of the single-judge court in *Soto Palmer*, then joined with another of the judges empaneled in this case to declare that the panel consequently lacked jurisdiction over the merits, thereby calling the appellate jurisdiction of this Court into question. What happened here, where a district court resolved the inherent jurisdictional conflict

[1] A petition for certiorari before judgment in *Soto Palmer* filed subsequent to this filing raises the question whether the single judge court even had jurisdiction over the Section 2 claim. Counsel of record is the same in both filings.

between competing Section 2 and Equal Protection claims by declaring the latter claim moot, appears to be a first in the history of three-judge panels. This Court must now answer a novel question about its direct appellate jurisdiction: Does this Court have jurisdiction to hear this appeal?

The answer is yes. This appeal lies under 28 U. S. C. § 1253 because *Abbott* v. *Perez* specified that *any* order with the practical effect of denying an injunction is directly appealable to this Court. 138 S. Ct. 2305, 2319 (2018). A three-judge panel's dismissal for want of jurisdiction is "literal[ly]" a denial of an injunction. *Gonzalez* v. *Automatic Emps. Credit Union*, 419 U. S. 90, 96 (1974). Hence, the aged holding of *Gonzalez*—that some jurisdictional dismissals are *not* directly appealable to this Court—is flatly incompatible with this Court's recent jurisprudence and the text of the statute. That alone establishes jurisdiction here.

Further, the panel majority's theory of mootness is baseless under the central mootness holding of *Moore* v. *Harper*, 143 S. Ct. 2065 (2023). Where a reviewing court's reversal of a lower court's invalidation of an enacted map means that the map "would again take effect[,]" a challenger's "path to complete relief" against that map runs through the appellate process and is not mooted by the lower court's decision. *Id*., at 2077. A reversal of the *Soto Palmer* decision enjoining LD-15 would result in the enacted map's taking effect again, which means Mr. Garcia's challenge against the same map remains live.

The most sensible path forward for resolving this one-of-a-kind situation, based on this Court's historical practice in similar situations, is for this Court, being assured of its jurisdiction, to reverse or vacate the errant jurisdictional dismissal and remand the case to the three-judge district court for consideration of the merits. See *Baker* v. *Carr*, 369 U. S. 186, 237 (1962) ("The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion."); *Am. Trial Lawyers Ass'n* v. *N.J. Supreme Court*, 409 U. S. 467, 469 (1973) ("[W]e vacate the judgment of the District Court and remand the case for proceedings consistent with this opinion.").[2] Garcia respectfully asks this Court to do the same.[3]

Even though the cases were consolidated at trial and even though it was entirely within the docket management discretion of the courts to decide *Garcia* first on the merits due to the constitutional nature of the underlying claim—a decision which would have been without question immediately reviewable by this Court—a single judge (who was also a member of the *Garcia* panel) instead decided the statutory claim in *Soto Palmer* first. Then the *Garcia* panel majority promptly dismissed that constitutional case based on

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

[3] In the *Soto Palmer* petition for writ of certiorari before judgment, petitioners ask for this Court to grant the petition and hold that entire case in abeyance pending the results of this litigation, so that the related cases not proceed on two different tracks.

the relief granted in *Soto Palmer* (which was not the relief Appellant sought). That thorny mess at the trial level has predictably spawned dual tracks on appeal. Appellant is at this Court on his Fourteenth Amendment claim while the intervening defendants in *Soto Palmer* are asking this Court to hold that appeal in abeyance pending resolution here, since what happens in this case directly affects that litigation. In other words, whatever happens next will happen to both cases.

This Court can and should exercise its appellate jurisdiction here, where post-submission strategic docket management is the sole reason that the injunction was denied on non-merits grounds. *Gonzalez* does not control here, primarily because it is incompatible with the Court's more recent decision in *Abbott*. But the panel majority below has also triggered a novel Article III problem. The panel could have (and should have) decided *Garcia*'s claim on the merits and only avoided doing so by choosing to decide a different case first. The *Gonzalez* case concerned a plaintiff's lack of standing at the time his complaint was filed, not *judicially created* "mootness" after cases consolidated at trial had been submitted and were ripe for decision. A single district judge cannot divest a three-judge court of jurisdiction through clever manipulation of the docket.

Garcia's constitutional claim should have been decided first, and should be in the future. Declining to correct the lower courts here will lead inevitably to similar gamesmanship in future cases. When a redistricted map is challenged by two different plaintiffs, one advancing a claim under the VRA and

the other a claim under the U. S. Constitution, the racial gerrymander claim (i.e., Fourteenth Amendment claim) must be given priority. First off, a constitutional racial gerrymander claim alleges the map was invalid from the moment it was enacted, whereas a VRA claim alleges the map becomes vote dilutive in effect at some point after its passage (and perhaps even substantially afterwards). Logical progression counsels deciding them in the same temporal order. Otherwise, a single district judge can usurp the role of the statutorily created three judge panel and hold that the VRA requires future racial gerrymandering as a remedy before the panel determines whether past racial gerrymandering has occurred, and whether it was justified. Not only that, the same action could be used to shield a necessary constitutional decision from this Court's appellate review. That's what happened here. Two courts used docket management and apparent coordination to nullify the role of the three-judge panel mandated by Congress to adjudicate the constitutional claim. In accordance with statute, three judges were empaneled to hear a Fourteenth Amendment case. They then declined to render a decision on the merits in that case, though they could have at any time after submission of the post-trial briefs.

