The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUSAN SOTO PALMER et al.,

Plaintiffs,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,

Defendants,

and

JOSE TREVINO et al.,

Proposed Intervenor-Defendants.

Case No.: 3:22-cv-5035-RSL

[PROPOSED] INTERVENOR-DEFENDANTS' [PROPOSED] RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Court should deny the preliminary injunction because Plaintiffs are not likely to succeed on the merits of their claim that the Washington's legislative redistricting plan violates the Voting Rights Act. Plaintiffs cannot clearly show a sufficiently compact group of minority voters, the existence of racially polarized voting, or that Latino voters have less opportunity for political participation. Instead, Plaintiffs merely describe a pattern of electoral defeat for one political party and now seek to obtain in court what they could not achieve in the political arena.

Even if Plaintiffs could show they were likely to succeed on the merits, a preliminary injunction would still be inappropriate because it would inject chaos and delay into Washington's elections system, leave voters confused, and risk disenfranchising countless Washingtonians.

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Moreover, the relief sought by Plaintiffs would inappropriately abrogate the State's redistricting authority. And in any event, this Court lacks jurisdiction over to grant Plaintiffs' requested relief.

For these reasons, and as argued more fully below, Plaintiffs' motion should be denied.

FACTUAL BACKGROUND

The Washington State Redistricting Commission (the "Commission") is established by the state constitution to provide for the decennial "redistricting of state legislative and congressional districts." Wash. Const. art. II, § 43. The Commission consists of four voting members appointed by the "leader[s] of the two largest political parties in each house of the legislature." *Id.* Over the last year, the Commission met regularly to receive public input and develop a redistricting plan. *See* Order Regarding the Washington State Redistricting Commission's Letter to the Supreme Court, No. 25700-B-676, at *2 (Wash. Dec. 3, 2021) [hereinafter Redistricting Order].

Shortly before midnight on November 15, 2021, the Commission "voted unanimously to approve a legislative redistricting plan," and soon after submitted the plan to the Washington State Legislature (the "Legislature"). *Id.* The Legislature then approved a series of minor adjustments to the Commission's final plan during its 2022 session. *See* H. Con. Res. 4407, 67th Leg., 2022 Reg. Sess. (Wash. 2022). Under state law, the redistricting plan as approved by the Commission and amended by the Legislature (the "Enacted Plan") constitutes Washington state's districting law for legislative elections, beginning with the upcoming 2022 elections. *See* Wash. Const. art. II, § 43(7); Wash. Rev. Code § 44.05.100(3); *see also* Redistricting Order, *supra*, at *4.

Plaintiffs filed the present action on January 19, 2022, alleging the Enacted Plan violated section 2 of the Voting Rights Act of 1965 ("VRA") as applied in the Yakima Valley. Plaintiffs then filed a Motion for Preliminary Injunction (Dkt. # 38), seeking to enjoin Defendants' use of the Enacted Plan and implement Plaintiffs' proposed legislative district map (the "Proposed Plan") for the upcoming 2022 elections. (*See* Dkt. # 54 at 12.) Curiously, Plaintiffs only named three state officials as Defendants, none of whom caused the harm Plaintiffs allege and only one of whom has the authority to provide Plaintiffs with any of the relief they request. After observing that none of the present Defendants were opposing the merits of Plaintiffs' VRA claims, Proposed

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Intervenor-Defendants ("Intervenors") moved to intervene pursuant to Fed. R. Civ. P. 24. (*See* Dkt. # 57.) To ensure this Court can benefit from a full adversarial presentation of the issues, Intervenors submit this Response in Opposition to Plaintiffs' Motion for Preliminary Injunction.

LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief" *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis added). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. "To warrant a preliminary injunction, [the plaintiff] must demonstrate that it meets all four elements of the preliminary injunction test established in *Winter*." *Dish Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011) (internal citation omitted).

Because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," additional considerations are relevant in election cases such as this one. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). For example, the Supreme Court "has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle." *Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring). Earlier this year, the Supreme Court invoked the *Purcell* principle to stay a district court injunction with respect to elections that were scheduled to begin four months later. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022).

Lastly, because "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts," pre-trial rulings on the merits of section 2 claims are often premature. *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994); *see also*, *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) ("The trial court is to consider the 'totality of the circumstances' and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is

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equally open to minority voters. This determination is peculiarly dependent upon the facts of each case." (cleaned up)); *Ga. State Conference of the NAACP v. Fayette County Bd. of Comm'rs*, 775 F.3d 1336, 1343, 1348 (11th Cir. 2015) ("Normally, claims brought under § 2 of the VRA are resolved pursuant to a bench trial. . . . Summary judgment in these cases presents particular challenges due to the fact-driven nature of the legal tests required by the Supreme Court.").

ARGUMENT

Because Plaintiffs are unlikely to succeed on the merits of their claim, are unlikely to suffer irreparable harm, and have not shown the balance of equities tips in their favor or that an injunction is in the public interest, the preliminary injunction should be denied. Furthermore, the primary election is less than four months away, an even narrower window than what prompted the Supreme Court to invoke the *Purcell* principle earlier this year. *See Merrill*, 142 S. Ct. 879. Plaintiffs also inappropriately and prematurely ask this Court to encroach upon the State's redistricting authority. Lastly, it is at best unclear whether this Court even has jurisdiction to grant Plaintiffs' motion.

I. Plaintiffs are unlikely to clearly show all required elements of a "vote dilution" claim

Plaintiffs allege that the Enacted Plan violates section 2 of the VRA, which prohibits any "standard, practice, or procedure" resulting "in a denial or abridgement of the right of any citizen of the United States to vote on account of race." To prove a section 2 "vote dilution" case, *Thornburg v. Gingles* "established a two-step inquiry." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 550 (9th Cir. 1998). First, all three of the so-called *Gingles* preconditions must be satisfied—that "(1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the Section 2 majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* (citing *Gingles*, 478 U.S. at 50-51). *Only if* a plaintiff has established *all three* does a court reach the second step, where it decides, based on the "totality of the circumstances," whether "the challenged practice impermissibly impairs the ability of the minority group to elect their preferred representatives." *Ruiz*, 160 F.3d at 550. As articulated below, Plaintiffs cannot clearly show they are likely to prevail on *any* of these required elements, much less all of them.

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A. Plaintiffs cannot satisfy all three *Gingles* preconditions by a clear showing

Although the three *Gingles* preconditions do not, "standing alone, . . . prove dilution," *De Grandy*, 512 U.S. at 1012, the Supreme Court has emphasized that "unless *each* of the three *Gingles* prerequisites is established, 'there neither has been a wrong nor can be a remedy.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (quoting *Growe v. Emison*, 507 U.S. 25, 41 (1993)) (emphasis in original). Thus, a failure to prove any one of these preconditions is fatal to a section 2 claim. In this case, Plaintiffs cannot satisfy first *Gingles* precondition because they cannot show the existence of a compact minority group or do so without violating traditional districting principles. Nor can they satisfy the other two preconditions because, based on their own evidence, the overwhelming cause of defeat for Latino-preferred candidates is party, not race.

1. Plaintiffs fail to satisfy the first *Gingles* precondition

The first *Gingles* precondition requires Plaintiffs to demonstrate that Latino voters are "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. In fact, "a plaintiff must show that the minority group is 'geographically compact' to establish § 2 liability." *Shaw v. Hunt*, 517 U.S. 899, 916 (1996). And while this "refers to the compactness of the minority population, not to the compactness of the contested district," *LULAC v. Perry*, 548 U.S. 399, 433 (2006), "there is no § 2 right to a district that is not reasonably compact." 548 U.S. at 430 (citing *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997)).

a. *Compactness of the Minority Group*

"[T]here is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *LULAC v. Perry*, 548 U.S. at 433. Consequently, a minority group is not "reasonably compact" if it merges multiple "distant, disparate communities" that have "different characteristics, needs, and interests." *Id.* at 433-34. Moreover, mapmakers may not "assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 433 (quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995)). Here, Plaintiffs claim "at least five maps" exist to demonstrate the first *Gingles* precondition can

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be satisfied, but none of them meet the minority-compactness requirement because all of them merge multiple distant, disparate communities with different characteristics, needs, and interests.

Three of Plaintiffs' five maps—the "Yakima Reservation" option (*see* Dkt. # 38-8 at 23) and the revised proposals released by Commissioners Sims and Walkinshaw (*see* Dkts. # 38-9, 38-10)—would draw a virtually identical target district. Each center around the southwestern half of the Yakima Valley and reach westward to capture the entire Yakama Indian Reservation. They also extend to the northeast to include the small, isolated cities of Mattawa, Royal City and Othello, all of which are over an hour's drive away from any city in the Yakima Valley and share little in common with Yakima-area communities other than their large Latino populations.

The Yakima Firing Range and Hanford Nuclear Site are at the geographic center of another of Plaintiffs' maps—the "Yakima-Columbia River Valley" option (*see* Dkt. # 38-8 at 22). Out of the sparsely-populated core of this district protrudes several finger-like extensions that reach into the cities of Yakima, Mattawa and Pasco, none of which have been placed in the same legislative district before, as they too share little in common with each other except large Latino populations.

The final suggestion, Plaintiffs' Proposed Plan (*see* Dkt. 54-1 at 3), is a hybrid of these two other approaches. Like the first set of maps, it includes the Yakama Indian Reservation. And like the "Yakima-Columbia River Valley" option, it contains finger-like extensions that reach into the densest neighborhoods of Yakima and Pasco, fusing them into a district with the smaller farming communities that dot I-84 along the Yakima River. Like the other proposals, this version combines farflung areas with divergent political interests, seemingly on the basis of a shared racial identity.

Instead of demonstrating a sufficiently compact group of Latino voters as required, all five of Plaintiffs' attempts are instead combinations of multiple "distant, disparate communities" that have "different characteristics, needs, and interests." *LULAC v. Perry*, 548 U.S. at 434. Plaintiffs have failed to even allege, much less demonstrate by "a clear showing," that Latinos in the relatively dense and urban city of Yakima share the same characteristics, needs and political interests as Latinos in the small, rural farming communities along the Yakima River, or what either group has in common (besides race) with Latinos in Pasco or Mattawa, Royal City and Othello.

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Thus, because Plaintiffs cannot clearly show the existence of a sufficiently large and compact group of Latino voters, they do not satisfy the first *Gingles* precondition.

b. *Traditional Districting Principles*

Even though "the § 2 compactness inquiry" is focused on minority compactness, it should still follow "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams*, 521 U.S. at 92. Other such principles include "preserving the cores of prior districts and avoiding contests between incumbent[s]." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Yet not only are Plaintiffs unable to demonstrate the existence of a compact Latino population, all of their attempts to do so violate numerous traditional districting principles.*

By including slices of five different counties, but not a single entire county, the three "Yakama Reservation" proposals fail to follow preexisting political subdivisions. The large indents found on both the northern and southern boundaries of these maps underscore how each of these proposals artificially fuses two distinct communities of interest into one district. And bizarrely, rather than connecting Yakima to Mattawa and Othello in the most convenient and direct manner along State Route 24, the district instead would connect the two different communities through the sparsely-populated Hanford Nuclear Site, separating it from the Tri-Cities entirely.