The Constitution cannot be avoided when, as here, a Fourteenth Amendment plaintiff makes solely a constitutional claim in one case while a separate plaintiff makes a statutory claim in another. Here there are two entirely distinct cases, unlike instances in which a single plaintiff files both statutory and constitutional challenges to a law. It is not clear that the constitutional avoidance canon can even be

applied *across* two separate cases. Nor was this a case in which there was "no need to convene the three-judge court." *Hagans* v. *Lavine*, 415 U. S. 528, 545 (1974) (internal citation omitted). A three-judge court needed to be convened here for *Garcia*'s claim. Only docket finagling could attempt to dodge the claim at that point, and that is indeed what the district court did. That's not a faithful application of the constitutional avoidance canon; that's constitutional abdication. See *Page* v. *Bartels*, 248 F.3d 175, 191 (3d Cir. 2001) (warning of the "danger that the single district judge's conclusions with regard to the statutory claims--particularly his or her factual findings--might well have the effect of dictating the outcome of the constitutional claims, thereby thwarting the expressed congressional policy of requiring a specialized three-judge court for the disposition of such singularly important matters."). On top of that, this thwarts the same expressed congressional policy—incorporated into § 1253—that § 2284's singularly important matters should be directly appealable to this Court.

Consider a counter-hypothetical where the panel majority was inclined to *grant* relief to Garcia on the merits.[4] Mooting the case based on the same docket

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[4] While disclaiming any advisory opinion, the panel majority made clear that it would deny the injunction on the merits because "a full analysis of the record presented does not yield" that Appellant established an Equal Protection violation, the "testimony weighs heavily against finding that race predominated in the drawing of LD 15[,]" and the "dissent's summary and interpretation of the facts" was wrong. App.5–6. This is simply incorrect as a factual and legal matter. A full three-fourths of the Washington Independent Redistricting

coordination in that situation demonstrates even more clearly the absurdity of the counterargument: Mr. Garcia would have *won* if the panel published its opinion first but would have *lost* if they published its opinion second, simply by virtue of sequencing. That cannot be how Article III courts work. Federal judges must not be able to choose winners and losers through arbitrary docket management instead of through the application of law, and a single-judge court should not be permitted to usurp the jurisdiction of a three-judge court. What actually happened is equally problematic.

Even if *Garcia* need not be dealt with necessarily before *Soto Palmer*, these inextricably intertwined constitutional and statutory challenges concerning the legality of the same legislative district should not proceed in two different courts—with the *Garcia* plaintiff seeking the redrawing of the district without a predominant focus on race, while the *Soto Palmer* plaintiffs seek precisely the opposite relief at the Ninth Circuit. Even more troublingly, this current state of the two cases was not expected before or during trial after the *Soto Palmer* single-judge court had previously declared that "[j]udgments in the two matters will be issued on the same day so that the

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Commission testified that race was the sine qua non in the drawing of District 15. That fact alone should have resulted in summary judgment for Mr. Garcia or, at the very least, a merits decision in his favor after trial. If the conduct of the Washington Redistricting Commission, in drawing LD-15, is not a racial gerrymander, Appellant strains to imagine a fact pattern where a court could find that race predominated in the drawing of a map. See App.42 (VanDyke, J., dissenting) ("If the mere consideration of other factors *in addition* to making race nonnegotiable meant race no longer predominated, the race would literally never predominate.").

appeals, if any, can proceed together." *Soto Palmer et al.* v. *Hobbs*, No. 3:22-cv-5035, ECF No. 136 at 5. That approach was evidently abandoned when it no longer advanced the result desired by at least one of the three judges.

Docket decisions notwithstanding, at no point was this case moot anyway, either before or after the *Soto Palmer* decision. The map at issue in both cases—and the injunction against it—is currently on appeal, which means Mr. Garcia's path to full relief "runs through" the federal appeals process. *Moore*, 143 S. Ct., at 2077. And even if it didn't, the relief that Mr. Garcia sought consisted of not being sorted on the basis of his race going forward under *any* state legislative map. That harm is now inevitable in any remedial map resulting from *Soto Palmer* thanks to the *Soto Palmer* district court's order to pack more Hispanic voters into LD-15.

The Court can and should send this case back to the three-judge panel to address the merits.

OPINION BELOW

The district court's order under review is available at *Garcia* v. *Hobbs*, No. 3:22-cv-05152-RSL-DGE-LJCV, 2023 U. S. Dist. LEXIS 159427 (W.D. Wash. Sep. 8, 2023), ECF No. 81, and App.1.