The "Yakima-Columbia River Valley" option and the Proposed Plan exhibit similar flaws, by drawing the majority-Latino district through parts of four counties but including the entirety of none. Nor does their tortured shape follow natural or political boundaries. Like the "Yakima Reservation" versions, both of these proposals place the Hanford Nuclear Site in a Yakima-based district, separating it from Richland.

The location of the Hanford is but one example of how Plaintiffs' proposals divide communities of interest. The Hanford site is undergoing an extensive long-term clean-up operation to remove contamination from its past nuclear operations. The Tri-Cities are located immediately

* Plaintiffs argue their Proposed Plan follows traditional districting principles by comparing it to the Enacted Plan. (*See* Dkt. # 54 at 9-10.) But this is the wrong baseline. There was no federal requirement for the Commission to follow traditional districting principles, which only apply under state law "insofar as practicable." Wash. Rev. Code § 44.05.090. Since there was no obligation for the Enacted Map to follow these districting principles, an alternative map does not necessarily adhere to such principles merely by violating fewer of them than the Enacted Plan.

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down-river from the site and have a strong interest in its clean-up, both because they lay in the path of potential contamination and because it is one of the largest employers of their residents. For decades this interest has been acknowledged and Richland's legislative district has included the Hanford site. It defies traditional districting principles to strip Richland's legislators from oversight of Hanford issues and place it instead in a district dominated by Yakima.

Other problems abound too. For example, the "Yakima-Columbia River Valley" option and the Proposed Plan would combine Yakima and Pasco—two of the biggest cities in Central Washington—into a single legislative district. As large, distinct cities with their own newspapers and chambers of commerce, different industries and infrastructure, and separate microclimates and water sources, Yakima and Pasco are two very different areas with divergent needs and interests.

Plaintiffs' Proposed Plan shifts numerous incumbent legislators into new districts (often pitting two or more incumbents against each other) and fails to maintain the cores of many districts. For example, Legislative District 13, which has included Ellensburg since 1931, would see that city replaced by Adams County and much of Franklin County, neither of which has ever been part of the district. *See* State of Wash., *Members of the Legislature 1889-2019*, at 173-90 (2019) [hereinafter *Members of the Legislature*]. Legislative District 14 would extend into Benton and Franklin Counties for the first time in the State's history. *See id.* And Legislative District 15 would be drawn to the northern edge of Kittitas County while Legislative District 16 would go to the western edge of Klickitat County, even though neither of those counties have ever been even partially included in those respective districts before. *See id.*

Thus, because Plaintiffs cannot point to a sufficiently large and compact community of Latino voters without violating traditional districting principles like following political boundaries, uniting communities of interest and maintaining the core of districts, they are also unable to satisfy first *Gingles* precondition in the manner required by *Shaw* and its progeny.

2. Plaintiffs fail to satisfy the other *Gingles* preconditions

Plaintiffs also fail to satisfy the second and third *Gingles* preconditions, which address racially polarized voting. The purpose of this inquiry is "to ascertain whether minority group

members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." 478 U.S. at 56. "Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices." *Id.*

Plaintiffs argue their expert's analysis has done so, by finding that "seven out of eight [statewide elections] demonstrated white block voting, as did all four legislative elections." (Dkt. # 38 at 10-11.) But a cursory review of Plaintiffs' evidence (*see* Dkt. # 38-25 at 5) indicates that *partisanship* explains the polarization, not race. However, the VRA "does not guarantee that nominees of the Democratic Party will be elected, even if [minority] voters are likely to favor that party's candidates." *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992). Thus, due to the analytical deficiencies in Plaintiffs' arguments, they do not meet the second and third *Gingles* preconditions, much less by the "clear showing" required for a preliminary injunction.

Plaintiffs' proffered evidence underscores the "often-unstated danger" in section 2 cases—that "[u]nless courts exercise extraordinary caution in distinguishing race-based redistricting from politics-based redistricting, they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena." *Cooper v. Harris*, 137 S. Ct. at 1490 (Alito, J., concurring) (internal citation omitted). "[W]hat appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates." *Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000).

Although the Ninth Circuit has not yet reached the question, *nine* other circuit courts have recognized the frequent interplay between race and partisanship and either expressly or implicitly incorporated some type of a "causation" requirement when assessing racial bloc voting. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act since 1982*, 39 U. Mich. J.L. Reform 643, 670-71 (2006).

This "causation" requirement is consistent with the philosophy espoused by a majority of the Supreme Court Justices in *Gingles*. Although the decision was fractured, only four Justices joined an opinion that rejected a "causation" test. 478 U.S. at 61-73 (plurality opinion).

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Conversely, one Justice explicitly "disagree[d]" with that portion of the opinion. *Id.* at 82 (White, J., concurring). And four other Justices not only disagreed that "divergent voting patterns" explained "by causes other than race . . . can never affect the overall vote dilution inquiry," but also observed that "[e]vidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than [racial ones] would seem *clearly relevant* in answering the question whether bloc voting by white voters will consistently defeat minority candidates." *Id.* at 100 (O'Connor, J., concurring in the judgment) (emphasis added).

This "causation" approach is also consistent with the text of section 2 of the VRA itself, which only applies to vote denial or abridgement "*on account of* race or color" and requires a showing that the minority group has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (emphasis added). These requirements can't be met if the reason that Plaintiffs' preferred candidates lose is because white voters simply prefer a different party than they do.

Thus, in order to succeed under section 2 of the VRA plaintiffs do not just have to show that voting is racially polarized—they have to demonstrate that election results are tied to racial bias and not merely partisan voting patterns. *See, e.g.*, *Nipper v. Smith*, 39 F.3d 1494, 1523-24 (11th Cir. 1994) ("Unless the tendency among minorities and white voters to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, voting rights plaintiffs simply cannot make out a case of vote dilution."); *LULAC v. Clements*, 999 F.2d 831, 854 (5th Cir. 1993) (en banc) ("[F]ailures of a minority group to elect representatives of its choice that are attributable to 'partisan politics' provide no grounds for relief.").