JURISDICTION

The three-judge district court issued its opinion on September 8, 2023, dismissing as moot Appellant's claim that LD-15 violates the Equal Protection Clause of the Fourteenth Amendment. On September 28, 2023, Appellant filed a Notice of Appeal to directly appeal the constitutional panel's dismissal to this Court. App.49.

This Court has jurisdiction under 28 U. S. C. § 1253: "[A]ny party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The "practical effect" of the jurisdictional dismissal was to deny the injunction Mr. Garcia requested. See *Abbott* v. *Perez*, 138 S. Ct. 2305, 2319 (2018); see also *Gonzalez*, 419 U. S., at 96 ("[D]ismissal of a complaint on grounds short of the merits does 'deny' the injunction in a literal sense"). *Abbott* held that such a dismissal is directly appealable to this Court. and carved out no exceptions to that general rule. 138 S. Ct., at 2319.

Abbott left in doubt the status of *Gonzalez*. In *Gonzalez*, this Court had held that "when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio*, review of the denial is available only in the court of appeals." *Gonzalez*, 419 U. S., at 101. But forty-four years later, *Abbott* held that—without exceptions—orders that have the practical effect of denying injunctions are directly appealable to this Court. *Abbott*, 138 S. Ct., at 2319–21. *Gonzalez* had held that some jurisdictional dismissals that *do* have the practical effect of denying injunctions are *not* directly appealable. The two irreconcilable holdings cannot both control this case.

However, even if *Gonzalez* were still good law, it is not clear that its rule applies to a strategic docket management decision intended to moot a case. That novel situation more naturally falls within the sphere of reviewable non-merits dismissals this Court left open to future applications. See *Gonzalez*, 419 U. S., at 100 (declining to adopt a proposed per se rule against hearing direct appeals of orders dismissing for want of jurisdiction).

In *Gonzalez*, the plaintiff never had standing in the first place sufficient to convene a three-judge court, thereby rendering the panel's decision on how to handle that purely "technical." See *id*., at 93, 101. Standing and mootness are different jurisdictional doctrines, and in *Gonzalez* it was not the situation that a single judge's decision in a related case supposedly mooted out Gonzalez's injury *after* the

three-judge panel had already been convened. Gonzalez lacked standing at the outset of his case, and therefore the secondary consideration of mootness was never at issue there.

Here, the supposed mootness arose *after* the consolidated trial was completed and both cases were submitted for decision. In other words, *Garcia* was ripe at every moment in the litigation, from the complaint through submission, and only became moot (in the panel's errant view) through docket management in a separate case.

In holding that some logistical decisions could divest it of appellate jurisdiction, the *Gonzalez* Court took a purpose-driven approach, noting that "Congress established the three-judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Id.*, at 97. Direct (and swift) appeals to this Court safeguard that underlying policy.

The actions of the *Garcia* and *Soto Palmer* courts work to defeat this policy. This Court should not allow the panel majority's docket games to divest this Court of immediate appellate jurisdiction, lest this become a roadmap for future litigants. If the panel had decided this case first (as it should have), there would be no doubt that its decision would be an "order . . . denying . . . an . . . injunction" immediately reviewable by this Court under § 1253. Only by strategically switching the order of operations could the panel try to shield its decisions from direct review. The panel majority attempted to strike down a state law it would have

found not unconstitutional in such a way that shielded its constitutionality finding from direct review in this Court. In that way the panel has tried to strip away the federalist protections that Congress gave state statutes in § 1253. The panel could have, and should have, decided Appellant's constitutional claim on the merits (and, per its dicta, would have rejected it), then turned to the related statutory claim. Only by flipping the order could the panel try to divest this Court of jurisdiction. That ploy should not be allowed to succeed. And it does not matter whether the panel would have denied or granted the injunction on the merits. What matters is that it tried to keep this Court from reviewing its conclusion either way.

Again, even if *Gonzalez* were still good law post-*Abbott*, the *Gonzalez* Court explicitly declined to adopt a per se rule that only merits dismissals are directly reviewable by this Court. *Id.*, at 100. That means—even under *Gonzalez*—some jurisdictional dismissals remain directly reviewable. It makes sense for this Court, if *Gonzalez* is still good law, to take a case-by-case approach to deciding which types of decisions "short of the ultimate merits," *id.*, at 101, are directly reviewable, and which are not.

The unique situation presented by *Garcia* and *Soto Palmer* makes the *Garcia* order the exact type of decision short of the ultimate merits that this Court left open to direct review. First, because *Gonzalez* was not a redistricting case, its holding did not address the situation of dueling VRA and constitutional challenges to the same map and left open the possibility that the congressional purpose in § 1253 could cut the other way. The *Garcia* panel, unlike the

court in *Gonzalez*, *could have* denied the injunction on the merits, but *chose* not to. For those reasons, this Court should recognize this particular situation as one that lies beyond the ambit of *Gonzalez*'s rule, because it undermines *Gonzalez*'s rationale.

In any case, "it is also a fact that in the area of statutory three-judge-court law the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight." *Id.*, at 95. On top of that, this Court has already heard at least five direct appeals from denials of injunctive relief for want of standing or justiciability. See *id.*, at 95 n.11 (collecting cases). And revisiting *Gonzalez*'s unintended consequences is especially important here, where one such consequence is that two judges can weaponize docket management to effectively evade this Court's review of the constitutionality of a state statute.

If the Court nonetheless finds it lacks appellate jurisdiction, Appellant respectfully requests that, in line with its historical practice, the Court "vacate the order before [it] and remand the case to the District Court so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *Id.*, at 101; accord *Pennsylvania Pub. Util. Comm'n* v. *Pennsylvania R. Co.*, 382 U. S. 281 (1965); *Wilson* v. *Port Lavaca*, 391 U. S. 352 (1968); *Mengelkoch* v. *Industrial Welfare Comm'n*, 393 U. S. 83 (1968); *Butler* v. *Dexter*, 425 U. S. 262 (1976).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

STATEMENT OF THE CASE

A. Before this case was about the internal deliberations of three federal judges, it was about the deliberations and negotiations of four redistricting Commissioners in the State of Washington. In Washington, redistricting is conducted by four voting individuals—two Republican-picked and two Democrat-picked Commissioners, with final congressional and legislative maps each requiring at least three of four votes to pass. Wash. Const. Art. II, §§ 43(1), (2) (6); Wash. Rev. Code § 44.05.030. Statute commands the Commissioners to provide fair and competitive maps to the best of their ability, abiding by traditional criteria. Wash. Rev. Code § 44.05.090(5). The Commission must approve new maps by November 15 of the districting year, followed by small and technical amendments by the State Legislature, if the latter so chooses (but by statute, no such revision may result in more than 2% population change in a district). Wash. Rev. Code §§ 44.05.100(1), (2). The maps become Washington law upon amendment by the Legislature or after 30 days have lapsed without legislative action. *Id.* The Legislature may not reject the maps.

In 2021, April Sims (Democrat), Brady Piñero Walkinshaw (Democrat), Paul Graves (Republican)

and Joe Fain (Republican) chose Sarah Augustine as their nonvoting chairwoman before each released separate legislative redistricting proposals on September 21, 2021. *Garcia*, ECF No. 197 at 4–5. In those early stages of the Commission's work, no proposal contained a majority Hispanic Citizen Voting Age Population ("HCVAP") in the Yakima Valley. *Id.*, at 5. That did not last. A month later, the Washington State Senate Democratic Caucus circulated a slide deck created by Dr. Matt Barreto, an academic from UCLA who focuses much of his work on redistricting. Dr. Barreto's slide deck provided scatter plots for precinct-level demographic figures and election results from several statewide races and made conclusory legal assertions about the need for a "VRA Compliant" district in the Yakima Valley region. App.94. At the same time, a legal analysis commissioned by the Washington State Republican Party reached the opposite conclusion and found that any polarization among voters was on account of partisanship and not race. App.119.

After the Barreto PowerPoint claimed in October 2021 that all four initial proposals were VRA noncompliant, negotiations among the Commissioners shifted. The creation of a majority-minority district in the Yakima Valley region—now LD-15—became a sine qua non in the statewide legislative map negotiations. On October 25, 2021, exactly 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, recognizing their

Democrat colleagues' new priorities, each understood that a majority HCVAP district was now necessary to garner at least three Commissioner votes (and to enact a legislative map reflecting other priorities of Commissioners Graves and Fain). See App.38–40 (VanDyke, J., dissenting) (summarizing the negotiations on the majority HCVAP district). By their own admission, at no point did either Commissioner Graves or Commissioner Fain think a VRA district was in fact required by law, nor did the four Commissioners ever engage a shared VRA expert. Yet the Republican Commissioners continued to negotiate for a majority-minority district in LD-15 because they knew their Democratic colleagues would not support any map that failed to include a majority HCVAP district. App.39.

In the end, the Commissioners met their target of an over-fifty percent HCVAP population in LD-15.[5] The map, containing no whole counties, grabbed in narrow slivers of dense Hispanic populations on opposite sides of the district—the City of Yakima in the northwest and Pasco to the southeast, even though those distinct areas had never been included

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[5] The Commission reached its final agreement seconds before Washington's constitutional deadline. Unusually, the final agreement was not a physical (or electronic) map or a defined set of precincts or census blocks. Rather, the final agreement was an unwritten "framework" that the Commissioners and their staff spent another day reducing to map form. At trial, the Commissioners testified that most of this "framework" consisted of agreed-to partisanship metrics for the state's legislative districts as well as the HCVAP level for LD-15 (but not the racial makeup of any of the state's other 48 legislative districts). App.40 (VanDyke, J., dissenting) (citing trial testimony at *Garcia*, ECF Nos. 73 at 16–17; 74 at 71; 75 at 31, 42, 72.

in the same legislative district in Washington's history. After a few minor tweaks (which resulted in no population change to LD-15), the Legislature adopted the map on an up-or-down vote.