As noted above, Plaintiffs offer only two sets of election results to support their claim that the third *Gingles* precondition has been satisfied. (*See* Dkt. # 38 at 10-11.) First, they point to four "endogenous" elections in Legislative District 15 where Latino-preferred candidates were defeated. But in every election over the past decade (with exception of 2014, when Republicans' share of the vote was higher in races across the state), each Democratic candidate for State House or Senate in Legislative District 15 earned between 38.92 and 41.95 percent of the vote in the

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November general election. *See* Wash. Sec'y of State, Election Results and Voters' Pamphlets, https://www.sos.wa.gov/elections/research/election-results-and-voters-pamphlets.aspx. In other words, the legislative elections cited by Plaintiffs are perfectly consistent with normal partisan outcomes in Legislative District 15. Moreover, in each of the four elections Plaintiffs analyzed, the "Latino-preferred candidate" who lost was facing an incumbent with four to 24 years of legislative experience. *See Members of the Legislature*, *supra*, at 52-54. And in each of those elections, the incumbents raised between three and 10 times as much money as the "Latino-preferred candidate" who lost. *See* Wash. Pub. Disclosure Comm'n, Legislative Candidates, https://www.pdc.wa.gov/browse/more-ways-to-follow-the-money/candidates/legislative.

This is not abnormal. The "state legislative elections literature suggest[s] that candidates' performance in elections is largely a function of incumbency, campaign spending and party support," but Plaintiffs fail to show the outcomes they cite are attributable to race rather than these other common electoral indicators. Timothy B. Krebs, *The Determinants of Candidates' Vote Share and the Advantages of Incumbency in City Council Elections*, 42 Am. J. Pol. Sci. 921, 921 (1998). On similar facts, other courts have found that these confounding variables were sufficient to bar Plaintiffs from showing the *Gingles* preconditions had been met. *See, e.g.*, *Clements*, 999 F.2d at 850 ("Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race . . . plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under § 2, must fail."); *Lopez v. Abbott*, 339 F. Supp. 3d 589, 612-13 (S.D. Tex. 2018) (finding that where "the distribution of votes between political parties remained at comparable levels even when the race of the candidate varied . . . partisanship is a better explanation for defeats of Hispanic-preferred candidates than racial vote dilution"); *Mallory v. Ohio*, 38 F. Supp. 2d 525, 575 (S.D. Ohio 1997) (finding that "numerous factors, other than race, explain losses at the polls by particular minority candidates"), *aff'd*, 173 F.3d 377 (6th Cir. 1999).

Plaintiffs also examine eight statewide elections, but their analysis fails for similar reasons. They again make no attempt made to isolate race from partisanship, such as by considering primary

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election results instead of only general election results, presumably because it would undermine their case. As but one example, in the 2020 gubernatorial primary, Republican candidate Raul Garcia, who is Hispanic, received 28 percent of the votes cast for Republican-aligned candidates in Benton and Franklin Counties and 26 percent of Republican votes in Yakima County. In the rest of the state, he only received 11 percent of the Republican vote. Examples like this show why "courts have increasingly looked to primary elections to determine which candidate is minority-preferred. Because primary elections remove party as a causal explanation for voting patterns, some courts view these elections as allowing better focus on the role of race in voter decsionmaking." Katz, *supra*, at 668-69; *see, e.g.*, *Old Person v. Cooney*, 230 F.3d 1113, 1123-25 (9th Cir. 2000); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 417-26 (S.D.N.Y. 2004); *United States v. Alamosa County*, 306 F. Supp. 2d 1016, 1021-26 (D. Colo. 2004) (all of which analyzed primary election results before making any findings of fact regarding race and partisanship).

Plaintiffs provide no explanation for why the election disparities they highlight are connected to race and not partisanship (or other determinants of electoral success), and thus cannot satisfy the remaining *Gingles* preconditions, much less carry their burden of persuasion by "a clear showing." Therefore, their preliminary injunction motion should be denied for this reason as well.

B. Plaintiffs are unlikely to prevail on a "totality of the circumstances" analysis

Even if Plaintiffs have demonstrated that each of the three *Gingles* preconditions are satisfied, they "can prevail in a section 2 claim only if, based on the totality of the circumstances, the challenged voting practice results in discrimination on account of race." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (cleaned up). In particular, "[t]he statute requires evidence that members of the affected minority class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 401 (9th Cir. 2016) (quoting VRA § 2).

To guide this inquiry, "the Supreme Court cited a non-exhaustive list of nine factors (generally referred to as the 'Senate Factors' because they were discussed in the Senate Report on the 1982 amendments to the VRA) that courts should consider in making this totality of the

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circumstances assessment." *Gonzalez v. Arizona*, 677 F.3d at 405 (citing *Gingles*, 478 U.S. at 44-45). As noted above, the determination of these factors must "be based upon a searching practical evaluation of the past and present reality" and "is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (cleaned up). Consequently, "the ultimate conclusions about equality or inequality of opportunity . . . rest[] on comprehensive, not limited, canvassing of relevant facts." *De Grandy*, 512 U.S. at 1011. The Ninth Circuit will also reject a "vote dilution" challenge under section 2 of the VRA that is "'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged voting qualification causes that disparity." *Gonzalez v. Arizona*, 677 F.3d at 405 & n.32 (quoting *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir.1997)).

Plaintiffs offer scant evidence for most of the factors considered in the "totality of the circumstances" analysis, especially given the seriousness of relief they are seeking. Most of the examples they do cite are either incorrect, incomplete or inapplicable. In the end, arguably none of the factors weigh in their favor, but certainly not enough of them to make a "clear showing" that they are likely to prevail on this step of their claim.

1. Proportionality of opportunity districts

When analyzing the "totality of the circumstances" and before applying the Senate Factors, the Supreme Court "proceed[s] first to the proportionality inquiry." *LULAC v. Perry*, 548 U.S. at 436. While proportionality "does not act as a 'safe harbor' for States in complying with § 2," *Bartlett v. Strickland*, 556 U.S. 1, 30 (2009) (cleaned up), "no violation of § 2 can be found . . . where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." *De Grandy*, 512 U.S. at 1000. In fact, one study of all published VRA section 2 decisions between 1982 and 2006 found that in every instance where a court found proportionality existed, it denied relief. *See* Katz, *supra*, at 730-31.

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The proportionality inquiry compares "the percentage of total districts that are Latino *opportunity districts* with the Latino share of the citizen voting-age population. *LULAC v. Perry*, 548 U.S. at 436 (emphasis added); *see also Bartlett*, 556 U.S. at 30 ("[A] § 2 complaint must look to an entire districting plan (normally, statewide), alleging that the challenged plan creates an insufficient number of minority-*opportunity* districts in the territory as a whole." (emphasis added)). An opportunity district is one where "minority voters make up less than a majority of the voting-age population [but] the minority population . . . is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* at 13 But Plaintiffs misapply the proportionality test by pointing to "districts in which the minority group forms an effective majority" (which they argue is zero) or majority Latino CVAP districts (which they say is one). (Dkt. # 38 at 20.).

Because of this error, Plaintiffs present no evidence and make no argument that the Enacted Plan lacks Latino *opportunity* districts across the state. While it is Plaintiffs' burden to show that proportionality is lacking, 31 of the state's 49 legislative districts are represented by at least one legislator with the same partisan preference as the candidates that Plaintiffs identify as "Latino-preferred." These 31 districts meet the definition of opportunity district—Latino voters make up less than a majority in each are still a large enough group to elect their preferred candidates with help from white majority voters who also support the Latino-preferred candidate. Thus, 63 percent of Washington's legislative districts are arguably "opportunity districts," which far exceeds the state's Latino CVAP proportion. Even if Plaintiffs dispute that there are 31 such districts, they still have not attempted to figure the number of opportunity districts using the definition required by *LULAC v. Perry* and *Bartlett*. Thus, this factor cuts dramatically against Plaintiffs.

2. History of discrimination (Senate Factor 1)

The first Senate Factor examines the "history of official discrimination . . . that touched the right of the members of the minority group to . . . participate in the democratic process," *Gingles*, 478 U.S. at 36-37. In order to resolve this factor in favor of Plaintiffs, they must demonstrate not only instances of discrimination, but how it has hampered their political participation. *See, e.g.*,

NAACP v. Fordice, 252 F.3d 361, 367 (5th Cir. 2001) ("Absent an indication that these facts actually hamper the ability of minorities to participate, they are, however, insufficient to support a finding that minorities suffer from unequal access to Mississippi's political process." (cleaned up)); *Clements*, 999 F.2d at 866 ("Texas' long history of discrimination [is] insufficient to support the district court's 'finding' that minorities do not enjoy equal access to the political process absent some indication that these effects of past discrimination actually hamper the ability of minorities to participate."); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1561 (11th Cir. 1987) ("[A] history of official discrimination did exist in Carroll County but . . . the plaintiffs failed to establish there was a lack of ability of blacks to participate in the political process."); *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) ("Evidence of past discrimination cannot, in the manner of original sin, condemn action that is not in itself unlawful." (cleaned up)).

Plaintiffs offer several historical examples of discrimination (*see* Dkt. # 38 at 13-14), but fail to allege how any have "touched the right of" Latinos "to participate in the democratic process" as required by *Gingles*. They point to two past VRA cases in Yakima and Pasco, plus two pending state law cases in Yakima and Franklin Counties, each of which challenged the local jurisdiction's at-large election system, but offer no explanation how an at-large voting system in one jurisdiction inhibits participate in another. Likewise, the only other two examples cited by Plaintiffs—Yakima County's alleged failure to provide Spanish-language voting materials and the 1960s-era administration of literacy tests to Latino voters in Yakima County—do not indicate how these practices hamper current political participation. Lastly, Plaintiffs fail to allege any history of voting discrimination in Adams, Benton, Grant or Klickitat Counties, even though Plaintiffs rely on these counties in their attempt to satisfy the *Gingles* preconditions. *See* discussion *supra* Part I.A.1.

Washington has also taken a number of steps in recent years to promote participation of Latinos and other minority groups in the political process. For example, the Legislature has enacted a state-level voting rights act, *see* Washington Voting Rights Act of 2018, ch. 113, 2018 Wash. Sess. Laws 666, the state Department of Licensing automatically registers individuals to vote when renewing their enhanced driver's license, Wash. Rev. Code § 29A.08.355, and voters are

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automatically issued their ballot by mail, Wash. Rev. Code § 29A.40.010. *Cf. Butts v. City of New York*, 779 F.2d 141, 150 (2d Cir. 1985) (noting "the existence of mitigating factors that further diminish the force of this showing" of past discrimination); *Aldasoro v. Kennerson*, 922 F. Supp. 339, 363-64 (S.D. Cal. 1995) ("the numerous laws enacted by the California Legislature in the last 30 years to improve minority voting participation and to liberalize the political process create an election environment free of discrimination touching the right to vote." (cleaned up)); *Romero v. City of Pomona*, 665 F. Supp. 853, (C.D. Cal. 1987) ("[E]vidence regarding any history of past discrimination in California and in the City of Pomona touching upon the right of minorities to . . . participate in the political process have been mitigated by intensive efforts of the California Legislature to improve minority participate and to liberalize the political process.").