B. On March 15, 2022, Plaintiff Benancio Garcia III sued Washington Secretary of State Steven Hobbs, Complaint, No. 3:22-cv-5152, ECF No. 1, and the State of Washington was joined as a required party under Rule 19, Order of Joinder, No. 3:22-cv-5152, ECF No. 13. The Amended Complaint contained a single count: an allegation that the state actor Commission violated the Fourteenth Amendment's Equal Protection Clause by sorting Washington citizens by race when it drew the lines for LD-15. *Garcia*, ECF No. 14 ¶¶ 72–77. For relief, Garcia asked for (i) a declaration that LD-15 was an illegal racial gerrymander; (2) a permanent injunction enjoining the Secretary from using LD-15 in further elections; (3) an order for a remedial map that did not violate Garcia's Equal Protection Clause rights; and (4) attorneys' fees. *Garcia*, ECF No. 14 ¶ 78. Because the claim was a constitutional one, 28 U. S. C. § 2284 required the assignment of a three-judge panel. Ninth Circuit Judge VanDyke, Chief District Judge Estudillo, and Judge Lasnik were assigned. *Garcia*, ECF No. 18.

The case was initially assigned to a magistrate judge, but was reassigned to Judge Lasnik, Minute Order Reassigning Case, No. 3:22-cv-5152, ECF No. 3, because the case was related to *Soto Palmer*, which had already been assigned to him and which involved

a separate Section 2 challenge to LD-15, Complaint for Declaratory and Injunctive Relief, *Soto Palmer et al.* v. *Hobbs et al.*, No. 3:22-cv-5035, ECF No. 1. In *Soto Palmer*, the plaintiffs claimed that Hispanics could not elect the candidate of their choice in LD-15 as constituted and sought invalidation of the enacted map, triggering intervention by three individuals, including a state lawmaker, who sought to defend the map against the claim it violated Section 2. No. 3:22-cv-5035, ECF Nos. 69; 70. On the eve of trial, the State of Washington abandoned its defense of the *Soto Palmer* Plaintiffs' Section 2 claims, and, but for the presence of the *Soto Palmer* Intervenors, would have likely entered into a settlement agreement that paved the way for the now-aligned *Soto Palmer* Plaintiffs and State to create a more Democrat-friendly map—ducking the bipartisan support the Washington Constitution expressly requires. See *Garcia*, ECF No. 65 at 7; see also Wash. Const. Art. II, §§ 43(1), (2) (6); Wash. Rev. Code § 44.05.030.

C. As the case headed towards trial, Washington held its 2022 state legislative general elections. In LD-15, candidate Nikki Torres, a Hispanic Republican, was elected to the State Senate in the only contested race (against a White Democrat candidate) under the Enacted Plan by 35 points. See Trial. Ex. 1055.

D. After the panel denied summary judgment on April 8, 2023, it began a joint bench trial on June 5, 2023 that was originally scheduled through June 10. The State, Garcia, the *Soto Palmer* plaintiffs, and the intervening *Soto Palmer* defendants all put on witnesses and designated testimony. All four voting Commissioners testified, as did their primary staffers.

For all portions of the trial that addressed the work of the Commission in passing LD-15, which implicated the claims of plaintiffs in each case, the three-judge panel presided.

E. With the trial over, the two courts—comprised of three total judges—began their deliberations concerning the two cases, assisted by the parties' post-trial briefs, which were submitted on July 12, 2023. The single-judge court, the district judge of which was a part of the three-judge panel, delivered its decision first. The *Soto Palmer* court issued its opinion on August 10, 2023, finding in favor of Plaintiffs on their VRA Section 2 dilution-in-effect claim and invalidating LD-15. Memorandum of Decision, No. 3:22-cv-5035, ECF No. 218 at 32. It gave the State until February 7, 2024, to fully adopt a new map. *Id.* However, on September 15, 2023, after some news reports suggested that Democrats (who currently command majorities in both chambers of the State Legislature) would not attempt to reconvene the Commission, the *Soto Palmer* court *sua sponte* asked for input on creating its own remedial map. Order, No. 3:22-cv-5035, ECF No. 224. Meanwhile, on September 8, 2023, the intervening *Soto Palmer* defendants had appealed to the Ninth Circuit. Notice of Appeal, No. 3:22-cv-5035, ECF No. 222.

Less than a month after the *Soto Palmer* court issued its VRA decision, the *Garcia* panel majority published its decision on September 8, 2023, dismissing Garcia's claim as moot based on the *Soto Palmer* decision. App.1. This was over a strenuous

dissent by Ninth Circuit Judge VanDyke, who would have found for Mr. Garcia on the merits but also believed the panel had committed a serious Article III error in the order it decided the cases. App.11.

REASON FOR SUMMARILY REVERSING AND REMANDING OR NOTING PROBABLE JURISDICTION

I. MR. GARCIA'S PATH TO COMPLETE RELIEF IS NOT CUT OFF BUT RUNS THROUGH THE FEDERAL APPELLATE SYSTEM AND REMEDIAL PROCEEDINGS.

Legislative District 15 is on appeal, not a gravestone. 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 review of LD-15 is itself complete. See *Moore*, 143 S. Ct., at 2077. That review is just getting started.