Thus, because Plaintiffs have not shown how their cited historical examples hamper present-day political participation, and because Washington has taken numerous steps to promote voting ease, the Court should not resolve this first Senate Factor in favor of Plaintiffs.

3. Racially polarized voting (Senate Factor 2)

The second Senate Factor calls for an evaluation of the extent of legally significant racially polarized voting. *Gingles*, 478 U.S. 37. This factor involves a similar analysis as the type required to assess the existence of the second and third *Gingles* preconditions. *See* discussion *supra* Part I.A.2. In their motion, Plaintiffs point back to the incomplete and poorly-documented analysis that they relied on to argue the *Gingles* preconditions were satisfied. (*See* Dkt. # 38 at 14.) But as argued above, Plaintiffs err by assuming, ipso facto, that any disparity in voting preferences is on account of race rather than partisanship. Thus, this factor does not tip toward the Plaintiffs' favor because they cannot show race is the cause of their favored candidates' defeats.

4. Discrimination-enhancing practices (Senate Factor 3)

The third Senate Factor concerns "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S. at 37. Plaintiffs offer just one example of such a "voting

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practice or procedure" (which they misidentify as "Senate Factor 4") by claiming—quite incorrectly—that "[i]n Washington state legislative elections, even-numbered districts are up for election in presidential election years" and "odd-numbered legislative districts are up for election in non-presidential years." (*See* Dkt. # 38 at 14.)

This is false, and has been since the first anniversary of statehood. *See* An Act to Prescribe the Number of Senators and Members of the House of Representatives, §§ 6-7, 1890 Wash. Sess. Laws 3, 12. Elections for state representative are held every two years, meaning voters in all odd-numbered legislative districts elect two state representatives in presidential and non-presidential election years. And while elections for state senator are held every four years, even- and odd-numbered districts are staggered evenly between presidential and non-presidential election years, with 13 odd-numbered districts electing state senators during presidential election years and 12 odd-numbered districts electing state senators in non-presidential election years. *See* An Act Relating to Reapportionment and Redistricting, ch. 288, § 63, 1981 Wash. Sess. Laws 1180, 1213.

Intervenors point out this glaring factual error, not to insist it is dispositive, but to highlight that if not even Plaintiffs can get the "intensely local appraisal of the design and impact of the contested electoral mechanisms" right, then they cannot have met the high hurdle of clearly showing a likelihood of success on the merits of their claim. *Gingles*, 478 U.S. at 79. Since Plaintiffs' only example of this factor is demonstrably false, it cuts decidedly against their favor.

5. Candidate slating process (Senate Factor 4)

The fourth Senate Factor asks "if there is a candidate slating process, whether the members of the minority group have been denied access to that process." *Gingles*, 478 U.S. at 37. Washington does not utilize a candidate-slating process for legislative elections, nor do Plaintiffs allege so. Because there is no candidate-slating process in Washington, there can be no Latino exclusion from such process, and this factor weighs against Plaintiffs' favor.

6. Effects of socioeconomic disparities (Senate Factor 5)

The fifth Senate Factor calls for an evaluation of "the extent to which members of the minority group bear the effects of discrimination in such areas as education, employment and

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health, *which hinder their ability to participate effectively in the political process*." *Gingles*, 478 U.S. at 37 (emphasis added). Similar to the burden required for resolving the first Senate Factor, most courts require "some kind of nexus not only between a history of discrimination and lowered socioeconomic status, but also between depressed socioeconomic status and the ability to participate in the political process." Katz, *supra*, at 703; *see, e.g.*, *Fordice*, 252 F.3d at 368 ("Absent an indication that [such disparities] actually hamper the ability of minorities to participate, they are . . . insufficient to support a finding that minorities suffer from unequal access to [the] political process."); *cf. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1027-28 (9th Cir. 2020) (determining "that the effects of discrimination 'hinder' minorities' ability to participate effectively in the political process" (internal citation omitted)); *Old Person*, 230 F.3d at 1129 (observing that a minority group's "lower socioeconomic status" hindered its "ability to participate fully in the political process"). Yet Plaintiffs fail to show, or even allege, a causal connection or any other nexus between the cited socioeconomic disparities and low political participation.

Also, the statistics provided by Plaintiffs are at best incomplete. (*See* Dkt. # 38 at 16-17.) "In the majority of lawsuits, . . . courts require concrete evidence of depressed participation, measured through voter registration and turnout statistics." Katz, *supra*, at 704. Plaintiffs point to the total *number* of registered voters and Spanish-surnamed voters in Yakima County, but these figures are useless without the number of *eligible* voters in each category. And Plaintiffs only provide registration totals and turnout rates for Yakima County, not any of the other four counties they rely on to argue a sufficiently large and compact minority group exists to satisfy *Gingles*.

Thus, because Plaintiffs offer neither sufficient evidence of depressed political participation nor any argument that the cited socioeconomic disparities are caused depressed political participation, this Senate Factor does not support their claim.

7. Racial appeals in campaigns (Senate Factor 6)

The sixth Senate Factor asks whether political campaigns in the jurisdiction "have been characterized by overt or subtle racial appeals." *Gingles*, 478 U.S. at 37. While the stories cited by Plaintiffs are certainly detestable (*see* Dkt. # 38 at 17-19), almost all of them involve individual

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voters, not the *campaign appeals* contemplated by *Gingles* and this Senate Factor. The sole example from a political campaign was a candidate's Facebook post opposing illegal immigration. (*Id.* at 19.) But opposing *illegal* immigration is hardly a "racial appeal." Moreover, in a 2014 VRA case, the district court, "[h]aving reviewed the record," was "not persuaded that *political campaigns* in Yakima have been characterized by racial 'appeals' to the voting base." *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1413 (E.D. Wash. 2014) (emphasis added). Because Plaintiffs fail to cite any "racial appeals" in political campaigns, this factor does not resolve in their favor.