And even in a different universe where LD-15 were truly dead, Mr. Garcia's claim remains live because of the imminent certainty that he would once again be racially sorted when the Commission or the *Soto Palmer* district court redraws the map. After all, the *Soto Palmer* district court explicitly ordered *more* racial sorting to attempt to reach a supermajority-minority district in LD-15 that would not re-elect a Hispanic Republican who won by thirty-five points. Memorandum of Decision, No. 3:22-cv-5035, ECF No. 218 at 32. The *Garcia* court refused to issue an order that Appellant's rights not be violated in that remedial process. Maybe the *Garcia* court would have

found the VRA justified such racial gerrymandering if it reached the merits of Mr. Garcia's case, but it didn't, and that was for the *Garcia* court to decide in *this* case, not for the *Soto Palmer* court acting alone in another. That the remedial map will inevitably sort Mr. Garcia on the basis of his race is enough to keep him in court to argue the *later* question of whether such sorting is justified.

A. Mr. Garcia challenged Legislative District 15, Legislative District 15 is on appeal, and Mr. Garcia's challenge is as live as ever.

The sole basis for the lower court's mootness conclusion is that the single-judge *Soto Palmer* court conclusively, definitively invalidated LD-15. But that was not true when the panel order was issued, and it is not true today; LD-15 remains on appeal. Notice of Appeal, No. 3:22-cv-5035, ECF No. 222. The Ninth Circuit could reverse the errant lower court decision in *Soto Palmer*. Or this Court could grant certiorari to the Ninth Circuit and reverse. Either way, the injunction would be lifted and the originally enacted LD-15 would once again take effect without any further action from the State Legislature or a reconstituted Commission. Apparently, in the panel's view, that would "unmoot" this case. But that is not how mootness works, and that is not how appeals work. The fate of LD-15—and Appellant's claims thereto—remains unsettled until the *entire* federal appellate process is complete. The mere possibility that a decision from the Ninth Circuit or this Court could vacate the injunction against LD-15 means that Mr. Garcia's injury is not mooted. A reversal doesn't

unmoot a case; the very potential for a future reversal means the case was never moot to begin with. 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 reinstated, the federal court should redress his injury of being racially sorted by the State.

In *Moore* v. *Harper*, this Court found no mootness, because the originally challenged 2021 North Carolina maps enacted by the state legislative defendants would have "again take[n] effect" had this Court reversed. 143 S. Ct., at 2077. In other words, a snapback was possible, depending on the appellate process. *Id*. Plaintiffs therefore maintained a "personal stake in the *ultimate disposition*" throughout the appeal when the final appellate decision *could* reinstate a challenged map that had been invalidated by the lower court. *Id*. (emphasis added) (internal citation omitted); cf. *Thomas* v. *Bryant*, 938 F.3d 134, 144 (5th Cir. 2019) (State's appeal was not moot when appellate court could "reverse the district court's judgment," and the State would "then revert to using its original map[,]" remedial map notwithstanding).

The snapback in *Moore* was possible through a State law's reinstating the map, not a reviewing court's vacatur of an injunction, but the result is functionally equivalent as to the effect of a federal appeals court's decision on the map. That is the situation here. The *Soto Palmer* district court's enjoining of LD-15 has been appealed. That means LD-15 will snap back into effect if either the Ninth

Circuit or this Court vacates the lower court's grant of a permanent injunction in *Soto Palmer*. Mr. Garcia's "path to complete relief" in his challenge to LD-15, then, "runs through" the federal appellate process, see *Moore*, 143 S. Ct., at 2077, because LD-15 must 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 different case is either (1) ultimately affirmed or (2) not appealed, thereby concluding the federal appellate process—for good. Only after the ultimate disposition of *Soto Palmer* will the question of Garcia's complete relief be answered.

There's no doubt a final judgment invalidating a law can moot a separate challenge to the same law, but that judgment must be, in fact, final. 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 over does a "conclusive" end occur and thereby moot related claims. That makes sense; after all, an issue on appeal by definition remains an unresolved question.

The Circuit Courts recognize this reality. For example, in *Moore* v. *Louisiana Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014), the Fifth Circuit waited until the Louisiana supreme court had affirmed the trial court's decision declaring

the federally challenged law unconstitutional to find that case moot. That is, the Fifth Circuit declined to find the injury mooted until after the highest—final—court had definitively declared the fate of the challenged law. Even more pointedly, the Eleventh Circuit found moot a constitutional challenge based on a Florida circuit court's invalidation of a project 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." *Gagliardi* v. *TJCV Land Trust*, 889 F.3d 728, 732–33 (11th Cir. 2018) (citation omitted) (emphasis added); accord *Enrico's, Inc.* v. *Rice*, 730 F.2d 1250, 1254 (9th Cir. 1984) (finding moot a federal challenge to California rule only once the petition for certiorari was denied in state court case holding the rule invalid). Likewise in agency and arbitration contexts. See, *e. g.*, *International Bhd. of Teamsters, Local Union No. 639* v. *Airgas, Inc.*, 885 F.3d 230, 235–36 (4th Cir. 2018) (finding a case mooted by a "*final and binding arbitration award*" because the finality of the arbitrator's decision made any relief in the federal case "impossible"); *Medici* v. *City of Chi.*, 856 F.3d 530, 533 (7th Cir. 2017) (finding a case mooted by arbitration award because the losing party "elected not to appeal the arbitration award[,]" thereby rendering it final); *Oklahoma* v. *Hobia*, 775 F.3d 1204, 1210–11 (10th Cir. 2014) (declining to find case mooted by agency action because the action was not "final agency action" such that it would make the alleged harm impossible).