8. Minority electoral success (Senate Factor 7)

The seventh and final enumerated Senate Factor is "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37.

Plaintiffs claim that "no Latino candidate has *ever* been elected to the Washington legislature from the Yakima Valley region." (Dkt. # 38 at 10.) They are wrong. Representative Mary Skinner, from Legislative District 14, was "born in California to migrant-worker parents and raised in the Yakima Valley" and became "[t]he first Latino legislator from the Yakima Valley." Pat Muir, *Yakima Legislator Mary Skinner Dies*, The Seattle Times, Feb. 7, 2009, *available at* https://www.seattletimes.com/seattle-news/yakima-legislator-mary-skinner-dies/. Representative Skinner was elected to the State House seven times, winning every election she ran in from 1994 until 2006. *See id.*; *Members of the Legislature*, *supra*, at 51. In addition, Legislative District 13 is currently represented in the State House by Intervenor Alex Ybarra, who is Latino. Under the Enacted Plan, he will represent 30,702 individuals in Yakima County, of whom 8,303 identify as Hispanic or Latino. Wash. State Redistricting Comm'n, 2021 Report to the Legislature, at 69 (Nov. 22, 2021), *available at* https://indd.adobe.com/view/717c7700-23fc-468b-bfe0-22650328637a.

Almost every city in Yakima County currently has Latino mayors and/or city councilmembers, including Grandview, Granger, Mabton, Toppenish, Wapato, Yakima and Zillah. Even Plaintiffs acknowledge this is evidence of "a growing ability" for these communities "to exercise their political strength." (Dkt. # 54 at 10 n.7.). Though Plaintiffs dismiss these positions as "hyperlocal offices" (Dkt. # 54 at 19), other courts have found minority success in such "lesser"

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elections as sufficient evidence of minority electoral success. *See, e.g.*, *Butts*, 779 F.2d at 150 (disagreeing that "the electoral success that minorities have had in New York City" is "devalued" because the "victories did not involve the City's three top offices").

Plaintiffs claim that only one Latino has been elected to the Yakima County Board of Commissioners, and that none have been elected to the Franklin County Board of Commissioners, but there is no indication this is because Latinos ran for these offices and lost. *Cf. Jenkins v. Red Clay Consol. Sch. Dist.*, 780 F. Supp. 221, 226 (D. Del. 1991) (noting that a lack of minority electoral success could "very well be attributable to the failure of black citizens to consistently offer themselves as candidates . . . rather than to any defects in the [challenged] system").

The only examples of defeated candidates that Plaintiffs provide are exclusively Democratic candidates for the Legislature. But as described in Part I.A.2 above, this merely illustrates the partisan preference of a majority of Yakima Valley voters, not any racial bias.

Thus, given the significant number of Latino candidates who have been elected to public office in the Yakima Valley area, this factor weighs heavily against Plaintiffs.

9. Responsiveness and tenuousness (additional Senate Factors)

On top of the seven "typical" Senate Factors, two "additional factors" with "probative value" in VRA section 2 cases are "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group" and whether the challenged practice is "tenuous." *Gingles*, 478 U.S. at 37. Plaintiffs do not allege any such tenuousness or lack of responsiveness in their motion for preliminary injunction. (*See* Dkt. # 38.) Thus, these factors should be resolved against Plaintiffs. *See, e.g.*, *NAACP v. Fordice*, 252 F.3d at 372 (upholding district court finding that the responsiveness factor "did not support [plaintiff's] Section 2 complaint" because plaintiff "proffered proof neither to contravene [defendant's witness's] testimony nor to elucidate [plaintiff's] allegations of unresponsiveness").

10. Special factors in Ninth Circuit election cases

The Ninth Circuit considers other factors in election cases, including whether an injunction would "affect the state's election processes or machinery," whether a challenged law "newly

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criminalizes activity associated with voting," whether an "injunction would disrupt long standing state procedures," and whether the court had time to give "careful and thorough consideration" to the issues. *Feldman*, 843 F.3d at 367-70 (9th Cir. 2016). But none of these factors favor Plaintiffs, and in fact the latter two decidedly *disfavor* granting Plaintiffs' motion for preliminary injunction.

* * *

This Part I discusses the core of Plaintiffs' section 2 "vote dilution" claim. To prevail at trial, they bear the burden of proving *every single one* of the elements outlined above—satisfaction of all three *Gingles* preconditions and that, based the "totality of the circumstances," Latinos have a diminished opportunity to participate in the political process and to elect representatives of their choice.'" *Feldman*, 843 F.3d at 401. And to obtain a preliminary injunction, they must demonstrate by a "clear showing" that they are "likely to succeed on the merits" of each of these elements. *Winter*, 555 U.S. at 22. Plaintiffs have failed to do so, and therefore their motion must be denied.

II. Plaintiffs have not shown they meet any of the other elements for injunctive relief

Because Plaintiffs are not likely to succeed on the merits, they are also not likely to suffer any irreparable harm. The individual Plaintiffs are also entitled to vote in the upcoming elections, even if the candidates they support are not as favored in the current district configurations.

Moreover, Plaintiffs argue that if a preliminary injunction is not granted now, "Latino voters will have to wait until 2024 (House) and 2026 (Senate) . . . to elect a candidate of choice to the legislature." (Dkt. # 38 at 21.) But this claim contradicts their own implicit argument about the Court's authority. If this Court can preempt a legislative task like redistricting by ordering a new districting plan (*but see* discussion *infra* Part III), it follows that the Court could also order new elections. Conversely, if this Court cannot order new legislative elections outside of the normal state law process, then it must also lack authority to order new legislative district boundaries outside of state law. Thus, Plaintiffs either won't suffer irreparable harm or their motion seeks inappropriate relief. Since at least one must be true, the injunction should be denied.