Cases end when they end and not a second before. A separate case cannot moot an injury until the appellate process on the challenged law has run its full course.

LD-15's fate remains an open question until the Ninth Circuit rules and until this Court denies or grants certiorari after (or before) the Ninth Circuit's own decision. That is how appeals work. Cases featuring appealed injunctions are still "cases and controversies" under Article III even if the order being appealed is in effect for the pendency of 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). No one would take seriously a plaintiff-appellee's moving to dismiss a defendant-appellant's appeal against them. But that is in essence what the *Garcia* court did below. Garcia's case is as live as the *Soto Palmer* appeal. If his injury rises and falls with LD-15, then his injury's fate will be the same as LD-15 on appeal. Were the Ninth Circuit to affirm in *Soto Palmer* and this Court were to then deny certiorari, Garcia's LD-15 injury would become a past injury, and we would then rely solely upon the argument in Section B below. But if the Ninth Circuit or this Court reverses the *Soto Palmer* district court, then Garcia and his injury would be right back to where they were below, just like *any* injury in *any* other appeal. And it simply does not matter that it is uncertain which way the Ninth Circuit or this Court might go on appeal in *Soto Palmer*. See *Moore*, 143 S. Ct., at 2077 (what matters is only that this Court *could* reverse and reinstate the map, not that it in fact would or did); see also *Chafin*

v. *Chafin*, 568 U. S. 165, 175 (2013) (uncertainty as to relief does not moot a case).

Gaming out how the panel's framework could proceed in real life showcases its unworkability. If Garcia's injury is now moot because LD-15 has been enjoined by the district court, what would happen if the Ninth Circuit reversed *Soto Palmer* and vacated the injunction against LD-15? Garcia's injury, as the panel sees it, would rise from the grave under their unmootness doctrine.[6] Would the panel expect Garcia to file a motion to reopen his case? Would the panel expect Garcia to refile the same complaint, as if amending a complaint to address jurisdictional issues? Would the case need to start from the beginning? Would there be a new trial, calling all the same witnesses? Would Mr. Garcia then be forced to contend with the *Purcell* doctrine, potentially forcing him to endure another election cycle under an

[6] Even assuming arguendo this view of mootness were correct (and it certainly is not), it would nonetheless be covered by the capable of repetition yet evading review doctrine. That exception applies when: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." See *FEC* v. *Wisconsin Right to Life, Inc*., 551 U. S. 449, 462 (2007). First, the odd procedural history of the docket management by the judges caused the review to be evaded in a unique way. And second, it's unavoidable that under a VRA remedial map, Mr. Garcia would continue to live in "a district of approximately similar geographic size, population density and distribution of municipalities" as the old map, so there is a "reasonable expectation that the 'same controversy involving the same party will recur.'" See *Gill* v. *Linnabary*, 63 F.4th 609, 614 (7th Cir. 2023) (quoting *FEC*, 551 U. S., at 464).

unconstitutional map because of the trial court's error below?

Or asked another way, what does the *Garcia* panel believe to be the case or controversy in the *Soto Palmer* appeal? Surely, LD-15's legality and fate is the issue on appeal. But according to the *Garcia* panel, LD-15 is gone forever and ever, and therefore no case or controversy can exist concerning LD-15. But if that were true, there could not be a *Soto Palmer* appeal working its way through the federal courts.

These questions are unanswerable. The panel's approach cannot be right nor squared with the most basic functions of Article III.

The fate of Mr. Garcia's injury is as much an open question as the fate of LD-15. His relief runs through the federal appellate system. On that ground alone, the order below must be reversed or vacated, and this should be sent back for a merits determination.

B. The appellate fate of LD-15 notwithstanding, it remains an open question whether Mr. Garcia will continue to be segregated on the basis of race.

The panel majority assumed it could not give Mr. Garcia any relief at all in the wake of the *Soto Palmer* injunction. App.3 ("Since LD 15 has been found to be invalid and will be redrawn (and therefore not used for further elections), the Court cannot provide any more relief to Plaintiff."). That is flatly incorrect. A claim is moot only when it is impossible for a court to

grant "any effectual relief whatever." *Knox* v. *SEIU, Local 1000*, 567 U. S. 298, 307 (2012). The *Garcia* court could have granted relief as to the imminent redrawing of the map because Mr. Garcia asked not to be segregated on the basis of race. See Amended Complaint, *Garcia v. Hobbs*, No. 3:22-cv-5152, ECF No. 14 ¶ 78 ("Plaintiff asks for the following relief: . . . Order the creation of a new valid plan for legislative districts in the State of Washington that does not violate the Equal Protection Clause").