Granting Plaintiffs an injunction also is not in the public interest, as it will lead to voter confusion, frustration and even disenfranchisement. That's why rulings in *Purcell* and a stream of

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subsequent cases, from district courts to the Supreme Court, have "repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election." *Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. at 20 (Kavanaugh, J., concurring); *see also Merrill*, 142 S. Ct. 879 (staying an injunction involving elections that were scheduled to begin four months later). In fact, considering how many voters would be affected by the injunction sought, "equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, *even though the existing apportionment scheme was found invalid*." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (emphasis added).

For these reasons, equitable factors also weigh against granting a preliminary injunction.

III. Plaintiffs' requested remedy would violate judicial federalism

Even if the Plaintiffs have met the requisite burden to obtain a preliminary injunction, it would nonetheless be improper for the Court to order adoption of a new legislative map at this early stage of litigation. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that 'reapportionment is primarily the duty and responsibility of the State.'" *Miller v. Johnson*, 515 U.S. at 915 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) ("The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." (cleaned up)).

Because "legislative reapportionment is primarily a matter for legislative consideration and determination, . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds*, 377 U.S. at 586. Thus, "[w]hen a federal court declares an existing apportionment scheme unconstitutional, it is therefore appropriate . . . to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Lipscomb*, 437 U.S. at 540; *see also Shaw v. Hunt*, 517 U.S. at 918 n.9 ("States retain broad discretion in drawing districts to comply with the mandate of § 2." (cleaned up)).

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Here, the State should be given such an opportunity to remedy any defects in the Enacted Plan before the Court orders a new map. Washington law provides a mechanism to reconvene the Commission "for the purpose of modifying the redistricting plan." Wash. Rev. Code § 44.05.120(1). Plaintiffs have not explained why the State should not have the opportunity to resolve any defects in the Enacted Plan, nor why this Court should "intrude upon state policy," *White v. Weiser*, 412 U.S. 783, 795 (1973), or "disregard the political program" of the State, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554-55 (2018) (per curiam). Therefore, if this Court does issue a preliminary injunction, it should permit the State to enact a new redistricting plan rather than ordering implementation of Plaintiffs' Proposed Plan.

IV. This Court lacks jurisdiction to grant Plaintiffs' requested relief

Plaintiffs' motion should fail because this Court lacks jurisdiction to consider Plaintiffs' claims. Intervenors intend to file a motion to dismiss briefing these issues as soon as practicable, but in the meantime expressly preserve these arguments for appeal and respectfully request that the Court carefully considers these jurisdictional issues before ruling on Plaintiffs' motion.

A. A Three-Judge Court is required to hear Plaintiffs' claim

"A district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). Because Plaintiffs have filed an action challenging "the apportionment of a[] statewide legislative body," § 2284 requires a court of three judges be convened. *See, e.g.*, *Thomas v. Reeves*, 961 F.3d 800, 810-27 (5th Cir. 2020) (Willett, J., concurring) (concluding that "constitutionality" only modifies the phrase "the apportionment of congressional districts," and not "the apportionment of any statewide legislative body").

Even if § 2284(a) is parsed in a way so that "constitutionality" also modifies "the apportionment of any statewide legislative body," a three-judge court is still required. That's because "the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980).

Since section 2 of the VRA is simply a statutory extension of the Fifteenth Amendment, any claim thereunder is also a de facto constitutional claim, meaning that § 2284 applies under either reading.

Because a three-judge court is required pursuant to be convened § 2284(a), this Court does not currently have jurisdiction to grant any application for preliminary injunction. *Id.* § 2284(b)(3).

B. Section 2 of the VRA does not contain a private right of action

"It is undisputed that Congress did not include in the text of the Voting Rights Act a private right of action to enforce § 2." *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, No. 4:21-cv-01239-LPR, at *16 (E.D. Ark. Feb. 17, 2022), *appeal docketed*, No. 22-1395 (8th Cir. filed Feb. 23, 2022). Further, "[u]nder the current Supreme Court framework, it would be inappropriate to imply a private right of action to enforce § 2 of the Voting Rights Act." *Id.* at *30. Therefore, "because no private right of action exists to enforce § 2 of the Voting Rights Act, none of the jurisdictional statutes identified by Plaintiffs actually confer jurisdiction on this Court" to grant Plaintiffs' motion for preliminary injunction. *Id.* at *15.

C. Section 2 of the VRA does not apply to redistricting

Redistricting not a "standard, practice, or procedure" by any ordinary definition. VRA § 2. Thus, Plaintiffs' motion should fail because section 2 of the VRA "does not apply to redistricting." *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (Thomas, J. concurring); *see also Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 294-98 (2015) (Thomas, J., dissenting); *Bartlett*, 556 U.S. at 26 (Thomas, J., concurring); *Holder v. Hall*, 512 U.S. 874, 892-93 (1994) (Thomas, J., concurring). Though this argument may be currently foreclosed by precedent, Intervenors preserve it for appeal.

CONCLUSION

Because Plaintiffs have not made a "clear showing" that they are "likely to succeed" in demonstrating the existence of all three *Gingles* preconditions and prevailing on the totality-of-the-circumstances analysis, the Court should not award them the "extraordinary remedy" of a preliminary injunction. *Winter*, 555 U.S. at 22. Plaintiffs' motion should also be denied in order to not usurp the State's redistricting role, to avoid injecting chaos into Washington's upcoming primary elections, and because there are serious jurisdictional questions yet to be addressed.

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DATED this 7th day of April, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 8th day of April, 2022.

Respectfully submitted,

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