And that is the gravamen of Mr. Garcia's claim—sorting on the basis of race, not the precise contours of the underlying line-drawing per se. See *North Carolina* v. *Covington*, 138 S. Ct. 2548, 2553 (2018) (per curiam) ("[I]t is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims."). Just because the earlier lines are (in the panel's view) gone does not mean that Mr. Garcia's claim dies with those lines. It is not the lines making up LD-15, as the panel majority seems to think, that constitute Mr. Garcia's claim, but the segregation. Remedial lines—absent Mr. Garcia's requested relief—may still end up being "continuations of the old, gerrymandered districts[,]" and so racial sorting claims remain "the subject of a live dispute." *Id*. The majority's citation to *Covington* completely misses this main point of that decision.

And in *Covington*, this Court concluded that a dispute concerning an earlier map remained live even *after* the drawing of a remedial map. *Id*. Garcia's case has not advanced even to that point. If the injury in *Covington* was not mooted after the old maps were repealed *and* replaced, then Garcia's injury is

certainly still live if only the (still reversible) invalidation of the original map has occurred. The harm in gerrymandering cases is that the boundaries comprising a voter's district cause his vote to carry less weight than it would in a hypothetical different district. *Gill* v. *Whitford*, 138 S. Ct. 1916, 1931 (2018). That very same concern remains just as live now in the remedial phase as it did during trial.

On that note, Garcia's harms are accentuated by the decision in *Soto Palmer*, which ordered more racial gerrymandering. The panel's decision, in effect, is that Mr. Garcia's racial gerrymandering claim vis-a-vis LD-15 is mooted by the *Soto Palmer* order to construct a more racial gerrymandered district. As the dissent succinctly summed 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." App.27 (VanDyke, J., dissenting).

And it does not matter that the *Soto Palmer* court thought that the Voting Rights Act requires more racial gerrymandering in the new map. That is the holding of *that* court. The *Garcia* court, however, made no such finding under the strict scrutiny prong of Mr. Garcia's Fourteenth Amendment claim.[7] For

[7] Furthermore, although compliance with Section 2 is assumed to be a compelling State interest satisfying strict scrutiny review triggered by racial predominance, the State bears the burden of showing it had a "strong basis in evidence" that Section 2

mootness purposes in *Garcia*, the panel majority was not permitted to assume that the State had a compelling interest under the VRA, a merits determination. See *Chafin*, 568 U. S., at 174 (warning against "confus[ing] mootness with the merits"). The opposite is true; if anything, while analyzing mootness, the court should have assumed that Mr. Garcia *would* be able to show the racial gerrymandering was unwarranted, especially considering it would be the State's burden, not Garcia's, to establish a permissible justification for racial sorting. 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 her argument that the relief sought is legally available and that she is entitled to it is 'so implausible that it is insufficient to preserve jurisdiction.'") (quoting *Chafin*, 568 U. S., at 174).

It is for that straightforward reason that Garcia asked for this relief: If a new map were drawn, that he would not be racially gerrymandered in violation of the Equal Protection Clause. Amended Complaint, No. 3:22-cv-5152, ECF No. 14 ¶ 78. That is relief that the *Garcia* court could have ordered for the remedial process, just as in *Covington*.

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required such racial sorting at the time it was done. *Cooper* v. *Harris*, 581 U. S. 285, 292–93 (2017) (quoting *Alabama Legis. Black Caucus* v. *Alabama*, 575 U. S. 254, 278 (2015)). It is thus entirely possible that map drawers could lack a "strong basis in evidence" that Section 2 requires a certain design, even if an *ex post* judicial determination mandates such design under its own Section 2 analysis.

Nor does the fact that the State (or the *Soto Palmer* district court) *should* not violate the law when drawing new lines moot the case. The panel majority opined that the legislative presumption of legality means that Garcia's request for future relief was unnecessary, and so his injury no longer existed. App.8 (The "directive to the State to redraw LD 15 properly presumes that the State will comply with the Constitution when it does so").

This "trust me" theory of mootness makes no sense. It would give States anti-jurisdictional cover to gerrymander based on remedial court orders, and this Court has never employed the good faith presumption that way. See *Grace, Inc.* v. *City of Miami*, No. 1:22-cv-24066, 2023 U. S. Dist. LEXIS 126332, at *14 (S.D. Fla. July 18, 2023) ("Nor does *Abbott* hold that the legislative presumption of good faith mandates a finding that the passage of a remedial map renders the controversy moot."). And the "trust me" theory works even less in the context of *Soto Palmer*, where the court quite literally ordered more racial gerrymandering. It is a reasonable expectation—indeed, a certainty due to *Soto Palmer*—that the State (or the district court) will enact a map that is substantially similar to the earlier one in the constitutional harms it imposes upon Mr. Garcia and others similarly situated who will be racially sorted.

CONCLUSION

For these reasons, this Court should reverse or vacate the district court's order dismissing this case

as moot, and remand for consideration of the merits in the first instance.

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